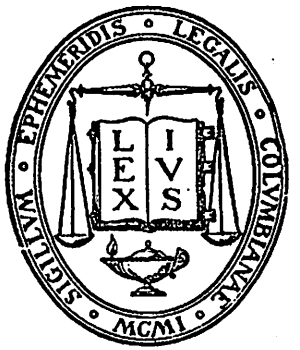
COLUMBIA LAW REVIEW

Vol. XXXVII—1937



NEW YORK
1937

This rule, furthermore, is the one embodied in Article 187 of the Code Bustamente and its adoption in Brazil would tend to give greater effect to the basic doctrine of uniformity of Conflict of Laws rules among South American countries typified by that treaty.

On the whole, the book constitutes a valuable contribution to the literature written on this topic. Though one might wish that the author had treated in greater detail the results attained in countries similarly situated to Brazil, economically and politically, the broad survey done results in an elaborate bibliography as well as an admirable expression of the analytical viewpoint.

HENRY P. DEVRIES.*

* Student, Columbia University School of Law.

BOOKS RECEIVED:

ANALYSIS OF THE PROBLEM OF WAR. By CLYDE EAGLETON. New York: THE RONALD PRESS CO., 1937. pp. v, 132. $1.50.

ANNALES DE L'INSTITUT DE DROIT COMPARE DE L'UNIVERSITE DE PARIS. Volume II. Paris: LIBRAIRIE DU RECUEIL SIREY, 1936. pp. 272.

ART AND PRUDENCE. A Study in Practical Philosophy. By MORTIMER J. ADLER. New York: LONGMANS, GREEN AND CO., 1937. pp. xiv, 686. $5.00.

L'ASSICURAZIONE SULLA VITA A FAVORE DI TERZI. By MARIO STOLFI. Milan: DOTT. A. GIUFFRE, Editor, 1937. pp. 196.

BIG BUSINESS: ITS GROWTH AND ITS PLACE. Prepared under the Auspices of the Corporation Survey Committee of the Twentieth Century Fund, Inc. New York: TWENTIETH CENTURY FUND, INC., 1937. pp. xv, 102. $1.35.

CABINET GOVERNMENT. By W. IVOR JENNINGS. New York: THE MACMILLAN CO., 1936. pp. xii, 484. $5.50.

COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE, THE. By FELIX FRANKFURTER. Chapel Hill: UNIVERSITY OF NORTH CAROLINA PRESS, 1937. pp. 114. $1.00.

DE RE MILITARI ET BELLO TRACTATUS. By PIERINO BELLI. Vol. I. A Photographic Reproduction of the Edition of 1563. Vol. II. A Translation of the Text, by HERBERT C. NUTTING. New York: OXFORD UNIVERSITY PRESS, 1936. pp. 150; viii, 411. $7.50.

DETERMINATION OF CONFUSION IN TRADE-MARK CONFLICT CASES. By NEIL H. BORDEN. Boston: HARVARD UNIVERSITY GRADUATE SCHOOL OF BUSINESS ADMINISTRATION, 1936. pp. vi, 34. $1.00.

ELEMENTS OF INTERNATIONAL LAW. By HENRY WHEATON. The Literal Reproduction of the Edition of 1866 by Richard Henry Dana, Jr. Edited, with Notes, by GEORGE GRAFTON WILSON. New York: OXFORD UNIVERSITY PRESS, 1937. pp. xliv, 642. $4.00.

FEDERAL JUSTICE. By HOMER CUMMINGS and CARL MCFARLAND. New York: THE MACMILLAN CO., 1937. pp. ix, 576. $4.00.

HISTORY OF AMERICAN POLITICAL THOUGHT FROM THE CIVIL WAR TO THE WORLD WAR, A. By EDWARD R. LEWIS. New York: THE MACMILLAN CO., 1937. pp. x, 561. $5.00.

INTERNATIONAL LAW. By K. R. R. SASTRY. Allahabad: M. N. PANDEY, 1936. pp. xxxi, 472.

Authors: Herbert Wechsler
Jerome Michael

COLUMBIA LAW REVIEW

VOL. XXXVII MAY, 1937 NO. 5

A RATIONALE OF THE LAW OF HOMICIDE: I

The demand for revision of the criminal law is almost as insistent in our own time[1] as it was in the nineteenth century on the continent and in England. Two contemporary projects for reform of the substantive law have proposed to begin with a reconsideration of the law relating to homicide and bodily injury.[2] There is wisdom in the choice.

[1] Until quite recently lawyers have concerned themselves primarily with the reform of the administration of the criminal law while social scientists and psychiatrists have devoted themselves to the study of crime causation and to arguing the questions of legal responsibility and of individualization of treatment. Though the substantive law of crimes has been criticized as generally uncertain, formally defective, inconsistent and antiquated [see, *e.g.*, Mikell, *The Criminal Code of Pennsylvania* (1917) 65 U. OF PA. L. REV. 232; POUND, CRIMINAL JUSTICE IN CLEVELAND (1922) 588, 604-5, CRIMINAL JUSTICE IN AMERICA (1930) 142-148; *Report of Joint Committee of American Bar Ass'n and American Law Institute on the Improvement of Criminal Justice* (1931) 56 A. B. A. REP. 513] there has been no sustained effort comparable to that which has been made abroad for generations, to think through its inherent legislative problems and their relation to those of administration and of treatment. That this should be the case is the more surprising in view of the excellent start to be found in HOLMES, COMMON LAW (1881) Lecture II. Compare also Freund, *Classification and Definition of Crimes* (1915) 5 J. CRIM. L. 807 and the general emphasis of Professor Freund's work as indicated by LEGISLATIVE REGULATION (1932). The work which is needed may, however, be undertaken in connection with contemporary projects of reform. Dean Pound has recently reminded the bar that "a satisfactory administration of criminal justice must rest ultimately on a satisfactory criminal law." *Towards a Better Criminal Law* (1935) 21 A. B. A. J. 499. The New York Law Revision Commission has undertaken a revision of the New York Penal Law to be based, so its chairman reports, upon "careful study, in the light of modern conditions, of two fundamental questions: what acts should be made punishable, and what punishment should be visited upon these acts, so that society may be adequately protected." Burdick in PROCEEDINGS OF THE GOVERNOR'S CONFERENCE ON CRIME, THE CRIMINAL AND SOCIETY (1935) 669. A similar project is reported for Wisconsin and, as a basis for it, Professor Gausewitz has published a stimulating paper endeavoring to canvass the broad issues which legislative choice must resolve. *Considerations Basic to a New Penal Code* (1936) 11 WIS. L. REV. 346. Finally the American Law Institute, after a suggestion by President Roosevelt that it turn its attention to "the field of the substantive criminal law," has approved the recommendation of an advisory committee that it undertake the preparation of a model criminal code, a task that may, however, prove to be impossible of performance on any comprehensive scale, under contemporary social and economic conditions. *Cf.* Wechsler, *A Caveat on Crime Control* (1937) 27 J. CRIM. L. 629.

[2] See THE AMERICAN LAW INSTITUTE REPORTS IN RELATION TO FUTURE WORK OF THE INSTITUTE (1935) 26-28; SECOND ANN. REP. OF THE N. Y. LAW REVISION COMMISSION (1936) 17; Burdick, *op. cit. supra* note 1, at 668-9. The American Law Institute project has apparently not proceeded for lack of funds. The project

All men agree that in general it is desirable to prevent homicide and bodily injury. The scope of reasonable controversy is therefore limited to the way in which the criminal law can and should operate to this end. An exploration of these issues may also have the larger value of clarifying the task of penal code revision as a whole, for they arise in varying forms throughout the entire field of the criminal law.

I.

The Anglo-American Law of Homicide

The English common law rules purported to distinguish among homicides in terms of those that were murder, those that were manslaughter and those that were justifiable and excusable.[3] The principal function of these distinctions was to differentiate criminal from non-criminal homicides, and criminal homicides that were capital, in the absence of royal clemency, from those that were not.[4] The American law followed the same general pattern, though it purported to make further distinctions for the purpose (1) of narrowing the category of capital homicides and (2) of prescribing and varying the penalties for non-capital ones. For the purposes of our inquiry it will be sufficient to explore the major criteria by which these discriminations are made and the nature of the problems which are presented in their application. We shall then endeavor to formulate the theoretical considerations which are of primary importance in the evaluation of such discriminations.

(a) *Murder*

When Mr. Justice Stephen undertook, in 1877, to survey and restate the English law of homicide,[5] he thought the authorities indicated that an unlawful homicide without adequate provocation was murder if it resulted from an act accompanied by one of the following states of mind: (a) an intention to cause the death of or grievous bodily harm to any person or (b) knowledge that the act will probably cause either of these results, even though the actor hopes they may not occur or is indifferent about them, or (c) an intention to commit a felony or to

of the Law Revision Commission is proceeding, however, and has resulted in the preparation by S. Rosenzweig and M. V. Lybolt, under the supervision of the Commission, of an extensive and illuminating study of the New York cases Law Revision Commission, Communication and Study Relating to Homicide, N. Y. Leg. Doc. (1937) No. 65 (P).

[3] See, in general, 3 Stephen, History of the Criminal Law of England (1883) c. 26; Kenny, Outlines of Criminal Law (15th ed. 1936) 115-165; Perkins, *A Re-examination of Malice Aforethought* (1934) 43 Yale L. J. 537.

[4] On the development of English clemency practices, see *infra* note 19.

[5] Digest of the Criminal Law (7th ed. 1926) cc. 21-24.

resist a peace officer in the execution of his duty.[6] No one can question the accuracy of his statement with respect to the first category. An issue is raised, as we shall see, by the second, in which he was giving such content to the general statement of earlier writers that "malice" was "implied" when the act was so reckless as to evince a "heart regardless of social duty and fatally bent on mischief,"[7] as he thought their illustrations and the few reported cases justified. Shortly after he wrote he indicated his own doubt with regard to the third category and argued vigorously that on principle and authority this kind of homicide should not be held to be murder unless the felonious act were dangerous to life.[8] The problems presented by the common law rules resided, as we shall see, principally in the second and third categories of Stephen's classification and they were problems which arose in the United States as well.

In those states which, beginning with Pennsylvania[9] in 1794, varied the English scheme, the primary objective was to limit the use of the death penalty[10]—an objective accomplished by the division of murder into two degrees with the death penalty[11] reserved for the first degree.[12]

[6] Digest, art. 315.

[7] See 3 History of the Criminal Law 76; *cf.* Foster, Crown Cases (1746) 255; 1 Hawkins, P. C. (1739) c. 11, § 12, c. 13, § 68; 1 East, P. C. (1803) 225-7, 231, 232, 262; 1 Hale, P. C. (1736) 475-6.

[8] See his testimony before the Select Committee appointed in 1874 to consider the Homicide Law Amendment Bill, Minutes of Evidence 3 *et seq.*; Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences (1879) 23-24; Draft Code, § 175; 3 History of the Criminal Law 57, 74-76; Reg. v. Serné, 16 Cox 311 (1887).

[9] Laws 1794, c. 257, § 1, 2. Virginia speedily followed suit. 2 Stat. At Large (Shepherd, 1796) pp. 5-6, § 1, 2.

[10] The preamble of the Pennsylvania statute reads: "Whereas the design of punishment is to prevent the commission of crimes, and repair the injury that hath been done thereby to society or the individual, and it hath been found by experience that these objects are better obtained by moderate but certain penalties, than by severe and excessive punishments: And whereas it is the duty of every government to endeavor to reform, rather than exterminate offenders, and the punishment of death ought never to be inflicted, where it is not absolutely necessary to the public safety. . . ." *Cf.* Beccaria, Crimes and Punishments (2d Am. ed.) cc. 2, 3, 27; Bentham, Principles of Penal Law, Bk. II, c. 11, 1 Works 441 *et seq.*; To His Fellow-Citizens of France, 1 Works 525 *et seq.*; 1 Livingston, Works (1873 ed.) 194 *et seq.*

[11] The death penalty has been abolished in all cases in Maine, Michigan, Minnesota, South Dakota and Wisconsin. In Rhode Island it may be imposed for murder, and in North Dakota for murder in the first degree only when committed by a convict under life sentence. Kansas reinstated capital punishment in 1935, although there had been no executions in the state since 1872.

[12] Murder is not divided into degrees in Georgia [Code (Park and Strozier, 1935) §§ 26-1001 *et seq.*], Illinois [Rev. Stat. Ann. (Cahill, 1933) c. 38, § 337 *et seq.*], Kentucky [Stat. (Carroll, 1930) § 1149], Louisiana [Rev. Stat. (Wolff, 1920) § 784], Maine [Rev. Stat. (1930) c. 129, § 1], Mississippi [Code Ann. (1930) §§ 985, 987], Oklahoma [Stat. (Harlow, 1931) § 2216 *et seq.*], South Carolina [Code (Michie, 1932) § 1101], South Dakota [Comp. Laws (1929) § 4012 *et seq.*], Texas [Pen. Code Ann. (Vernon, 1925) art. 1256]. In Kentucky and

The most common definition of first degree murder is still that derived from the Pennsylvania Act of 1794 which included (a) premeditated and deliberate homicide[13] and (b) homicides occurring in the course of the commission of or in the attempt to commit arson, rape, robbery or burglary[14]—a list of felonies which has been somewhat enlarged in recent years in many states, principally by the inclusion of mayhem and kidnapping. The most common definition of second degree murder,

---

Louisiana the crime is not defined; the statutes merely prescribe the penalty for "wilful murder." In the other jurisdictions enumerated the crime is defined in somewhat varying common law terms. See, *e.g.*, the Georgia Code, *supra*: "Murder is the unlawful killing of a human being, in the peace of the state, by a person of sound memory and discretion, with malice aforethought express or implied. . . . Express malice is that deliberate intention of mind unlawfully to take away the life of a human being which is manifested by external circumstances capable of proof. . . . Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart."

"". . . All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing. . . ."

In eighteen states death must be the result of ". . . poison, lying in wait or any other kind of wilful, deliberate and premeditated killing. . . ." See ARIZ. REV. CODE ANN. (Struckmeyer, 1928) § 4584; CAL. PEN. CODE (Deering, 1931) § 189; CONN. GEN. STAT. (1930) § 6043; IDAHO CODE ANN. (1932) § 17-1101; IOWA CODE (1935) § 12911; KAN. GEN. STAT. ANN. (Corrick, 1935) § 21-401; MD. ANN. CODE (Bagby, 1924) art. 27, § 397; MICH. COMP. LAWS (1929) § 16708; MO. STAT. ANN. (Vernon, 1932) § 3982; MONT. REV. CODES ANN. (Anderson & McFarland, 1935) §10955; N. H. PUB. LAWS (1926) c. 392, § 1; N. J. COMP. STAT. (1911) § 106; N. C. CRIM. CODE & DIG. (Jerome, 1934) § 903; N. D. COMP. LAWS ANN. (1913) § 9469; PA. STAT. ANN. (Purdon, 1930) tit. 18, § 2221; VT. PUB. LAWS (1933) § 8374; VA. CODE (Michie, 1936) § 4393; W. VA. CODE (1931) c. 261, art. 2, § 1.

In New York the analogous requirement is: ". . . a deliberate and premeditated design to effect the death of the person killed or of another. . . ." PENAL LAW § 1044(1). In four states a "premeditated design" without "deliberation" is sufficient. FLA. COMP. GEN. LAWS ANN. (Skillman, 1927) § 7137; MINN. STAT. (Mason, 1927) § 10067; WASH. REV. STAT. ANN. (Remington, 1932) § 2392; WIS. STAT. (1933) § 340.01.

In eight states the killing must not only be "deliberate and premeditated" but must also be "malicious." ALA. CODE ANN. (Michie, 1928) § 4454; ARK. DIG. STAT. (Crawford & Moses, 1921) § 2343; COLO. STAT. ANN. (Michie, 1935) c. 48, § 32; NEV. COMP. LAWS (Hillyer, 1929) § 10066; N. M. STAT. ANN. (Courtright, 1929) § 35-301; R. I. GEN. LAWS (1923) § 6013; TENN. CODE ANN. (Michie, 1932) § 10767; UTAH REV. STAT. ANN. (1933) tit. 103, c. 28, § 1-3.

"Premeditated malice" is required in Indiana [STAT. ANN. (Burns, 1933) c. 10, § 3401], and Wyoming [REV. STAT. ANN. (Courtright, 1931) § 32-201]; "deliberately premeditated malice aforethought" in Massachusetts [GEN. LAWS (1932) c. 265, § 1]; "deliberate and premeditated malice" in Nebraska [COMP. STAT. (1929) c. 28, art. 4, § 401], Ohio [GEN. CODE ANN. (Page, 1926) § 123400] and Oregon [CODE ANN. (1930) § 14-201]; "express malice aforethought" in Delaware [REV. CODE (1935) § 5157].

"". . . or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary. . . ." For a comprehensive description of contemporary statutory provisions, see Arent and MacDonald, *The Felony Murder Doctrine and Its Application under The New York Statutes* (1935) 20 CORN. L. Q. 288, 294-5.

also derived from the Pennsylvania Act,[15] is, in substance, "all other homicides which would have been murder at common law."[16] The New York discriminations are more elaborate.[17] First degree murder includes homicides committed (a) "from a deliberate and premeditated design" to effect death, (b) without "premeditated design" to kill "by an act imminently dangerous to others, and evincing a depraved mind regardless of human life,"[18] or (c) "by a person engaged in the com-

---

"". . . and all other kinds of murder shall be deemed murder in the second degree. . . ."

"ALA. CODE ANN. (Michie, 1928) § 4454; ARIZ. REV. CODE ANN. (Struckmeyer, 1928) § 4584; ARK. DIG. STAT. (Crawford & Moses, 1921) § 2344; CAL. PEN. CODE (Deering, 1933) § 189; COLO. STAT. ANN. (Michie, 1935) c. 48, § 32; CONN. GEN. STAT. (1930) § 6043; DEL. REV. CODE (1935) § 5158; D. C. CODE (1929) tit. 6, § 23; IDAHO CODE ANN. (1932) § 17-1103; IOWA CODE (1935) § 12912; IND. ANN. CODE (Bagby, 1924) art. 27, § 401; MASS. GEN. LAWS (1932) c. 265, § 1; MICH. COMP. LAWS (1929) § 16709; MO. STAT. ANN. (Vernon, 1932) c. 30, art. 4, § 3983; MONT. REV. CODE ANN. (Anderson & McFarland, 1935) § 10955; NEV. COMP. LAWS (Hillyer, 1929) § 10068; N. H. PUB. LAWS (1926) c. 392, § 1; N. J. COMP. STAT. (1911) tit. 352, § 107; N. M. STAT. ANN. (Courtright, 1929) § 35-304; N. C. CRIM. CODE & DIG. (Jerome, 1934) § 4200; PA. STAT. (Purdon, 1936) tit. 18, c. 6, § 2221; R. I. GEN. LAWS (1923) c. 395, § 1; TENN. CODE ANN. (Michie, 1932) § 10767; UTAH REV. STAT. ANN. (1933) tit. 103, c. 28, § 3; VT. PUB. LAWS (1933) c. 335, § 8374; VA. CODE (Michie, 1936) § 4393; W. VA. CODE (1936) c. 61, art. 2, § 1.

In six states, the category includes "every murder which shall be committed purposely and maliciously, but without deliberation and premeditation." IND. STAT. ANN. (Burns, 1933) § 10-3404; KAN. REV. STAT. ANN. (Corrick, 1935) § 21-402; NEB. COMP. STAT. (1929) § 28-402; OHIO CODE ANN. (Throckmorton, 1936) § 12403; ORE. CODE ANN. (1930) § 14-202; WYO. REV. STAT. ANN. (Courtright, 1931) § 32-204; see also ALASKA COMP. LAWS, CRIM. CODE, § 1885.

"PENAL LAW §§ 1044-1048. For variations of the New York pattern see FLA. COMP. GEN. LAWS (Skillman, 1927) § 7137 *et seq.* (three degrees of murder and none of manslaughter); MINN. STAT. (Mason, 1927) § 10065 *et seq.* (three degrees of murder, first and second both punishable by life imprisonment); WASH. REV. STAT. ANN. (Remington, 1932) § 2392 *et seq.*; WIS. STAT. (1933) § 340.01 *et seq.* (three degrees of murder, no death penalty).

"The statutes of 22 states contain an express reference to homicides characterized as "evincing a depraved and malignant heart" or in some similar way. In 6 states such homicides are designated as murder in the first degree: ALA. CODE ANN. (Michie, 1928) § 4454; COLO. STAT. ANN. (Michie, 1935) c. 48, § 32; N. M. STAT. ANN. (Courtright, 1929) § 35-304; N. Y. PENAL LAW § 1044(2); UTAH REV. STAT. ANN. (1933) § 103-28-2; WASH. REV. STAT. ANN. (Remington, 1932) § 2392. In 5 states such homicides are designated as murder, but there are no degrees of murder: GA. CODE (1933) § 26-1001, 26-1004; ILL. STAT. ANN. (Jones, 1936) § 37.279; OKLA. STAT. (Harlow, 1931) § 2216; MISS. CODE ANN. (1930) § 985; S. D. COMP. LAWS (1929) § 4012(2). In 10 states such homicides are designated as murder in the second degree: ARIZ. REV. CODE ANN. (Struckmeyer, 1928) §§ 4583, 4585 (minimum of ten years); ARK. DIG. STAT. (Crawford & Moses, 1921) § 2338, 2341, 2344, 2353 (5 to 21 years); CAL. PEN. CODE (Deering, 1933) § 187-190 (5 years to life); FLA. COMP. GEN. LAWS ANN. (Skillman, 1927) § 7137 (20 years to life); IDAHO CODE ANN. (1932) § 17-1101-1104 (10 years to life); MONT. REV. ANN. (Anderson & McFarland, 1935) § 10954, 10955, 10957 (minimum of ten years); NEV. COMP. LAWS (Hillyer, 1929) § 10068 (10 years to life); N. D. COMP. LAWS ANN. (1913) § 9462, 9467, 9473 (10 to 30 years); ORE. CODE ANN. (1930) § 14203, 14212 (life); WIS. STAT. (1935) § 340.03 (14 to 25 years). In Minnesota such homicides are designated murder in the third degree. MINN. STAT. (Mason, 1927) § 10070 (7 to 30 years).

Statutes which merely refer to all homicides that would be murder at common law include this formula by implication.

mission of or in an attempt to commit a felony." A killing is murder in the second degree when committed "with a design to effect the death of the person killed or of another, but without deliberation and premeditation." For the most part, therefore, the function performed by all the English definitions of murder—the determination of what homicides may be capitally punished[19]—is performed in the United States by the "deliberation and premeditation" formula, on the one hand, and the felony-murder rule, on the other.[20] However, the balance of the com-

[19] It is worth emphasizing the point that so long as a power to grant clemency exists, the function of the legal rules is to determine who *may* rather than who *shall* be capitally punished. In England that power, vested in the sovereign, is exercised by the Home Secretary. In the early nineteenth century clemency was apparently uncommon in murder cases. Thus from 1805 to 1818, sentence of death was passed for murder in 229 cases in England and Wales and there were 202 executions, according to a statement printed by the Home of Commons March 22, 1819. 17 ACCOUNTS AND PAPERS (Jan. 21-July 13, 1819). For figures on Old Bailey convictions, 1749-1777, see HOWARD, THE STATE OF THE PRISONS (1787) 483. In 1836, when the capital penalty was rarely inflicted for the many offences then capital, the Royal Commissioners on Criminal Law asserted that in "Murder . . . the penalty of death is almost invariably executed after conviction." SECOND REPORT OF THE COMMISSIONERS (1836) 31. But increased leniency is apparent in available figures. In 1837 Lord John Russell, Home Secretary, informed the Commission that for the seven years ending 1834 "of fourteen persons found guilty of murder in London and Middlesex, only nine were executed." 31 PARLIAMENTARY PAPERS (Sess. Jan. 31-July 17, 1837). In 1831 there were 14 sentences and 12 executions in England and Wales; in 1833 the sentences were 9 and the executions 6; in 1838 the numbers are 25 and 5; in 1862 they are 28 and 15. Testimony of Sir John Anderson, Select Committee on Capital Punishment, MINUTES OF EVIDENCE (1930) 1. Normal contemporary practice is indicated by the figures for the period from 1880 to 1929. Of the 1123 men and 166 women convicted of murder and necessarily sentenced to death, 695 men and 18 women were executed and 416 men and 148 women granted clemency. REPORT OF THE SELECT COMMITTEE ON CAPITAL PUNISHMENT (1930) Appendix III, p. 574. It is quite obvious from this report and the evidence upon which it was based that ever since the large scale reduction of the number of capital offences, Englishmen have tolerated the broad common law definition of murder only because of the difficulties experienced in legislative efforts to articulate satisfactory legal criteria for discriminating among murder cases for the purpose of mitigation. See especially *id.*, No. 162 *et seq.*; *cf.* 3 STEPHEN, *op. cit. supra* note 3, at 84-87. Reprieved murderers receive a "life" sentence which, in practice, usually means imprisonment for twenty years, with a possible five year reduction for good behavior. REPORT OF THE SELECT COMMITTEE, *supra*, No. 228. Thus if a reprieve is granted, the treatment accorded the prisoner may not differ very greatly from that which would be accorded in an aggravated case of manslaughter. For punishment in manslaughter may range from imprisonment for not more than two years or a fine to penal servitude for life. See KENNY, *op. cit. supra* note 3, at 141-2; *cf.* 3 STEPHEN, *op. cit. supra* note 3, at 79.

[20] A power of clemency exists in each state, usually vested in the executive or in an administrative board [see JENSEN, THE PARDONING POWER IN THE AMERICAN STATES (1922) cc. 1, 2] and is frequently exercised. The Select Committee estimated (REPORT, *supra* note 19, No. 308) that for a stated period, of unspecified length, 71.9 per cent of death sentences in the United States were carried out, as opposed to 61.7 per cent for the same period in England and Wales. We have no way of checking the estimate, but the figures for New York State from 1920-1934 are very close, namely 206 executions to 74 commutations (73.5%). Whatever the exact proportion may be in different parts of the country, it is doubtful that American public opinion looks to the exercise of executive clemency as a

mon law of murder performs under American statutes the analogous function of singling out those homicides which, though not capital, are nevertheless punishable more severely for the most part than the other criminal homicides which constitute manslaughter.

The most striking phase of the development of the English law was the reduction of "malice aforethought" to a term of art signifying neither "malice" nor "forethought" in the popular sense.[21] Strikingly analogous in the judicial development of the American law of homicide is the narrow interpretation of "deliberation" and "premeditation" to exclude the two elements which the words normally signify: a determination to kill reached (1) calmly[22] and (2) some appreciable time prior

means of accomplishing a systematic limitation of the execution of capital sentences. On the other hand, the death penalty is mandatory upon conviction of murder, or, where murder is divided into degrees, of first degree murder, only in ten states. ARK. DIG. STAT. (Crawford & Moses, 1921) § 2338; CONN. GEN. STAT. (1930) § 6044; DEL. REV. CODE (1915) § 4697; FLA. COMP. LAWS (1927) § 7137; LA. CODE CRIM. PROC. (1932) § 1044; MASS. GEN. LAWS (1932) c. 265, § 2; N. MEX. COMP. STAT. (1911-24) § 52-108; N. Y. PENAL LAW § 1045 (except in felony-murder where by Laws 1937, c. 67, jury may recommend life imprisonment); N. C. CRIM. CODE (Jerome, 1934) § 903; VT. PUB. LAWS (1933) § 8376. In Indiana the death penalty is mandatory in one case, homicide "in the perpetration or attempt to perpetrate a rape, arson, robbery or burglary." IND. STAT. (Burns, 1933) § 10.3401. In other states there is discretion as to the imposition of the death penalty vested usually in the jury, sometimes in the judge.

[21] *Cf.* KENNY, *op. cit. supra* note 3, at 153: "a modern student may fairly regard the phrase 'malice aforethought' as now a mere arbitrary symbol. . . . For the 'malice' may have in it nothing really malicious; and need never be really 'aforethought' (except in the sense that every desire must necessarily come before—though perhaps only an instant before—the act which is desired)." See also STEPHEN, *op. cit. supra* note 3, at 63; Perkins, *supra* note 3, at 537-539. For a collection of cases illustrating the confusion which a typical "malice aforethought" charge must engender in a jury, see Note (1912) 38 L. R. A. (N. S.) 1054. *Cf.* Stephen's testimony, MINUTES OF EVIDENCE, SELECT COMMITTEE ON HOMICIDE LAW AMENDMENT BILL (1874) 5: "My opinion is, that the present definition of malice aforethought can only mislead the jury. . . . In times of excitement it might be very dangerous and very injurious indeed" [because counsel might argue that the jury should require "malice aforethought" in an untechnical sense]. But see his own charge in Reg. v. Serné, 16 Cox 311 (1887): "The definition of murder is unlawful homicide with malice aforethought; and the words malice aforethought are technical. You must not, therefore, construe them or suppose that they can be construed by ordinary rules of language." To the effect that the words need not be mentioned, see Turner v. Commonwealth, 167 Ky. 365, 368, 180 S. W. 768, 769 (1915); State v. McGuire, 84 Conn. 470, 80 Atl. 761 (1912) (assault with intent to murder). But see Watkins v. Commonwealth, 146 Ky. 449, 142 S. W. 1035 (1912); Note (1912) 38 L. R. A. (N. S.) 1054, 1104. Had codification efforts succeeded in England, the words would in all probability have been abandoned. See FOURTH REPORT OF HER MAJESTY'S COMMISSIONER'S ON CRIMINAL LAW (1839) xxii-xxiii; REPORT OF SELECT COMMITTEE ON HOMICIDE LAW AMENDMENT BILL (1874) iv-v; REPORT OF CRIMINAL CODE BILL COMMISSION (1879) 15.

[22] See, in general: People v. Harris, 209 N. Y. 70, 102 N. E. 546 (1913); State v. Walker, 173 N. C. 780, 92 S. E. 327 (1917); Caldwell v. State, 203 Ala. 412, 84 So. 272 (1919); People v. Bellon, 180 Cal. 706, 182 Pac. 420 (1919); State v. Camp, 180 N. C. 735, 105 S. E. 339 (1920); People v. Donnelly, 190 Cal. 57, 210 Pac. 523 (1922); Com. v. Dreher, 274 Pa. 325, 118 Atl. 215 (1922); Johnson v. State, 104 Miss. 889, 105 So. 742 (1925); State v. Butchek, 121 Or. 141, 253

to the homicide.[23] The elimination of these elements leaves, as Judge Cardozo pointed out,[24] nothing precise as the crucial state of mind but intention to kill.[25] Such a result creates peculiar difficulty in a juris-

Pac. 367 (1927); Williams v. State, 163 Miss. 475, 142 So. 471 (1932); Wooten v. State, 104 Fla. 597, 140 So. 474 (1932); People v. Russo, 133 Cal. App. 468, 24 P.(2d) 580 (1933); People v. Pivaroff, 138 Cal. App. 625, 33 P.(2d) 44 (1934); People v. Newman, 360 Ill. 232, 195 N. E. 648 (1935); People v. Hall, 14 Cal. App. (2d) 582, 58 P.(2d) 697 (1936); State v. Simborski, 120 Conn. 624, 182 Atl. 221 (1936). But *cf.* State v. Kotorsky, 74 Mo. 247 (1881): "Deliberation is also premeditation, but is something more. It is not only to think of beforehand, which may be but for an instant, but the inclination to do the act is considered, weighed, pondered upon, for such a length of time after a provocation is given, as the jury may find was sufficient for the blood to cool. One in 'a heat of passion' may premeditate without deliberating. Deliberation is only exercised in a 'cool state of the blood,' while premeditation may be, either in that state of the blood, or in 'heat of passion.'" See also Torres v. State, 39 N. M. 191, 43 P.(2d) 929 (1935) ("'deliberation' . . . involves a thinking over with calm and reflective mind, or involves a fixed and settled purpose and coolness of mind"); Winton v. State, 151 Tenn. 177, 268 S. W. 633 (1925) (the act must be done "coolly and in the absence of passion"); State v. Speyer, 207 Mo. 540, 106 S. W. 505 (1907) ("deliberation, as used in the statute, implies a cool state of the blood, and is intended to characterize what are ordinarily termed cold-blood murders; such as proceed from deep malignity of heart, or are prompted by motives of revenge or gain").

[23] People v. Sanchez, 24 Cal. 17 (1864); Perugi v. State, 104 Wis. 230, 80 N. W. 593 (1899); State v. Hawkins, 23 Wash. 289, 63 Pac. 258 (1900); People v. Harris, 209 N. Y. 70, 102 N. E. 546 (1913); State v. Coffey, 174 N. C. 814, 94 S. E. 416 (1917); Caldwell v. State, 203 Ala. 412, 84 So. 272 (1919); State v. Holdsclaw, 180 N. C. 731, 105 S. E. 181 (1920); Com. v. Daynarowicz, 275 Pa. 235, 119 Atl. 77 (1922); People v. Donnelly, 190 Cal. 57, 210 Pac. 523 (1922); Com. v. Scott, 284 Pa. 159, 130 Atl. 317 (1925); Basham v. State, 47 Okla. Cr. 204, 287 Pac. 761 (1930); State v. Hall, 54 Nev. 213, 13 P.(2d) 624 (1932); Maestas v. People, 91 Colo. 36, 11 P.(2d) 227 (1932); People v. Russo, 133 Cal. App. 468, 24 P.(2d) 580 (1933); State v. Simborski, 120 Conn. 624, 182 Atl. 221 (1936).

[24] *What Medicine Can Do for Law* (1928) in LAW AND LITERATURE (1930) 70, 96 *et seq.*

[25] "There can be no intent unless there is a choice, yet by the hypothesis, 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. What is meant as I understand it, is that the impulse must be the product of an emotion or passion so swift and overmastering as to sweep the mind from its moorings. A metaphor, however, is, to say the least, a shifting test whereby to measure degrees of guilt that mean the difference between life and death." CARDOZO, *op. cit. supra* note 24, at 99-100. The New York cases present striking contrasts. Compare People v. Beckwith, 103 N. Y. 360, 8 N. E. 662 (1886); People v. Pullerson, 159 N. Y. 339, 53 N. E. 1119 (1899); People v. Ferraro, 161 N. Y. 365, 55 N. E. 931 (1900) with People v. Barberi, 149 N. Y. 256, 43 N. E. 635 (1896); People v. Raffo, 180 N. Y. 434, 73 N. E. 225 (1905); People v. Fiorentino, 197 N. Y. 560, 91 N. E. 195 (1910); People v. Caruso, 246 N. Y. 437, 159 N. E. 390 (1927); see LAW REVISION COMMISSION, *op. cit. supra* note 2, at 47-99. Good motives are as immaterial under the statutes as they were at common law. Roberts v. People, 211 Mich. 187 (1920) (defendant at request of his incurably sick wife provided her with the means to commit suicide); People v. Kirby, 2 Parker Cr. 28 (N. Y. 1823); Rex v. Simpson [1915] 84 L. J. K. B. 1893. It is usually equally immaterial, if there is intention to kill, that the wrong person is killed. For an exceptional holding that such a homicide is not murder in the first degree, see State v. Caterni, 54 Mont. 456, 171 Pac. 284 (1918).

diction like New York where "design" to kill is, by statute, the distinguishing feature of second-degree murder.[26] The trial judge must solemnly distinguish in his charge between the two degrees in terms which frequently render them quite indistinguishable,[27] a procedure which obviously confers on the jury a discretion to follow one aspect of the charge or the other, if not a valid excuse for neglecting the charge entirely.[28] The statutory scheme was apparently intended to limit administrative discretion in the selection of capital cases. As so frequently occurs, the discretion which the legislature threw out the door was let in through the window by the courts.

The second of Stephen's categories of murder included, as we have said, homicides caused by an act which the actor knows will probably cause death or grievous bodily harm, a case treated summarily and ambiguously by the earlier writers in so far as it was treated at all.[29] It has commonly been thought to be the case of extremely gross recklessness resulting in death, to be distinguished from negligent homicides that are only manslaughter by the relatively greater danger of the act and the consequently greater indifference to the safety of others mani-

[26] N. Y. PENAL LAW § 1046: "Such killing of a human being is murder in the second degree, when committed with a design to effect the death of the person killed, or of another, but without deliberation and premeditation."

[27] Since People v. Guadagnino, 233 N. Y. 344, 135 N. E. 594 (1922) it has been settled that it is error to charge in the language of People v. Clark, 7 N. Y. 385, 394 (1852) and of People v. Leighton, 88 N. Y. 117 (1882) that it "is enough if the intention precedes the act although the act follows instantly." However, the jury may apparently be told, in the language of People v. Majone, 91 N. Y. 211 (1883), that the "design must precede the killing by some appreciable space of time. But the time need not be long. It must be sufficient for some reflection and consideration upon the matter, for choice to kill or not to kill, and for the formation of a definite purpose to kill." It may also be told, in the language of People v. Guadagnino, *supra*: "A design to kill formed at the instant of the killing where there is no deliberation and premeditation preceding the act is murder in the second degree, not murder in the first degree. . . . There must be some appreciable space of time for such deliberation, or circumstances showing such deliberation preceding the act." It may also be told, in the language of People v. Barberi, 149 N. Y. 256, 267, 43 N. E. 635, 638 (1896): "Deliberation and premeditation imply the capacity at the time to think and reflect, sufficient volition to make a choice, and by the use of these powers to refrain from doing a wrongful act." And People v. Caruso, 246 N. Y. 437, 445, 159 N. E. 390, 392 (1927), warrants a charge that time "to make a choice whether to kill or not to kill—to overcome hesitation and doubt—to form a definite purpose" is not decisive.

[28] *Cf.* CARDOZO, *op. cit. supra* note 24, at 100-101: "What we have is merely a privilege offered to the jury to find the lesser degree when the suddenness of the intent, the vehemence of the passion, seems to call irresistably for the exercise of mercy. I have no objection to giving them this dispensing power, but it should be given to them directly and not in a mystifying cloud of words. 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."

[29] See the references *supra* note 7; LAW REVISION COMMISSION, *supra* note 2, at 103-132.

fested by it.[30] Holmes thought that the actor's awareness of the danger was immaterial if he was aware of circumstances that would lead a man of common experience to conclude that the danger was very great; that the common law employed an external standard even in the case of murder.[31] Whether the common law judges carried the law of murder so far along the line of externality must be doubted. Stephen believed, as we have said, that the actor must have knowledge of the danger and not merely of the circumstances.[32] The reports of the Common Law Commissioners express the same view.[33] The cleavage between the two positions is, however, wider in theory than it is in practice. Inferences as to a particular man's knowledge must usually proceed from propositions about the knowledge that men like the actor would generally have, if they should act as he did under like circumstances.[34] If the danger was

[30] FOURTH REPORT OF HER MAJESTY'S COMMISSIONERS ON CRIMINAL LAW (1839) xxiii; SEVENTH REPORT (1843) 23-26; STEPHEN, DIGEST, art. 315(b); Perkins, *supra* note 3, at 555-557.

[31] "The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw. To say that he was presumed to have intended them is merely to adopt another fiction, and to disguise the truth. The truth was, that his failure or inability to predict them was immaterial, if under the circumstances known to him, the court or jury, as the case might be, thought them obvious. As implied malice signifies the highest degree of danger, and makes the act murder; so, if the danger is less, but still not so remote that it can be disregarded, the act will be called reckless, and will be manslaughter. . . ." Com. v. Pierce, 138 Mass. 165, 178 (1884); see also THE COMMON LAW (1881) 51 *et seq.*; Com. v. Chance, 174 Mass. 245, 252, 54 N. E. 551, 554 (1899).

[32] DIGEST, art. 315(b). To the same effect see Pollock, C. B. in Reg. v. Vamplew, 3 F. & F. 520, 522 (1862): "The distinction [between murder and manslaughter] which seemed most reasonable consisted in the consciousness that the act done was one which would be likely to cause death. No one . . . could commit murder without that consciousness." See also Reg. v. Doherty, 16 Cox 306 (1887); Reg. v. Walters, 1 Car. & M. 164 (1841). For a recent defense of this view see J. W. C. Turner, *The Mental Element in Crimes at Common Law* (1936) 6 CAMB. L. J. 31.

[33] In their FOURTH REPORT, *loc. cit. supra* note 30, they say: "The *'mens mala,'*—the heart regardless of social duty,—are figurative expressions used to denote the criminal apathy or indifference with which an act is wilfully done which puts human life in peril. Whether such a peril be wilfully occasioned is a question not of law but of fact, depending on a consideration of the nature of the act done, the circumstances under which it was done, the probability that the act under those circumstances would be fatal to life, and the consciousness on the part of the offender that such peril would ensue." In their SEVENTH REPORT, *supra* note 30, at 26, they add: "If, supposing the likelihood of an evil result to be continually and gradually increased from very little to very great, it be asked at what point a party should be deemed to offend not merely negligently but wilfully, the answer is, that the question does not depend on the mere degree of probability, but that his liability as a wilful offender attaches when, being conscious that his act is attended with risk and danger of producing the evil consequence, he wilfully does that act." *Cf.* on the general question, Radin, *Criminal Intent* (1932) 8 ENCY. SOC. SCIENCES 126.

[34] In this sense, the standard employed in proving state of mind is always external, most obviously so in the days before defendants could testify in their own defense. This is perhaps all that is involved in the so-called presumption

very great, most men would perceive it, and, therefore, if the actor was both sober and sane, it is highly likely that he did too.[35] Nevertheless some cleavage remains. If a jury is told that, in order to convict, it must find that a defendant created great risk consciously, its freedom of decision is circumscribed differently than if it is told that "malice in murder means knowledge of such circumstances that according to common experience there is a plain and strong likelihood that death will follow the contemplated act."[36] In cases of drunkenness the cleavage is clear

that men intend the natural and probable consequences of their acts. With respect to this "common maxim which is sometimes stated as if it were a rule of law," Stephen observed: "I do not think the rule in question is really a rule of law, further or otherwise than as it is a rule of common sense. The only possible way of discovering a man's intention is by looking at what he actually did, and by considering what must have appeared to him at the time the natural consequence of his conduct." 2 HISTORY OF THE CRIMINAL LAW 111; see 3 HOLDSWORTH, HISTORY OF ENGLISH LAW (1927) 374-5; Reg. v. Doherty, 16 Cox 306 (1887); Reg. v. Macklin, 2 Lewin 225 (1838). Holmes, *supra* note 31, treats this matter as if the "presumption" were conclusive, as is the case with "implied malice." Thus in Com. v. Pierce, 138 Mass. 165, 180 (1884), *supra* note 31, he comments: "When the jury are asked whether a stick of a certain size was a deadly weapon, they are not asked further whether the defendant knew that it was so. It is enough that he used and saw it such as it was." It must be conceded that the language of some American cases supports this view. See, *e.g.*, Com. v. Webster, 5 Cush. 295, 306 (Mass. 1850); State v. Grant, 152 Mo. 57, 64, 65, 53 S. W. 432, 433 (1899); Anderson v. State, 133 Wis. 601, 614, 114 N. W. 112, 116 (1907). But *cf.* King v. Meade, [1909] 1 K. B. 895, 899, 900: "A man is taken to intend the natural consequences of his acts. This presumption may be rebutted—(1) in the case of a sober man, in many ways; (2) it may also be rebutted in the case of a man who is drunk, by showing his mind to have been so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous, *i.e.* likely to inflict serious injury. If this be proved, the presumption that he intended to do grievous bodily harm is rebutted." See also Allen v. United States, 164 U. S. 492, 496 (1896); State v. Bell, 21 Del. 192, 194, 62 Atl. 147, 148 (1904); State v. Silk, 145 Mo. 240, 249, 44 S. W. 764, 766 (1898); Note (1912) 38 L. R. A. (N.S.) 1054, 1081.

[35] The necessary externality of proof is enhanced by placing the burden of proving circumstances of mitigation or excuse on the defendant, since the probability of an erroneous finding against the existence of such circumstances is thereby increased. This is the effect, in some jurisdictions, of the "presumption of malice" which is said to arise variously on proof of homicide, of intentional homicide or of homicide with a deadly weapon. See *e.g.* Com. v. York, 50 Mass. 93 (1845); Com. v. Palmer, 222 Pa. 299, 71 Atl. 100 (1908); People v. Knapp, 71 Cal. 1, 11 Pac. 793 (1886); Note (1909) 19 L. R. A. (N. S.) 483; Note (1912) 38 L. R. A. (N.S.) 1054, 1077; Perkins, *supra* note 3, 550-551. This is the effect which the common-law writers explicitly accorded the presumption. See, *e.g.*, STEPHEN'S DIGEST, art. 322 and the texts discussed in Woolmington v. Director of Public Prosecutions [1935] A. C. 460. However, in the Woolmington case, the House of Lords held that the burden of persuading the jury that a homicide was intentional, unprovoked and not accidental rests upon the prosecution throughout. If the decision is reviewed in Valhalla we have little doubt that two centuries of English judges will vote to reverse.

[36] Holmes, J., in Com. v. Chance, 174 Mass. 245, 252, 54 N. E. 551, 554 (1899), *supra* note 31. On the other hand, if the matter is viewed from the standpoint of predicting what appellate courts will do, it is quite correct to say that if the danger was very great a conviction will probably be affirmed and otherwise not. Compare Mayes v. People, 106 Ill. 306 (1883) with People v. Crenshaw, 298 Ill. 412, 131 N. E. 576 (1921); McAndrews v. People, 71 Colo. 542, 208 Pac. 486 (1922).

and here the modern English decisions hold that if the actor was unaware of the danger, and the act was not otherwise felonious, the homicide is manslaughter, not murder.[37] It is difficult to believe that a more stringent rule would apply where the actor is sober but for other reasons, such as absent-mindedness, unaware of the danger.[38] In any event, American courts habitually deal with the matter ambiguously,[39] although homicides committed unintentionally "by an act imminently dangerous to others and evincing a depraved mind regardless of human life" are usually either first or second degree murder.[40] In New York, where such homicide is murder in the first degree, its scope is apparently limited by a requirement that the act endanger the lives of many persons and not merely the life of the person killed.[41] This limitation was expressly rejected in Wisconsin,[42] where a homicide of this sort is second degree murder, and it has not elsewhere been invoked. A few cases suggest that the actor's motive[43] in creating the risk as well as his general character[44] may be considered by the jury along with the act itself as indicating "depravity of heart," a suggestion which has also been vehemently repudiated.[45] Beyond this, the common law uncertainties as to degree of danger and state of mind remain, to be passed on to the jury by a general charge in terms of the "implied malice" formula.

We have said that Mr. Justice Stephen argued that the felony-murder rule should be limited to unintentional homicides which are the result of a felonious act dangerous to life or limb.[46] Even while the argument proceeded, authority was being manufactured in its support,[47] and the authority against it went little beyond the general statements in the texts.[48] Two different techniques were employed in the cases for the purpose of restricting the rule. On the one hand it was explicitly qualified[49] and, on the other, there was read into it the requirement that death be a "natural and probable result,"[50] and not merely a result of the felonious act.[51] A similar impetus to limit the rule has been felt in the

But this kind of case analysis has its limitations, if one is searching for the "law" that is to be recited to juries. It is not sufficient to tell a jury that if you convict on such and such facts an appellate court will probably sustain your verdict. A jury must be told what facts *should* lead to conviction. And the facts that will lead an appellate court to affirm are not always the facts that *should* lead to conviction.

[37] See KENNY, *op. cit. supra* note 3, at 68-72; King v. Meade, [1909] 1 K.B. 895; Director of Public Prosecutions v. Beard, [1920] A.C. 479; Reg. v. Doherty, 16 Cox 306 (1887); *cf.* Reg. v. Noon, 6 Cox 137 (1852); KENNY, at 69, n. 5, cites a case in 1748 in which it appeared that at a baby's christening party, its nurse, having got so drunk as to be "quite stupid and senseless," put the infant on the fire by mistake for a log of wood and the magistrates discharged her. See also Errington and Others' Case, 2 Lewin 217 (1838). But *cf.* Reg. v. Monkhouse, 4 Cox 55 (1849).

[38] It is because cases of this sort are rare, in murder, that the more common case of drunkenness is an excellent one to test the general theory. Many cases involving an attack upon the deceased, in which the defendant denies that he intended to kill, are easily determined on the ground that there was an actual intent to cause serious injury, which, at common-law, suffices in itself. Holmes might, of course, have said that one reason why intent to cause serious injury suffices is that death is a highly probable consequence of acts intended to produce such injury. But this objective reason for the rule does not make the standard of *liability* external rather than subjective.

[39] *Cf.* Mayes v. People, 106 Ill. 306 (1883), *supra* note 36: Defendant, having been drinking, threw a beer glass at his wife who was carrying a lighted oil-lamp. The glass struck the lamp, scattering the oil over her and igniting her clothes. She died of the burns. The defense requested a charge that the jury must find that the glass was thrown with an intention to injure. The court so charged with the following qualification: "unless . . . all the circumstances of the killing . . . show an abandoned and malignant heart on the part of the defendant." The charge was held to be correct; "the presumption is the mind assented to what the hand did, with all the consequences resulting therefrom, because it is apparent that he was willing that any result might be produced, at whatever harm to others." But what did the charge mean to the jury? See also State v. Smith, 2 S.C. 77 (1847); Braunie v. State, 105 Neb. 355, 180 N.W. 567 (1920); People v. Jernatowski, 238 N.Y. 188, 144 N.E. 497 (1924); State v. Trott, 190 N.C. 674, 130 S.E. 627 (1925); State v. Shepard, 171 Minn. 414, 214 N.W. 280 (1927); United States v. Freeman, 25 Fed. Cas. No. 15,162 (C.C.D. Mass. 1827) (Story, J.). But see State v. Massey, 20 Ala. App. 56, 58-9, 100 So. 625, 627 (1924); Com. v. Mayberry, 290 Pa. 195, 198-9, 138 Atl. 686, 688 (1927); Hyde v. State, 230 Ala. 243, 160 So. 237 (1935).

[40] See *supra* note 18.

[41] *Cf.* People v. Darry, 10 N.Y. 120 (1854) (no degrees of murder at the time, but the statutory language the same as it is now).

[42] Hogan v. State, 36 Wis. 226, 249-250 (1874). Accord: State v. Alvarez, 41 Fla. 532, 27 So. 40 (1899); and see State v. Lowe, 66 Minn. 296, 298-9, 68 N.W. 1094, 1095 (1896).

[43] Ramsey v. State, 114 Fla. 766, 768, 154 So. 855, 856 (1934): "The phrase 'evincing a depraved mind regardless of human life' conveys the idea of 'malice' in the popular or commonly understood sense of ill will, hatred, spite, an evil intent. It is the malice of the evil motive which the statute makes an ingredient of the crime of murder in the second degree."

[44] People v. Campbell, 1 Edmonds' Rep. 307 (N.Y. 1846); see State v. Shepard, 171 Minn. 414, 214 N.W. 280 (1927).

[45] Hogan v. State, 36 Wis. 226 (1874); see Montgomery v. State, 178 Wis. 461, 466, 190 N.W. 105, 107 (1922).

[46] See *supra* note 8.

[47] Compare the testimony of Bramwell and Stephen before the Select Committee on the Homicide Law Amendment Bill (1874) with their respective charges in Regina v. Horsey, 3 F. & F. 287 (1862) and Regina v. Serné, 16 Cox 311 (1887). And see the much earlier case of Rex v. Lad, 1 Leach 96 (1773).

[48] See 3 STEPHEN, *op. cit. supra* note 3, at 74-76; Perkins, *supra* note 3, at 557; Arent and MacDonald, *supra* note 14, at 289; LAW REVISION COMMISSION, *op. cit. supra* note 2, at 132 *et seq.*

[49] Reg. v. Serné, 16 Cox 311, 313 (1887): "I think that, instead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life, and likely in itself to cause death done for the purpose of committing a felony which caused death, should be murder." *Cf.* Rex v. Lumley, 22 Cox 635 (1912) (abortion).

[50] Reg. v. Horsey, 3 F. & F. 287 (1862), *supra* note 47.

[51] But later English cases cast doubt on the authoritative character of either limitation. Thus in Director of Public Prosecutions v. Beard [1920] A.C. 479, it was held enough that the felony, rape, was one of violence. In Rex v. Betts and Ridley, 22 Cr. App. R. 148, 153 (1930) death resulted from robbery with violence and a charge that the jury must be satisfied that the fatal act was one which would generally be regarded as calculated to cause death was said to be too favorable to the accused. See also State v. M'Mullen, 2 I.R. 9 (1925) (re-

United States and the work of limitation has proceeded more effectively than in England by means of the same two techniques[52] and of a third—the requirement that the felony be *malum in se* and not merely *malum prohibitum*.[53] A limitation of the rule in terms of the dangerousness of the felony is, however, deceptively simple, for there is a difficult problem in determining what the danger to be estimated is. The danger which is determinative may be the usual danger of the sort of behavior generally involved in robbery or arson, for example, as indicated by the common results of such behavior. But robbery and arson may be committed in different ways and under different circumstances, not all of which are equally dangerous to life and limb and some of which may be only slightly dangerous or not dangerous at all. Hence, the determinative risk may be that of the particular felonious act under the circumstances of the particular case as indicated by the usual results of such acts under such circumstances. Holmes thought the broad common law felony-murder rule defensible precisely on the ground that a legislator might reasonably look at the common law felonies as a whole and conclude that in general they endangered life and limb;[54] adopting the

sisting arrest). But see Reg. v. Whitmarsh, 62 Just. Peace 711 (1898). On the general subject see Arent and MacDonald, *supra* note 14; Turner, *supra* note 32, at 53 *et seq.*; Perkins, *supra* note 3. Argument that unless the actor can discern the probability of death, a penalty for causing death must be ineffective as a deterrent and therefore, should not be employed, will be found in FOURTH REPORT OF THE CRIMINAL LAW COMMISSIONERS (1839) xxviii *et seq.*; SEVENTH REPORT (1843) 26 *et seq.*; SECOND REPORT (1846) (of the Commissioners appointed in 1845) 17. But *cf.* REPORT OF THE CRIMINAL CODE BILL COMMISSION (1879) 24. The argument is stated simply by Holmes. If a man shoots at chickens intending to steal them and accidentally kills the owner, the "only blameworthy act is firing at the chickens, knowing them to belong to another. It is neither more nor less so because an accident happens afterwards; and hitting a man whose presence could not have been suspected, is an accident. The fact that the shooting is felonious does not make it any more likely to kill people. If the object of the rule is to prevent such accidents, it should make accidental killing with fire-arms murder, not accidental killing in the effort to steal; while, if its object is to prevent stealing, it would do better to hang one thief in every thousand by lot." THE COMMON LAW (1881) 58.

[52] See, *e.g.*, State v. Weisengoff, 85 W. Va. 271, 101 S. E. 450 (1919); Burton v. State, 122 Tex. Cr. 363, 55 S. W. (2d) 813 (1933); See State v. Glover, 330 Mo. 709, 50 S. W. (2d) 1049 (1932); State v. Diebold, 152 Wash. 68, 277 Pac. 394 (1929); Powers v. Com., 110 Ky. 386, 413-416, 61 S. W. 735, 741-745 (1901).

[53] People v. Pavlic, 227 Mich. 562, 199 N. W. 373 (1924). On the derivation of these terms see Note (1930) 30 COLUMBIA LAW REV. 74-78.

[54] THE COMMON LAW (1881) 59: ". . . if experience shows, or is deemed by the law-maker to show, that somehow or other deaths which the evidence makes accidental happen disproportionately often in connection with other felonies, or with resistance to officers, or if on any other ground of policy it is deemed desirable to make special efforts for the prevention of such deaths, the lawmaker may consistently [with the general theory of liability based on dangerousness] treat acts which, under the known circumstances, are felonious, or constitute resistance to officers, as having a sufficiently dangerous tendency to be put under a special ban. The law may, therefore, throw on the actor the peril, not only of the consequences foreseen by him, but also of consequences which, although not predicted by common experience, the legislator apprehends. I do not, however, mean to argue that the rules under discussion arose on the above reasoning, any more than that they are right, or would be generally applied in this country." *Cf.* Lord Alverstone, L. C. J., quoted by KENNY, *op. cit. supra* note 3, at 158: "The experience of the judges shews that there are so many cases of death caused by attempts to commit felonies, that, for the protection of human life, it is not desirable to relax the rule which treats such crimes as murders." See in this connection Arent and MacDonald, *supra* note 14, at 290-291, 302-3.

same view one might defend even more persuasively those American statutes which limit the rule to the most violent felonies, excluding larceny, for example, although in the course of its commission homicides have been known to occur. It seems likely, although Stephen never squarely faced the issue, that he inclined towards a limitation in terms of the danger of the behavior involved in the particular case and even, perhaps, of the danger known to the actor.[55] But if the rule is limited that narrowly, it is difficult to conceive of a homicide which would be murder under the felony-murder rule that would not also be murder at common law without regard to that rule,[56] unless the degree of danger necessary in murder is smaller where the act is a felony than where it is not.[57]

In New York the felony murder rule purports to apply to all felonies and has not been limited by the courts in any of the ways discussed above. It has, however, been limited in other and possibly less sensible ways.[58] The first of these limitations is the requirement that

[55] See the quotation from Regina v. Serné, *supra* note 49. But *cf.* the following from the same charge: ". . . Suppose that a man, intending to commit a rape upon a woman, but without the least wish to kill her, squeezed her by the throat to overpower her, and in so doing killed her, that would be murder. I think that everyone would say in a case like that, that when a person began doing wicked acts for his own base purposes, he risked his own life as well as that of others. . . . If a man once begins attacking the human body in such a way, he must take the consequences if he goes further than he intended when he began." See also REPORT OF THE CRIMINAL CODE BILL COMMISSION (1879) 24.

[56] The situation differs, of course, in a jurisdiction where first degree murder consists of intentional, deliberate and premeditated homicide on the one hand and felony-murder on the other. Even if the felony-murder rule is qualified by requiring knowledge of the danger, it includes many homicides that would not be first degree murder under the deliberation formula.

[57] The Criminal Code Bill Commission of 1878, under Stephen's influence, proposed the following rule [REPORT (1879) 100]: "Culpable homicide . . . is murder . . . whether the offender means or not death to ensue, or knows or not that death is likely to ensue . . . (a) if he means to inflict grievous bodily injury for the purpose of facilitating the commission of [treason, piracy, escape from prison or lawful custody, resisting lawful arrest, murder, rape, forcible abduction, robbery, burglary, arson] or the flight of the offender upon the commission or attempted commission thereof, and death ensues from his violence; (b) if he administers any stupefying thing for [any] . . . of the purposes aforesaid and death ensues from the effects thereof; (c) if he by any means wilfully stops the breath of any person for . . . [any] of the purposes aforesaid and death ensues from such stopping of the breath." [REPORT (1879) 100.] The proposal failed of passage.

[58] For a full discussion of the New York cases, see Arent and MacDonald, *supra* note 14; LAW REVISION COMMISSION, *op. cit. supra* note 2, at 135 *et seq.*; Corcoran, *Felony Murder in New York* (1937) 6 FORDHAM L. REV. 43.

the felony be "independent" of the homicide. An assault upon the person killed with intent to kill, injure or resist arrest is felonious[59] but "dependent" and therefore does not provide a basis for conviction of felony-murder.[60] However, if the felonious assault is committed upon some person other than the person killed, it is "independent" and will support such a conviction.[61] So, apparently, will the felony of escape,[62] if the defendant has been successfully arrested for a felony and is escaping.[63] On the other hand, the felonious possession of dangerous weapons has been held to be an inadequate basis for felony-murder.[64] No revealing analysis of the criterion of "independence" has appeared in the cases,[65] but Judge Cardozo has advanced the plausible ground for excluding the assault cases from the operation of the rule, that to include them would obliterate what remains of the distinction between murder in the first and second degrees, since every homicide "by design" involves an assault with intent to kill.[66] One result of this limitation of the rule is, however, that the legal consequences of a felonious assault which results in death vary according as the person killed is the person assaulted or some other person. In the former case, the felony-murder rule does not apply; in the latter case it does. The rule has also been restricted by the contraction of the period during which the felony can be said to be "in the course of" commission. Thus, if a person in flight kills a policeman attempting to interfere with his escape, it is not felony-murder if he was not carrying away spoils.[67] Conceding the ever present legislative necessity for reconciling extremes by drawing arbitrary lines the justice of which must be viewed from afar, the limits of intelligent casuistry have clearly been reached when the question whether judgment of death shall be imposed on a man who went no further than

[59] See N. Y. PENAL LAW §§ 240-245.

[60] People v. Hüter, 184 N. Y. 237, 77 N. E. 6 (1906); People v. Moran, 246 N. Y. 100, 158 N. E. 35 (1927).

[61] People v. Wagner, 245 N. Y. 143, 156 N. E. 644 (1927). But *cf.* People v. Spohr, 206 N. Y. 516, 100 N. E. 444 (1912).

[62] N. Y. PENAL LAW § 1694.

[63] People v. Wilson, 145 N. Y. 628, 40 N. E. 392 (1895); People v. Udwin, 254 N. Y. 255, 172 N. E. 489 (1930). But see People v. Marendi, 213 N. Y. 600, 612, 107 N. E. 1058, 1061-1062 (1915) to the effect that "the shot . . . must have been fired by the defendant in the act and for the purpose of effecting his escape."

[64] People v. Marendi, 213 N. Y. 600, 607, 611, 107 N. E. 1058, 1060, 1061 (1915).

[65] The reason advanced in Buel v. People, 78 N. Y. 492 (1879) for holding rape "independent," that the carnal purpose implicit in rape is not an element of homicide, would apply with equal force to assault with intent to resist arrest which is "dependent." People v. Hüter, 184 N. Y. 237, 77 N. E. 6 (1906).

[66] See People v. Moran, 246 N. Y. 100, 102, 158 N. E. 35, 36 (1927).

[67] See, *e.g.*, People v. Hütter, People v. Moran, both *supra* note 60; People v. Marwig, 227 N. Y. 382, 125 N. E. 535 (1919); People v. Walsh, 262 N. Y. 140, 148, 186 N. E. 422, 424 (1933); People v. Michalow, 229 N. Y. 325, 128 N. E. 228 (1920). But *cf.* People v. Meyer, 162 N. Y. 357, 56 N. E. 758 (1900); People v. Smith, 232 N. Y. 239, 133 N. E. 574 (1921).

to participate in the planning of a robbery[68] depends upon whether his accomplice shot the victim in his store or on the sidewalk outside.[69] The latest device of the New York Court of Appeals for applying rules such as these is to require that the question whether the homicide took place "in the commission" of the felony, be submitted to the jury in doubtful cases, even though the facts are clear and the issue is therefore the meaning of the statute, presumably a question of law.[70] The result is that, as in cases arising under the "deliberation" and "depraved mind" sections of the statute, no guiding criterion is actually given the jury by which to decide whether or not to convict of murder in the first degree. There was, however, until recently, one important difference. In many felony-murder cases the jury was required either to convict of a capital offense, or to acquit. These extreme alternatives may well have made the jury's problem, otherwise difficult enough, utterly insoluble. In that respect the problem has been simplified in New York by an amendment to the statute permitting juries to convict of felony-murder but recommend that the death penalty be withheld.[71]

(b) *Manslaughter*

At common law, homicide was "without malice" and consequently manslaughter and not capital even though intentional, if committed in the heat of passion upon adequate provocation.[72] Subject to qualifications hereafter to be considered, it was also manslaughter if it resulted from an act unduly dangerous to life or limb or otherwise unlawful.[73]

The English courts experienced little difficulty with the requirement

[68] For an account of the effect of the felony-murder rule upon the criminal responsibility of accomplices in the principal crime, see Corcoran, *supra* note 58, at 56; Arent and MacDonald, *supra* note 14, at 305; LAW REVISION COMMISSION, *op. cit. supra* note 2, at 180 *et seq.*

[69] See People v. Marwig, 227 N. Y. 382, 125 N. E. 535 (1919). Other jurisdictions have succeeded in drawing the line less sharply. See, *e.g.*, Conrad v. State, 75 Ohio St. 52, 70-71, 78 N. E. 957 (1906); State v. Hauptmann, 115 N. J. L. 412, 427-428, 180 Atl. 809, 820 (1935), though even when the statute includes "in withdrawing from the scene" the problem may arise. See State v. Diebold, 152 Wash. 68, 277 Pac. 394 (1929); *cf.* State v. Whitfield, 129 Wash. 134, 138-9, 224 Pac. 559, 561-2 (1924).

[70] See People v. Smith, 232 N. Y. 239, 133 N. E. 574 (1921); People v. Walsh, 262 N. Y. 140, 186 N. E. 422 (1933); People v. Ryan, 263 N. Y. 298, 189 N. E. 225 (1934).

[71] Laws 1937, c. 67. The statute provides that the jury may "recommend that the defendant be imprisoned for the term of his natural life" and that upon "such recommendation the court *may* sentence the defendant to imprisonment for the term of his natural life." Whether a life sentence is mandatory upon the court or permissive has not yet been determined.

[72] STEPHEN'S DIGEST, arts. 316, 317, 318.

[73] *Id.*, art. 314.

that provocation produce the passion and the passion the homicide.[74] Their problem was to determine when such passion should suffice to avoid the death penalty. They made short shrift of arguments that it should always do so, and required, in general, that the particular provocation be such as would be likely to deprive a "reasonable man" of his self-control. In addition, they regarded only a few acts, such as physical violence or unlawful arrest, as provocative, apparently on the ground that they alone resulted in emotional pressure under which ordinarily law abiding men might be expected to collapse.[75] American[76] decisions

[74] See KENNY, *op. cit. supra* note 3, at 131-5. For a sketch of the development of the doctrine, see 3 STEPHEN, *loc. cit. supra* note 3, especially pp. 58-60, 63-4, 69-73. For a typical charge, *cf.* Reg. v. Welsh, 11 Cox 336, 338 (1869): "The question therefore, is—first, whether there is evidence of any such provocation as could reduce the crime from murder to manslaughter; and, if there be any such evidence, then it is for the jury whether they can attribute the act to the violence of passion naturally arising therefrom, and likely to be aroused thereby in the breast of a reasonable man."

[75] See the reference *supra* note 74. For an incisive criticism of the discriminations among provoking acts embodied in the English law, see MACAULAY, NOTES ON THE INDIAN PENAL CODE (1937) Note M, pp. 107-109. It is quite clear that although a provocation may be legally insufficient to render a homicide manslaughter rather than murder, it is always an important consideration on an application for clemency.

[76] In 11 states the statutes expressly distinguish in substantially common law terms between voluntary and involuntary manslaughter, the maximum or minimum penalty for the former being more severe than for the latter. ALA. CODE ANN. (Michie, 1928) § 4460 *et seq.* (voluntary: 1-10 years; involuntary: 1 year and $500 fine maximum); ARK. DIG. STAT. (Crawford & Moses, 1921) § 2354 *et seq.* (voluntary: 2-7 years; involuntary: 1 year maximum); COLO. STAT. ANN. (Michie, 1935) c. 48, §§ 33-37 (voluntary: 1-8 years; involuntary: 1 year maximum); GA. CODE (1933) §§ 26-1006 *et seq.*, 27-2506 (voluntary: 1-20 years; involuntary: 1-3 years if unlawful act, otherwise 6 months and $1000 fine maximum); IND. STAT. ANN. (Burns, 1933) § 10-3405 (voluntary: 2-21 years; involuntary: 1-10 years); PA. STAT. ANN. (Purdon, 1936) tit. 18, § 2225 (voluntary: 12 year and $1000 fine maximum; involuntary: 3 year and $1000 fine maximum); S. C. CODE (1932) § 1107 (voluntary: 2-30 years; involuntary: 3 year maximum); TENN. CODE (Will. Shan. & Harsh. 1932) §§ 10774-6 (voluntary: 2-10 years; involuntary: 1-5 years); UTAH REV. STAT. ANN. (1933) tit. 103, c. 28, §§ 5-6, 4396-7 (voluntary: 1-5 years; involuntary: 1-5 years in the penitentiary and/or $1000 fine and/or 1 year maximum in jail); W. VA. CODE (1931) c. 61, art. 2, §§ 4, 5 (voluntary: 5-18 years; involuntary: 1 year and/or $1000 fine maximum).

The major New York provisions are more complicated. For homicide to be manslaughter it must be committed "without a design to effect death." The crime is then divided into two degrees; the maximum penalty for first degree is twenty years and for second degree, fifteen years and $1000 fine. Homicide "in the heat of passion" is first degree if committed "in a cruel and unusual manner or by means of a dangerous weapon"; otherwise it is second degree. Homicide committed "by a person engaged in committing or attempting to commit a misdemeanor affecting the person or property of the person killed, or of another" is first degree; it is second degree if the person is "committing or attempting to commit a trespass or other invasion of a private right." Homicide by "culpable negligence" is also second degree. PENAL LAW §§ 1049-1053.

In 7 states the crime is divided into degrees which build both upon the common law division and upon that in New York: KAN. REV. STAT. ANN. (Corrick, 1935) § 21-407 *et seq.* (1st degree [in commission of misdemeanor] 5-21 years; 2d degree [voluntary, in heat of passion and in cruel and unusual manner, unnecessary killing in resistance of felony] 3-5 years; 3d degree [voluntary by dangerous weapon, homicide while engaged in trespass] 6 months-3 years; 4th degree [involuntary by weapon or means neither cruel nor unusual] 6 months-2 years); MINN. STAT. (Mason, 1927) § 10073 *et seq.* (1st degree [in commission of misdemeanor affecting person or property, in heat of passion cruelly or with dangerous weapon] 5-20 years; 2d degree [in commission of trespass or in "heat of passion but not by a deadly weapon" or cruelly] 1-5 years and $1000 maximum fine); N. H. PUB. LAWS (1926) c. 392, §§ 8-11 (1st degree [in commission of any offense, by person *bearing* any deadly weapon, by means of dangerous instrument, cruelly] 30 year maximum; 2d degree [all other cases] 10 year and/or $1000 fine maximum); N. D. COMP. LAWS ANN. (1913) §§ 9470-1, 9474-5 (1st degree: 5-15 years; 2d degree: 1-5 and/or $1000 maximum fine); OKLA. STAT. ANN. (Harlow, 1931) §§ 2223, 2227, 2228, 2234 (1st degree [in commission of misdemeanor, heat of passion cruelly or with dangerous weapon, unnecessarily in resistance of crime] 4 year minimum; 2d degree [all other cases] 2-4 years in the penitentiary *or* 1 year maximum in a county jail and/or $1000 maximum fine); S. D. COMP. LAWS (1929) § 4020 *et seq.* (1st degree [in commission of misdemeanor, heat of passion cruelly or with dangerous weapon, unnecessarily in resistance of crime] 4 year minimum; 2d degree: 2-4 years in the penitentiary *or* 1 year maximum in a county jail and/or $1000 maximum fine); WIS. STAT. (1933) § 340.10 *et seq.* (1st degree [in commission of misdemeanor] 5-10 years; 2d degree [heat of passion, cruelly, unnecessarily in resistance of crime] 4-7 years; 3d degree [heat of passion with dangerous weapon, in commission of trespass] 2-4 years; 4th degree [involuntary, in heat of passion, by weapon or means not cruel] 1-2 years in the state prison *or* 1 year maximum in a county jail and/or $1000 maximum fine).

The statutes of 28 states and of the District of Columbia define the crime more or less fully but provide only a single penalty. In 12 states the crime remains undefined, punishment being meted to "whoever commits manslaughter": CONN. GEN. STAT. (1930) § 6046 (15 year and/or $1000 fine maximum); D. C. CODE (1929) tit. 6, § 25 (same); DEL. REV. CODE (1935) c. 149, § 5161(5) (30 year and/or $10,000 fine maximum except in case of husband killing adulterer when maximum of 1 year and fine of $100-$1000); IOWA CODE (1935) § 12919 (8 year and $1000 fine maximum); KY. STAT. (Carroll, 1936) § 1150 (2-21 years); LA. CODE CRIM. PROC. ANN. (Dart, 1932) art. 1045, 1046 (20 year and $2000 fine maximum); MD. ANN. CODE (Bagby, 1924) art. 27, § 354 (10 years in the penitentiary and/or 2 years in jail and/or $500 fine maximum); MASS. GEN. LAWS (1932) c. 265, § 13 (20 years in state prison *or* $1000 fine and 2½ years in jail maximum); MICH. COMP. LAWS (1929) § 16717 (15 year and/or $1000 fine maximum); N. J. COMP. STAT. (1911) p. 1781, § 109 (10 year and/or $1000 fine maximum); N. C. CRIM. CODE & DIG. (Jerome, 1934) § 905 (4 months-20 years); R. I. GEN. LAWS (1923) c. 395, § 3 (20 year maximum); VT. PUB. LAWS (1933) c. 335, § 8377 (1 year-life or $1000 maximum fine).

In 5 states the crime is either defined generally as "the killing of a human being by the act, procurement or culpable negligence of another where such killing shall not be justifiable or excusable homicide nor murder," or in some similar way, or so defined with the inclusion in addition of such specific behavior as "assisting in self-murder," "killing an unborn quick child," "producing miscarriage," "death from mischievous animal," "homicide by an intoxicated physician," the "reckless operation of a steamboat or engine." FLA. COMP. GEN. LAWS ANN. (Skillman, 1927) § 7141 (20 years in the state prison or 1 year in a county jail or $5000 fine maximum); MISS. CODE ANN. (1930) §§ 990-1003 (2-20 years in the penitentiary *or* $500 minimum fine and/or 1 year maximum in a county jail); MO. STAT. ANN. (Vernon, 1932) §§ 3988-3997 (2-10 years in the penitentiary or $500 minimum fine or 6 month minimum in a county jail *or* both $100 minimum fine and 3 month minimum in a county jail); OHIO CODE ANN. (Throckmorton, 1930) § 12404 (1-20 years); WASH. REV. STAT. ANN. (Remington, 1932) §§ 2395-2403 (20 year maximum in state prison *or* 1 year maximum in a county jail and/or $100 maximum fine).

In 8 states definition is in terms of an "unlawful killing of a human being, without malice . . . (1) voluntar[ily]—upon a sudden quarrel or heat of passion

fall into the same pattern[77] though a few courts have been troubled about the psychological operation of passion and have required, in effect, that it produce mental disturbance, short of insanity, which negatives intention and knowledge.[78] Such a requirement obviously defeats the rule, for if neither intention nor knowledge exists, the homicide is not murder on any theory. However, the absence of an intent to kill is required by the statute in New York[79] and some other jurisdictions.[80]

Homicide resulting from an act unduly dangerous to life or limb

(2) involuntar[ily]—in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." ARIZ. REV. CODE ANN. (Struckmeyer, 1928) § 4586 *et seq.* (10 year maximum) CAL. PEN. CODE (Dearing, 1933) § 192 *et seq.* (same); IDAHO CODE ANN. (1932) § 17-1106 (same); ME. REV. STAT. (1930) c. 129, § 2 (20 year or $1000 fine maximum); MONT. REV. CODE ANN. (Anderson & McFARLAND, 1935) §§ 10959-10960 (10 year maximum); NEB. COMP. STAT. (1929) § 28-403 (1-10 years); N. M. STAT. ANN. (Courtright, 1929) § 35-306 (same); WYO. REV. STAT. ANN. (Courtright, 1931) § 32-205 (20 year maximum). The statutes of 3 states add, after "without malice," the words "and without any mixture of deliberation." ILL. STAT. ANN. (Jones, 1935) §§ 37, 282-37.285 (1-14 years); NEV. COMP. LAWS (Hillyer, 1929) §§ 10069-10070, 10072-10073 (10 year maximum); ORE. CODE ANN. (1934) §§ 14-205—14-210, 14-213 (1-15 years and $5000 maximum fine).

The crime was abolished in Texas in 1927 [Act 1927, 46th Leg., p. 412].

[77] For a collection of cases, see MILLER, CRIMINAL LAW (1934) § 92; see the famous discussion of the proper formulation of the test by Christiancy J., in Maher v. People, 10 Mich. 212 (1862). There is much variety in the way the matter is put to the jury. See *e.g.* Com. v. Gelfi, 282 Pa. 434, 439, 128 Atl. 77, 79 (1925): "To show provocation . . . there must be sufficient cause and a state of rage or passion without time to cool, placing the prisoner beyond the control of his reason, suddenly impelling him to act"; People v. Rice, 351 Ill. 604, 609, 184 N. E. 894, 896 (1933): "provocation which is apparently strong enough to make the passion to kill irresistible"; State v. Lee, 36 Del. 11, 18, 171 Atl. 195, 198 (1933): "where a deadly weapon is used, the provocation must be great, so great as to produce such an actual frenzy of mind as to render the accused for the time utterly deaf to the voice of reason"; State v. Watkins, 147 Iowa 566, 569, 126 N. W. 691, 692 (1910): "such provocation as had a natural tendency to produce a state of mind in an ordinary man of average disposition, in which reason is so disturbed or obscured by passion that the person is likely to act rashly, without due deliberation, and from passion rather than judgment. . . . The provocation must be such as is likely, or has a natural tendency, to produce such a degree of excitement or disturbance in the mind of such men as that reason is dethroned by passion, and the act is the product of the latter rather than judgment." That a defendant cannot benefit by proof of a special emotional susceptibility is well settled. See *e.g.*, Jacobs v. Com., 121 Pa. 586, 15 Atl. 465 (1888). The possibility of a plea of irresponsibility by reason of temporary insanity must, however, be remembered. *Cf.* Note (1934) 43 YALE L. J. 809 (wife's adultery).

[78] See Johnson v. State, 129 Wis. 146, 158 *et seq.*, 108 N. W. 55, 60 *et seq.* (1906).

[79] For homicide to be manslaughter, it must be committed "without a design to effect death." N. Y. PENAL LAW §§ 1050, 1052. In other words, some homicides that would be manslaughter at common law are second degree murder under the statute. The result is the same as in England in that the death penalty is inapplicable but different in that the penalty for second degree murder in New York is more severe than that usually imposed for manslaughter in England.

[80] See, *e.g.*, WIS. STAT. (1933) § 340.14; Johnson v. State, 129 Wis. 146, 108 N. W. 55 (1906), *supra* note 78.

may, subject to the qualifications discussed above,[81] be held to be murder. If not murder, it is manslaughter, unless it is civil negligence and non-criminal. The line dividing manslaughter from civil negligence is as shadowy as that dividing murder from manslaughter. For the most part, the negligence that is criminal is distinguished from the negligence that is not, only by the addition of an epithet such as "gross," "culpable," "wanton" or "reckless," as opposed to "ordinary" or "slight."[82] What, if anything, these epithets mean remains for the most part undetermined.[83] But the differences between two negligent acts that are significant for this purpose, must reside in the degree of the risk of injury they unjustifiably create, the character of the injury or the actor's awareness of the risk. There is authority for the view that the character and degree of risk distinguish criminal from non-criminal negligence, whereas awareness of the risk distinguishes murder from manslaughter.[84] There is also authority for the view that awareness of the risk is necessary for negligence to be criminal at all,[85] and this, indeed, is what the epithets listed above are most likely to mean to a jury. On Holmes' view, written into the law of Massachusetts, awareness of the risk is un-

[81] See notes 30-45 *supra*.

[82] See Riesenfeld, *Negligent Homicide, A Study in Statutory Interpretation* (1936) 25 CALIF. L. REV. 1, Appendix, pp. 37-40; Note (1926) 24 MICH. L. REV. 286; TURNER, *op. cit. supra* note 32, at 35, n. 25.

[83] *Cf.* Andrews J., in People v. Angelo, 246 N. Y. 451, 458, 159 N. E. 394, 397 (1927): "However indefinite the rule, however uncertain the meaning of such words as 'gross,' 'wanton,' 'reckless,' 'slight,' yet in view of the facts of a particular case, both the rule and the words do convey an idea to the jury sufficient to guide their action."

[84] STEPHEN'S DIGEST, arts. 314, 315; see the reports of The Criminal Law Commissioners, cited *supra* note 33 and the cases cited *supra* notes 37, 39; see also Hull's Case, Kelyng 40 (1664); Regina v. Bengé, 4 F. & F. 504 (1865); Reg. v. Campbell, 11 Cox 323 (1869); Reg. v. Packard, Car. & M. 235 (1841); People v. Clemente, 146 App. Div. 109, 130 N. Y. Supp. 612 (1st Dep't 1911); State v. Hardie, 47 Iowa 647 (1878). In 2 STEPHEN, *op. cit. supra* note 3, at 123, the following view is expressed: "in order that negligence may be culpable it must be of such a nature that the jury think that a person who caused death by it ought to be punished; . . . that the person guilty of it might and ought to have known that neglect in that particular would, or probably might, cause appreciable positive danger to life or health . . ."; Rex v. Bateman, 94 L. J. K. B. 791 (1925): ". . . whatever epithet is used, and whether epithet is used or not [in charging juries], in order to establish criminal liability, the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such a disregard for the life and safety of others as to amount to a crime against the State and conduct deserving of punishment;" and see Reg. v. Doherty, 16 Cox 306, 309 (1887); KENNY, *op. cit. supra* note 3, at 135 *et seq.* For a criticism of criteria stated in these terms, see Turner, *Mens Rea and Motorists* (1933) 5 CAMB. L. J. 61, 73. For an account of special legislation governing homicides by automobile see Turner, *supra;* Reisenfeld, *supra* note 82.

[85] See, *e.g.*, Rice v. State, 8 Mo. 561 (1844); State v. Schulz, 55 Iowa 628, 8 N. W. 99 (1881). Turner, *supra* note 84, advances the view that there must at least be awareness of probable bodily harm to someone though not of probable serious injury or death. And see KENNY, *op. cit. supra* note 3, at 43. But *cf.* REX v. Burdee, 12 Cr. App. R. 153 (1916).

necessary, as we have seen, in murder,[86] and *a fortiori*, in manslaughter.[87]

Even if awareness of the risk is necessary for manslaughter, as well as for murder, it is a negative and not a positive test. The jury must still determine, first, whether the danger created was unduly great, *i.e.*, whether the risk should be regarded as a normal and desirable, or as an abnormal, undesirable and, therefore, unjustifiable incident of an otherwise lawful activity; and, second, whether the unjustifiable risk was slight, great or very great. Since human beings can make only rough estimates of degrees of danger, the jury may be expected in many cases to do no more than ask itself whether the particular behavior should be punished. If awareness of the risk is necessary, cases of inadvertence are excluded, but the problem in other cases is the same. The question is left to the jury subject to a limited and uncertain censorship by the court.

Homicides resulting from unlawful acts were manslaughter, subject to the single qualification which early appeared,[88] that the unlawful act be *malum in se*. In the course of time the same impetus was felt as in the case of felony-murder, to narrow this category to cases where the unlawful act was dangerous to life. This was accomplished more successfully than in the case of felonies in similar ways, by defining *malum in se* so as to include misdemeanors dangerous to life or limb[89] and exclude non-dangerous misdemeanors,[90] or by introducing the factor of danger by means of a requirement of proximate causation.[91] But the limitation has resulted in uncertainties similar to those created by efforts to limit the felony-murder rule. Is it sufficient that a misdemeanor involve some kind of behavior which is usually dangerous to life or limb, or must the particular instance of such behavior be dangerous to some

[86] Com. v. Chance, 172 Mass. 245, 54 N. E. 551 (1899); THE COMMON LAW, *loc. cit. supra* note 31.

[87] Com. v. Pierce, 138 Mass. 165 (1884). But knowledge of the danger may convert what would otherwise be manslaughter into murder. *Id.* at 180.

[88] See Note (1930) 30 COLUMBIA LAW REV. 70, 78; Reisenfeld, *supra* note 82; Note (1936) 24 CALIF. L. REV. 555.

[89] See, *e.g.*, Dixon v. State, 104 Miss. 410, 61 So. 423 (1913); People v. Townsend, 214 Mich. 267, 183 N. W. 177 (1921); Keller v. State, 155 Tenn. 633, 299 S. W. 803 (1927); *cf.* State v. McIver, 175 N. C. 761, 766, 94 S. E. 682, 684 (1917): "It is, however, practically agreed, without regard to this distinction, that if the act is a violation of a statute intended and designed to prevent injury to the person, and is in itself dangerous and death ensues, that the person violating the statute is guilty of manslaughter at least, and under some circumstances of murder."

[90] See, *e.g.* State v. Horton, 139 N. C. 588, 51 S. E. 945 (1905); Dixon v. State, 104 Miss. 410, 61 So. 423 (1913). But see Com. v. McAfee, 108 Mass. 458, 461 (1871).

[91] See, *e.g.*, State v. Budge, 126 Me. 223, 137 Atl. 244 (1927); Dixon v. State, 104 Miss. 410, 61 So. 423 (1913); People v. Mulcahy, 318 Ill. 332, 149 N. E. 266 (1925); Dunville v. State, 188 Ind. 373, 123 N. E. 689 (1919); Regina v. Bennett, Bell 1 (1858).

serious degree?[92] And if the former, is it also sufficient that the legislature has regarded behavior, such, for example, as driving an automobile at a speed in excess of a statutory limit,[93] as generally dangerous and has therefore forbidden it, or is this legislative judgment open to re-examination by court and jury? And if the latter, is the degree of danger required the same or less than, and the state of mind required the same or different from, what would be required if the behavior were not a misdemeanor? Finally, does the answer to any of these questions vary with the technique employed to limit the rule by a particular court?[94] These are issues which have not received definitive consideration in the cases, and remain for the most part unresolved.

(c) *Causality*

The requirement both in murder and in manslaughter that the death be the result of the defendant's act presents the problem of causality.

[92] *Cf.* Keller v. State, 155 Tenn. 633, 637, 299 S. W. 803, 805 (1927), where in response to defendant's contention that he could not have avoided the result had he been sober, the court said: "we think the policy of the law forbids an investigation as to probable consequences, when the driver of an automobile 'under the influence of an intoxicant' . . . runs his car over another person and kills him on the public highways of the State. There are many things that a sober man, in the exercise of due care, would do to avoid such a collision, which would be entirely beyond an intoxicated driver. Fatalities are too numerous and conditions too serious to permit speculative inquiries in a case like the one before us." Accord: McGoldrick v. State, 159 Tenn. 667, 21 S. W. (2d) 390 (1929). *Contra:* Dunville v. State, 188 Ind. 373, 123 N. E. 689 (1919); *cf.* Dixon v. State, 104 Miss. 410, 61 So. 423 (1913).

[93] *Cf.* HOLMES, *loc. cit. supra* note 54.

[94] Though the misdemeanor-manslaughter rule has not been limited in New York by the techniques employed in other states, a limitation has recently been imposed upon it analogous to that imposed on the felony-murder rule by the requirement that the felony be "independent" of the homicide. See *supra* notes 60-65. In People v. Grieco, 266 N. Y. 48, 51, 193 N. E. 634, 635 (1934) the Court of Appeals held that the misdemeanors of driving while intoxicated and reckless driving (VEHICLE AND TRAFFIC LAW §§ 58, 70[5]) are crimes "against society, against law and order, and against the people of the state" rather than misdemeanors "affecting the person or property of the person killed or of another," as required by PENAL LAW § 1050, *supra* note 76, for the homicide to be manslaughter in the first degree, rather than manslaughter in the second degree for which "culpable negligence" suffices. The distinction is unintelligible in the terms in which it is stated. Obviously all misdemeanors resulting in personal injury are, in one sense, "against society" and, in another sense, against the person injured. The result would not be reached in other states. Indeed, cases where the danger is as great as it was here would be regarded as the most eligible cases for the application of the rule. But the New York statute presents a special problem, since homicides due merely to "culpable negligence" are manslaughter in the second degree. Thus a contrary decision would have the effect of treating some instances of "culpable negligence" more severely than others (*cf.* p. 716, *supra*) as well as to make criminal some homicides resulting from acts that would not be regarded as "culpably negligent" at all. The court stresses the latter point but a proximate cause rule would take care of this problem. The former point is more difficult and was of particular consequence in this case since the defendant had a previous conviction and received a twenty year sentence. The obvious conclusion is that the New York statute was drafted for an age of few statutory misdemeanors, not for an age when most behavior that is dangerous to life or limb is a misdemeanor, regardless of the consequences in the particular case. *Cf.* Turner, *supra* note 84.

That something more is required in some cases than what commentators call "but-for" causation is clear, but as in the law of torts, what that something more is may be questioned.[95] As in the law of torts, the matter is relatively simple when there is intention to kill or injure or the conscious creation of great risk of death or injury and the problem arises because death occurs in an unintended and improbable way.[96] It is more difficult when, as in some of the felony-murder and misdemeanor-manslaughter cases, death or injury is not intended, or known to be highly probable, or highly probable at all, and the causation requirement is employed, as we have observed,[97] to satisfy the felt necessity for a limitation of liability. Indeed, it may in general be ventured that the only firm thread on which the causality cases can be strung is that of probability. As has often been said, the question usually presented is not whether there is cause in fact, but rather whether there should be liability for results in fact caused. The effort has been to reduce the scope of liability for results that are unintended and only slightly probable. In this respect, the problem of causality in torts and in criminal law is the same.[98] But in the vital respect that the grounds of policy which must govern the scope and limits of liability are different, the problem is not the same.[99] The discussion of those grounds of policy must be postponed, however, for consideration later in connection with the broader problems of policy presented by the law of homicide as a whole.[100]

(d) *Omissions*

Death may result not only from an act but also from an omission to act. An omission may be accompanied by the same states of mind that may accompany an act, and the consequences of an omission are

[95] See, in general, J. Smith, *Legal Cause in Actions of Tort* (1911) 25 HARV. L. REV. 103; (1912) *ibid.* 223, 303; Beale, *The Proximate Consequences of an Act* (1920) 33 HARV. L. REV. 633; Edgerton, *Legal Cause* (1924) 72 U. OF PA. L. REV. 211, 343; McLaughlin, *Proximate Cause* (1925) 39 HARV. L. REV. 149; Carpenter, *Workable Rules for Determining Proximate Cause* (1932) 20 CALIF. L. REV. 229, 396, 471; GREEN, RATIONALE OF PROXIMATE CAUSE (1927) esp. 56-63; BOHLEN, STUDIES IN THE LAW OF TORTS (1926) 25; KENNY, *op. cit. supra* note 3, at 147 *et seq.*; 3 STEPHEN, *op. cit. supra* note 3, at 1-11; and an excellent note in (1933) 31 MICH. L. REV. 659.

[96] See, *e.g.*, Hopkins v. Comm., 117 Ky. 941, 80 S. W. 156 (1904); Regina v. Michael, 2 Moody 120 (1840); People v. Lewis, 124 Cal. 551, 57 Pac. 470 (1899); *cf.* Regina v. Bengé, 4 F. & F. 504 (1865); Rex v. Russell, [1932] Victorian L. Rep. 59.

[97] See *supra* notes 50, 52, 91; see also Com. v. Campbell, 7 Allen 541 (Mass. 1863); State v. Oxendine, 187 N. C. 658, 122 S. E. 568 (1924); *cf. In re* Heigho, 18 Idaho 566, 110 Pac. 1029 (1910).

[98] *Cf.* Palsgraf v. Long Island R. R. Co., 248 N. Y. 339, 162 N. E. 99 (1928), especially the dissent of Andrews, J.

[99] *Cf.* Note (1933) 31 MICH. L. REV. 659.

[100] The matter will be considered in a subsequent issue as a phase of the general problem of treatment.

susceptible of the same analytical treatment as those of an act. But a homicide resulting from an omission is non-criminal, even though intentional, unless there is a duty to act.[101] Such a duty does not arise merely because death is probable or even inevitable. It may, however, be created by statute[102] or assumed by contract[103] and the courts have, reluctantly perhaps, imposed it as an incident of some special relationships where there is great dependence on one side and support on the other,[104] even though legal duty in a strict sense may otherwise be hard to find. Beyond this, the individualistic tradition prevailed and still prevails[105] against all argument that the criminal law extend its reach, building upon the foundation of universally acknowledged moral duty.[106] Whether a homicide resulting from the breach of a legal duty is murder, manslaughter or non-criminal depends upon the same considerations as in the case of a homicide resulting from an act.[107]

[101] Stephen's Digest, arts. 300-304, 314; KENNY, *op. cit. supra* note 3, at 136 *et seq.*

[102] Reg. v. Downes, 13 Cox 111 (1875).

[103] State v. Harrison, 107 N. J. L. 213, 152 Atl. 867 (1930); see Rex v. Hall, 14 Cr. App. R. 58 (1919). But *cf.* Reg. v. Smith, 11 Cox 210 (1869).

[104] *Cf.* Rex v. Gibbons & Proctor, 13 Cr. App. R. 134 (1918); Stehr v. State, 92 Neb. 755, 139 N. W. 676 (1913); Reg. v. Instan, [1893] 1 Q. B. 450; see United States v. Knowles, 4 Sawyer 517 (N. D. Cal. 1864).

[105] *Cf.* People v. Beardsley, 150 Mich. 206, 113 N. W. 1128 (1907) (neglect to provide medical attention for concubine); Hawkins, J. in Reg. v. Paine, quoted by Kenny, *op. cit. supra* note 3, at 137: "If I saw a man, who was not under my charge, taking up a tumbler of poison, I should not become guilty of any crime by not stopping him." On the general question see the discussion by MACAULAY, NOTES ON THE INDIAN PENAL CODE (1837) Note M, pp. 103-106.

[106] *Cf.* MACAULAY, *op. cit. supra* note 105, at 105: "It is indeed, most highly desirable that men should not merely abstain from doing harm to their neighbours, but should render active service to their neighbours. In general however the penal law must content itself with keeping men from doing positive harm, and must leave to public opinion, and to the teachers of morality and religion, the office of furnishing men with motives for doing positive good. We must grant impunity to the vast majority of those omissions which a benevolent morality would pronounce reprehensible, and must content ourselves with punishing such omissions only when they are distinguished from the rest by some circumstance which marks them out as peculiarly fit objects of penal legislation." His proposal was for drawing the line at omissions which are "on other grounds illegal," *i.e.* "an offence, . . . a breach of some direction of law, or . . . such a wrong as would be a good ground for a civil action." (p. 104.) These views were approved by The Criminal Law Commissioners of 1845. See SECOND REPORT (1846) 14, proposing the following rule: "An injury resulting from an omission does not subject the person causing it to punishment, unless such omission be unlawful. An omission shall be deemed to be unlawful whensoever it is a breach of some duty imposed by law, or gives cause for a civil action." Compare BOHLEN, *The Basis of Affirmative Obligations in the Law of Tort* and *The Moral Duty to Aid Others as a Basis of Tort Liability* in STUDIES IN THE LAW OF TORTS (1926) 33, 291.

[107] *Cf.* Rex v. Gibbons and Proctor, 13 Cr. App. R. 134 (1918) (murder); State v. Harrison, 107 N. J. L. 213, 152 Atl. 867 (1930) (manslaughter); Westrup v. Com., 123 Ky. 95, 93 S. W. 646 (1906) (non-criminal); Reg. v. Peacock, 5 Cox 172 (Q. B. 1851) (same). A few courts have experienced especial though unnecessary difficulty in dealing with the causality problem. See, *e.g.*, Bradley v. State, 79 Fla. 651, 655-6, 84 So. 677 (1920); *cf.* Rex v. Russell, [1932] Victorian L. Rep. 59.

(c) *Non-Criminal Homicides*

It follows from the foregoing discussion that homicide is non-criminal if the result of an act (or omission to perform a legal duty) which is not intended to cause death or serious injury and which does not create or (in some jurisdictions) is not known to create a risk of death or serious injury sufficiently high to be deemed criminally negligent. Homicide may also be non-criminal, even though intentional, if committed in furtherance of certain public purposes or in defending one's self or others against serious injury. Legal executions apart, private citizens and law officers may kill if necessary to prevent the immediate commission of a "violent" felony, to suppress a riot or to apprehend a felon.[108] Mistakes about these matters, if reasonable, usually excuse, except a private citizen's mistaken belief that a felony has been committed.[109] Killing in self-defense is excused only if there is reasonable belief in its necessity to avert death or serious injury.[110] Unreasonable mistake is no defense in any case and a homicide inspired by it may be murder,[111] since intentional, though it is difficult to see why negligence in judging the existence of grounds of justification should be treated more severely than negligence in judging the dangerous character of one's own acts. Beyond this, complexities arise with respect to the relationship of rules governing killings in self-defense or in defense of others to that governing killing to prevent a felony, which we need

[108] See, in general, STEPHEN'S DIGEST, arts. 283-5; KENNY, *op. cit. supra* note 3, at 116 *et seq.*; MILLER, CRIMINAL LAW (1934) c. 10; Pearson, *Right To Kill in Making Arrests* (1930) 28 MICH. L. REV. 957. For an elaborate survey of the rules governing the legality of arrest and the force that may be employed to effect an arrest, see Wilgus, *Arrest without a Warrant* (1924) 22 MICH. L. REV. 541, 673, 798; *cf.* Bohlen, *Arrest without a Warrant* (1927) 75 U. OF PA. L. REV. 485; Waite, *Some Inadequacies in the Law of Arrests* (1931) 29 MICH. L. REV. 448; RESTATEMENT, ADMINISTRATION OF THE CRIMINAL LAW (Tent. Draft No. 1, 1931) (Killing or Wounding to Effect Arrest, commentaries).

[109] An arrest by a private citizen on reasonable suspicion that a felony was committed by the person arrested is legalized by some statutes, even though no felony was in fact committed. See Wilgus, *supra* note 108, at 694. For a holding in a civil case that an officer has no right to kill unless a felony was in fact committed, see Petrie v. Cartwright, 114 Ky. 103, 70 S. W. 297 (1902).

[110] See, *e.g.*, People v. Scimeni, 316 Ill. 591, 147 N. E. 484 (1925). On the difficult question of when aggression bars resort to this defense, see MILLER, *op. cit. supra* note 108, § 67; Beale, *Homicide in Self-Defense* (1903) 3 COLUMBIA LAW REV. 526, 531-9. On the existence and nature of a "duty" to retreat, see Beale, *Retreat from a Murderous Assault* (1903) 16 HARV. L. REV. 567; Holmes, J., in Brown v. U. S., 256 U. S. 335 (1921). On the defense of others, see Note (1913) 45 L. R. A. (N.S.) 145.

[111] In this respect at least the standard of liability is clearly external. But see Keedy, *Ignorance and Mistake in the Criminal Law* (1908) 22 HARV. L. REV. 75. But *cf.* on the question of treatment, WIS. STAT. (1933) § 340.15: "Any person who shall unnecessarily kill another either while resisting an attempt by such other person to commit any felony or to do any other unlawful act, or after such attempt shall have failed" is guilty of manslaughter in the second degree; OKLA. STAT. (Harlow, 1931) § 2223.

not pursue in detail.[112] It is sufficient, so far as doctrine is concerned, to note that the question of reasonable necessity, submitted to a jury, reduces to the question whether or not persons should be permitted to kill under the circumstances of the particular case.[113] With the rise of professional police and the growing liaison between police and prosecution, prosecutions for official misconduct will undoubtedly continue to be rare. Nevertheless, it is well to remember that the law of homicide provides the only drastic sanction against policemen too quick on the trigger, and our police standards may well suffer from the reluctance and ineffectiveness with which the sanction is invoked.

There remain to be considered only the rules governing responsibility, traditionally viewed as determining non-criminal as opposed to criminal homicides.[114] The traditional view has both virtue and vice. Homicides by the irresponsible are non-criminal in the sense that they are exempt from the usual criminal penalties. But at the present time, at least, they may and usually do result in compulsory treatment serving the ends of reformation and incapacitation, if the individual is dangerous.[115] That the machinery whereby this is accomplished may differ from the usual machinery of the criminal law does not mean that such

[112] Many jurisdictions hold that one who kills to save another, especially a relative, from death or serious bodily injury stands in the same position as the person he defends, and takes the risk that he may be defending an aggressor. See Note (1913) 45 L. R. A. (N.S.) 145. But courts so holding sometimes seem unaware that they are also holding reasonable belief in the necessity of killing to prevent the commission of a felony to be no defense. See, *e.g.*, Mitchell v. State, 43 Fla. 188, 30 So. 803 (1901); *cf.* Erwin v. State, 29 Ohio St. 186 (1876); State v. Donnelly, 69 Iowa 705, 27 N. W. 369 (1886); (1901) 15 HARV. L. REV. 155; (1908) 8 COLUMBIA LAW REV. 411. On the question whether the threatened "serious bodily injury" which justifies killing in necessary self-defense must be felonious, see State v. Rader, 94 Or. 432, 186 Pac. 79 (1919).

[113] There is little authority on the rare case where as a necessary means to saving one's own life one intentionally kills or consciously endangers an innocent person. Stephen (DIGEST, art. 43, p. 37, n. 2) was not content to regard the matter as settled by the famous decision in Queen v. Dudley and Stephens [1884] L. R. 14 Q. B. D. 273, on the ground that there the jury found only that the shipwrecked men would *probably* not have survived but for killing and eating the boy. He favored a general standard forbidding the infliction of harm disproportionate to the evil avoided. But *cf.* CARDOZO, *op. cit. supra* note 24, at 113: "There is no rule of human jettison," speaking of the decision in United States v. Holmes, 1 Wall. 1 (C. C. E. D. Pa. 1842). As to compulsion by threats of death, see DIGEST, art. 42; State v. Nargashian, 26 R. I. 299, 58 Atl. 953 (1904); *cf.* 2 STEPHEN, *op. cit. supra* note 3, at 107-108.

[114] But *cf.* the English form of verdict, devised by Queen Victoria: guilty but insane. Trial of Lunatics Act, 1884, 46 & 47 VICT., c. 38, § 2 (1).

[115] See, in general, S. GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW (1933) (1925) c. 11; WEIHOFEN, INSANITY AS A DEFENCE IN CRIMINAL LAW (1933) 266 *et seq.* In only a few jurisdictions does commitment to an institution follow automatically upon the verdict, as it does in England. See KENNY, *op. cit. supra* note 3, at 67

homicides are legally ignored.[116] Indeed, the criteria determining who are irresponsible may be viewed, as we shall see,[117] as the criteria determining who may be treated only for the sake of incapacitation and reformation and who may be treated punitively for the sake of deterrence as well. From this point of view, the function of the rules governing responsibility, like the distinction between murder and manslaughter, is to determine the type of treatment; such rules are to be distinguished from those which serve the end of determining amenability to *any* sort of treatment. It may be observed in passing that the category of the irresponsible has considerably broadened with the ripening of the "twenty-pence test" of Fitzherbert[118] and the "child of fourteen test" of Lord Hale[119] into the right and wrong test of the M'Naghten rules,[120] and in some jurisdictions into the irresistible impulse test as well.[121] It has been enlarged further by no longer treating drunkenness as a special or aggravating circumstance[122] and finally by the development of the juvenile court.[123]

[116] In England, according to Kenny (*loc. cit. supra* note 115), confinement in Broadmoor "during His Majesty's pleasure" is usually life-long. For this reason, perhaps, the defense is rarely raised except in murder cases, in which it is frequently sustained. Thus the Select Committee on Capital Punishment found that from 1920-1929 in England and Wales as many persons (239) charged with murder were held irresponsible by reason of insanity (before trial, on arraignment or by the jury) as were convicted, and of the 239 convictions only 138 were executed. From 1901-1922, 1,445 persons were put on trial for murder, 134 found insane on arraignment and 351 held guilty but insane, the percentage in the case of men being 26.43 and of women 46.74. On the other hand, only 2.151 per cent of persons tried for attempts and threats of murder, manslaughter, wounding and attempted suicide were disposed of in this way; and for other offences the percentage was only .188. (REPORT, *supra* note 19, at 146-7, 185.)

[117] See Part II, *infra*, pp. 752-757.

[118] NEW NATURA BREVIUM (1794 ed.) f. 2336.

[119] 1 Hale P. C. (1739) 30.

[120] 10 Clark & F. 200 (1843).

[121] On the development and present applicability of these tests, see GLUECK, *op. cit. supra* note 115, at 123-273; WEIHOFEN, *op. cit. supra* note 115, at 14-147.

[122] Compare 1 Hale, P. C. 32 (1736) with King v. Meade [1909], 1 K. B. 895; People v. Koerber, 244 N. Y. 147, 155 N. E. 79 (1926); see Sears, *Drunkenness as Intent* (1928) 23 ILL. L. REV. 159 and the discussion by Lord Birkenhead in Director of Public Prosecutions v. Beard [1920] A. C. 479. Consider also, in this regard, the English Infanticide Act, STAT. 12 & 13 GEO. V, c. 18 (1922) reducing to infanticide, punishable as manslaughter, the act of a mother who "causes the death of her newly born child, but at the time of the act or omission has not fully recovered from the effect of giving birth to such child, and by reason thereof the balance of her mind was then disturbed . . ." For an indication of the rarity of convictions in such cases in England prior to the statute and the uniform granting of a pardon in the event of conviction of murder, see REPORT OF SELECT COMMITTEE ON CAPITAL PUNISHMENT (1929) 183; *cf.* REPORT OF THE CRIMINAL CODE BILL COMMISSION (1879) 25; COMMISSION (1866); REPORT OF THE CRIMINAL CODE BILL COMMISSION (1879) 25; KENNY, *op. cit. supra* note 3, at 142.

[123] See in general, Mack, *The Juvenile Court* (1909) 23 HARV. L. REV. 104; LOU, JUVENILE COURTS IN THE UNITED STATES (1927); S. & E. GLUECK, ONE THOUSAND JUVENILE DELINQUENTS (1934) 9-46. However, the significance of the juvenile court in cases of homicide, except homicides committed by the very young,

It will be well, in closing this brief survey of the law of homicide, to recall that the rules defining criminal homicides are not the only rules of the criminal law which have for their end or among their ends the protection of life. Even though life is not destroyed, a multitude of acts entailing unjustifiable risk of death is made criminal by the law governing other common law offences, arson, burglary, robbery, assault, battery, mayhem and rape, as well as by the general law of attempts, solicitation, conspiracy, riot, disorderly conduct and the heterogeneous mass of lesser offences created because the behavior involved is deemed to be dangerous to life or limb. Indeed, most behavior which is inspired by an intention to kill, or is characterized by an unjustifiable risk of killing, conscious or inadvertent, falls, where death does not ensue, within some wider or narrower, more or less specific category of criminal behavior, calling forth treatment which may be as drastic as that for homicide or as gentle as a stereotyped fine. Moreover, any provision of the criminal law serves the end of protecting life in so far as it makes possible the incapacitative or reformative treatment or persons who, unless they were subjected to such treatment, would engage in behavior threatening life.

Similarly, behavior endangering life is not the only undesirable behavior that the law of homicide may operate to prevent. For one thing, behavior which endangers life also threatens bodily injury. But more than this, individuals who engage in behavior which causes death may also be dangerously likely to engage in behavior which is undesirable for other reasons, for example, because it interferes in an unjustifiable way with the enjoyment of property. In so far as the law of homicide makes possible the incapacitation or reformation of such persons it obviously serves the end of preventing such behavior.

That the law of homicide is but one element in a vast legal cosmos serving the purpose of protecting life, and must be viewed with this in mind, does not mean that it is necessary to treat the rest of the cosmos in detail in order to consider the law of homicide as a unit in the whole.[124] By the same token, the recognition that the law of homicide serves other ends besides the prevention of homicide does not negate the point that its dominant purpose is the protection of life.

depends to a great extent upon the discretion of the District Attorney in reducing the charge. For crimes punishable by death or life imprisonment are usually beyond the statutory jurisdiction of the court. See, *e.g.*, COLO. STAT. ANN. (Michie, 1935) c. 33, § 1, 53; MASS. GEN. LAWS (1932) c. 119, § 52; N. J. COMP. STAT. (1911) § 206; N. Y. PENAL LAW § 2186; WYO. REV. STAT. ANN. (Court right, 1931) c. 20, art. 70

[124] The only specific difference between the law of homicide and many subordinate crimes is that the former comprehends behavior which has actually caused death. Upon this specific difference grave legal consequences with regard to

II.

Primary Considerations in Evaluating the Law of Homicide*

A. The Distinction between Criminal and Non-Criminal Homicides

Though the principal end to be served by the law of homicide[125] is the preservation of life,[126] it is obvious that this does not mean the prevention of all homicides. In the first place, while it is generally desirable to preserve life, not all homicides are undesirable. In the second place, the law can operate to prevent homicides only by preventing the behavior which causes them and even if a homicide viewed alone is undesirable, the behavior which causes it may not be, because it serves ends which justify the creation of such risk of death as it creates. Moreover, if it does not serve justifying ends and is therefore undesirable, it may nevertheless be behavior which the law cannot possibly prevent. Finally, even if the behavior is of a sort which it is possible to prevent by law, the likelihood of prevention may be so low, and the probability

treatment depend. Not the least of our problems hereafter will be the consideration of the sufficiency of this difference to justify the legal consequences to which it gives rise.

* It will be apparent in the following pages that our principal concern has been the development of theory and not the disposition of particular cases, though we have not hesitated to discuss particulars where discussion seemed profitable in the space at our command. We are, of course, fully cognizant of the extent to which even the best theory leaves the difficult problems of practice unsolved, with the result that decisions must be referred to "prudence," "wisdom" or "experience" and are not referable to theory alone. But we are equally aware of the extent to which practice suffers when it is divorced from and unconscious of theory, *i.e.*, of its own principles. To refer decisions solely to "experience," unrefined by theory, is, so far as communication and explanation are concerned, to refer them to nothing at all. If, in spite of these considerations, an *apologia* were necessary for an enterprise of the sort undertaken here, we should choose the language of a great theoretician: "If, within the bounds which I have set myself, any one should feel inclined to reproach me for a want of greater detail, I can only quote the words of Lehuëron. 'Nous faisons une théorie et non un spicilège.'" Holmes, The Common Law (1881) iv.

[125] By the "law of homicide" we mean the body of law which defines the criminality of behavior that causes death and prescribes the treatment of persons who engage in such behavior. By "homicide" is meant death caused by the behavior of some one other than the person killed. By "homicidal behavior" we mean behavior that has resulted or is likely to result in death.

[126] In making this assertion we are, of course, rejecting the contention that the penal law should serve the end of retribution, in favor of the view that the law, like the state, should serve the end of the common good and, as a means to that end, should endeavor to prevent behavior which is inimical to the common good. What ends the law should serve is a question of ethics and politics; but we do not set forth the ethical and political analysis that leads to our rejection of retribution as an end. See Michael and Adler, Crime, Law and Social Science (1933) 340-352. It is worth pointing out, however, that the rejection of retribution has precisely this significance: (1) no legal provision can be justified *merely* on the ground that it calls for the punishment of the morally guilty by a penalty proportionate to their moral guilt and (2) no legal provision can be criticized *merely* on the ground that it fails to do so. But legal provisions that do so provide are not unjustifiable for that reason. Their justifiability depends upon their adequacy as means to those other ends that are, in turn, means to the common good. *Cf.* Wechsler, Book Review (1937) 37 Columbia Law Rev. 687, 689-690.

that undesirable consequences will attend the effort to achieve prevention so high, that the effort will produce more harm than good. Not even with these qualifications, however, can it be said that the end of the law is the prevention of behavior which causes death. We rarely know with certainty whether particular kinds of behavior will or will not cause death. What we usually know is that behavior of certain sorts is capable of causing death and does so more or less frequently. Therefore, if we are to endeavor to prevent behavior which, when it occurs, actually causes death, we must do so, for the most part, by preventing behavior which is likely to cause death. Subject to these four qualifications, it can be said that the principal end of the law of homicide is the prevention of behavior which may cause death.

By describing behavior and declaring it to be undesirable, the law may prevent some men from engaging in such behavior. But it is only by subjecting particular persons to treatment that the law can prevent those who are not amenable to such simple exhortation from engaging in undesirable behavior. The treatment of particular individuals may serve the end of prevention in different ways. If persons are subjected to treatment because they have engaged in a kind of behavior which it is desirable to prevent and possible to deter, and if the treatment is generally regarded as unpleasant, its application may serve to deter other persons from engaging in similar behavior. Whatever the character of their past behavior, if the persons subjected to treatment are themselves likely to engage in undesirable behavior in the future, the treatment may serve to prevent such behavior by incapacitating, intimidating or reforming them.[127] Since treatment can operate to achieve prevention only in these ways, it is clear that the justifiability of selecting a particular person for treatment must rest on either or both of the following grounds: (1) that he has engaged in behavior of a sort which it is desirable and possible to deter; (2) that he is sufficiently more likely than the generality of men to engage in undesirable behavior in the future to warrant incapacitating him or endeavoring to reform him.[128] It is possible but obviously unwise to authorize officials

[127] By "intimidating" we mean the same as "deterring," *i.e.*, coercing an individual to refrain from the behavior in question because of his fear of the unattractive legal consequences. For convenience we use the former word to refer to the individual who has been subjected to treatment and the latter to refer to the general population. By "reforming" we mean assisting the individual who has been treated to refrain from engaging in the behavior by eliminating or modifying his desire to do so or by enabling him to control his desire on moral grounds. A particular individual may, of course, be partly intimidated and partly reformed, *i.e.*, a thief may come to fear the consequences of theft, his desire to steal may be reduced in intensity, and he may have been assisted to perceive that theft is wrong.

[128] It is probable to some degree that any individual in the population will engage in undesirable behavior. But not every one can be incapacitated. Efforts

to make these two determinations with regard to anyone in the population, without further specification.[129] Short of this, the classes of persons about whom these questions may be asked, and who may be subjected to treatment if they are answered adversely, must be designated somehow by law.[130] Eliminating the exceptional case of persons who suffer from well defined mental or physical disorder, it seems quite clear that this can be done by law only by specifying kinds of behavior,[131] and that the kinds of behavior to be described are (1) those which it is desirable and possible to deter and (2) those which provide sufficient grounds for believing that the persons behaving in those ways may be dangerous enough in the future to warrant incapacitating or reforming them, or at least subjecting them to further inquiry.[132] The determination of what behavior is of either of these sorts is the initial task involved in formulating the behavior content of a penal code.[133]

The law of homicide makes this determination in the case of persons whose behavior has caused death. As we have said,[134] it is not, in any important sense, an analytically distinct body of law and this for two reasons: (1) it is not the only part of the penal law that serves the end of protecting life by preventing behavior that may cause death; (2) it does not serve that end exclusively. The fact that particular behavior has *actually* resulted in death suffices to establish neither that the behavior is undesirable[135] nor that the person engaging in it is more likely than other men to behave in undesirable ways in the future. Nevertheless, for the sake of convenience, we shall confine our discussion, for the most part, to the case of persons whose behavior has caused death. Precisely because the basic principles which should govern amenability to treatment are the same in this case as in the case of persons whose behavior, though otherwise the same, has not caused death,[136] it is possible for us to do so without analytical loss.

1. *Homicidal Behavior That It is Desirable and Possible to Deter*

Externally considered, behavior that results in death consists of bodily movements of a particular sort occurring in an environment of

---

can, of course, be made to reform every one in the special sense of making all men more perfect, but the only means that can be employed on a wide scale are measures designed to promote education, health, recreation and economic security. To warrant subjecting any one to the extraordinary measures of the criminal law, there must be some reason for selecting him rather than his neighbor. The reason must be that it is substantially more likely that he will engage in undesirable behavior. Since the measures involved may be seriously inconvenient or distasteful to the individual, such behavior must be undesirable to some fairly serious degree. Four variables are involved: (1) the degree of probability that the individual will engage in undesirable behavior; (2) the degree of undesirability of the behavior; (3) the degree of inconvenience and unpleasantness of the treatment and (4) the degree of probability that the power to employ the treatment may be abused by the officials to whom it is given. Where the lines should be drawn in a particular society at a particular time is a political question of the gravest character.

[129] It will be observed that not even the so-called "principle of analogy" in the laws of Soviet Russia and Nazi Germany goes so far. A "socially dangerous act" and an "analogy" are both necessary. See THE PENAL CODE OF THE RUSSIAN SOCIALIST FEDERAL SOVIET REPUBLIC (H. M. Stationery Office, 1934) art. 16; *Advisory Opinion of the Permanent Court of International Justice on the Constitution of the Free City*, Dec. 4, 1935 (Série A/B No. 65); Frankfurter Zeitung vom 20. 2. 1936; Preuss, *Punishment by Analogy in National Socialist Penal Law* (1936) 26 J. CRIM. L. 847; Gausewitz, *Considerations Basic to a New Penal Code* (1936) 11 WIS. L. REV. 346, 373-4. Indeed, the principle may be employed so as to confer a power only slightly more extensive than that inherent in statutory interpretation.

[130] *Cf.* Gausewitz, *loc. cit. supra*, note 129: "Why not simply provide that any conduct which is socially dangerous or which indicates a socially dangerous personality shall subject one to an accusation of having committed the act and, if the accusation be found true, to the appropriate treatment? The reason is the social interest in individual freedom and liberty. It is an important end of the criminal law. Indeed, if one must choose between ends as primary or secondary, it might be maintained that it is the primary aim of the criminal law to protect the individual from arbitrary acts on the part of public agents. . . ." If "the question were fairly poised [sic], presenting a choice between risking public disorder on the one hand and injustice to a private individual on the other, the choice would undoubtedly be to risk the public interest. . . ."

Mr. Justice Holmes puts the matter somewhat differently. "Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do after a certain line is passed. To make the warning fair, so far as possible the line should be clear." McBoyle v. United States, 283 U. S. 25, 27 (1931).

The argument involves three elements which it is well to separate: (1) It is dangerously probable that administrators with such extensive powers would use them for the wrong ends or, even though seeking the right ends, would make the wrong judgments (a) of value and (b) of fact. (2) It is dangerously probable that, however good or bad the judgments, they would be unequal in character. (3) It is dangerously likely that men who would conform to the proper standard in particular situations if they knew what it was, would guess erroneously and thus present problems that would not have arisen had the standard been made clear.

[131] In the case of *well-defined* mental or physical disorder which involves serious danger that the sufferer will engage in undesirable behavior, the law can deal with the matter by designating the disorder. In part, at least, this is a short-hand description of behavior, namely, the behavior symptoms. But there may, of course, be other symptoms too. It seems quite clear, however, that where medical science genuinely understands the nature and effects of the disorder, and the effects are violent in character, there is no need to legislate about symptoms.

[132] See *supra* note 128.

[133] It is obviously impossible for a legislature to make these determinations for all possible instances or kinds of behavior. To a very considerable degree it must be content to prescribe a standard in more or less general terms and to relegate to administrators the task of applying it. The more general the standard, the more legislative in character is the administrative task. It may be observed in passing, however, that for the most part a legislature can safely undertake to be a good deal more specific about the behavior which it is desirable and possible to deter than about the significance of any particular kind of behavior as an index of the character and probable future conduct of individuals who engage in it.

[134] *Supra* p. 729.

[135] It is relevant only to the extent that it establishes that the behavior is of a sort that *can* cause death.

[136] The question whether the problem of treatment (as opposed to that of amenability to *any* treatment) differs in the two cases will be considered hereafter.

a particular sort. The fatal result is attributable to the character of the movements on the one hand and to the character of the environment on the other. Subjectively viewed, homicidal behavior is obviously a much more complicated affair. Some of these complications are of immediate importance here. Bodily movement may be voluntary, that is it may be willed, the product of a choice, or it may be involuntary, that is instinctive or reflexive. In the traditional language of jurisprudence only the former is denominated an "act." Men act for the sake of achieving ends which may range from the bodily movement itself, foreseen by the actor "with mysterious accuracy" as responsive to his "inward effort,"[137] to any number of consequences in the external world. Death may be one of those consequences. In that case, death is "intended," whether it is desired for its own sake or as a means to some more remote end.[138] Men may adopt many means to cause death and they may desire to cause death as a means to many of the countless ends that men seek to achieve. They may, moreover, act with this intention on momentary impulse or after deliberation which, in turn, may be more or less thorough, protracted and calm.[139] But acts not intended to cause death may nevertheless cause it; and they may be acts of countless different kinds motivated by the desire to achieve any of a multitude of ends. Whether intended or not, death may be a more or less probable consequence of an act (a) under the circumstances known to

[137] The quotations are from HOLMES, THE COMMON LAW (1881) 54.

[138] The text contains propositions of two sorts: (1) those analytical of states of mind; (2) those stating what we mean by such words as "intention." The analytical propositions are either true or false, either the states of mind exist or they do not. But the verbal usages are arbitrary. The words may be and have been used differently. We use them as we do for the sake of clarity. For helpful discussion of these matters, see Cook, *Act, Intention and Motive* (1917) 26 YALE L. J. 645; SALMOND ON JURISPRUDENCE (7th ed., 1924) §§ 133-136, 140-144; 2 STEPHEN, HISTORY OF THE CRIMINAL LAW (1883) 99-101, 110-126; HOLMES, THE COMMON LAW (1881) 52-57; Radin, *Criminal Intent* (1932) 8 ENCY. SOC. SCIENCES 126; ARISTOTLE, ETHICA NICHOMACHEA, Bk. 3.

[139] An act is preceded by deliberation in so far as it is preceded by thought about (a) what ends to seek, *i.e.* what desires to satisfy and (b) what means to employ to achieve the selected ends. Deliberation therefore involves (a) the weighing of competing desires viewed as motives for and against a proposed act; (b) the estimation of the probable consequences of the act, on the one hand, and of avoiding the act, on the other. Hence, deliberation may proceed for a longer or shorter time and is more or less thorough depending upon (a) the number of relevant desires which are considered and the prudence with which their satisfaction is appraised as means to happiness; (b) the accuracy with which probable consequences are foreseen; (c) the accuracy with which the adaptation of means to end is determined. The less thorough the deliberation, the more "impulsive" the act. "Calmness" and the length of the period for reflection are obviously conditions of thorough deliberation. It should be added that action which is preceded by deliberation may nevertheless not be a product of the deliberation; it is deliberate in that sense only if it conforms to the choices made as a result of deliberation, and this may not be the case.

the actor and (b) under some wider view of the circumstances short of that revealed by total omniscience. The actor's own estimate of the probability under the circumstances known to him measures the risk of death that he consciously creates. When risk is consciously created, it may be created impulsively or after more or less extensive deliberation. But risk may be created unconsciously as well as consciously. There are, however, various criteria available to measure the degree of inadvertently created risk. (1) On the basis of common experience one may attempt to estimate the probability that death would result from the act, taking into account only the circumstances known to the actor. (2) On the basis of common experience one may attempt to estimate the probability, taking into account some circumstances in addition to those known to the actor. (3) One may make the estimate in each case not on the basis of common experience, but rather on the basis of some special experience with the kind of activity in question. If the first criterion is adopted, it seems quite clear that the actor's unawareness of the risk he is creating must be due to his lack of common experience or to his failure to take his experience into account. If the second criterion is adopted, there may be an additional reason for his unawareness of the risk, his ignorance of the additional circumstances taken into account in making the calculation. If these additional circumstances would have been apparent to a man of common experience with such knowledge of the circumstances as the actor had, the actor's unawareness must again be due to his lack of common experience or his failure to take his experience into account. If they would not have been apparent to a man of common experience, the reason must be sought elsewhere, namely, in the actor's failure to make an investigation. Of course, if the third criterion is adopted, the reason for the actor's unawareness may be his lack of special experience with the kind of activity in question. In any event, the actor may or may not be the kind of person who has the capacity to acquire the knowledge which he lacked, whether common or specialized. We shall return to these matters hereafter.

It is obviously desirable to deter any act which is intended to kill and which under any circumstances may result in death, unless the act is itself a necessary means to preserving life or to some other end of greater social value than the preservation of life. Moreover, if an act is not a means to such ends, it is behavior of the sort which it is possible to deter, if deterrence is ever possbile. For whatever the motive to kill, the threat of unwelcome treatment at the hands of the law provides a competing motive to refrain from killing. The in-

fluence of the legally created motive in a particular case depends upon the nature of the legal treatment, the strength of the desires with which the desire to avoid it must compete and the rationality of the actor at the moment of choice. Its influence must therefore vary in different cases. But it cannot be denied that the creation of the motive *may* not only lead selfish and deliberate men to refrain from homicide to which they are coolly moved by dislike or the love of money, but *may* also lead altruistic men to endeavor to serve their altruistic ends in non-homicidal ways and excitable men to control their excitement, whatever its cause. In short, it cannot be denied in general that men may be led to control their passions by the threat of unpleasant treatment if they do not do so.

The most obvious case of homicidal behavior that serves the end of preserving life is that of the victim of a wrongful attack who finds it necessary to kill his assailant to save his own life.[140] We need not pause to reconsider the universal judgment that there is no social interest in preserving the lives of aggressors at the cost of those of their victims. Given the choice that must be made, the only defensible policy is one that will operate as a sanction against unlawful aggression. But here the simplicity of the matter ends. The initial problem arises from the fact that men sometimes believe that they are being attacked, that their lives are in immediate peril and that it is necessary to kill to save themselves when such is not the case. So long as the belief is reasonable, it seems quite clear, however, that the original policy still obtains. Men must act on the basis of their appraisal of the situation in which they find themselves, if they are to act at all. Their behavior must accordingly be evaluated on the basis of what was known or could have been known to them at the moment of action, not at some later time. To concede a privilege to kill only in cases of actual necessity is to lay down a rule that must either be disregarded or else must operate to deny freedom of action even in cases where the necessity exists and not merely in those where it does not. On the other hand, no such onerous limitation on freedom of action is imposed by requiring that men exercise the degree of care to appraise the facts correctly which is appropriate to the situation. It is desirable to deter men from acting without exercising such care; unless such care is taken, death is not a justifiable means even to the preservation of their own lives. The

[140] Strictly speaking, it is never necessary to kill for this purpose and always sufficient to disable. But effective disablement can be accomplished with a gun or a sword only by means very highly likely to kill. The point is therefore unimportant. Similarly, when we speak of "necessity" here we mean, of course, that it is highly probable that unless the victim took such action he would be killed.

question remains whether men can, by the threat of unpleasant treatment, be stimulated to exercise care before concluding that it is necessary for them to kill to save themselves. We shall consider this hereafter in discussing the problem presented by imprudent acts that are not intended to kill.

What has been said should suffice to cover the analogous case where homicide is believed to be necessary to save the life of some one other than the actor, were it not for one complicating factor. It may be feared that outsiders may mistake the assailed for the assailer and that it is even more likely that an outsider will misjudge the necessity than that the victim will himself. Hence, it may be argued that life is more likely to be preserved in the long run by forbidding interference entirely and leaving the victims of aggression to their own resources. But a prudent judgment about the identity of the victim must take into account the difficulties of making such judgments, particularly in the case of a scuffle; a prudent judgment about the necessity of intervening must consider that the victim may have the situation well in hand. Action which is unsupported by such judgments is imprudent and it should be sufficient to forbid imprudent intervention rather than all intervention. Moreover, a rule forbidding interference entirely would inevitably be disregarded in the case of persons whom the actor holds dear[141] and put a premium on selfishness in other cases. And here, as elsewhere, a rule which grants exemption only if the actor was right resolves the issue only by avoiding it.

A different question is presented when an actor intentionally kills some one whom he knows to be free from fault, reasonably believing that it is necessary for him to do so to save his own life. If the actor knew or could have known that he was placing himself in a situation in which he would probably be confronted by such ghastly alternatives, the problem can be resolved in general by the consideration that it is desirable and possible to deter men from getting themselves into such situations.[142] But the actor may have done nothing to create the situ-

[141] But see the cases referred to *supra*, Part I, note 112.

[142] *Cf.* 2 STEPHEN, *op. cit. supra* note 137, at 107-108: "Criminal law is itself a system of compulsion on the widest scale. It is a collection of threats of injury to life, liberty and property if people do commit crimes. Are such threats to be withdrawn as soon as they are encountered by opposing threats? The law says to a man intending to commit murder, if you do it I will hang you. Is the law to withdraw its threat if someone else says, If you do not do it I will shoot you?

"Surely it is at the moment when temptation to crime is strongest that the law should speak most clearly and emphatically to the contrary. It is, of course, a misfortune for a man that he should be placed between two fires, but it would be a much greater misfortune for society at large if criminals could confer impunity upon their agents by threatening them with death or violence if they refused to execute their commands. If impunity could be so secured a wide door would be

ation and omitted to do nothing that would have avoided it. In that event, Holmes suggested that a privilege to kill may be granted "on some of two grounds, either that self-preference is proper in the case supposed [as he evidently thought],[143] or that even if it is improper, the law cannot prevent it by punishment, because a threat of death at some future time can never be a sufficiently powerful motive to make a man choose death now in order to avoid the threat."[144] Whether the first ground is sufficient raises a difficult moral problem; the sufficiency of the second ground seems clear.[145] This result may be reached less reluctantly where the actor reasonably believes that it is necessary to kill not only to save his own life but also to safe the life of another who is also free from fault. For when only the actor's life is at stake the path of heroism at least is clear. When a third person's life is also at stake, even the path of heroism is obscure. In either event, if the actor has not exercised care to appraise the facts correctly, if, in other words, his belief in the necessity is unreasonable, his action is clearly undesirable and may be dealt with under principles which we shall subsequently consider.

A more difficult question is presented when an actor intentionally kills someone whom he knows to be free from fault, reasonably believing that it is necessary for him to do so, not to save his own life, but rather to save the life of some other person who is also free from fault. Such a case, involving intention to kill in the strict sense in

open to collusion, and encouragement would be given to associations of malefactors, secret or otherwise. No doubt the moral guilt of a person who commits a crime under compulsion is less than that of a person who commits it freely, but any effect which is thought proper may be given to this circumstance by a proportional mitigation of the offender's punishment.

"These reasons lead me to think that compulsion by threats ought in no case whatever to be admitted as an excuse for crime, though it may and ought to operate in mitigation of punishment in most though not in all cases. If a man chooses to expose and still more if he chooses to submit himself to illegal compulsion, it may not operate even in mitigation of punishment. It would surely be monstrous to mitigate the punishment of a murderer on the ground that he was a member of a secret society by which he would have been assassinated if he had not committed murder." On the other hand, in the case of "necessity" arising from other causes than threats, Stephen took a different position. See Part I, *supra* note 113; *cf.* STEPHEN'S DIGEST, art. 42.

[142] THE COMMON LAW, 44, 47.

[143] *Ibid.* 47.

[144] Stephen's objection in the case of compulsion by threats (*supra* note 142) suggests a problem of administration. But the cases he puts do not raise a genuine difficulty. Collusion among accomplices is not unduly difficult of detection, particularly since the evidence incriminates the parties to the threat. And the case of gangs or secret societies may be handled quite simply on the ground that since it is desirable and possible to deter men from joining in such associations, there is no case for an exemption.

which we have used the term, must inevitably be rare.[146] Indeed, it is likely to arise at all only if the person to be saved is one whom the actor loves;[147] and in that situation also it is highly unlikely that the actor can be deterred. But strangers may be involved and, in any event, deterrence may not be impossible. If that is so, nothing remains to guide legal policy but an imponderable choice among the lives of persons unknown. Either a choice must be made once and for all against human action to move the hand of doom or the man on the spot must be left free to choose his own course, taking care to judge the facts correctly.

We have now exhausted the cases where acts intended to kill can, in our opinion, be justified as a means to the end of preserving life. We must turn to a consideration of other justifying ends. The case of voluntary euthenasia presents a special problem. The argument for permitting the practice is not that it serves an end which is in general more important than the preservation of life, but rather that it does not disserve that end, that there is no social interest in preserving the lives of persons who by reason of mental or physical illness have lost the capacity to function as humans and desire death, if there is no reason to believe that their capacity can be restored. Three arguments are advanced against justifying homicide on this ground:[148] (1) that life is sacred; (2) that the practice may be abused;[149] (3) that to sanction the practice will lead to a general disrespect of life.[150] But the absolute sacredness of life under such circumstances must rest upon an

[146] But cases may easily be put where there is foresight of death as a very highly probable consequence, *e.g.* throwing passengers overboard to lighten the boat or opening a breach in the dyke which will inundate a particular area but avoid a total collapse.

[147] A threatens B's wife with instant death unless B kills C.

[148] For a full picture of the debate on this subject see ROBERTS, EUTHENASIA AND OTHER ASPECTS OF LIFE AND DEATH (1936); Stewart, *Euthenasia* (1918) 29 INT. JOURN. OF ETHICS 48; Emerson, *Who Is Incurable?*, N. Y. Times, Oct. 22, 1933, § 8, p. 5, col. 1; A. A. Brill, *Is Mercy Killing Justified?* (1935) 2 VITAL SPEECHES OF THE DAY 165; Walsh, *Life Is Sacred* (1935) 94 FORUM 333; Murano, *Murder by Request* (1935) 36 AMERICAN MERCURY 423; (1936) 106 J. AM. MED. ASS'N 224, 549, 636; Byers (1936) 32 OHIO ST. MED. J. 342; (1935) 2 BRITISH MED. J. 856; Hammond (1934) 132 PRACTITIONER 4. The Institute of Public Opinion reported the results of a poll showing popular opposition to "mercy killing" to have a slight margin, 54% to 46%. N. Y. Herald Trib., Jan. 17, 1937, § 2, p. 3, col. 1.

[149] The dangers of abuse are two: (1) that the patient may not really desire to die; (2) that there is uncertainty as to what ailments are incurable and as to when cures may be found for ailments generally regarded as incurable in the light of presently available knowledge.

[150] The trivial objection has also been voiced, that to authorize voluntary euthenasia would impose obstacles in the path of science by reducing the number of opportunities for experimentation. Enough persons may be expected to choose the chance of survival to permit science to go on.

article of faith. Those who hold the faith may follow its precepts without requiring those who do not hold it to act as if they did. The danger of abuse is genuine but calls, in our judgment, for regulation and caution rather than for an absolute prohibition. The point that officially sanctioned killing tends to some extent to promote disrespect for the value of life has force in general but seems to us of slight weight in this instance considering the purposes of voluntary euthenasia and the circumstances surrounding its practice.[151]

The argument for euthenasia suggests the general principle that should govern in determining what ends, if any, *other than the preservation of life*, can justify intentional homicide. Such an end, it seems clear, must be one the achievement of which by common agreement is almost indispensable if life is to be worth living. For the most part it is possible to achieve and protect the conditions of worth-while living by other means than homicide. But precisely as homicide is sometimes a necessary means to the preservation of life, it is sometimes a necessary means to the prevention of physical and psychic injuries that usually prove to be permanent and seriously impair the human capacities of those who suffer them. What has been said about the justifiability of homicide in the first case applies with equal force to homicide in the second.[152] There remains, of course, the difficult problem of determining what physical and psychic injuries so gravely impair the capacity to function that the value of life itself is seriously impaired. It is doubtful, indeed, whether a legislator can profitably do more than articulate a formula couched in these terms and leave to administrators the task of giving it a content that is consonant with the conditions and ideals of the community. Implicit in what has been said, however, is a condemnation of the common law formula in so far as it includes within the ambit of "violent felonies" crimes against property when threatened under circumstances involving little or no danger of serious personal injury. Implicit also is a condemnation of the common law rule permitting homicide when necessary to effect the arrest of a felon though not required to prevent death or serious injury to the person making the arrest or to others. The latter rule presupposes the judgment that if persons resist lawful arrest for felony or attempt to flee from lawful custody, it is better that they die than escape. Quite apart from the

[151] We think the analogy drawn by Brill, *supra* note 148, to war and capital punishment is false. The carnage inherent in the former and the spectacle and suspense of the latter are both absent.

[152] As in the case where the actor's life is at stake, the problem is simpler where the issue is the life of an aggressor as opposed to the serious injury of his victim, more difficult where the life at stake is that of an innocent person.

danger to third persons, we believe that in an age when capture and recapture are facilitated by all the methods now available to the police, this is to value apprehension too highly.[153] Indeed, it is worth noting that the common-law rule exacts a toll of lives in an age of fire-arms quite incommensurate with that exacted in an age of more primitive weapons; and that the toll must inevitably be greater in the United States, where fire-arms are habitually carried both by criminals and by

[153] For a vigorous discussion of the issues see 9 PROCEEDINGS OF THE AMERICAN LAW INSTITUTE (1931) 179 *et seq.*, containing the debate on a proposal to limit an officer's right to kill to effect an arrest to the cases where "the offense for which the arrest is being made or attempted is treason, murder, voluntary manslaughter, mayhem, arson, robbery, common law rape, kidnapping, burglary or an assault with intent to murder, rape, or rob." See A. L. I., ADMINISTRATION OF THE CRIMINAL LAW, TENTATIVE DRAFT No. 1 (1931) 21. Professor Mikell, who argued for a rule restricting the right to kill to cases of arrest for capital offenses, argued as follows: "It has been said, 'Why should not this man be shot down, the man who is running away with an automobile? Why not kill him if you cannot arrest him?' We answer; because, assuming that the man is making no resistance to the officer, he does not deserve death. . . . May I ask what we are killing him for when he steals an automobile and runs off with it? Are we killing him for stealing the automobile? If we catch him and try him we throw every protection around him. We say he cannot be tried unless 12 men of the grand jury indict him, and then he cannot be convicted until 12 men of the petit jury have proved him guilty beyond a reasonable doubt, and then when we have done all that, what do we do to him? Put him before a policeman and have a policeman shoot him? Of course not. We give him three years in a penitentiary. It cannot be then that we allow the officer to kill him because he stole the automobile, because the statute provides only three years in a penitentiary for that. Is it then for fleeing? And again I insist this is not a question of resistance to the officer. Is it for fleeing that we kill him? Fleeing from arrest is also a common law offense and is punishable by a light penalty, a penalty much less than that for stealing the automobile. If we are not killing him for stealing the automobile and not killing him for fleeing, what are we killing him for?" PROCEEDINGS, *supra*, at 186-187. Professor Waite took the position that the right to kill should extend to all offenses. He argued: "We can give the officer the privilege of arresting without jeopardizing the life of an innocent citizen since we say that the citizen runs no risk if he simply submits to the inconvenience of the arrest. If he is an innocent citizen the officer cannot shoot, remember, until he has reasonable ground to believe that the citizen knows the arrest is being effected. If he is an innocent citizen he will not have any reason for not submitting to the arrest. If he is not an innocent citizen, he ought to be arrested. . . . If we pass [the proposed section] . . . we say to the criminal, 'You are foolish. No matter what you have done you are foolish if you submit to arrest. The officer dare not take the risk of shooting at you. If you can outrun him, outrun him and you are safe.' We say to the officer, 'You dare not shoot at the fleeing criminal.' We say to the criminal, 'Outrun him if you can. If you are faster than he is you are free and God bless you.' I feel entirely unwilling to give that benediction to the modern criminal." *Id.* at 195. Certainly an officer labors under great difficulty so long as he is governed by rules drawn in terms of distinctions as technical as that between felony and misdemeanor. See NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON CRIMINAL PROCEDURE (1931) 16 *et seq.* But this consideration fortifies the argument for applying to all cases the rule for misdemeanors, that the officer may only kill in his own defense, but may use reasonable force, short of killing, to overcome resistance. Even then, of course, the difficulty of an officer's job is commensurate with his great responsibilities.

the police, than in England where they are rarely carried by either the one group or the other.[154]

Thus far our attention has been confined to acts that are intended to kill. In essence the problem is no different in the case of acts capable of causing death but not intended to do so. Whether or not it is desirable to deter such acts turns upon an evaluation of their desirable as opposed to their undesirable potentialities. But acts that are intended to kill and capable of causing death are usually highly likely to do so; and they rarely serve any ends other than those to which the homicide itself is a means. On the other hand, acts not intended to kill are not, in general, likely to cause death; and even when they are likely to do so, they necessarily serve some other end, which, frequently enough, is desirable. Indeed, in a mechanized, industrial society there are many ends which it is desirable that men be free to seek, which are attainable only by means that involve some risk of death. If all such means were prohibited there would be much that has to be done that men would not be free to do. But this does not hold, as we have said, for acts that are intended to kill. Hence, with respect to such acts it is sufficient to consider whether, in the situations in which they occur, it is desirable to prevent the homicide and possible to deter the homicidal act. If so, the existence of the intention to kill is adequate indication that death is so highly probable and the act so unlikely to have any good results that preventive efforts are warranted.[155] When there is no such intention to indicate the probable results of homicidal behavior, a more extensive inquiry is necessary to determine whether it is desirable to deter it. Since the degree of undesirability of the act depends upon the degree of probability that it will cause death (or other undesirable consequences), the element of probability is now independently significant. But for reasons that have already been stated, it is not the only significant factor. It must be considered along with the probability that the act may have other and good results. But in estimating the probability that the results of the act may be good, the actor's purposes become significant, and for the same reason that his intention is significant in cases in which he intends to kill. The more undesirable his ends, especially his more immediate ones, the less likely it is that the means which he employs to achieve them will have any good results. Hence, if the actor's less remote ends are undesirable, the inquiry can frequently stop at this point.[156] But if the actor's ends are not undesirable, if they are good in themselves or as a means to other good results, the inquiry must proceed further to a consideration of the degree of desirability of the ends and the efficacy of the act as a means, as opposed to the efficacy of other means, if there are any, entailing a lesser danger of death. An example may make the point clear. If it can be proved that A administered a drug to B, his wife, intending to kill her, it is sufficiently likely that A's act will cause death[157] and sufficiently unlikely that it will have any desirable results[158] to permit us to ignore both questions entirely. The

[154] *Cf.* MOYLAN, SCOTLAND YARD AND THE METROPOLITAN POLICE (2d ed 1934) 171-2: "Normally a constable is armed with a wooden truncheon . . . 15 inches long, with a leather strap to secure it round his wrist. Save on ceremonial occasions, swords are not worn by any rank, and pistols are kept only at stations to be issued in special cases where there is reason to apprehend encounters with armed criminals. . . . The fact that the new police had only small truncheons against the bludgeons, poles and shillelaghs of the mob, gained for them in their early years a respect and a reputation for fair play that could not have been won by a besworded and bepistolled police. An armed policeman is inconsistent with the English idea that a constable's authority should be exercised by carrying the methods of persuasion to their utmost limits." Testimony before the Select Committee on Capital Punishment indicates that it is rare for criminals to carry fire-arms and reflects the fear that abolition of the death penalty would result in the arming of criminals and the resultant necessity of arming the police. See MINUTES OF EVIDENCE (1929) Nos. 86, 89, 92, 100, 102, 404, 460, 506, 535-541, 573, 577-85, 879, 907-14, 957-60, 1027-8, 1032, 3948-50, 3967-71, 5237-32. The Committee (REPORT, at 252-259) attributes the habits of criminals to other causes than the death penalty.

We do not suggest, of course, that it is prudent in the United States to disarm the police without first disarming criminals. Indeed, a program of disarmament presents the same difficulty here as it does in foreign affairs. Nor do we deny that the fact that criminals frequently carry fire-arms is of vital significance in determining whether or not an officer has reasonable cause, under particular circumstances, to believe that his own life is in immediate peril. We do assert, however, that it does not justify a rule permitting an officer to kill to prevent escape rather than to save his own life. And even from that point of view one may doubt the wisdom of giving police advice of the following sort: "If a crook tries to pull a gun on you, be fast on the draw and pull the trigger first. We'll back you up. We've cut down the number of widows of policemen who come down here to get medals. Racketeers, punks and gangsters are not wanted in this administration. Don't give a crook or a gangster an even break." Mayor F. H. LaGuardia to 613 men added to the New York Police Department. N. Y. Times, Tuesday, March 2, 1937, p. 23, col. 5.

[155] *Cf.* HOLMES, THE COMMON LAW, 49, 65-68.

[156] Cases may easily be put, however, in which it is necessary to proceed further. Thus a revolutionary may call a meeting of the unemployed ostensibly to protest the stoppage of relief payments but actually in order to foment dissatisfaction as a means to rebellion. Assuming that rebellion is undesirable and that, under the circumstances, there is a danger that the meeting may grow violent, it may nevertheless be the case that the probability that the meeting will result in the resumption of necessary relief payments which would not otherwise be resumed is so high, and the probability of rebellion or other violence so low, that the calling of the meeting is in the social interest, in spite of the undesirability of the actor's end.

[157] It will be observed that unless the drug was dangerous in fact it would be difficult to prove that A administered it intending to kill. In other words, the reliability of intention to kill as an indication of the probability of homicide is fortified by the usual difficulty of proving the intention in the absence of the probability. We are assuming, of course, that the act is of a sort that, in general, may result in death. *Cf.* Part I, *supra* note 34.

[158] Nevertheless, to say that it is unlikely that A's act will serve any desirable ends, is to admit that it is probable to some degree that it will. The actual effect of the drug may be not to kill B but to cure an old ailment that had proved impervious to treatment. In that event, we should have to concede that, in the particular case, the good results of the act exceeded the bad. But we are not concerned

same point holds if A's purpose was not to kill B but to injure her. But suppose that A's purpose was not to kill or to injure but rather to play a joke on B by getting her drunk. The probability that the act will have desirable results is still so slight that it may be ignored, but A's intention is no longer a sufficient index of probable harm to warrant ignoring the question of what that probability is. If A's purpose, on the other hand, was to relieve a strain under which B was laboring by inducing sleep, or to cure a disease from which B was suffering, it becomes essential to consider the desirability of those ends and the efficacy and necessity of the means as well as the probability that harm will result. In the same way, the probability of causing death by firing a pistol aimlessly in the air may, in a particular case, be smaller than the probability of causing death by carefully blasting an excavation in city land, preparatory to building an apartment house. In the first case, however, the act is a means only to the actor's own amusement; in the second it is a means to providing housing, and this is true though the actor may desire to build the house only as a means to making a profit. Men can amuse themselves in ways that are less dangerous to others than the firing of pistols, but blasting is a necessary means to building. Accordingly, the danger may suffice to condemn the act in the first case; it is unlikely, in the second, to move us to regard a fatality as anything but an accident.[159] Thus, the matter may be summarized as follows: when death is not intended, the desirability of preventing a particular act because it may result in death, turns upon the following factors: (1) the probability that death or serious injury will result; (2) the probability that the act will also have desirable results and the degree of their desirability, in the determination of which the actor's purposes are relevant; (3) if the act serves desirable ends, its efficacy as a means, as opposed to the efficacy of other and less dangerous means.

No legislature can make these evaluations in advance for all possible acts under all possible circumstances. However, it is clear that whatever ends are thought to justify intentional homicide, when it is reasonably believed to be a necessary means to those ends, also justify acts endangering life which are not intended to kill, when they are reasonably believed to be necessary means. On the other hand, when the

with A's act under the unusual and unknown circumstances of the particular case. We are concerned with usual results of acts of that sort under ordinary circumstances.

[159] We use the word "accident" as a legal term to signify not only the unintended and very slightly probable consequences of acts but also those unintended and relatively more probable consequences which, in spite of their probability, do not move us to regard the act as undesirable.

actor's proximate end is itself criminal or otherwise undesirable,[160] the use of means that involve a homicidal risk obviously cannot be justified.[161] The difficult cases are those in which the actor's ends are themselves desirable, or, at least, are not undesirable, though they would not justify intentional homicide as a means. Within this broad domain, the legislature may single out specific acts and proscribe them, regardless of the actual degree of probability of good or evil results in particular cases,[162] and may regulate others,[163] thus providing, in effect, that any risks whatever created by the acts, in the first case, or by disregarding the regulations, in the second, shall be unjustifiable. But this can only be done to a limited extent. Beyond this, the legislature can do no more than articulate the standard to be employed by administrators in passing upon particular acts under particular circumstances. With respect to this vast residuum of behavior, the legislature can say no more, in effect, than (1) it is desirable if it is prudent and undesirable if it is not; (2) whether or not it is prudent in particular cases depends upon the desirability of the actor's ends, the efficacy and necessity of his means, and the probability that death or serious injury will result; and (3) in view of the rigor of the sanctions of the criminal law[164] the degree of imprudence should be sub-

[160] But see *supra* note 156.

[161] However, unless the homicidal risk is one that is or ought to be known to the actor, the risk itself does not provide a reason, in addition to the undesirability of the end, for disapproving the kind of act that is involved. This is one of the major points advanced in criticism of the Anglo-American felony-murder and misdemeanor-manslaughter rules. See Part I, note 51, *supra*. It is well to observe, however, that those rules (see pp. 713-717, 722-723, *supra*) are exclusively treatment rules. Although, to some extent they make homicides criminal that would not otherwise be criminal, they do not, by hypothesis, make criminal any behavior that would not otherwise be criminal. Whether or not the actor knew or ought to have known that his act was dangerous to life is relevant, however, to the issue whether or not the treatment employed should be that which we are prepared to use in the effort to prevent behavior that is dangerous to life. Holmes' defense of the felony-murder rule (*supra*, Part I, note 54) is therefore apposite in that he argues that the behavior involved may be thought to present such danger. But the dangerousness of the behavior is not the only factor that is relevant to the determination of treatment. Moreover, Holmes never meets the objection raised on the score of inequality to treating persons who engage in the same unlawful behavior differently, according as death does or does not result in the particular case. We shall consider this problem hereafter in discussing treatment.

[162] Such as the sale or possession of fire-arms.

[163] Such as blasting or driving automobiles.

[164] It must not be overlooked that however rigorously we may insist that the principal function of what we are accustomed to call the "civil law," and more particularly, the law of "torts," is "a redistribution of an existing loss between two individuals" [HOLMES, THE COMMON LAW 50; Comm. v. Pierce, 138 Mass. 165, 176 (1884)] by compelling reparation, the use of such sanctions also serves with varying efficacy to prevent the occurrence of such losses in the future by deterring men from engaging in the behavior that produces them; and that, notwithstanding the phenomenon of insurance, considerations of prevention are of prime, though not of sole importance in formulating policies to govern redistribution. *Cf.* HOLMES,

stantial.[165] The difficulty of applying such a vague standard is diminished somewhat, however, by the fact that every society proceeds on some broad assumptions that provide a necessary starting point. Thus the modern world stands as firmly committed to such activities as machine production, the construction of tall buildings, the use of the automobile, the airplane and other mechanized forms of transportation, as the ancient world was committed to the use of the chariot and the wooden boat. Unless penal legislation and administration are to undertake to remake the world, in which case they had better do so explicitly, the risk of death inevitably incident to such activities must be regarded as justifiable and such death must be accepted as accidental. The object of prevention can only be the creation of *unnecessary* risks by such activity. But these assumptions provide no more than a start. Once the risk is determined to be unnecessary, the difficult problem remains of determining whether or not the act creating it was nevertheless prudent. Automobiles may be driven at many speeds and still be useful; but we frequently sanction driving at a speed that is not, in any strict sense, necessary for the use of the automobile.

In considering the probable consequences of acts, two initial problems are encountered, to which we have previously referred. Since acts would have no consequences but for the conditions under which they occur (*i.e.*, the characteristics of the environment, on the one hand and of the actor,[166] on the other), and since any given result is a necessary consequence of the causal act under all the actual conditions,[167] an assertion that a particular consequence is a probable result of a particular act presupposes the existence of some but not all of the necessary conditions. The assertion is that, under these given conditions, the result will follow the act with some degree of frequency that is, of

COLLECTED LEGAL PAPERS (1921) 173-176; BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION c. xix, 1 WORKS (1843) 142 *et seq.*; *cf.* KENNY, OUTLINES OF CRIMINAL LAW (15th ed. 1936) c. 1; M. R. Cohen, *On Absolutisms in Legal Thought* (1936) 84 U. OF PA. L. REV. 681, 686-7. Since "civil" sanctions are relatively less burdensome to the individual than "criminal" sanctions and are also more easily administered, the problem here is that of drawing a line between the degree of imprudence that may be left to the civil law and that which calls for the more drastic preventive efforts involved in the use of the criminal law.

[165] This is precisely what is involved in a general condemnation of "negligence" and also, perhaps, of gross negligence." See Part I, *supra* notes 82-87. Because the term "negligence" suggests to case lawyers centuries of adjudications, we have, for the sake of clarity, avoided its use.

[166] Such as the actor's poor co-ordination, when the act is driving a car, or the actor's poor eye-sight, when the act is shooting a gun.

[167] *Cf.* Holmes, J. in Com. v. Pierce, 138 Mass. 165, 179 (1884): "If men were held answerable for everything they did which was dangerous in fact they would be held for all their acts from which harm in fact ensued."

course, indefinite, but may be generally characterized as very low, low, high or very high. The first problem is: what conditions are to be taken into account in making the probability judgments to which we have referred? The second problem is: given the act and these conditions, in terms of what knowledge is the probability to be determined? The answer to both questions must, it seems clear, take into account that these probability judgments are made for the purpose of determining what acts it is desirable and possible to prevent. Men must estimate the consequences of their acts on the basis of their knowledge before acting. As Holmes has pointed out: "All foresight of the future, all choice with regard to any possible consequence of action, depends on what is known at the moment of choosing. An act cannot be wrong, even when done under circumstances in which it will be hurtful, unless those circumstances are or ought to be known. A fear of punishment for causing harm cannot work as a motive, unless the possibility of harm may be foreseen."[168] Hence, the only conditions that are significant for the purpose of the judgment are those that were known or ought to have been known to the actor; and the only knowledge, in terms of which probabilities should be estimated, is that which the actor had or ought to have had.

We must look to the conditions first. The question of what the actor knew is solely one of fact; but the question of what he ought to have known is not. What standard, then, is to determine the minimum that actors ought to know about themselves, and about the environment, before they act? Holmes answers,[169] in substance, as follows: (a) A man without special knowledge or training ought to know (1) what would be apparent to most men of ordinary intelligence and experience exercising their common faculties; and (2) what would be discovered by the kind of investigation that a man of reasonable prudence would make. (b) A man with special knowledge or training ought to know, in addition, (1) what would be apparent to most men with such special equipment and (2) what would be discovered by the kind of investigation that they would make, in the exercise of reasonable prudence.

What would be apparent to the generality of men (with or without special knowledge or training) by the use of their common faculties, is a question of fact. By reason of the uncertainty of such words as "ordinary" and "common," it is a more or less ambiguous question, but the ambiguity cannot be eliminated and it does not alter the character of the question as one of fact. What is "prudent," however, is a ques-

[168] THE COMMON LAW 55.

[169] Com. v. Pierce, *supra* note 167, THE COMMON LAW 44-57.

tion of value, not of fact; the man of "reasonable prudence" is, as Holmes often observed, an "ideal being."[170] But what a man of reasonable prudence would discover is not solely a matter of value. Two questions are involved: (1) What knowledge would most men acquire from a given kind of investigation? This is a question of fact. (2) What sort of investigation, if any, would a reasonably prudent man make? This is the question of value. It cannot be answered, however, without first determining what conditions were known to the actor or would be known to most men prior to investigation. For prudence does not call for any investigation, unless what is known indicates a harmful result to be probable; only an initial probability, in short, points to the utility of further investigation. Assuming, however, that the utility of investigation is thus indicated, does prudence require that an investigation be made, and, if so, what kind of investigation? The question at this point is whether it is desirable to prevent the act when it is not preceded by the investigation. The relevant considerations, therefore, have already been stated. How great is the risk indicated by what is apparent? How desirable are the ends to be served by the contemplated action? To what extent would those ends be disserved by delaying the action pending the investigation? How difficult is the necessary investigation and how likely is it to be profitable? Hence, the crucial conditions, at the beginning of the inquiry at least, are those that are actually known to the actor coupled with those that would be apparent to most men and, if the actor has some special knowledge or training, to most men with that special equipment.

We come now to the second problem. Given the particular conditions and the particular act, by what general knowledge of relationships are the character of the probable results, and the degree of their probability, to be determined? Such general knowledge (formulated in terms of propositions of the form: result X follows act A under conditions B—never, rarely, usually or almost always) is derived from experience with the kind of activity in question. But, as we have said above, this experience may be that which is common to most men or that which is limited to specialists. The considerations which determine what knowledge ought to be employed in estimating probabilities are the same as those that determine what conditions should be taken into account. Men, in general, must act on the basis of the knowledge they have or can acquire. Accordingly, if a man is a specialist, he may be expected to use the knowledge that he has acquired from his special experience, and such knowledge may, therefore, be properly employed

[170] See *e.g.* THE COMMON LAW 51.

in judging the probable results of his acts. But not all men can be specialists and, if a man is not, the knowledge derived from common experience must obviously be determinative. It is worth noting, however, that common experience usually suffices to point to the need of specialized knowledge. The ordinary man may not know that a particular drug is dangerous to life but he does know that drugs are generally dangerous and therefore that this drug may be, *unless* expert knowledge of its specific propensities indicates that it is not.[171]

In short, the probable consequences of acts must be estimated by the kind of knowledge that men in general have or can acquire before they choose to act; and the probability of death, estimated in that way, must be sufficiently high generally to command attention. If a more rigorous standard is adopted, the threat of a penalty for causing death must either be ineffective or operate to prevent the act in undesirable ways. For if men are threatened with a penalty for causing death, no matter how careful they are to discover all appreciable risks and to avoid creating those that they discover, there is nothing that they can do but disregard the threat, or else avoid all but the simplest, necessary activities. But such wholesale abandonment of useful activity would obviously be catastrophic. If this result is to be avoided, there must be some tolerance in the standard; we must be content to endeavor to deter by law the creation of risks that most men feel they can discover they are creating,[172] or else to make particular acts unlawful re-

[171] By the same token, specialized knowledge may show that what common knowledge indicated to be dangerous is in fact harmless. Nevertheless, what common knowledge indicates to be dangerous is usually dangerous in fact, *i.e.* dangerous according to all available knowledge, common and special. Accordingly, it is generally desirable to prevent acts that are dangerous according to common experience, unless the actor is a specialist and has knowledge that indicates the act to be harmless.

[172] Similar considerations may explain the common reluctance to extend criminal liability beyond what Justice Holmes called "recklessness in a moral sense" [Commonwealth v. Pierce, 138 Mass. 165, 175 (1884)], understood "to depend on the actual condition of the individual's mind with regard to consequences, as distinguished from mere knowledge of present or past facts or circumstances from which someone or everybody else might be led to apprehend them if the supposed acts were done." See Part I, pp. 720-722, *supra*. To the extent that men in general doubt their ability to live up to the more exacting external standard stated in the text, the promulgation of such a standard creates the same kind of insecurity, though lesser in degree, as an absolute liability. Hence, if such doubts are widespread at a particular time and place, the legislator (especially with a jury system) has little choice but to accept the less rigorous standard of liability if he would avoid the greater evils of general insecurity and consequent nullification. *Cf.* HOLMES, THE COMMON LAW, 41: "The first requirement of a sound body of law is that it should correspond with the actual feelings and demands of the community, whether right or wrong." However, as popular imagination shifts from identification with the accused to identification with the victims of acts that would be deemed negligent by an external standard, an opportunity to broaden the liability is presented. Some clue to the vacillations of Anglo-American popular feeling on this point is given by

gardless of the risks they create or the results they have in particular cases. None of these considerations apply, however, to acts intended to cause death in the absence of a reasonable belief in the existence of circumstances that would constitute a justification, and this is a reason, in addition to those mentioned above,[173] why the probability of death need not be considered in such cases. The actor is aware of his own purpose and, therefore, of the applicability of the legal threat to him; his awareness of its applicability does not at all depend upon the probability that his intended purpose will be accomplished.

It is obvious that some men whose behavior is held criminal under an external standard of liability will create homicidal risk consciously while others will do so only inadvertently. Viewing the matter before the act occurs, if the actor is aware that the probable results of his act are such that it is very likely to be held criminal, the threat of a penalty provides a motive for avoiding the act precisely as it does when the criminal result is intended. To approximately the same extent that we can expect the legally created motive to be effective to control action in the latter case, we can expect it to be effective in the former.[174] But when the actor is unaware of the probable results of his act, when the risk is created inadvertently, it has been argued that deterrence is impossible because the actor is unconscious of the applicability of the legal threat to him. However, if the standard of liability is so defined that the creation of risk is criminal only in situations where the generality of men can, if they call upon their experience and utilize their faculties, discover that they are creating the risk, the objection loses force. Knowledge that punishment may follow behavior that inadvertently creates improper risk, supplies men with an additional motive to take care, before acting, to use their faculties and draw upon their experience in determining the potentialities of their contemplated acts.[175]

To some extent at least this motive may stimulate men to discover the risks that their acts entail when they would not otherwise discover them; and once the risk is discovered, the threat may, as we have said, be effective to control[176] the act.[177]

the history of legislative efforts to deal with homicide by motor vehicles. See, in this regard, Reisenfeld, *Negligent Homicide* (1936) 25 CALIF. L. REV. 1; *cf.* Turner, *Mens Rea and Motorists* (1935) 5 CAMB. L. J. 61. It is interesting to compare the strict subjectivity which is the usual basis of liability under the Italian Code [see PENAL CODE OF THE KINGDOM OF ITALY (H. M. Stationery Office, 1931) arts. 42, 43] with the thorough externality which is the usual rule under the Soviet Code, which provides: "Persons who commit socially dangerous acts shall be liable to the application of measures of social defense of a judicial-correctional character only—(a) if they acted deliberately, *i.e.*, if they foresaw the socially dangerous consequences of their acts, or desired those consequences, or knowingly permitted them to happen, or (b) if they acted carelessly, *i.e.*, if they did not foresee the consequences of their acts, although they ought to have foreseen them, or if they light-mindedly hoped to avert such consequences." See in this connection Battaglini, *The Fascist Reform of the Penal Law in Italy* (1933) 24 J. CRIM. L. 278; Saunders, *The New Penal Code in Italy* (1928) 165 L. T. 307; Stallybrass, *A Comparison of the General Principles of Criminal Law in England with the "Progetto Definitivo di un Nuovo Codice Penale" of Alfredo Rocco* (1931) 13 J. COMP. LEG. & INT. L. (3d Ser.) 203; (1932) 14 *id.* 45, 233; (1933) 15 *id.* 77, 232; Gillin, *Russia's Criminal Court and Penal System* (1933) 24 J. CRIM. L. 290; *cf.* Mannheim, *Mens Rea in German and English Criminal Law* (1935) 17 J. COMP. LEG. & INT. L. (3d Ser.) 82, 236. The case of those persons who have not got and cannot acquire the capacity to live up to an external standard is considered *infra* note 183. The problem here considered must not be confused with the analogous problem in defining murder. See Part I, pp. 709-713, *supra*. Here the question is that of amenability to any treatment; there the question is the propriety of the severe punishment reserved for murder.

[173] See p. 742, *supra*.

[174] It should be noted, however, that so long as the penalty is conditioned on the actual occurrence of the fatal result there is one reason why the legally created motive may be expected to have more influence when death is intended than when it is not. The man who intends to cause death usually expects to achieve his purpose. He contemplates, therefore, that the condition upon which the penalty depends will occur. The man who knows only that death is probable knows that it is also probable to some degree that death will not occur, and he may gamble on the latter eventuality. In short, he may contemplate that the condition upon which the penalty depends will not occur. This factor may, however, be counterbalanced by others, such as the greater intensity of the desire to kill as opposed to the desire to employ dangerous behavior as a means to other ends, the better character and, therefore, the greater amenability to legal threats of a man who is moved to acts creating risk, but does not desire to kill, as opposed to a man who desires to kill, etc. This matter will be considered in greater detail hereafter, in discussing the problems of treatment.

[175] In the foregoing discussion we have not considered the special case of an omission as opposed to an act. It is clear that an omission may be viewed psychologically in precisely the same way as an act and that the consequences of an omission are susceptible of the same analytical treatment as those of an act. Nevertheless, as we have pointed out above (see Part I, *supra* pp. 724-725), the common law, like most legal systems, restricts criminal liability for omissions, regardless of the degree of obvious peril that action would avert, to cases where there is a legal duty to act specially created, as by statute or contract. The traditional justification of the rule does not carry the dogma of individualism to the point of denying the desirability of stimulating action on a wider scale. It rests upon the ground that no broader rule can be formulated which is not too indefinite as a measure of liability. See Macaulay, *op. cit. supra* note 106. It is worth observing, however, that an appeal to common decency is in essence no less specific than the standard of liability for negligent acts. Whereas the issue there is, as we have said, whether or not the act is a sufficiently necessary means to sufficiently desirable ends to compensate for the risk of death or injury which it creates, the issue here is whether or not freedom to remain inactive serves ends that are sufficiently desirable to compensate for the evil that inaction permits to befall. The extent of the burden imposed by the act is obviously a relevant factor in making such an evaluation. If the burden is negligible or very light, the case for liability is strong, and the difficulty of formulating a general rule no more insuperable an obstacle than in the case of acts. Nor is the deterrence of inaction a different problem from that of deterring acts, though it may sometimes be more difficult to prove the state of mind accompanying an omission than that accompanying an act.

[176] When considering intentional homicide we reserved the question whether or not men can be stimulated by the threat of a penalty to exercise care in reaching the conclusion that it is necessary for them to kill for some justifiable purpose, such as self-defense (see *supra* p. 736). If the assertion in the text is sound in general,

We have thus far asserted that except in the few cases specifically noted, the law can operate to deter both acts intended to kill and acts not so intended but which create a risk of death that men of common knowledge and experience can perceive. These assertions require a general qualification. It cannot be denied that there are persons in every community whom the threats of the law cannot possibly deter for the reason that (a) they do not know and cannot learn the potentialities of their behavior, because they lack and cannot acquire common knowledge, or having such knowledge cannot employ it; or (b) they are not aware and cannot be made aware of the threats of the law also, for the most part, because of a lack of common knowledge; or (c) even when aware of the legal threats, they are incapable of being affected by them. It is futile to subject one such person to unpleasant treatment as a means to affecting the behavior of others like him. Moreover, if the characteristics of this group of persons can be discovered and the class defined in a way that will permit its members to be readily identified, exempting such persons from unpleasant treatment will not seriously weaken the deterrent effect of the law upon persons whom it is possible to deter.

The common law rules prescribing the limits of legal "responsibility" may properly be understood as an effort to define this class of persons.[178] Those who do not know the nature and quality of their

it seems clear that it holds for this case as well as the case discussed in the text. The more difficult question is: what standard of care is proper for men who fear that they are threatened by death? It is at least clear that, as Holmes put it, "Detached reflection cannot be demanded in the presence of an uplifted knife" [Brown v. U. S., 256 U. S. 335 (1921)]. Though the question what is prudent is difficult, it involves the same considerations in this instance as in the others referred to in the text.

[177] If the foregoing discussion is sound, it goes without saying that in so far as the law is to operate by way of deterrence, liability must be attached to acts and not to muscular contractions that are unwilled. To deter men is to affect their choices and, as Holmes pointed out long ago, "an act implies a choice." (THE COMMON LAW at 54.) See also STEPHEN, *loc. cit. supra* note 137. Indeed, men in general will interpret the law to attribute legal consequences only to acts, whether or not legal theory explicitly does so. Suppose, for example, that a tool slips out of the hand of a man at work on the roof of a tall building, and falls on and kills a man standing below; that the workman had no reason to distrust his own ability on the particular occasion, took proper precautions and, indeed, made every effort to prevent the tool from slipping out of his hands. If he is nevertheless held criminally responsible for the death, a court may say that he is held liable for *letting* the tool slip out of his hands, but men in general will say that he was penalized for using tools while at work on a tall building, which was all that, in the case supposed, the actor could have chosen to avoid doing in order to avoid the liability.

[178] This is the traditional English understanding of these rules. *Cf.* Beverley's Case, 4 Coke 124b (1603): "the punishment of a man who is deprived of reason and understanding cannot be an example to others." See also 2 STEPHEN, *op. cit. supra*, note 137, at 168 *et seq.*; KENNY, OUTLINES OF CRIMINAL LAW (15th ed. 1936) 58. Many critics of the "concept of responsibility" are unable to understand the rules as anything but an expression of retributive principles and feel, therefore, that they adequately criticize them by attacking the theory of retributive justice. This, in our opinion, is an inadequate disposition of the matter. As we have said above (p. 728), the rules governing responsibility do not usually determine amenability to *any* treatment; they determine amenability to the kind of punitive treatment that is justifiable only or primarily as a means to the deterrence of potential offenders. *Cf.* S. GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW (1925) 445-446. The matter is put somewhat in this way by the Soviet Code's explicit distinction between persons liable to "the application of measures of social defense of a judicial-correctional character" (see note 172 *supra*) and persons "who have committed crimes in a state of chronic mental disease or of temporary derangement of the mental faculties, or in any other condition of illness, if they were unable to realize the significance of their acts or to control them," to whom measures of social defense of a medical character only can be applied." (art. 11). See also EAST, FORENSIC PSYCHIATRY (1927) 63 *et seq.*

The exemption from punitive treatment accorded by the rules defining responsibility may, of course, be explained or defended on other grounds, such as the necessity of different treatment of the mentally normal and abnormal as a means to avoiding nullification by juries or to emphasizing humanitarian values. Modern methods of treating juvenile delinquents must, to a considerable extent, be defended on the latter ground. *Cf.* Michael, Book Review (1935) 44 YALE L. J. 908. And this may be the best defense of § 134(b) of the provision in one of the drafts of the proposed Illinois Criminal Code (59th G. A., H. B. No. 1145 [1935] that "a person [is irresponsible] who is insane in the sense of being afflicted with a mental disease or mental defect and commits an offense while in such condition of insanity. No other tests of the existence of such insanity shall be applied, and such existence shall be determined as a question of fact." *Cf.* CODE PÉNAL, art. 64: "Il n'y a ni crime ni délit, lorsque le prévenu était en état de démence au temps de l'action, ou lorsqu'il a été contraint par une force à laquelle il n'a pu résister." See also State v. Jones, 50 N. H. 369 (1871); ILLINOIS STATE BAR ASS'N DRAFT CODE (1935) § 134(b) introduced as 59th G. A., H. B. No. 712; GLUECK, *supra*, at 254. However, in so far as special treatment of the insane is to be defended as a means to avoiding nullification or on humanitarian grounds rather than on the ground that deterrence is impossible, the matter is better considered as a part of a general discussion of the problems of treatment. On the development of the Anglo-American rules see the references *supra* Part I, notes 115, 121.

[179] The distance of the legal threat is of obvious significance in this context. When the threat of punishment is symbolized by an attendant close at hand, as it often is even in an institution for the insane, its import may be understood, although it would not be understood if symbolized only by an occasional policeman or by newspaper headlines. This difference in the immediacy of the symbolized threat is vital in the case of the immature and of those who suffer from mental disease or defect. *Cf.* EAST, *loc. cit. supra* note 178.

[180] This is the only case, under the M'Naghten rules [10 Cl. & F. 200 (1843)] in which delusion suffices, in itself, to establish irresponsibility; in other cases delusion is significant only as evidence (1) of mental disorder and (2) of the kind of impairment of cognitive faculties that results in irresponsibility. See Kenny, *op. cit. supra* note 178, at 61.

acts or do not know that their acts are wrong are, in the only intelligible meaning of the words, those who must necessarily be unaware of any threat of punishment that the law may make. For either such persons must be unaware of the character or probable results of their bodily movements or else, having such awareness, they must be unaware of the existence, import or applicability of the legal threat. If, as the law requires, this unawareness is due to mental disease, mental defect or immaturity, it is obviously improbable that such persons can be stimulated by distant[179] legal threats to take care to discover such matters before acting. Again, those who, suffering from a delusion, believe that the facts are such that their acts would be lawful[180] must be un-

aware of the applicability of the legal threat; and the very conception of delusion as an *idée fixe* implies that men who suffer from them have not the capacity to take a reasonable view of the facts. They differ, therefore, from sane men who make unreasonable mistakes of fact precisely in this—that sane men can be stimulated to appraise the facts more carefully, whereas deluded men cannot be threatened away from their delusion.[181] But this is as far as the English common law rules go. It is clear that they do not cover the whole ground *if* there are persons who, even though they are aware of the potentialities of their acts and of the threat of punishment, are nevertheless incapable of choosing to avoid the act in order to avoid the punishment. There is no reason to doubt that such persons exist.[182] The question is whether or not it is possible to identify particular individuals as members of this class rather than of the broader class of persons who are capable of being deterred on one occasion though they may not be deterred on another, that is, those who are deterrable though not always deterred. If the substantive law is properly drawn and applied, it is obviously impossible to make this determination with respect to particular individuals who do not suffer from some form of mental disorder or defect; for, if an act was one which an ordinary person could not be deterred from performing, it ought not under the principles previously considered be made criminal at all.[183] The question therefore reduces to this: Given

[181] Thus a belief that the facts are such that an act would be lawful is usually no defense *if it is unreasonable;* but if it is a delusion, it produces irresponsibility. Similarly, mistake of law is usually no defense in the case of the mentally sound [*cf.* Barronett's Case, 1 El. & Bl. 1 (1851); HOLMES, THE COMMON LAW, 47-48] but establishes the irresponsibility of the mentally disordered.

[182] *Cf.* S. GLUECK, *op. cit. supra* note 178, 304-312, 329 *et seq.*

[183] This point is made clear if it is remembered that unless the individual is abnormal in some relevant respect, there is nothing that he can adduce in support of a contention that he is non-deterrable but the circumstances of the homicide itself; and the circumstances of the homicide would support his contention *only* on the hypothesis that most men would be non-deterrable under such circumstances. This generalization is subject to at least one apparent exception. Evidence that an individual is an habitual criminal may be thought to prove that it is unlikely that he can be deterred by threats that he has habitually disregarded. But habits of criminality, unlike mental disorder or defect, have their roots in conscious choices. Hence, the punitive treatment of one habitual criminal may be unlikely to deter others like him, but likely to deter potential habitual criminals from acquiring the habit in the first place. Similarly, it may be conceded that drug addicts cannot be threatened away from their addiction or deterred from acting to satisfy their craving, but threats may conceivably deter them from becoming addicts in the first place. *Cf.* Aristotle's discussion of these problems, ETHICA NICHOMACHEA, Bk. 3, 1109b-1115a.

We have not devoted explicit attention to the case of persons who cannot be stimulated to take care and therefore are in this respect beyond reach of pressure to adhere to the external standard of prudence to which we have referred. The existence of such persons had led to the argument that criminal negligence must be understood in terms of a standard of care which the particular actor rather than men in general can attain. See *e.g.* Keedy, *Ignorance and Mistake in the Criminal*

a particular individual who can be shown (1) to be mentally abnormal and (2) on one occasion, at least, to have done an act that the general run of men can (to some extent) be deterred from committing, is it possible to determine whether or not he would behave in the same way in a world from which legal threats are absent as in a world in which such threats are present? Juries or other administrative officers are now authorized to make this determination in jurisdictions where the traditional criteria of responsibility are supplemented by the "irresistible impulse" test; for the only meaning of "irresistible impulse" that is material for legal purposes, is an impulse that an individual would uniformly[184] not resist regardless of the presence or absence of a legal threat.[185] In jurisdictions where the irresistible impulse test is re-

Law (1908) 22 HARV. L. REV. 75, 84. It seems clear, however, that unless an individual is abnormal in some discernible respect, this cannot be determined, as the German courts speedily discovered. *Cf.* Mannheim, *supra* note 172, at 241-245. If he is abnormal in some discernible respect the question is whether he is a member of a class which is non-deterrable in this regard, *i.e.*, the question is one of responsibility. It is true that, strictly speaking, this is not a case of "irresistible impulse" except in an analogical sense, but we mean to include it within the category nevertheless.

[184] The uniformity demanded must, of course, be relative not absolute. We are dealing with matters of probability and degree and certainty is impossible. We mean by the statement in the text to designate a very high probability.

[185] Stephen at one time drafted a bill that would have recognized as an excuse "the existence of an impulse to commit a crime so violent that the offender would not be prevented from doing the act by knowing that the greatest punishment permitted by law for the offence would be instantly inflicted, the theory being that it is useless to threaten a person over whom by the supposition threats can exercise no influence." See REPORT OF THE ROYAL COMMISSION APPOINTED TO CONSIDER THE LAW RELATING TO INDICTABLE OFFENSES (1879) 17-18. The Royal Commission disapproved the bill (with Stephen's concurrence) on the following grounds: "The test proposed for distinguishing between such a state of mind and a criminal motive, the offspring of revenge, hatred or ungoverned passion, appears to us on the whole not to be practicable or safe, and we are unable to suggest one which would satisfy these requisites and obviate the risk of a jury being misled by considerations of so metaphysical a character." The Commission expressed the opinion that "many cases must occur which cannot be satisfactorily dealt with otherwise than by" an appeal to the executive. Since Stephen held the view that a man whose power of self-control was genuinely impaired cannot be said to *know* that his act is "wrong" (see 2 HISTORY OF CRIMINAL LAW, at 171), he had "no very strong opinion on the subject" of the Commission's conclusion (*ibid.*). But *cf.* his somewhat dogmatic testimony before The Select Committee on the Homicide Law Amendment Bill (1874) 9: "When you pass a law punishing a man for a crime you are dealing with a reasonable being; you are dealing with a being whom you presume to know that on a great many familiar grounds, quite independent of any mere fear of punishment, he ought not to commit crime; who knows, for instance, that if he does commit a murder he causes extreme distress, and great fear, and, it may be, ruin to his neighbors, and does a thing cruel and brutal in itself. That is the assumption on which all criminal law proceeds, that it is addressed to ordinary reasonable beings; but it seems to me that if a man by bodily disease is placed in such a position that he cannot feel that at all, and that he does not know the nature of this act, and the consequences of it, he ought to be locked up in a lunatic asylum, and that exactly as much whether the nature of his delusion does or does not prevent him from remembering that the law has forbidden his act."

jected, this inquiry is not authorized.[186] Considering the problem from the point of view of deterrence alone, there is much to be said in favor of the latter policy. Except in the clearest cases, such as kleptomania, any effort to distinguish deterrable from non-deterrable persons must obviously encounter tremendous difficulty in the present state of knowledge.[187] Since it is commonly known that the distinction is obscure and the issue in particular cases one of more or less, to sanction the inquiry at all holds out hope to all potential offenders that they may be able to win exemption in this way, a hope that every finding of irresistible impulse in a borderline case inevitably fortifies. Hence, it may reasonably be feared that the adoption of the "irresistible impulse" test would weaken the deterrent effect of the law upon those whom it is possible to deter.[188] This consideration is not decisive, however, for the

[186] The rule in a jurisdiction like New York [People v. Schmidt, 216 N. Y. 324, 110 N. E. 945 (1915) Cardozo, J.] that "wrong" in the "right and wrong test" means moral as well as legal wrong may be explained as the product of a judgment that people suffering from mental disorder, who believe that acts which they know to be legally punishable are morally right, are so unlikely to be deterred by the fear of punishment from doing what they believe to be right, that it is useless to threaten them. If it is true that impulses proceeding from the moral judgments of the mentally diseased are uniformly or usually irresistible, the New York rule provides a partial definition of the group of persons who are non-deterrable because of irresistible impulse, and it requires administrators to consider only the initial question whether the impulse proceeded from a belief in the morality of the act. We are not asserting that this is the explanation of the Schmidt decision but only that it may be defended on that basis. The decision may have been prompted merely by a desire to soften the rigor of the "right and wrong" test or not to discriminate against insane persons whose delusions relate to moral rather than legal matters. *Cf.* CARDOZO, LAW AND LITERATURE (1930) 108-9: "I know it is often said, and very likely with technical correctness, that the statute [N. Y. Penal Law § 34] ought not to be viewed as defining insanity. What it does, and all that it does is to state the forms or phases of insanity that will bring immunity from punishment. All this may be true, yet it is hard to read the statute without feeling that by implication and suggestion it offers something more. It keeps the word of promise to the ear and breaks it to the hope. Let us try to improve its science and at the very least its candor." See in this regard, *supra* note 178.

[187] *Cf.* S. GLUECK, *op. cit. supra*, note 178, at 308: "In most cases, it is difficult for the expert to answer with any certainty that any particular act was or was not irresistible, since it cannot be definitely stated that all impulses of a certain type in certain mental disorders are always irresistible. *The problem remains an individual one* (author's italics); and as such, the irresistible impulse test cannot be said to provide a uniform rule whereby the jury can measure off a defendant's responsibility."

[188] It may, of course, be feared that the same result will follow from the utilization of the "right and wrong test" and, indeed, from the recognition of a defense based on any condition that it is possible to simulate or any circumstances that may be proved by false testimony. The differences are in the degree of probability that the tribunal will make a mistake; and the more difficult the question, the higher is that probability. The "irresistible impulse" question is even more difficult, for the most part, than the "nature and quality" and "right-wrong" questions; hence a consideration of the danger of erroneous answers has greater force.

On the other hand, the proposal made in Illinois by a committee of the State Bar Association and the Cook County Judicial Advisory Council, that the crucial question be whether an individual "when he commits an offense is insane in the

rejection of the "irresistible impulse" test is open to objection from the other side. In some cases, at least, the irresistible character of the impulse is reasonably clear and the punitive treatment of the individuals involved is, therefore, not required in the interests of deterrence. But rejection of the test consigns such individuals to such treatment, with consequent sacrifice of the social interest in their individual welfare and, if the death penalty is employed, consequent public excitement. Hence, the issue is genuine and the question whether it is better to err on one side or on the other is difficult to resolve. The problem will be simplified, however, as the development of psychiatry augments our knowledge of the characteristics of the non-deterrable class and strengthens the case for eliminating the lay jury as the agency for determining whether or not a particular individual is a member of that class.[189]

2. *Homicidal Behavior Which Indicates that the Individual Engaging in Such Behavior is Probably a Dangerous Person*

We have thus far confined our attention to the problem of differentiating homicidal behavior which it is desirable and possible to deter from that which it is either undesirable or impossible to deter. But the distinction between criminal and non-criminal homicides cannot be made solely in these terms, unless the word "criminal" is defined to signify amenability to punitive treatment for the sake of deterrence, rather than amenability to *any* compulsory treatment. If the term is

sense of being afflicted with a mental disease or mental defect which is the direct cause of the commission of the offense," was urged on the principal ground that this "represents the real question which even under existing law the jury as a practical matter propounds to itself." See DRAFT CODE (1935) Intro. v. If that is as far as juries will in fact go, and we are not satisfied that it is, it must be admitted that, so long as jury trial is retained for this purpose, the issue is badly stated in the text; the issue is rather whether to authorize an inquiry as broad as this, in spite of the danger of weakening the net deterrent efficacy of the law, or to refuse to authorize any inquiry at all. The latter alternative may be impossible on the ground that juries would insist upon considering the question anyhow, with consequent nullification. Indeed, the English statistics, *supra* Part I, note 116, point to a deep-seated aversion to executing the insane. See also in this connection, note 178, *supra*.

[189] The literature dealing with the problem of the expert as opposed to the lay tribunal is very extensive. See, in particular, Tulin, *The Problem of Mental Disorder in Crime: A Survey* (1932) 32 COLUMBIA LAW REV. 933; Overholser, *The Massachusetts Procedure Relative to the Sanity of Defendants in Criminal Cases (The Briggs Law)* (1935) 19 MINN. L. REV. 308; WEIHOFEN, INSANITY AS A DEFENSE IN CRIMINAL LAW (1933) c. v. It is worth noting that perhaps the major difficulty with employing the expert tribunal reduces to the fear that psychiatrists, lacking sympathy with the use of treatment directed toward the deterrence of potential offenders, will only ask themselves whether an individual is mentally abnormal and not whether, if he is, he is also a member of the class of non-deterrable persons. *Cf.* Dr. H. Douglas Singer, quoted in ILLINOIS CRIME SURVEY (1929) 743: "... from the psychiatrist's point of view the question is not one of abolishing responsibility, but of ignoring it, and of planning treatment to fit the offender rather than his offense."

accorded the latter significance, the problem of distinguishing criminal and non-criminal homicides is that of differentiating among persons whose behavior has caused death for the purpose of determining which of them should be amenable to any treatment and which of them should not.[190] Since treatment can operate to prevent undesirable behavior by incapacitating or reforming dangerous individuals as well as by deterring potential offenders,[191] we must consider whether there is any homicidal behavior which (1) indicates an individual to be more likely than the generality of men to engage in undesirable behavior in the future[192] but (2) is not included within the class of homicidal behavior that it is desirable and possible to deter. If there is any such behavior there is an obvious case for making it criminal so that the individuals who engage in it will be amenable to incapacitative and reformative treatment. But we doubt that there is any such except for the homicidal behavior of the legally irresponsible, that is, of members of the non-deterrable class.[193] It seems clear that an actor is not indicated to be more dangerous than other men by an act which is intended to kill, if, under principles previously discussed,[194] the act is justifiable, or by an act not intended to kill, which

[190] This is the function of the distinction under the terminology we have adopted. Its function is broader than that of distinguishing between the legally responsible and irresponsible, which is, as we have said, the separation of those individuals who may be subjected to treatment directed towards the deterrence of potential offenders, from those who may not be subjected to treatment designed to serve that end. *Cf.* *supra* note 178; Part I, pp. 727-728, *supra*. Nevertheless, it must be recognized that in legal as well as popular language, the behavior of the legally irresponsible is usually denominated "non-criminal" (but see Part I, note 114, *supra*) with the result that the functions of the two distinctions are rendered identical. From the legislative point of view there may be wisdom in adhering to this popular usage. For the words "criminal behavior" normally carry an implication of moral disapproval that can be put to practical use by reserving the words to designate behavior that it is desirable and possible to deter. If that is done, some other word is necessary to make the distinction referred to in the text. On the other hand, the identification of "criminality" and "responsibility" is practically undesirable because it leads to a misunderstanding of the function and effect of the rules governing responsibility. It also leads to preconceptions as to what the purposes of treatment should be. Accordingly, we prefer to voice disapproval of behavior directly by referring to "behavior which it is desirable to prevent" (whether by deterrence or by other means) and to use the world "criminal" as a strictly legal term, connoting the particular legal consequence of amenability to treatment under an existing body of law.

[191] See p. 731, *supra*.

[192] The indication need not, of course, be conclusive. The question at this stage is whether the indication is sufficient to warrant further inquiry. See pp. 731-733 and notes 128-131, *supra*.

[193] In view of the scope of this article, we do not consider the broad problem of the extent to which non-homicidal behavior may be sufficiently indicative of individual dangerousness to warrant rendering the individuals who engage in it subject to a full inquiry into their personality and background and amenable to incapacitative and reformative treatment, if such an inquiry should justify a finding that they are highly likely to engage in seriously undesirable behavior in the future. But see notes 128-130, *supra* and note 196, *infra*.

[194] See pp. 735-742, *supra*.

creates a risk of death, if the risk would not be apparent to prudent men of common knowledge and experience or, even if the risk would be apparent to such men, if under principles discussed above, its creation is justifiable. On the other hand, an actor is indicated to be more dangerous than other men by homicidal behavior of the sort which cannot be deterred solely because the individual involved is a member of what we have called the class of non-deterrable persons. Indeed, it is difficult to think of any persons who are, in general, more likely to engage in undesirable behavior, unless subjected to incapacitative and curative-reformative treatment, than those who by reason of mental disorder or defect are beyond reach of the threats of the law.[195] Accordingly, even though it may be futile to endeavor to deter potential criminals of this sort, it is necessary that their behavior be made criminal[196] for the sake of rendering them amenable to incapacitative and reformative treatment, if after full inquiry they are deemed to be dangerous persons.[197] In other words, there is no reason why the behavior of non-deterrable persons should not be made criminal to precisely the same extent as the

[195] It is worth noting that persons who solely by reason of mental disorder or defect are unaware of the character or potentialities of their bodily movements or who, having that awareness, are unaware of the threat of punishment, or cannot be affected by the threat, are highly likely also to be immune to the normal extra-legal incentives to avoid undesirable behavior. *Cf.* Stephen's testimony, *supra* note 185.

[196] As we have suggested above, in so far as individuals suffer from *well-defined* mental disorder or defect which generally involves dangers of seriously undesirable activity, the law may safely deal with the problem by specifying the disorder or defect as a basis for compulsory treatment and by authorizing administrative officers to determine the probability of undesirable behavior and the character of the treatment necessary to prevent it. See pp. 732-3, and note 131, *supra*. The preventive value of such a general commitment procedure is obvious but it is equally clear that its possibilities are restricted in scope. Unless the persons amenable to the procedure are designated in terms of some reliable indicium of dangerousness, intolerable power is conferred upon administrative officials. See note 130, *supra*. Accordingly, except in cases of *well-defined* mental disorder or defect (matters of reliable psychiatric knowledge) the criterion of amenability to treatment must be formulated in terms of specific behavior. But what behavior (that is not indicative of *well-defined* mental disease or defect) may serve to stamp individuals as sufficiently likely to engage in undesirable behavior in the future to warrant subjecting them to this sort of regimen? The answer, it seems clear, is, only behavior that is itself seriously undesirable, that is, behavior which it is desirable to deter. Hence, the problem reduces to that of determining what mental disorders or defects are sufficiently well-defined to be employed for this purpose. This is a problem that lawyers and psychiatrists must endeavor to solve jointly. What is required is a careful discrimination between more and less reliable psychiatric knowledge, a discrimination that scientists, appraising their own knowledge at a given time, should be ready and eager to make. It may be found, as a matter of drafting, however, that the word "insanity," for all its ambiguity, has been accorded a legal meaning that is sufficiently clear for legislative purposes and is not too rigid to permit expansion of meaning with the expansion of psychiatric knowledge. *Cf.* ILLINOIS STATE BAR ASS'N, DRAFT CODE (1935) v.

[197] In part, such a provision overlaps the general commitment provision referred to above (note 196). In part, however, it may be more extensive.

behavior of deterrable persons. The distinction between the two classes of persons is significant only for purposes of treatment.

In the light of the foregoing discussion, we are justified in concluding that whether a legal system is constructed on the so-called classical theory that the principal purpose of treatment should be the deterrence of potential offenders,[198] or on the positivist theory that the incapacitation and reformation of dangerous individuals should be the principal ends of treatment,[199] the distinction between criminal and non-criminal homicides must be made in the same general terms.[200] No matter how closely one follows Bentham[201] in clinging to deterrence as the dominant objective, it is necessary, in dealing with non-deterrable persons, to embrace the incapacitative principle and, if gratuitous cruelty is to be avoided, the reformative principle as well. No matter how firmly one rejects deterrence as an end of treatment, the only persons who may justifiably be selected from the rest of the population for compulsory incapacitative and reformative treatment are those who suffer from well-defined mental disorder or defect and those who have engaged in behavior of the sort that it is desirable and *generally* possible to deter.[202] Hence, the same considerations are relevant in distinguishing criminal from non-criminal homicides whatever the dominant end of treatment may be.[203] Accordingly, any further discrim-

[198] See, *e.g.*, BENTHAM, PRINCIPLES OF PENAL LAW, Part II, Bk. I, c. iii; I WORKS (1843) 396 *et seq.*

[199] See, *e.g.*, Cantor, *Conflicts in Penal Theory and Practice* (1935) 26 J. CRIM. L. 330; S. Glueck, *Principles of a Rational Penal Code* (1928) 41 HARV. L. REV. 453; Gausewitz, *supra* note 129; MCCONNELL, CRIMINAL RESPONSIBILITY AND SOCIAL CONSTRAINT (1912); ALEXANDER AND STAUB, THE CRIMINAL, THE JUDGE AND THE PUBLIC (1931) esp. p. 70 *et seq.*; Bernard Glueck, *Analytic Psychiatry and Criminology* in S. GLUECK, PROBATION AND CRIMINAL JUSTICE (1933) 197; Singer, *supra* note 189.

[200] The point does not hold if deterrence is regarded as the *sole* end of treatment and if it is admitted that there is a non-deterrable class. It may be that the earliest followers of Beccaria in France did not admit that there is such a class (*cf.* Gillin, Penology [1927] 326-328), and that this is what is meant by the frequently repeated statement that the classical theorists postulated absolute freedom of the will. It seems clear, however, that in so far as there is a real issue as to what the purposes of treatment should be, it must be formulated in terms of the partial inconsistency of the theories stated in the text. That such inconsistency is genuine will appear hereafter.

[201] See *supra* note 198.

[202] We do not assert that it is *necessary* to subject *all* such persons either to incapacitative or to reformative treatment, that is, that *all* such persons are dangerous. An inquiry into the particular circumstances of the homicide and the background of the individual may warrant the conclusion that he is as safe a risk for the future as any man selected at random from the population. We assert only that it is sufficiently probable that *any* such person may be dangerous, in the sense defined *supra*, note 128, to justify subjecting all to the test of such an inquiry. We shall have something to say hereafter of the problems of the inquiry itself.

[203] Professor Glueck has suggested that if we ever come to large-scale acceptance of the positivist theory, as he thinks we should, we may probably expect substantial modification of the behavior content of the substantive law. *Principles of a Rational Penal Code*, *supra* note 199, at 480; CRIME AND JUSTICE (1936) 221 *et seq.* As we have said, we see no basis for this view in the field of major offences, though many minor offences involve behavior which is not indicative of dangerousness in any sense and must be dealt with on deterrent principles if it is to be dealt with at all. Professor Glueck quotes a statement of Dean Pound's as showing "the basic mode of analysis into act and intent . . . to be faulty." The statement is: "We know that the old analysis of act and intent can stand only as an artificial legal analysis and that the mental element in crime presents a series of difficult problems." CRIMINAL JUSTICE IN CLEVELAND (1922) 586. The sentence is obviously equivocal and we doubt that it bears the interpretation put upon it. In any event, an analysis of criminal behavior in terms of act, knowledge, intent, motive and risk is essential for legal purposes, whatever the ends of treatment may be determined to be. In so far as such an analysis is psychological, it is not in any respect unsound. It does not, of course, provide a complete psychology but the problem is not solely a psychological one.

inations among criminal homicides are, like the distinction between deterrable and non-deterrable persons, significant only in determining how individuals who commit such homicides should be treated. We shall therefore proceed in a subsequent issue to a consideration of the general problems of treatment.

[To Be Concluded]

HERBERT WECHSLER
JEROME MICHAEL
COLUMBIA UNIVERSITY SCHOOL OF LAW