ARTICLES

HUNTING THE DRAGON:

REFORMING THE MASSACHUSETTS MURDER STATUTE

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"Other sinnes onely speake; Murther shreikes out: The Element of water moistens the Earth, But blood flies upwards, and bedewes the heavens."

—John Webster[1]

I. INTRODUCTION

Murder is the most serious of all crimes. Given the grave consequences of murder, both in act and in punishment, one would expect careful, clearly defined elements of the crime. Unfortunately, this is often not the case. Some states, including Massachusetts, have statutes that retain outdated or archaic common law terms that are subject to constant redefinition by judges.

This article will examine how the Massachusetts murder statute has dramatically changed in the last two decades. This metamorphosis has come at the hands of a Supreme Judicial Court willing to freely interpret the archaic common law terms. The recently approved Model Jury Instructions on Homicide[2] codify the changes to

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[1] 2 JOHN WEBSTER, *The Duchess of Malfi*, Act 4, Sc. 2 (1623), *reprinted in* THE COMPLETE WORKS OF JOHN WEBSTER (F.L. Lucas ed., 1928).

[2] The Model Jury Instructions were approved in Massachusetts in 1999. This article is not intended as a definitive statement of what the law of homicide in Massachusetts currently is, but rather how it has recently evolved through the judicial process. For a survey of the current law including the recently approved Model Instructions on Homicide, see Patricia A. O'Neill & Katherine E. McMahon, *Recent Developments in the Law of Malice and*

the law of homicide over the last thirty years.[3] However, this restatement of the law occurred outside the legislative system and therefore, may not reflect how the public believes murder is defined and its appropriate punishment. The murder statute, in fact, has effectively gone untouched by the Legislature since 1858. Second, the Model Instructions do not restrict the Supreme Judicial Court ("SJC') from continuing to redefine the substantive law through case law. Some attempts to rectify this legislative neglect, notably a bill to add a definitional section to the current statute sponsored by the Massachusetts District Attorney's Association were recently offered.[4] However, I propose that a better course of action is to subject the murder statute to the legislative process and to rewrite the statute without relying on archaic common law terms.

Part I of this article examines the common law history of murder as it developed over the centuries. Part II analyzes how murder was ultimately codified in Massachusetts during the 19th century. Part III discusses how various court decisions recently altered the nature of murder, and specifically how malice is defined. Finally, Part IV proposes a new murder statute that is clearly written, not tied to archaic common law terms and attempts to properly punish homicides according to culpability.

II. THE COMMON LAW DEFINITION—FROM ENGLAND TO MASSACHUSETTS

"The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is part of the rational study, because it is the first step toward an enlightened skepticism, that is, toward a deliberate reconsideration of the worth of those rules."[5]

The law of homicide, the distinction between murder and manslaughter, and the various grades of each, took centuries to develop. As this body of law developed, the terms that define the various forms of murder such as "malice," "premeditation," "extreme atrocity" and "felony-murder," became terms of art and divorced from their original meaning. These terms are often not only absolutely indecipherable to lay people, but due to the changing nature of case law, their meaning has become elusive for the bench and the bar alike.

In 1858, the Massachusetts Legislature enacted a murder statute, but it simply codified common law terms and principles without further defining those terms. Given the Legislature's use of common law terms, the courts were free to develop and to change the definitions of those terms. To understand what the Legislature codified and how the courts changed the law of murder, one must understand how

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Homicide, 84 MASS. L. REV. 158 (2000).

[3] *See id.*

[4] *See* H.R. 3430, 182d Leg. Reg. Sess. (Mass. 1999).

[5] Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

the law of murder developed.

A. *English Common Law*

Early English common law did not consider a person's mental state when establishing liability for homicide. Rather, the English adopted a form of strict liability, thereby; a person was liable if his or her conduct in any way caused the victim to "be nearer to death or further from life."[6] A person was liable for the homicide even in instances of an accident or self-defense.[7] It was not until the 12th century that *mens rea*, literally a "guilty mind," became a consideration in homicide cases, thus excusing a person who killed without fault from punishment.[8] After this important development, homicide was divided into two categories. The first category was justifiable and excusable homicides, which were not subject to punishment. The second category included felonious homicides and murderous or secret killings,[9] which were both punishable by death.

All unjustified and unexcused homicides carried the death penalty.[10] In response, the common law developed an exception to the law called "benefit of clergy" in order to soften the harsh penalties for certain killers.[11] The benefit of clergy exception shielded those who qualified for its protection from capital punishment.[12] Originally, only clergy members could benefit from clergy

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[6] ROY MORELAND, THE LAW OF HOMICIDE 1-2 (1952) (citing 2 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 52 (3d ed. 1923)).

[7] *See id.* at 2.

[8] *See id.* at 5-7 (emphasis added).

[9] The term "murder" developed during this period to categorize certain secret killings. The history of the term "murder" reveals the rationale behind the "lying-in-wait" form of homicide:

> After the Norman conquest of England, the enmity of the subjected Anglo-Saxons sought satisfaction in secret slayings of Normans by waylaying. To crush this evil, William the Conqueror imposed a heavy amercement fine called the *murdrum* upon any hundred where a Norman was found by a slain by an unknown hand. Anyone killed under such circumstances was presumed to be a Norman and to have met death at the hands of Anglo-Saxons who had lain in wait for him. The sole rebuttal of the presumption was the presentment of Englishry, that is, proof that the deceased was English and not Norman. By 1340 there were practically no foreign born Normans left in England. Therefore, the fine was abolished in that year, but the word "murder" lived on as the worst kind of homicide, although without its former technical meaning.

Id. at 9 (footnotes omitted).

[10] *See id.*

[11] *See id.* at 10.

[12] Rollin M. Perkins, *A Re-Examination of Malice Aforethought*, 43 YALE L.J. 537, 541-42 (1934). Perkins states that:

> [i]n ancient times the lay courts did not have criminal jurisdiction over the clergy in felony cases. The members of the clergy could be tried only in the ecclesiastical court

protection, but eventually it protected all who met certain criteria, such as the ability to read.[13]

The benefit of clergy exception ultimately led to the introduction of the term "malice aforethought."[14] From 1496 to 1547 Parliament passed a series of statutes excluding some of the more serious felonious homicides from benefit of clergy protection.[15] The excluded homicides were referred to as "murder committed with malice aforethought."[16] This new element of malice aforethought, therefore, became the dividing line between the most serious crime of murder and other felonious, but lesser, homicides. As with most innovations of British law during the Elizabethan period, the definition of Lord Coke became the standard: "[m]urder is when a [person], of sound memory and of the age of discretion, unlawfully killeth . . . any reasonable creature in [being] under the king's peace, with malice [aforethought], expressed or . . . implied by law . . . ."[17] English law named homicides committed without malice aforethought manslaughter. Although such crimes were purposeful killings, the law deemed those homicides to lack malice aforethought because they occurred based upon "chance-medley,"[18] such as in the cases of a physical altercation or the discovery of a spouse in the act of adultery.[19] Those killings committed with malice aforethought were treated more severely than any other killings, and the penalties reflected the difference, murder was punishable by death whereas manslaughter was punishable by a brand on the thumb and up to a year's imprisonment.[20]

The key to understanding what constituted murder quickly became how one defined "malice aforethought." Prior to the 16th century, "malice aforethought" suggested only that a felonious homicide was not accidental and implied little about intentional wrongdoing.[21] By the 16th century, malice aforethought became associated with the concept of a premeditated killing, as opposed to a sudden or provoked killing.[22] Thereafter the common law presumed malice aforethought, and the defendant bore the burden of showing the existence of a legal justification or

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and could be punished only by such penalty as that court could inflict. It was an elementary rule that the church would never pronounce a judgment of blood.

Id. (quoting 1 Pollock and Maitland at 424).

[13] *See id.*

[14] *See id.*

[15] *See id.* at 543; *see also* MORELAND, *supra* note 6, at 9.

[16] Perkins, *supra* note 12, at 543.

[17] 3 EDWARD COKE, INSTITUTES OF THE LAW OF ENGLAND 47 (E & R Brooke 1794).

[18] In the context of homicide, "chance-medley" is sometimes defined as any kind of homicide by misadventure, but is more often strictly applicable to such killing only as happens in defending one's self. BLACKS LAW DICTIONARY (6th ed. 1990).

[19] 4 WILLIAM BLACKSTONE, COMMENTARIES *191-92 (Garland Pub. 1978).

[20] Perkins, *supra* note 12, at 544.

[21] *See id.* at 545; MORELAND, *supra* note 6, at 10.

[22] Perkins, *supra* note 12, at 545-546.

extenuation.[23]

The common law did not limit malice aforethought to hatred, ill-will, or the desire of revenge against the victim, but included several other possible situations. "The malice requisite to murder or other culpable homicide may be that of the disposition or temper, independently of a definite motive to, or end proposed to be attained by a homicide."[24] Several common law examples included, cruelty or a depraved spirit,[25] facilitating the commission of a crime,[26] and situations of reckless behavior or gross negligence.[27]

Although premeditation was useful in proving malice aforethought, the law did not always require proof of planning activity. If no motive was obvious, and the killing was not in response to provocation, the law assumed that the killer had a concealed motive.[28] This assumption led to the development of the concepts of "express" and "implied" malice.[29]

Where planning and motive were apparent, the law expressly acknowledged malice aforethought.[30] A judge could also find malice aforethought without external evidence, such as a clear motive, under the theory of implied malice.[31] Implied malice was an inference of fact, one that assumes that people generally intend the natural and probable consequences of their acts.[32] By the 19th century, it

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[22] 4 WILLIAM BLACKSTONE, COMMENTARIES at *201; 1 EDWARD H. EAST, PLEAS OF THE CROWN 224 (P.R. Glasebrook ed., Professional Books 1972)(1803).

[24] 1 HALE 475; 1 EAST, P.C. 224 (1803).

[25] For example, ROSS'S C. 1 GAL. 628; FOST. 256; Or by resolving to kill the next man one shall meet. 4 BLACKSTONE, *supra* note 19, at *200.

[26] In a homicide done incidentally to the commission of any other intended crime, or in the doing of another intended act, the malice and its kind and degree is indicated by the crime intended, or by the motive, manner, means and circumstances of the commission of the crime or the doing of the act. FOST. 290, 291; 1 EAST, *supra* note 24, at 234.

[27] For example, 1 HALE, 475; 4 BLACKSTONE, *supra* note 19, at *200; 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN ch. 29 § 12 (7th ed. 1795); 1 EAST, P.C. 231 (deliberately discharging a gun at a multitude of people); 1 HAWKINS, ch. 31 § 68 (riding a horse, known to be vicious and dangerous, into the midst of a multitude of people); 1 HALE, 475; 3 COKE, *supra* note 17, at 57; 1 EAST, *supra* note 24, at 231 (throwing a stone likely to do bodily injury, among a crowd, though no injury is intended to any one in particular); SQUIRE'S C. RUSSELL ON CR. 620, Ed. of 1224 (grossly and cruelly neglecting or refusing to supply nourishment to one, whom the party so neglecting or refusing is bound to support).

[28] Perkins, *supra* note 12, at 546.

[29] MASSACHUSETTS COMMISSION ON THE PENAL CODE REPORT 18 n.v (1844) (citing RUSS. ON CRIME. b.3, c.1, p. 614, Ed. 1824)).

[30] 3 COKE, *supra* note 17, at 51; 1 HAWKINS, *supra* note 27, at ch. 31, § 3. Express malice, therefore, had to be proven by external evidence, "when one kills another with a deliberate mind and formed design; such formed design being evidenced by external circumstances discovering the inward intention. . . ." RUSSELL. ON CRIME. b.3, c.1, p. 614 (1824).

[31] MORELAND, *supra* note 6, at 11-12.

[32] *See id.*

was an accepted legal doctrine that malice could be established by proof of intent to kill or intent to inflict serious injury, or "wanton disregard" of the risk to human life.[33] Malice aforethought could be reduced to four different states of mind:

> (a.) An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not;
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> (b.) Knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
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> (c.) An intent to commit any felony whatever;
>
> (d.) An intent to oppose by force any officer of justice on his way to, in, or returning from the execution of the duty of arresting, keeping in custody, or imprisoning any person whom he is lawfully entitled to arrest, keep in custody, or imprison, or the duty of keeping the peace or dispersing an unlawful assembly, provided that the offender has notice that the person killed is such an officer so employed.[34]

As the meaning of malice aforethought moved away from intentional or premeditated killings, the role of provocation also changed, eventually becoming a form of mitigation in an intentional killing.[35] As Justice Holmes wrote, "[a]ccording to current morality, a man is not so much to blame for an act done under the disturbance of great excitement, caused by a wrong done to himself, as when he is calm."[36] An individual is not a murderer if he kills with the proper provocation because "[t]he law is made to govern men through their motives, and it must, therefore, take their mental constitution into account."[37]

One of the most dramatic changes to the law of murder was an American

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[33] Perkins, *supra* note 12, at 552-57. Justice Holmes took the following example from Blackstone to illustrate the difference between the level of recklessness required for murder and conduct that is merely manslaughter:

> When a workman flings down a stone or piece of timber into the street, and kills a man; this may be either misadventure, manslaughter, or murder, according to the circumstances under which the original act was done: if it were in a country village, where few passengers are, and he calls out to all people to have a care, it is misadventure only; but if it were in London, or other populous town, where people are continually passing, it is manslaughter, though he gives loud warning; and murder, if he knows of their passing, and gives no warning at all.

OLIVER WENDELL HOLMES, THE COMMON LAW 60 (1881) (quoting 4 WILLIAM BLACKSTONE COMMENTARIES *192).

[34] *Id.* at 52 (quoting SIR JAMES STEPHEN, DIGEST OF CRIMINAL LAW art. 233 (1883)).

[35] MORELAND, *supra* note 6, at 10-11.

[36] HOLMES, *supra* note 33, at 61.

[37] *Id.*

innovation of the late 18th and early 19th century: the division of murder into degrees. In 1794, the Pennsylvania Legislature created two distinct levels of murder to drastically reduce the number of capital offenses. [38] The Pennsylvania legislature declared that "[t]he several offenses, which are included under the general denomination of murder, differ so greatly from each other in the degree of their atrociousness that it is unjust to involve them in the same punishment."[39] Therefore, the Pennsylvania legislature developed first degree murder and second degree murder which several other states adopted over the next fifty years.[40] American law wanted the slowly evolving concepts of culpability to reflect the "current morality" of society. Still, the changes were viewed in terms of decades and centuries. During the early and mid 19th century some American states sought to end or limit the common law evolution of murder through codification. Other states, such as Massachusetts, chose to enshrine common law terms and concepts within their new murder statutes.

B. *Murder in Massachusetts*

The Massachusetts Bay Colony Charter expressly required that the new colony not enact any laws contrary to the laws of England.[41] The colonists broadly interpreted this provision to mean simply that their laws could not contradict the basic principles found in English law and its unwritten Constitution.[42] When the colonists developed their laws, they started with English common law and statutes and tempered them with principles of natural law and their own Puritan Protestant beliefs.[43] The 1641 Body of Liberties includes the first Massachusetts murder statute. That statute, which cited Biblical authority for each provision, mandated death for nearly every unjustified homicide, whether provoked or not:

> If any person committ any willful murther, which is manslaughter, committed upon premeditated mallice, hatred, or Crueltie, not in a mans necessarie and just defence, nor by meere casualtie against his will, he shall be put to death.[44]. . .If any person slayeth an other suddaienly in his anger or Crueltie of

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[38] Samuel Pillsbury, *Evil & The Law of Murder*, 24 U.C. DAVIS L. REV. 437, 452 (1990).

[39] *Id.* (quoting Edwin R. Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PA. L. REV. 759, 772-73 (1949) (quoting 4 JOURNAL OF THE SENATE OF THE COMMONWEALTH OF PENNSYLVANIA 242 (1974) codified as amended at PA. STAT. ANN. tit. 18, § 4701 (Purdon 1945))).

[40] Matthew A. Pauley, *Murder By Premeditation*, 36 AM. CRIM. L. REV. 145, 146 (2d ed. 1986); WAYNE LAFAVE & AUSTIN SCOTT, CRIMINAL LAW 642 (2d ed. 1986).

[41] *See generally* Mark DeWolfe Howe, *The Sources And Nature Of Law In Colonial Massachusetts, in* LAW AND AUTHORITY IN COLONIAL AMERICA (George Athan Billias ed., Barre Publishers 1965).

[42] *See id.*

[43] *Id.*

[44] MASSACHUSETTS BODY OF LIBERTIES OF 1641, *Liberty* 94 §4. *See* EDWIN POWERS, CRIME AND PUNISHMENT IN EARLY MASSACHUSETTS 1620-1692: A DOCUMENTARY HISTORY

> passion, he shall be put to death.[45]. . .If any person shall slay another through guile, either by poysoning or other such develish practice, he shall be put to death.

In 1804, Massachusetts redrafted the statute to include "willful" murder, felony-murder, and criminal solicitation.[46] Although not specifically mentioned, the courts interpreted the statute to include malice aforethought as an essential element of murder: "[t]o constitute the crime of murder. . . the killing must have been with malice, either expressed or implied . . . . . But though innocent of the crime of murder, the prisoner may . . . be convicted of manslaughter. . . ."[47]

During the 19th century, legal codification became a popular concept. Consequently, several states left behind their common law traditions and adopted comprehensive penal codes. Like many other states, Massachusetts's lawmakers sought to codify their common laws.[48] The works of Jeremy Bentham inspired this movement, arguing for a single legal code for judges to interpret, but not to expand upon or alter.[49] Bentham proposed that only legislative action should expand or alter this legal code.[50] The codification movement shared many common themes including a distrust of the past, the belief that the legislative process should regularly reconsider the law on the basis of modern developments, that judge made law was undemocratic, and that codification offered greater clarity, brevity and

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545 (1966). This section cites as authority *Exodus* 21:12-13 "Whoever strikes a man a mortal blow must be put to death. He, however, who did not hunt a man down, but caused his death by an act of God, may flee to a place which I will set apart for this purpose" and *Numbers* 35:31, "You shall not accept indemnity in place of the life of a murderer who deserves the death penalty; he must be put to death." *quoted in* POWERS, *supra*.

[45] MASSACHUSETTS BODY OF LIBERTIES OF 1641, *supra* note 44, at 94 §5. This section cites as authority *Leviticus* 24:17 and *Numbers* 35: 20-21, "If a man pushes another out of hatred, or after lying in wait for him throws something at him, and causes his death, or if he strikes another out of enmity and causes his death, he shall be put to death as a murderer. The avenger of blood may execute the murderer on sight" *quoted in* POWERS *supra* note 44, at 545.

[46] *See* 1804 MASS. ACTS c. 123 § 1 (1809).

> [T]hat if any person shall commit the Crime of Willful Murder, or shall be present, aiding and abetting in the Commission of such Crime, or, not being present, shall have been accessory thereto before the fact, by counseling, hiring, or otherwise procuring the same to be done, every such offender. . .shall suffer the punishment of death.

Id.

[47] Commonwealth v. Thompson, 6 Mass(1 Tyung). 134, 138-40 (1809).

[48] For a discussion of the codification movement during this period and especially in California, see Suzanne Mounts, *Malice Aforethought in California: A History of Legislative Abdication and Judicial Vacillation*, 33 U.S.F. L. REV. 313, 320-23 (1999).

[49] *See id.* at 320 (citing Justice Scarman, *Codification and Judge-Made Law: A Problem of Co-Existence*, 42 IND. L.J. 355, 367 (1967)).

[50] *See id.*

simplicity making the law more accessible to the individual.[51] Only a few jurisdictions, however, adopted codes with all of these lofty goals in mind. Many more jurisdictions emphasized the more modest goals of systemizing and simplifying the law, along the same lines of as Sir James Fitzjames Stephen's proposed 1878 Criminal Code in England.[52] For example, Stephen's proposed code excluded the term "malice aforethought" from the law of murder, because the term was too complex, ill defined and incompatible with the goal of simplifying the law. [53] The codification movement took hold in the United States including New York in 1865 and California in 1872, who both attempted to redraft their penal codes.[54] Although Bentham's goals were conspicuously absent from these codes, the New York code did not include common law terms, such as malice aforethought, to prevent courts from relying on common law precedent to intelligibly decipher their meaning.[55]

In 1833, the Massachusetts Legislature created the Commission on the Penal Code to study common law crimes and to report findings on how to best reduce the common law to a statutory scheme.[56] In 1844, the Commission issued a report that included a chapter on the law of homicide.[57] In addition to proposing a statute built upon a foundation of common law terms, the Commission recommended that murder be split into two levels, first-degree and second-degree murder.[58] The division of murder into two distinct categories was an attempt to make the punishment proportionate to the severity of criminal activity.[59] First-degree murder included only the homicides the Commission believed to be the most blameworthy: malicious killings committed with deliberate premeditation, killings committed with extreme atrocity or cruelty, and killings committed during the commission of felonies that carried at least a penalty of life imprisonment. Death was the punishment for "first-degree" murders.[60] Life imprisonment was the punishment for all other murders.[61] This sentencing scheme broke away from the common law tradition that included within the definition of capital murder many cases of unintentional killing, and a great variety of offenses terminating accidentally in death.[62]

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[51] *See* Sanford H. Kadish, *Codifiers of the Common Law: Wechsler's Predecessors*, 78 COLUM. L. REV. 1098, 1099-06 (1978).

[52] *See id.* at 1121.

[53] *See id.* at 1129.

[54] *See id.* at 1137.

[55] *See id.* at 1136.

[56] 1832 Mass. Acts ch. 30.

[57] MASS. COMM. ON PENAL CODE REPORT § 4 n.(c) (1844).

[58] *See id.* (enumerating the states that had adopted degrees of murder).

[59] *See id.*

[60] *See id.*

[61] *See id.*

[62] *See id.* The Commission cites the example of English law that if "one engaged in the perpetration of any 'felony' (a word of wide and somewhat doubtful interpretation in the common law) shall kill another, though accidentally, and where the offender could not have

The movement to update the Massachusetts murder statute continued in 1846 when Governor George N. Briggs called for reform during his annual address to the Legislature.[63] Governor Briggs stated that the mandatory death penalty in murder cases was often too severe.[64] First, he argued, prosecutors found it difficult to obtain convictions because some juries resisted sentencing some defendants to death because: "too heavy a blow in their opinion will fall upon the head of a fellow human being. . . ."[65] This trend, in the opinion of the Governor, ultimately weakened public confidence in the jury system.[66] Second, Governor Briggs argued that the severe penalty led to frequent use of the pardoning power.[67] The Governor recommended that only "the willful and deliberate murderer" be punished with death; murders "committed under circumstances of mitigation," should be punished by life in prison.[68]

Despite these calls for reform, the Legislature did not amend the murder statute until 1858. The new statute divided murder into two degrees, reserving the death penalty for only those "serious" murders identified by the Commission[69] Secondly, and significantly, the Legislature authorized the jury to determine the degree of murder.[70] This provision seems to be a response to Governor Briggs and was intended to keep juries from taking the law into their own hands by refusing to convict of a capital offense. Rather than allowing the jury to choose a verdict of murder in the second degree when the facts warranted murder in the first degree, the new statute was intended to oblige the jury to find facts within legislative

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foreseen the consequence, he is guilty of murder" *Id.* (citing 3 COKE INST. 56).

[63] Address of His Excellency George N. Briggs to the Two Branches of the Legislature of Massachusetts (Mass. 1846).

[64] *See id.* at 16-17.

[65] *Id.* at 16.

[66] *See id.* at 16-18.

[67] *See id.* at 17. He argued that even though an executive magistrate should not "interpose and arrest the execution of a law, because in his opinion its penalty was too severe," he stated that when public sentiment for leniency becomes too great, "there is danger that the pressure it might be too powerful for a kind-hearted though upright magistrate to resist." *Id.*

[68] *Id.* at 18.

[69] 1858 Mass. Acts c. 154. This statute read in relevant part:

> Section 1. Murder committed with deliberately premeditated malice aforethought, or in the commission of an attempt to commit any crime a crime punishable with imprisonment for life, or committed with extreme atrocity or cruelty, is murder in the first degree.
>
> Section 2. Murder not appearing to be in the first degree is that in the second.
>
> Section 3. The degree of murder is to be found by the jury.

Id.

[70] *Id.*

categories.[71] The current Massachusetts murder statute remains substantively the same as the 1858 statute:

> Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree. Murder which does not appear to be in the first degree is murder in the second degree. Petit treason shall be prosecuted and punished as murder. The degree of murder shall be found by the jury.[72]

The Legislature accepted only limited changes to the common law tradition. First-degree murder is limited to malicious premeditated killings,[73] killings that were extremely atrocious or cruel, and felony-murders that had an underlying penalty of death or life in prison. Although Massachusetts has not had a death penalty case since 1972,[74] the difference in punishment between the two degrees is significant. First degree murder carries the mandatory penalty of a life sentence in state prison, without the possibility of parole;[75] second degree murder also carries a life sentence, but with the possibility of parole after 15 years.[76]

Rather than rewriting the statute to be clear and free from judicial expansion, contraction, or alteration as Bentham proposed, the legislature continued to define murder in common law terms. The most important, and confusing, element of murder continues to be "malice aforethought." In Massachusetts, malice aforethought includes anger, hatred and revenge, and any other unlawful and unjustifiable motive.[77] Malice aforethought has also been defined as intent to

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[71] *See* Commonwealth v. Dickerson, 364 N.E.2d 1052, 1065 (Quirico J., concurring) (1977).

[72] MASS. GEN. LAWS ch. 265 §1.

[73] Whereas malice refers to the mental state of the defendant, deliberate premeditation describes the mental process by which the malice is formed. 32 JOSEPH R. NOLAN & BRUCE R. HENRY, MASSACHUSETTS CRIMINAL LAW ch. 8, §176 (2d ed. 1988).

[74] In 1972 the United States Supreme Court found the death penalty to be cruel and unusual punishment. Furman v. Georgia, 408 U.S. 238 (1972). Since that time, several legislative attempts to revive capital punishment in Massachusetts were found violative of Article 26 of the Massachusetts Declaration of Rights. *See, e.g.,* District Attorney for the Suffolk District v. Watson, 411 N.E.2d 1274 (Mass. 1980). Despite an amendment to the Massachusetts Constitution to allow the death penalty, the SJC again struck down the law. *See, e.g.,* Commonwealth v. Abimael Colon-Cruz, 470 N.E.2d 116 (Mass. 1984). In recent years, the death penalty has not had sufficient support in the legislature for passage. *See, e.g.* Erin C. McVeigh, *Death Penalty Bill Soundly Defeated*, BOSTON GLOBE, Mar. 13, 2001 at B4. *See* MASS. GEN. LAWS ch. 265 §2.

[76] *See* MASS. GEN. LAWS ch. 127 §133A.

[77] *See* Commonwealth v. Mangum, 256 N.E.2d 297, 303-04 (Mass. 1970); Commonwealth v. Leate, 225 N.E.2d 921, 924 (Mass. 1967) (citing Commonwealth v. Webster, 5 Cush 295, 304) Commonwealth v. Lussier, 128 N.E.2d 569, 575, 592 (Mass. 1955); Commonwealth v. York, 50 Mass. (9 Met.) 93, 104 (1845).

inflict injury "without legal justification or palliation."[78] Until the mid 1990s, Massachusetts law established malice aforethought through proof of any one of the following three malice prongs:

(1) The defendant (without justification or excuse) either specifically intended to kill the victim; or

(2) specifically intended to do the victim grievous bodily harm; or

(3) intended to do an act creating a plain and strong likelihood that death or grievous bodily harm would follow.[79]

Until recently, the first and second malice prongs could both apply to either first or second-degree murder, with the difference being the presence of premeditation. The third malice prong, which is not compatible with premeditation because it encompasses reckless killings, could only be applied to second-degree murder.

The continued inclusion of common law terms, such as "malice aforethought," "deliberately premeditated," "extreme atrocity or cruelty," along with the common law concept of felony-murder, within the murder statute, which remain undefined outside of case law has resulted in interpretational problems for the SJC. The SJC's decisions of the last 20 years have significantly changed the nature of each of these concepts. Equally important is the fact that despite these changes, the Legislature never clarified or redrafted the law of murder to reflect current public opinion.

III. RECENT CHANGES TO THE LAW OF HOMICIDE

"When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength."[80]

A. *Malice Aforethought*

In a 1934 article on the subject of malice aforethought, Professor Rollin M. Perkins stated, "[t]he phrase 'malice aforethought,' although it has been reasonably

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[78] Commonwealth v. Hicks, 252 N.E.2d 880, 881 (Mass. 1969); Commonwealth v. Bedrosian, 142 N.E. 778, 779 (Mass. 1924). An action in self-defense, however, excludes malice. *See* Connolly v. Commonwealth, 387 N.E.2d 519, 522-23 (Mass. 1979) (trial judges are warned against use of "finding" language in connection with malice).

[79] *See* Commonwealth v. Blake, 564 N.E.2d 1006, 1010 (Mass. 1991). The new standard, "knowledge of a reasonably prudent person that in the circumstances known to the defendant, the defendant's act was very likely to cause death" may be found in Commonwealth v. Judge, 650 N.E.2d 1242, 1246 (Mass. 1995) (citing Commonwealth v. Grey, 505 N.E.2d 171, 173 n.1 (Mass. 1987)).

[80] Oliver Wendell Holmes, *supra* note 5, at 469.

stable from day to day, has shifted its moorings appreciably during the centuries, and gives today no assurance that the period of change has passed."[81] Recent Massachusetts case law demonstrates that the law of murder, and especially the interpretation of "malice aforethought," is not so much shifting at its moorings, but rather adrift on the tide. In recent years, the Massachusetts Supreme Judicial Court significantly narrowed the concept of malice. In addition, the case law greatly changed the nature of third prong malice that effectively blurred the line distinguishing malice in murder and manslaughter.

1. The Limitation of Second Prong Malice

For centuries, proof of either an intent to kill or an intent to commit bodily harm to the victim proved malice aforethought. In the last five years, the SJC severely restricted second prong malice, the intent to cause a victim bodily harm, to the point where it no longer applies to first-degree murder and may only be used to prove second degree murder.[82] Amazingly, the SJC did this without stating that it was dramatically changing the law of murder and without setting forth their reasons for the change.

The SJC's assault on second prong malice began in 1995 with *Commonwealth v. Judge.*[83] The court accepted the trial judge's instructions on the traditional "three prong" definition of malice aforethought,[84] but ultimately limited the definition of malice when it turned its attention to the concept of "deliberate premeditation."[85] The court stated that deliberate premeditation requires specific intent—that the defendant act with the intent that his actions will cause death and that he acted with sufficient time to reflect on that consequence.[86] The court claimed to derive this position from the definition of "deliberate premeditation" as found in cases that went back to 1905.[87] Quoting from *Commonwealth v. McLaughlin,* the court stated that the word "deliberately" in the phrase "deliberately premeditated malice aforethought" referred to a prior formation of a purpose to kill.[88] The court did not

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[81] Perkins, *supra* note 12, at 570.

[82] *See* Commonwealth v. Judge, 650 N.E.2d 1242 (Mass.1995).

[83] *See id.*

[84] *Id.* at 437 (citing Commonwealth v. Puleio, 474 N.E.2d 1078, 1083 (Mass. 1985)).

[85] *Id.*

[86] *See Judge*, 650 N.E.2d at 1248 (citing Commonwealth v. Podlaski, 385 N.E.2d 1379, 1384 (Mass. 1979)) and Commonwealth v. Satterfield, 284 N.E.2d 216, 218 (Mass. 1972), both of which held that to convict on a theory of deliberate premeditation a jury must find "a conscious and fixed purpose to kill continuing for a length of time"). *See Satterfield*, 284 N.E.2d at 218.

[87] *See Judge*, 650 N.E.2d at 1248 n.6; Commonwealth v. Blaikie 378 N.E.2d 1361 (Mass. 1978). "The word 'deliberately' in the expression 'deliberately premeditated malice aforethought' has reference to the prior formation of a purpose to kill rather than to any definite length of time." Judge, 650 N.E.2d at 1248 n.6 (quoting Commonwealth v. McLaughlin, 224 N.E.2d 444, *cert. denied*, 398 U.S. 916 (Mass. 1967)).

[88] *See Judge*, 650 N.E.2d at 1248 n.6

find prejudicial error and upheld the conviction.[89] Yet, the *Judge* decision planted the seeds for a dramatic change in second prong malice.

Two 1998 cases have built upon *Judge*. In both *Commonwealth v. Diaz* and *Commonwealth v. Jenks,* the defendants were convicted of murder in the first degree by reason of deliberate premeditation.[90] In *Diaz*, the defendant argued that the trial judge erred by not instructing the jury that deliberate premeditation was incompatible with second or third prong malice.[91] Relying on *Judge*, the defendant contended that neither second nor third prong malice require a specific intent to kill[92] and that the jury mistakenly believed it could convict the defendant on a theory of deliberate premeditation without proof of a specific intent to kill.[93] Although the court refused to overturn the conviction, it agreed that it "would have been better to make clear to the jury. . .that murder in the first degree by reason of deliberate premeditation relates only to the first prong of malice."[94]

The concept of second prong malice as it relates to first-degree murder gasped its last breath on August 3, 1999 when the SJC approved new model jury instructions on homicide.[95] The Model Instructions state the elements for murder in the first degree by deliberate premeditation as: a) an unlawful killing with, b) malice which equals an intent to cause death, and c) deliberate premeditation.[96] An endnote

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[89] *See id.* at 1248.

[90] Commonwealth v. Diaz, 689 N.E.2d 804, 807-08 (Mass. 1998), Commonwealth v. Jenks, 689 N.E.2d 820, 822 (Mass. 1998).

[91] *See Diaz*, 689 N.E.2d at 807.

[92] *See id.* (citing *Judge*, 650 N.E.2d at 1248).

[93] *See id.*

[94] *Id.* Likewise, in *Jenks*, the court held that although the judge instructed the jury on all three prongs of malice, the instructions were clear and in accord with previous case law. Additionally the court found that the deliberate premeditation requirement for first-degree murder requires a specific intent to kill. *See Jenks*, 689 N.E.2d at 822 (quoting Commonwealth v. Gibson, 675 N.E.2d 776, 779 (Mass. 1997), *cert. denied*, 521 U.S. 123 (1997) (citing Commonwealth v. Waitte, 665 N.E.2d 982, 991 (Mass. 1996))).

[95] The Committee on Model Jury Instructions on Homicide proposed the Model Instructions. the Supreme Judicial Council appointed the committee and charged it with recommending a reasonably simplified set of jury instructions on the law of homicide and related issues. The Committee, chaired by Supreme Judicial Court Justice John M. Greaney, included representatives from the judiciary, prosecutors, and the defense bar. An initial set of draft Model Jury Instructions was published for comment and responses and commentary were solicited from the legal community. The Supreme Judicial Court issued a statement with the Model Instructions which cautioned that the instructions are not intended to be a comprehensive statement of the law on homicide but are designed to provide guidance on instructions that are frequently given in trials of homicide cases. The court stated, however, that trial judges should use the model instructions in applicable cases unless they determine that a different instruction would more clearly or accurately state the law. Supreme Judicial Court Public Information Office Press Release (Aug. 3, 1999) (on file with author).

[96] Model Jury Instructions on Homicide, Supreme Judicial Court Public Information Office Press Release (Aug. 3, 1999). The model instruction for malice states: "The second element the Commonwealth must prove beyond a reasonable doubt is that the killing was

accompanying the elements stated that the court intended to eliminate second prong malice; "[i]t is clear from recent cases, however, that the second prong of malice, i.e., an intent to do grievous bodily harm, is also insufficient, since deliberately premeditated murder requires proof that the defendant formed a plan to kill after deliberating."[97]

The court may claim that its recent rulings are rooted in precedent dating back to 1905, but it ignores several cases where second prong malice was valid proof of premeditated malice aforethought. As recently as 1985, in *Commonwealth v. Puleio,* the court clearly stated that the presence of either the first or second prong of malice could prove first-degree murder. In *Puleio*, the defendant pulled out a gun and shot at an acquaintance during an altercation with a third party but missed and killed a bystander.[98] The jury convicted the defendant of first-degree murder on a theory of deliberate premeditation.[99] The defendant appealed the conviction alleging five errors, including an objection to the judge's definition of malice during the charge to the jury.[100] The trial judge instructed the jury on malice as follows:

> If you are not convinced beyond a reasonable doubt that the defendant fired the pistol, you will return a verdict of not guilty. If you are convinced beyond a reasonable doubt that the defendant fired the pistol *intending to kill Wayne Subatch*, you will return a verdict of guilty of *murder in the first degree.* If you are convinced beyond a reasonable doubt that the defendant fired the pistol *intending to injure Mr. Subatch*, in such circumstances known to the defendant that, according to common experience, there was a plain and strong likelihood that death would follow the firing, then *even though you are not convinced beyond a reasonable doubt that the defendant intended to kill Wayne Subatch, you will return a verdict of guilty of murder in the second degree.*[101]

The trial judge offered the jury three choices: not guilty, guilty of first degree murder based upon deliberately premeditated first prong malice, or guilty of second degree murder based upon third prong malice. The defendant argued that the judge erred by failing to properly define for the jury the word "malice."[102] The court agreed that the instruction was erroneous because "[i]t was clearly incorrect to say that, to establish murder in the first degree, the Commonwealth had to prove that the defendant intended to kill" the other man.[103] The court ruled that this incorrect

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committed with malice. Malice, as it applies to deliberately premeditated murder, means an intent to cause death. The Commonwealth must prove that the defendant actually intended to cause the death of the deceased." *Id.* at 8.

[97] Commonwealth v. Jenks, 689 N.E.2d 820; Commonwealth v. Diaz, 689 N.E.2d 804.

[98] Commonwealth v. Puleio, 474 N.E.2d 1078, 1080 (Mass. 1985).

[99] *See id.* at 1079.

[100] *See id.*

[101] *Id.* at 1082.

[102] *Id.*

[103] *Id.*

standard placed "too heavy a burden on the Commonwealth."[104]

The judge's instruction erroneously deprived the Commonwealth of the ability to satisfy the *mens rea* requirement for murder in the first degree by establishing, in addition to deliberate premeditation, an intent to grievously injure [the other man] or to act in a way that would create a plain and strong likelihood of his death or grievous bodily harm. [105]

Despite the fact that the trial judge was in error, the court upheld the conviction in part because the jury convicted the defendant despite the fact that they were given a very limited definition of first-degree malice.[106] Likewise, *Commonwealth v. Campbell and Commonwealth v. Puleio* upheld this expansive version of malice to include the first and second prong of malice to satisfy mens rea for first degree murder.[107] The court held that malice aforethought "encompasses the intent to inflict great bodily harm and the intent to kill."[108]

In *Judge, Diaz* and the Model Instructions, the SJC greatly limited the *mens rea* required for first-degree murder, without even acknowledging the limitation with clear precedents such as *Puleio* and *Campbell.* Rather than explaining the limitation of an acceptable mens rea for first degree murder or distinguishing later cases from the facts of *Puleio*, the court simply acts as though *Puleio* and *Campbell* never existed. Worse yet, the court takes the intellectually dishonest course of deciding *Judge, Diaz* and *Jenks* as if this limited form of mens rea was the accepted rule since 1905. This sudden change by the court severely limited prosecutors as to whom they were able to prosecute under a theory of first-degree murder. Some defendants, who prior to 1995 the jury may have convicted for first-degree murder, are now only eligible for conviction for second-degree murder. Furthermore, the court usurped legislative authority in determining what constitutes criminal behavior and to determine how to punish that behavior. In addition, the court usurped the jury's power to determine the degree of murder by limiting them in

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[104] *Puleio*, 474 N.E.2d at 1082.

[105] *See id.* (emphasis added).

[106] *See id.* "The defendant cannot legitimately complain of an error that only could have benefited him." *Id.*

[107] *Puleio* 474 N.E.2d at 1083; Commonwealth v. Campbell, 393 N.E.2d 820 (Mass. 1979). In *Campbell*, a prisoner was convicted of first degree murder for the brutal murder of a fellow inmate. *Id.* at 820.

[108] *Campbell,* at 825 (citing Commonwealth v. Hebert, 368 N.E.2d 1204, 1207 (Mass. 1977)); Commonwealth v. Mangum, 256 N.E.2d 297, 303 (Mass. 1970); ROLLIN M. PERKINS, CRIMINAL LAW 30-40 (1957). The court stated,

> Applying these definitions, it is apparent that there was a case for the jury on the issue of murder in the first degree. The evidence tended to show that Perrotta died of strangulation following brutal dismemberment. The jury could infer that the wounds were not self-inflicted; that they were inflicted intentionally, *with at least the purpose of causing grievous bodily harm to Perrotta*; and that the use of two ligatures implied that the killing had been deliberately premeditated.

Campbell, 393 N.E.2d at 826 (emphasis added).

some cases to only a second-degree conviction.

2. The Limitation of Third Prong Malice

In recent years, the SJC also considerably limited third prong malice, . As with second prong malice, the phrase at issue is "grievous bodily harm". Contrary to traditional definitions of third prong malice, the court recently held that acts creating a plain and strong likelihood of grievous bodily injury should be viewed as involuntary manslaughter rather than murder.[109] The court arrived at this rule over the course of several, and seemingly inconsistent, decisions between 1987 and 1998. Additionally, in recent years, the SJC significantly changed the standard of knowledge required for third prong malice.

a. Standard of Harm

As noted above, the rule for third prong malice traditionally applied when the defendant intended to commit an act that created a plain and strong likelihood of either death or grievous bodily harm. Blackstone and Holmes illustrated the third prong malice with the workman who kills a man by flinging a stone onto a busy street without warning, knowing that people are passing below.[110] Third prong malice may encompass several forms of highly reckless behavior, such as certain physical assaults made upon a child, or the burning of a dwelling house.[111] Furthermore, the court held that malice is "implied from any deliberate or cruel act against another. . . ."[112]

Because the third prong of malice relies on what amounts to reckless behavior, some have argued that third prong malice crimes are involuntary manslaughter and

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[109] Commonwealth v. Vizcarrondo, 693 N.E.2d 677 (Mass. 1998).

[110] *See* HOLMES, *supra* note 33, at 60 (citing 4 WILLIAM BLACKSTONE COMMENTARIES *192).

[111] *See, e.g.*, Commonwealth v. Mello, 699 N.E.2d 1106 (Mass. 1995) (defendant fire bombed a six-family apartment building, which he knew was occupied, in the middle of the night); Commonwealth v. Starling, 416 N.E.2d 929 (Mass. 1981) (simple blow to a young child is sufficient to permit an inference of malice).

[112] Commonwealth v. Hicks, 252 N.E.2d 880, 881 (Mass. 1969) (quoting Commonwealth v. Leate, 225 N.E.2d 921, 924 (Mass. 1967) ("Malice includes 'every. . .unlawful and unjustifiable motive' and is 'implied from any deliberate or cruel act against another, however sudden"). In *Hicks*, the defendant was convicted of second degree murder for kicking the victim in the stomach several times thereby tearing the bowel attachment and causing internal bleeding. On appeal, the defendant argued that that the judge should have instructed the jury on involuntary manslaughter. The court rejected this notion first in that, the unlawful battery was quite "likely to endanger life." Second, as a result of the kicking, physical injury to the deceased was intended as much as the kicking action itself; therefore, the act could not be termed merely as a "disregard of probable harmful consequences." The fact that the defendant threw the victim to the ground and kicked him in the stomach with such force as to cause death by internal bleeding "amply warranted a finding of malice." *See id.* at 880-82.

not murder.[113] Traditionally the court rejected such arguments.[114] Starting in the late 1980's, however, the SJC significantly shifted its position on third prong malice to a point where some deliberate and cruel acts are now classified as involuntary manslaughter. Two child abuse cases illustrate this change.[115]

In *Commonwealth v. Starling,* the defendant was baby-sitting his girlfriend's twenty-two month old baby girl, who they later found dead due to "lacerations of the liver", and internal bleeding "as a result of one or more 'very severe' blows to the chest or abdomen with a blunt instrument such as a fist, a foot, or a board."[116] The defendant claimed that the baby fell out of bed twice, but the medical evidence did not support his account.[117] The defendant objected to the jury instruction on malice that stated an intentional act is "malicious" if one uses "force on the body of another that 'will probably do grievous bodily harm to that other and will create a strong and plain likelihood that the other will die as a result.'"[118] In approving that jury instruction, the court held, "[m]alice aforethought simply does not require any actual intent to kill or to do grievous bodily harm, or any foresight of such consequences, if the jury thought them obvious in the circumstances known to the defendant. . . . We are not inclined to revise our settled doctrine."[119]The Court pointed out that the jury must make the inference from common experience.[120] Therefore, "a simple blow with the hand administered to a healthy adult' will not support a finding of malice aforethought, since there is no 'plain and strong likelihood that death will follow.'"[121] But in a case of an assault and battery on a tender infant, 'a slight blow on the head of a new-born infant, which, if inflicted on an adult, would be harmless, but which necessarily would endanger the life and actually caused the death of the child, is proof upon which a jury might well find a party guilty of murder.'[122] This "settled doctrine," however, would soon be

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[113] *See id.* at 882. The defendant argued that his case met the standard for involuntary manslaughter found in *Campbell*:

> involuntary manslaughter is an unlawful homicide, unintentionally caused (1) in the commission of an unlawful act, *malum in se*, not amounting to a felony nor likely to endanger life. . ., or (2) by an act which constitutes such a disregard of probable harmful consequences to another as to constitute wanton or reckless conduct.

Id. (quoting Commonwealth v. Campbell, 226 N.E.2d 211, 218 (Mass. 1967)).

[114] *See id.* at 882 ("unlawful battery was quite unlikely to endanger life," and hence "could not be classified as involuntary manslaughter").

[115] Commonwealth v. Vizcarrondo, 693 N.E.2d 677 (Mass. 1998); Commonwealth v. Starling, 416 N.E.2d 929 (Mass. 1981).

[116] *See Starling*, 416 N.E.2d at 930.

[117] *See id.*

[118] *Id.* at 932.

[119] *Id.* at 932 (internal citations omitted).

[120] *Id.*

[121] *Starling*, 416 N.E.2d at 931 (quoting Commonwealth v. Mahnke, 335 N.E.2d 660, 684 n.48 (Mass. 1975), *cert. denied,* 425 U.S. 959 (1976)).

[122] *See id.* (quoting Commonwealth v. Fox, 73 Mass. (7 Gray) 585, 588 (1856)).

uprooted.

Starting with *Commonwealth v. Grey* it seems the SJC set forth a new standard for third prong malice that requires nothing less than a plain and strong likelihood of death:

> Malice aforethought may be shown by proof that the defendant, without justification or excuse, intended to kill the victim or to do the victim grievous bodily harm. However, proof of such an intent is not required because malice aforethought may be inferred if, in the circumstances known to the defendant, a reasonably prudent person would have known that according to common experience *there was a plain and strong likelihood that death would follow the contemplated act.*[123]

Despite this clear language, the standard for third prong malice was still in question. For example, in the 1991 decision of *Commonwealth v. Sama,* the court included a plain and strong likelihood of death or injury within its standard of third prong malice.[124] The next year, in *Commonwealth v. Sires*, the court returned to the "plain and strong likelihood of death" limitation in *Grey*.[125] Referring specifically to the *Sama* decision, *Sires* rejected "any suggestion that [the court has] made something less than a plain and strong likelihood of death sufficient for the proof of third prong malice."[126] The waters were muddied again, however, in 1994 when the court decided *Commonwealth v. Delaney*[127] and *Commonwealth v. Pierce.*[128] Both *Delaney* and *Pierce* reiterated *Sama's* third prong malice standard that included a plain and strong likelihood of injury despite the *Sires* opinion.[129] Throughout this series of cases, it seemed as if the court waited for a murder conviction based on acts that created a plain and strong likelihood of injury, in order to clarify the third prong malice standard.

In 1998, the SJC heard a case in which they could clearly reverse a murder conviction based on an incorrect instruction on third prong malice.[130] In *Commonwealth v. Vizcarrondo*, the defendant inflicted serious injuries on his girlfriend's ten-month-old daughter.[131] The baby suffered extensive bruising to her body, several bite marks, multiple rib fractures, a spiral fracture of the left tibia, a lacerated and crushed liver, and internal bleeding.[132] "The medical testimony established that the cause of death was multiple blunt force trauma that required

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[123] Commonwealth v. Grey, 505 N.E.2d 171, 173 n.1 (Mass. 1987) (internal citation omitted) (emphasis added) (citing Commonwealth v. Chance, 54 N.E. 551, 554 (Mass. 1899)).

[124] *See* Commonwealth v. Sama, 582 N.E.2d 498, 501 (Mass. 1991).

[125] *See* Commonwealth v. Sires, 596 N.E.2d 1018, 1025 n.14 (Mass. 1992).

[126] *Id.*

[127] *See* Commonwealth v. Delaney, 639 N.E.2d 710 (Mass. 1994).

[128] *See* Commonwealth v. Pierce, 642 N.E.2d 579 (Mass. 1994).

[129] *Id.* at 585; *Delaney*, 639 N.E.2d at 714-15.

[130] *See* Commonwealth v. Vizcarrondo, 693 N.E.2d 677 (Mass. 1998).

[131] *See id.* at 679.

[132] *See id.*

four or more blows to the body."[133] The defendant contended on appeal that the jury instructions on the third prong of malice were confusing and incorrect because the inclusion of the phrase "or grievous bodily harm".[134] The defendant argued that this phrase improperly permitted the jurors to infer malice upon proof that the defendant committed an act that he knew (or should have known) would result in grievous bodily harm,[135] and that such proof is equivalent to the proof required for manslaughter, as opposed to murder.[136] The court agreed with the defendant's argument.[137] Relying on *Sires*, the court held, "[w]e reject any suggestion that we have made something less than a plain and strong likelihood of death sufficient for proof of the third prong of malice."[138] Unlike previous cases, the court determined that the *Vizcarrondo* fact pattern "could have 'warranted a finding of a risk of harm less than a strong likelihood of death.'"[139] The court further noted that, "[a]lthough the injuries to the baby were severe and ultimately fatal, the injuries were not inflicted in a manner from which malice is ineluctably inferred."[140] The court contrasted this case with other examples where malice could be "ineluctably inferred" such as stabbing a victim in the chest with a knife[141] and firebombing an occupied apartment building at night.[142]

Unlike other cases that limited second prong malice, the *Vizcarrondo* court at least acknowledged its prior inconsistencies.[143] The court admitted that in past cases they included the "grievous bodily harm" language when defining third prong malice.[144] The court explained that they included this language only in cases either where third prong malice was not at issue, or where the jury instructions were challenged on other grounds.[145] The court stated that, regardless of its past decisions, "[t]hese cases are not to be read to suggest that something less than a plain and strong likelihood of death is sufficient for proof of the third prong of

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[133] *Id.*

[134] *See id.* at 680.

[135] The judge's instructions, in relevant part, were as follows: "Malice aforethought may be inferred if from the circumstances known to the Defendant, a reasonably prudent person would have known that according to common experience there was a plain and strong likelihood that death or grievous bodily harm would follow the contemplated act" *Id.* n.4.

[136] *See id.* at 680.

[137] *See Vizcarrando*, 693 N.E.2d at 680.

[138] *Id.* at 680 (citing Commonwealth v. Sires, 688 N.E.2d 966, 971 (Mass. 1992)).

[139] *Vizcarrondo*, 693 N.E.2d at 681-82 (citing Commonwealth v. Murphy, 426 Mass. 395, 401 (1998)). The *Vizcarrondo* court declared that conduct that 'involves a high degree of likelihood that substantial harm will result to another' is the equivalent of an act where "there [is] a plain and strong likelihood that. . .grievous bodily harm would follow." Vizcarrando, 693 N.E.2d at 680-82.

[140] *Vizcarrando*, 693 N.E.2d at 681.

[141] *See* Commonwealth v. Murphy, 688 N.E.2d 966, 972 (Mass. 1998).

[142] *See* Commonwealth v. Mello, 649 N.E.2d 1106 (Mass. 1995).

[143] *See Vizcarrondo*, 693 N.E.2d at 680-81 n.5.

[144] *See id.* at 681 n.5.

[145] *See id.*

malice."[146]

The logic by which the SJC arrived at this conclusion, however, is troubling. Rather than announcing a change in the common law standard and citing precedent from other jurisdictions or announcing a public policy reason for the change, the court simply equated two very different standards of conduct. The court declared that the jury could not infer malice from an act where the defendant knew that "there [is] a plain and strong likelihood that. . .grievous bodily harm would follow" because that is the standard for manslaughter.[147] The court was mistaken because traditionally the standard for manslaughter is conduct that "involves a high degree of likelihood that substantial harm will result to another."[148] It is easy to confuse these standards because they both developed side by side through common law. If these two distinct standards covered the same conduct, then only manslaughter or malice would exist today, however, the two standards have strong differences and must be distinguished in contemporary law. Not only does "plain and strong likelihood" standard represent a higher level of probability than the "a high degree of likelihood" standard, but a plain meaning reading of "grievous bodily injury" indicates a higher standard of harm than "substantial harm."[149] These cannot be equated.[150] Given this legal sleight of hand, the SJC arrived at a very different opinion in *Vizcarrondo* than it did in *Starling*, despite very similar fact patterns.

The dividing line between murder and malice has always been difficult to determine. The court's recent decisions, however, have made it even more difficult to predict what fact patterns will meet the malice requirements for murder. Other

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[146] *See id.*

[147] *Id.* at 680.

[148] NOLAN & HENRY, *supra* note 73, at ch. 9, § 205.

[149] Justice Holmes used the following example to illustrate the differences between murder and manslaughter:

> One great difference between the two will be found to lie in the degree of danger attaching to the act in the given state of facts. If a man strikes another with a small stick which is not likely to kill, and which he has no reason to suppose will do more than slight bodily harm, but which does kill the other, he commits manslaughter, not murder. But if the blow is struck as hard as possible with an iron bar an inch thick, it is murder. So if, at the time of striking with a switch, the party knows an additional fact, by reason of which he foresees that death will be the consequence of a slight blow, as, for instance, that the other has heart disease, the offence is equally murder.

HOLMES, *supra* note 33, at 59-60 (citations omitted).

[150] The differences in standards were identified in commentary on the proposed homicide instructions for New Mexico, "[t]he instructions should explicitly state that a critical difference between murder in the second degree and involuntary manslaughter hinges on the degree of risk and that a 'strong probability' rather than a mere possibility is required for murder." Leo M. Romero, *Unintentional Homicides Caused By Risk-Creating Conduct: Problems In Distinguishing Between Depraved Mind Murder, Second Degree Murder, Involuntary Manslaughter, And Noncriminal Homicide In New Mexico*, 20 N.M. L. REV. 55, 72 (1990).

areas also blurred the line between manslaughter and murder for example with respect to what level of knowledge the defendant must have of his act and circumstances.

b. Knowledge

Another third prong issue is whether and how the jury considers the defendant's knowledge of his actions and the implications of those actions at the time of the crime.[151] Whereas a defendant's diminished mental capacity, from either intoxication or mental illness, traditionally only affected a defendant's ability to premeditate the crime, since 1987 the SJC applied knowledge to malice as well. In 1987, *Commonwealth v. Grey* extended the relevancy of mental impairment to the defendant's ability to act with malice.[152] In 1991, the court extended this rule to third prong malice in *Commonwealth v. Sama*,[153] and required the prosecution to prove guilty knowledge when proceeding under a third prong malice theory.[154] This dramatic change in the burden of proof, where mental impairment becomes a major evidentiary factor in a jury's decision as to whether a killing constitutes murder in the first degree, murder in the second degree or manslaughter, has been called a "new focus in Massachusetts jurisprudence."[155]

Traditionally, the court did not restrict malice by proof of actual or specific intent.[156] As stated in *Commonwealth v. Chance*, "reduced to its lowest terms, 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, coupled perhaps with an implied negation of any excuse or justification."[157] Third prong malice relied, therefore, on a classic "objective standard," what a reasonably prudent person, in the circumstances known to the defendant, would have comprehended and foresaw as the probable outcome of his

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[151] The question of a defendant's knowledge is exclusively within the province of the jury, and they are "free to draw an inference of guilty knowledge . . . . 'if the inferences drawn from the circumstances be reasonable and possible.'" Commonwealth v. Albano, 365 N.E.2d 808, 810 (1977) (quoting Commonwealth v. Medeiros, 236 N.E.2d 642, 644 (1968), *cert. denied sub nom.* Bernier v. Massachusetts, 393 U.S. 1058 (1969)).

[148] Commonwealth v. Sama, 582 N.E.2d 498 (Mass. 1991).

[152] Commonwealth v. Grey, 505 N.E.2d 171, 173 (Mass. 1987).

[153] *See Sama*, 582 N.E.2d at 501.

[154] *See id.*

[155] Katherine E. McMahon, *Murder, Malice and Mental State: A Review Of Recent Precedent Recognizing Diminished Capacity, from Commonwealth v. Grey To Commonwealth v. Sama*, 78 MASS. L. REV. 40, 48 (1993) (providing an excellent review of the case law leading to a diminished capacity rule as it applies to malice).

[156] *See* Commonwealth v. Henson, 476 N.E.2d 947, 953 n.4 (Mass. 1985) (citing PERKINS, *supra* note 108, at 763; *See also* Commonwealth v. Huot, 403 N.E2d 411, 415 (Mass. 1899); Commonwealth v. McGuirk, 380 N.E.2d 662, 667 (Mass. 1978).

[157] Commonwealth v. Chance, 54 N.E. 551, 554-55 (Mass. 1899), *quoted in* Commonwealth v. Mangum, 256 N.E.2d 297, 303 (Mass. 1970).

actions. [158] The "subjective" standard of what the defendant actually foresaw or intended as the outcome of his contemplated action was immaterial.[159] A subjective standard makes available the defense of diminished capacity. The court had created a diminished capacity rule for cases of extreme atrocity or cruelty,[160] and for the first two prongs of malice,[161] but it had not introduced such a rule for the general intent third prong of malice.

In 1991, the SJC introduced a subjective standard into third prong malice. In *Sama*, "[t]he defendant presented credible evidence of debilitating intoxication bearing on his ability to possess meaningful knowledge of the circumstances at the time of the victim's death."[162] The trial judge, however, refused to instruct the jury that, with respect to the third prong of malice, the jurors also could consider the effect of the defendant's mental state on the question of "what he 'knew.'"[163] On appeal, the court held that the jury should have been allowed to consider the defendant's capacity when deciding whether the Commonwealth proved the defendant's guilty knowledge beyond a reasonable doubt.[164] Under this new rule, the jury should consider both a subjective and objective standard: "1) the nature and extent of the defendant's knowledge of the circumstances at the time he acted; 2) whether, in the circumstances known by the defendant, a reasonably prudent person would have recognized that the defendant's conduct would create a plain and strong likelihood of death or injury."[165] "[T]o establish the third prong of malice. . ., the Commonwealth had [to demonstrate] that the defendant knew that he was stabbing the victim. . . and that a reasonably prudent person, although not necessarily the defendant, would recognize that such conduct carried with it the risk of death or serious bodily injury."[166] Furthermore, the court held that evidence of a defendant's intoxication is a factor for the jury to consider whenever the Commonwealth bears the burden of establishing the defendant's knowledge beyond

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[158] *See* Commonwealth v. Starling, 416 N.E.2d 929, 932 (Mass. 1981).

[159] *See McGuirk*, 380 N.E.2d at 667; Commonwealth v. Pierce, 138 Mass. 165, 178 (1884).

[160] *See* Commonwealth v. Gould, 405 N.E.2d 927, 932 (Mass. 1980).

[161] *See Grey*, 505 N.E.2d at 173-74.

[162] *Sama*, 582 N.E.2d at 502.

> The defendant testified that he long has suffered from uncontrolled alcoholism that in the past had caused him to experience memory loss. Moreover, the defendant's father testified and described his son's chronic substance abuse and what he perceived to be his son's resulting mental impairment. Lastly, an expert witness testified on behalf of the defendant, and she opined that the defendant could have hallucinated at the time of the killing, due to the effect of the alcohol and drugs he ingested earlier that day.

Id.

[163] *Id.* at 500.

[164] *See id.* at 501.

[165] *Id.*

[166] *Id.*

a reasonable doubt.[167]

Thus, *Sama* extended the diminished capacity rule to the general intent third prong of malice.[168] According to the court, *Sama* constituted a "logical extension" of precedent allowing a jury to consider a defendant's mental state when deciding his intent or knowledge.[169]

At least one commentator has stated that this introduction of subjective standards for determining the presence of malice, is nothing less than "revolutionary."[170]Jurors may now consider mental impairment in assessing whether a defendant charged with murder acted with malice.[171] The defendant's subjective mental condition, and not merely an assessment of his conduct under the objective reasonable person standard, weighs in the determination of the degree of guilt and of ultimate criminal culpability.[172] Once again, however, the court introduced a new and radical departure from its precedent. The prosecutor's burden became much greater as a result of this change. Significantly, this change was made without notice and without the input of prosecutors, private attorneys and the public that are part of the legislative process. Additionally, the question of knowledge may be more important to forms of malice that require specific intent rather than the general intent based third prong malice.

3. Implications of the New Definition of Malice

Although malice aforethought existed as a complicated term of art for centuries, its definition was relatively stable over the years. The recent changes by the SJC, however, significantly changed the nature and scope of the definition of malice aforethought. What was always first-degree murder may now be second degree murder, and what was second-degree murder may now be involuntary

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[167] *See* Commonwealth v. Mello, 649 N.E.2d 1106, 1116-17 (Mass. 1995); *Sama*, 582 N.E.2d at 501.

> In order to establish the third prong of malice, the Commonwealth had the burden of demonstrating that the defendant knew that he was setting fire to an occupied apartment building, and that a reasonably prudent person, although not necessarily the defendant, would recognize that such conduct carried with it the risk of death.

Mello, 649 N.E.2d at 1116.

[168] *See* McMahon, *supra* note 155, at 47.

[169] Commonwealth v. Sires, 596 N.E.2d 1018, 1023 (Mass. 1992).

[170] *See* McMahon, *supra* note 155, at 48.

[171] *See id.*

[172] *See id.* McMahon illustrates that the use of presumptions to establish malice may have been significantly undermined by the United States Supreme Court decision in Sandstrom v. Montana, 442 U.S. 510 (1979), which found a violation of Constitutional due process in grounding a mental element of a crime in a presumption that a man intends the ordinary consequences of his voluntary acts. McMahon suggests that the Court started to re-think how murder could Constitutionally be proven due to this case. *See id.*

manslaughter. These changes are not only confusing, but they usurp the Legislature's prerogative to state what the law is and to formulate public policy. Ultimately, these changes constitute bad public policy.

a. Shifting standard is confusing

The changing nature of malice is confusing to both the bench and bar. *Avellar v. DuBois* is just one example of this unfortunate situation.[173] In *Avellar*, the jury convicted the defendant of murder on a theory of third prong malice and petitioned for a writ of habeas corpus.[174]The defendant argued that his attorney was ineffective because he failed to argue that the trial judge's instructions on malice were erroneous due to the inclusion of the traditional "grievous bodily harm" language.[175] The federal district court judge had to determine whether the trial judge had a rational basis for determining that the appellate counsel's performance constituted effective assistance even though the attorney did not argue that the judge's third-prong malice instruction was clearly erroneous given the SJC's rulings.[176]The defendant argued that although *Avellar* was argued before the *Viscarrondo* decision, his attorney should have argued based on the clear line of cases leading up to *Vizcarrondo*.[177] The district court found that given the history of SJC decisions on malice, counsel's failure to make the argument on third prong malice did not fall outside "the wide range of reasonable professional assistance."[178] In reaching this conclusion, the District Court judge discussed the tortured history of SJC decisions in an attempt to determine what the state of Massachusetts law was at various stages of the case at hand. First, he cited the expansive definition of first degree malice in *Puleio*.[179] The judge then discussed the "somewhat confused state of the law" at the time that the *Avellar* jury was instructed due to the recent SJC decisions in *Grey* [180]and *Sama,*[181] which the court decided on the same day with seemingly different statements to define malice.[182] Before the *Avellar* briefs were filed, the court decided *Sires*,[183] which made a seemingly unequivocal statement on third prong malice. Still, in 1994 the SJC seemed to reopen the question with their decisions in *Delaney*[184] and *Pierce*.[185] Only with *Vizcarrondo* did the court seem to settle on a definition of third prong

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[173] *See* Avellar v. Dubois, 30 F.Supp.2d 76 (D. Mass. 1998).
[174] *Id.* at 87.
[175] *Id.*
[176] *See id.* at 97-98.
[177] *See id.* at 95.
[178] *See id.* (citing Strickland v. Washington, 466 U.S. 668, 689 (1984)).
[179] *See id.* (citing Commonwealth v. Puleio, 474 N.E.2d 1078, 1083 (Mass. 1985)).
[180] *See Grey*, 505 N.E.2d at 171.
[181] *See Sama*, 582 N.E.2d at 498.
[182] See *Avellar*, 30 F.Supp. 2d at 96.
[183] *See Sires*, 596 N.E.2d at 1018.
[184] *See* Commonwealth v. Delaney, 639 N.E.2d 710, 714 (Mass. 1994).
[185] *See* Commonwealth v. Pierce, 642 N.E.2d 579, 585 (Mass. 1994).

malice.[186] The *Avellar* case demonstrates the confusion that this line of homicide cases has caused. At each stage of that case, the law, as determined by the state's highest court, appeared different.

b. Bad Public Policy

Removing the "grievous bodily injury" standard from second prong malice limits the number of people who can be convicted of first-degree murder. The removal of the same language from third prong malice, however, potentially has a much greater impact on the law of murder in that homicides that the legal community and the public alike always considered murder would now be involuntary manslaughter.

As one commentator points out, murder is practically and symbolically a very different crime from manslaughter.[187] A person who kills with malice is labeled a murderer, society's most profound brand of criminality. In contrast, there is no similar brand for a person convicted of manslaughter.[188]In addition, the difference in penalty is significant. The penalty for involuntary manslaughter recommended by the recent Massachusetts Sentencing Commission may be as low as 3.3 - 5 years in prison.[189] The *Vizcarrondo* standard excuses defendants who commit reckless acts despite the plain and strong probability of grievous bodily injury to another victim from facing a murder charge, a possible life sentence, or the label of "murderer."

Whether intent to inflict grievous bodily injury should be considered first or second-degree murder, or even involuntary manslaughter, is not a new topic. In 1934, Professor Perkins argued that intent to cause great bodily harm should give rise to a rebuttable inference that there was in fact an actual intent to kill.[190] Even if the inference is overcome, the accused is still guilty of murder, but under many statutes it may be a different degree of murder than it would be if the purpose to cause death had been established.[191] Professor Perkins offered several examples of acts that demonstrate an intent to inflict great bodily injury, even if there is no intent to cause death: (1) where the defendant shot at the deceased, or (2) cut him across the neck with a razor, or (3) hit him over the head with a heavy iron bar, or (4) threw a heavy glass tumbler, or a rock "the size of a man's fist," or (5) choked him violently.[192]

Each of Professor Perkins' examples, however, carries a high probability of death. Alternatively, Professor Romero states, "[a] death that results from an act that risks great bodily harm but not involving a high probability of death might suffice for involuntary manslaughter, but not for murder. Murder should be

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[186] *See Avellar*, 30 F.Supp.2d at 96.
[187] *See Mounts*, *supra* note 49, at 314.
[188] *See id.*
[189] REPORT OF THE MASSACHUSETTS SENTENCING COMMISSION (1997).
[190] Perkins, *supra* note 12, at 554-55.
[191] *See id.*
[192] *See id.*

reserved for deaths caused by indifference to the value of life."[193] The difficulty comes when the death involves an unarmed assault, such as a punch with a fist. Such a punch, when directed to the head or Massachusetts Sentencing Commission may be as low as 3.3 - 5 years in prison.[194] The *Vizcarrondo* standard excuses defendants who commit reckless acts despite the plain and strong probability of grievous bodily injury to another from facing a murder charge, a possible life sentence, or the label of "murderer."

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[193] Romero, *supra* note 150, at 62 (citing DRESSLER, UNDERSTANDING CRIMINAL LAW 461-62 (1987), LAFAVE & SCOTT, *supra* note 40, at 618.

[194] REPORT OF THE MASSACHUSETTS SENTENCING COMMISSION (1996) at 27.

[195] Perkins, *supra* note 12, at 554-55.

[196] *See id.*

[197] *See id.*

[198] Romero, *supra* note 150, at 62 (citing DRESSLER, UNDERSTANDING CRIMINAL LAW 461-62 (1987), LAFAVE & SCOTT, *supra* note 40, at 618.

[199] Perkins, *supra* note 12, at 555.

[200] *See id.*

can infer malice from a strong probability of grievous bodily harm, and find the crime constitutes murder.

The effect of *Vizcarrondo* is that the SJC eliminated this entire class of intentional acts from the murder category. Even multiple and intentional blows to an infant may be no more than involuntary manslaughter. What the court deems to be injuries where the jury can "ineluctably infer" malice remains to be seen. Will any unarmed assault rise to this level? Given the holding in *Vizcarrondo*, that is doubtful. Regardless, *Vizcarrondo* signals another dramatic reduction in what constitutes murder.

c. Abrogation of the Legislative Prerogative

Whether the changes are good public policy or not, the SJC significantly transformed the law of murder through many changes to the traditional definition of malice. Since "malice" is a common law concept that has no statutory definition the SJC was probably within its power to interpret malice as it saw fit. The court, however, has a responsibility to explain its reasons for making such sweeping changes. At minimum, the court should acknowledge when it is breaking with past legal doctrines and is creating new law. The SJC has yet to make these acknowledgements. Ultimately, it is the responsibility of the Legislature to decide what is criminal activity and how that activity should be punished. If there are severe changes to the law of murder, that task should go to the Legislature and not the courts. The policy considerations of changing the knowledge requirement in third prong malice, or for removing the grievous bodily injury language from second and third prong malice should have been done in a formal legislative process that includes notice to affected parties and a public debate. If there are limitations on the law of murder the limitations should reflect the will of the people, not the justices of the SJC.

B. *Murder by Extreme Atrocity or Cruelty*

A killing committed with extreme atrocity or cruelty falls under murder of the first degree.[201] Extreme atrocity or cruelty is in and of itself enough to justify a first-degree murder charge.[202] However, it does not require deliberate premeditation, but only requires proof of malice aforethought.[203] Additionally, a defendant is not required to be aware that his actions were either extremely atrocious or cruel.[204] Rather, it is for the jury to determine.

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[201] MASS. GEN. LAWS ch. 265 § 1 (1998).

[202] NOLAN & HENRY, *supra* note 73, at ch. 8 § 183.

[203] *See id.*

[204] "A murder committed with malice aforethought may be found to have been committed with extreme atrocity or cruelty, even though the murderer did not know that his act was extremely atrocious or cruel." Commonwealth v. Gilbert, 42 N.E. 336. 338 (Mass. 1895).

Until recently, the SJC loosely spelled out a number of factors that a jury may consider when deciding whether a murder was committed with extreme atrocity or cruelty: "(1) indifference to or taking pleasure in the victim's suffering, (2) consciousness and degree of suffering of the victim, (3) extent of physical injuries, (4) number of blows, (5) manner and force of delivery, (6) instrument employed, and (7) disproportion between the means needed to cause death and those actually employed."[205] Still, the jury was left to decide what killings were committed with extreme atrocity or cruelty based on all of the facts of the case and whether it included savagery, brutality or indifference to the victim's suffering.[206] In the last twenty years, however, the SJC limited this part of the murder statute and introduced a mental element for this form of first degree murder and declared the list of factors for atrocity or cruelty exclusive.

1. Commonwealth v. Gould: Diminished Capacity?

Starting in 1980, the SJC significantly altered the doctrine of extreme atrocity or cruelty, by insisting that juries consider the defendants' mental state when determining whether their actions were cruel or extremely atrocious. In *Commonwealth v. Gould*,[207] the SJC all but established a new rule of diminished capacity within this area of murder. In this case, the defendant fatally stabbed his former girlfriend while suffering from mental illness. [208] After a trial in which criminal responsibility was the sole issue, the jury convicted the defendant of first-degree murder on theories of premeditation and extreme atrocity or cruelty.[209] On

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See also Commonwealth v. Monsen, 385 N.E.2d 984, 989 (Mass. 1979) ("considering the legislative intent with respect to the principal, it would be inconsistent to require a showing of intent beyond that of malice aforethought in order to convict an accomplice of a murder committed with extreme atrocity or cruelty"); Commonwealth v. Golston, 366 N.E.2d 744, 752 (Mass. 1977) (finding that there is no requirement that the defendant know that his act was extremely atrocious or cruel, and no requirement of deliberate premeditation). *See generally* Commonwealth v. Gould, 405 N.E.2d 927, 933 n.14 (Mass. 1980); Commonwealth v. Clifford, 372 N.E.2d 1267, 1276-77 (1978); Commonwealth v. Lacy, 358 N.E.2d 419, 423 (Mass. 1976). *But see* John C. Williams, Annot. *What Constitutes Murder by Torture*, 83 A.L.R. 1222 (1978) (discussing rules of other States).

[205] *Cunneen*, 449 N.E.2d 658 at 664. *See, e.g.*, *Monsen*, 385 N.E.2d at 990; *Strother*, 366 N.E.2d at 752 (noting that "[t]he size and nature of the weapon used, the number of blows, the manner and force with which they were delivered, and the target at which the blows were directed" are among the factors supporting a determination of extreme atrocity or cruelty); *Golston*, 366 N.E.2d at 752.

[206] *See, e.g.*, Commonwealth v. Devlin, 126 Mass. 253, 255 (1879) ("[t]he question is left largely for the determination of the jury to consider whether the case presents a case of such savage, unfeeling, [and] long-continued brutality").

[207] *See Gould*, 405 N.E.2d 927 (1980).

[208] *See id.* at 673 (stating that the defendant had suffered from delusions for five years).

[209] *See id.*

appeal, the defendant argued that the jurors "should have been able to have considered the manner of the homicide [as it] related to the defendant's mental illness."[210] The court agreed and overturned the conviction stating that mental illness should be a consideration when the jury considers both deliberate premeditation[211] and extreme atrocity or cruelty.[212]

After enumerating several traditional factors of extreme atrocity or cruelty,[213] the court reasoned that a "malicious mind [was] evidence that a defendant committed a murder with extreme atrocity or cruelty."[214] In fairness, therefore, evidence of an impaired mind should be considered as to whether the murder was committed with extreme atrocity or cruelty:

> The jurors' broad discretion will more accurately reflect the community's conscience, goals, and norms, if the jurors are not arbitrarily restricted to considering only the defendant's course of action, but are also permitted to consider the defendant's peculiar mental state as an additional factor to be weighed in determining whether the murder was committed with extreme atrocity or cruelty.[215]

The court argued, however, that this decision did not adopt the doctrine of diminished capacity despite this clear addition of a mental element.[216]

The court's new rule drew a sharp rebuttal from Justice Quirico joined by Chief Justice Hennessey.[217] Justice Quirico distinguished between premeditation and extreme atrocity or cruelty. Since the prosecution has the burden of proving capacity for premeditation introducing a diminished capacity rule would severely affect the theory of murder with extreme atrocity or cruelty.[218] Justice Quirico

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[210] *Id.* at 933.

[211] *See id.* at 932. Although at the time there was precedent for a jury to consider the use of intoxicating liquor or drugs when determining if the defendant had the required element of deliberate premeditation for first-degree murder, there was no similar rule for mental illness. If a defendant who has voluntarily used alcohol or drugs is found by the jury to be incapable of deliberately premeditating the acts charged, he may not be found guilty of murder in the first degree but may be found guilty of murder in the second degree. *See id,* (citing Commonwealth v. Costa, 274 N.E.2d 802, 808 (Mass. 1971)); Commonwealth v. Delle Chiaie, 84 N.E.2d 7, 9 (Mass. 1949); Commonwealth v. Taylor, 161 N.E. 245, 248 (Mass. 1928).

[212] *See Gould*, 405 N.E.2d at 932

[213] *See id.* (stating that the Court was taking pleasure in causing the victim pain).

[214] *Id.* at 934.

[215] *Id.* (pointing the reader to *Monsen*, 385 N.E.2d 984 (Mass. 1979)).

[216] *See id.*

[217] *See id.* at 935-39.

[218] *Id.* at 935-36. Justice Quirico's reasons that the "Commonwealth has always had the role of proving the element of deliberate premeditation, and that impliedly includes the burden of proving that the defendant had the capacity to deliberately premeditate the homicide." *See id.* at 936.

argued that in previous cases, the jury was never required to consider the defendant's mental state on a theory of extreme atrocity.[219] By introducing a mental element, the court had, in fact, made "diminished capacity as a partial defense to the crime of murder in the first degree when committed with extreme atrocity or cruelty."[220] The court's decision, therefore, was a "judicial attempt to rewrite a legislative definition of what constitutes one of the three types of murder in the first degree" and "will erode a legislative mandate which has passed judicial scrutiny in a number of decisions by this court since 1858."[221] In fact, the precedent clearly indicates that "[a] murder committed with malice aforethought may be found to have been committed with extreme atrocity or cruelty, even though the murderer did not know that his act was extremely atrocious or cruel."[222] The SJC upheld this principle as recently as one year before *Gould*:

> To import a mens rea requirement into the words 'extreme atrocity or cruelty' would be to blur the distinction between that form of murder in the first degree [murder committed with extreme atrocity or cruelty] and the premeditated variety. Rather, we think that the Legislature intended to exact [upon an accomplice] the greater punishment of the principal solely on the basis of the shocking, unnecessary, and often painful manner in which the death has been caused. Although the inference that the actor possesses a particularly brutal state of mind might be warranted by the objective circumstances of the killing, no such inference is necessary in order to convict.[223]

Based on this long line of precedent, Justice Quirico concluded that the legislature should decide whether to introduce the theory of diminished capacity as a mitigating factor in murders committed with extreme atrocity or cruelty.[224]

Since *Gould*, the court continues to insist that the jury consider a defendant's mental state when determining whether a murder was committed with extreme atrocity or cruelty. In *Commonwealth v. Perry*,[225] the defendant killed his wife by intentionally lighting a fire in her bedroom. The defendant was convicted of first

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[219] *Id.* at 937.

[220] *Id.* at 938.

[221] *Id.* Justice Quirico relies on Commonwealth v. Gilbert, 42 N.E. 336 (Mass. 1895), Commonwealth v. Appleby, 265 N.E.2d 485 (Mass. 1970), and *Monsen*, 385 N.E.2d at 990. In *Gilbert*, the Court found that a defendant could not have the required malice aforethought if he was too intoxicated at the time of the crime to deliberately premeditate the homicide. The Court also pondered whether murder in the first degree by reason of extreme atrocity and cruelty required the defendant to know that the act of killing was attended with extreme atrocity or cruelty. In that case, the Court found that it was not, because the theory of extreme atrocity or cruelty was a separate and distinct ground of first-degree murder from that of deliberately premeditated murder. *See Gould*, 405 N.E.2d at 938 (citing *Gilbert*, 42 N.E. at 338).

[222] *Gilbert*, 42 N.E. at 338.

[223] *Gould*, 405 N.E.2d at 939 (quoting *Monsen*, 385 N.E.2d at 990) (alteration in original).

[224] *See id.*

[225] 433 N.E.2d 446 (Mass 1982).

degree murder, in part on a theory of extreme atrocity or cruelty.[226] The defendant argued on appeal that the jury instructions on extreme atrocity and cruelty were incorrect because the judge refused to give a *Gould* type of instruction that the defendant's extreme intoxication at the time of the crime affected his mental state.[227] The court reasoned that in light of *Gould*, it was a jury consideration whether the defendant's intoxication at the time of the murder was so great as to reduce the defendant's criminal culpability.[228] Ultimately, the court reduced the conviction to second-degree murder.[229]

An interesting footnote to *Perry* stated that the court did not "consider the question [of] whether the common meaning of 'cruel' and 'atrocious' requires [a] mental element, in addition to malice aforethought, for conviction of murder in the first degree based on extreme atrocity and cruelty."[230] Still, the court gave the Webster dictionary definition for "cruel"[231] and "atrocious,"[232] perhaps suggesting that it would consider extending the *Gould* decision by requiring a mental element for extreme atrocity or cruelty.

In the 1983 case of *Commonwealth v. Cunneen,* the SJC revisited the issue of requiring a mental element for extreme atrocity or cruelty as raised in the *Perry* footnote.[233] In *Cuneen* the defendant argued that under *Gould* and *Perry* "extreme atrocity or cruelty [can only be found where] the defendant had a specific mental intent or knowledge of the character of his [or her] acts beyond the malice aforethought required for murder in the second degree."[234] Chief Justice Hennessey, now writing for the court accepted the *Gould* decision that he previously dissented to,[235] but he refused to make intent an "entirely new element of the crime of murder committed with extreme atrocity and cruelty."[236] The result of such an extension would be to blur the line between killing with extreme atrocity or cruelty and premeditated killings. He reasoned that "[a]lthough the inference

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[226] *See id.*

[227] *See id.* at 452-53. The judge instructed: "[i]f you find the murder to be of extreme atrocity and cruelty because of the effect upon the body of the victim, then whether [the defendant] was drunk or not does not matter." *Id.* at 452 (quoting lower court's opinion) (alteration in original).

[228] *See id.* at 453.

[229] *See id.*

[230] *Id.* at 435 n.14.

[231] *Id.* (defining "cruel" as "disposed to give pain to others . . .) (quoting WEBSTER'S SECOND NEW INT'L DICTIONARY 635 (1959)).

[232] *Id.* (defining "atrocious" as "savagely brutal; outrageously . . .) (quoting WEBSTER'S SECOND INT'L DICTIONARY 176 (1959)).

[233] *Cunneen*, 449 N.E.2d at 664.

[234] *Id.*

[235] *See id.* at 665. ("Thus, we have diluted the objective test to some extent, since indifference to or pleasure in the victim's pain, as well as a defendant's reduced mental capacity, is considered relevant.") Justice Abrams remarks upon the "grudging" acceptance of *Gould* in her dissent. *See id.* at 667.

[236] *Id.* at 665.

that the actor possesses a particularly brutal state of mind might be warranted by the objective circumstances of the killing, no such inference is necessary in order to convict."[237] Although the court continues to hold that a jury may consider evidence of the defendant's mental retardation,[238] intoxication[239] and prolonged mental illness,[240] the court has, so far, resisted the argument to make intent an element of extreme atrocity or cruelty.[241]

Some argue that the *Gould* holding "constituted a rational revision of the law."[242] Perhaps this change is acceptable because it only affects the degree of murder, and still allows the jury to make its determination on the totality of the circumstances. In addition, the court continues to resist the next step of introducing a mental element. Still, the changes have occurred through judicial fiat and without any public process. Equally important, the court could revise its position on this issue and make intent an element of extreme atrocity or cruelty, which would further confuse the law of murder.

3. The Narrowing of "Extreme Atrocity"

In *Commonwealth v. Hunter* the SJC made another significant limitation on a jury's ability to find murder in the first degree on a theory of extreme atrocity or cruelty.[243] Until 1994 the jury was free to determine when the mode of inflicting death was so shocking as to amount to extreme atrocity or cruelty.[244] *Hunter* limited the jury to only the factors previously identified in *Cunneen*.[245] Once again, this significant change to the law of murder was done with no explanation, and without even an indication that it was a departure from previous decisions.

In *Cunneen*, the court identified several factors that a jury could consider in deciding whether a killing was committed with extreme atrocity or cruelty.[246] They

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[237] *Id.* at 229 (citing *Monsen*, 385 N.E.2d at 984). *See also Gilbert*, 42 N.E. 336; Commonwealth v. Desmarteau, 82 Mass. 1 (1860).

[238] *See Cunneen*, 449 N.E.2d 658.

[239] *See Perry*, 433 N.E.2d 446 (Mass. 1982).

[240] *See Gould*, 405 N.E.2d at 933-35.

[241] *See Sinnott*, 507 N.E.2d at 709. This ruling was later reiterated and upheld in 1989. *See* Commonwealth v. Lawrence, 536 N.E.2d 571 (Mass. 1989). Commonwealth v. James, 427 693 N.E.2d 148, 152 (Mass. 1998). *See also*, MODEL JURY INSTRUCTIONS ON HOMICIDE (1999).

[242] McMahon, *supra* note 156, at 43.

[243] 626 N.E.2d 873 (Mass. 1994).

[244] *See* Commonwealth v. Devlin, 126 Mass. 253, 255 (1879) (stating that the jury must determine whether the case is one of "savage, unfeeling, and long continued brutality"). *See also* Commonwealth v. Lacy, 358 N.E.2d 419, 423 (Mass. 1976) ("[T]he issue of [extreme atrocity or cruelty] must be left largely to the deliberation of the jury . . . ."); *Golston*, 366 N.E.2d at 752 ("[i]ndifference to the victim's pain, as well as actual knowledge of it and taking pleasure in it, is cruelty; and extreme cruelty is only a higher degree of cruelty.").

[245] *See* Commonwealth v. Hunter, 626 N.E.2d 873 (Mass. 1994).

[246] *See Cunneen*, 449 N.E.2d at 665.

became widely referred to in subsequent case law as the "*Cunneen* factors:"

> We have delineated a number of factors which a jury can consider in deciding whether a murder was committed with extreme atrocity or cruelty. These include indifference to or taking pleasure in the victim's suffering, consciousness and degree of suffering of the victim, extent of physical injuries, number of blows, manner and force with which delivered, instrument employed, and disproportion between the means needed to cause death and those employed. [247]

The court found that the trial judge appropriately instructed the jury on the factors identified above.[248] In addition, the judge's instructions also included several illustrative opinions on the subject, such as: the question is left largely for the determination of the jury to consider whether the case presents a case of such savage, unfeeling, and long-continued brutality,[249] and that "indifference to the victim's pain" is an appropriate factor.[250]

The SJC consistently cited the *Cunneen* factors as the standard for extreme atrocity or cruelty.[251] Still, the court also clearly stated that the *Cunneen* factors are not exhaustive, nor does the trial judge have a mandatory burden to recite each and every factor.[252] In 1994, however, the court took the opportunity to make the *Cunneen* factors exclusive.[253] In *Commonwealth v. Hunter,* the jury convicted the defendant of first degree murder under theories of deliberate premeditation and extreme atrocity or cruelty for shooting his estranged wife repeatedly with a semi-automatic rifle. At trial, the judge instructed the jury that the Commonwealth had to prove that the defendant caused the victim's death "by a method which surpassed the cruelty inherent in any taking of human life."[254] The judge also listed as part of his instructions a number of factors found in *Cunneen* for consideration by the jury, but also instructed that "extreme atrocity or cruelty is not limited to such cases of such evidence."[255] On appeal, the defendant argued that the trial judge's instructions on the issue of extreme atrocity or cruelty were unconstitutionally

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[247] *Id.* (citing Commonwealth v. Monsen, 385 N.E.2d 984 (Mass. 1979)); Commonwealth v. Strother, 378 N.E.2d 958, 959 (Mass. 1978); Commonwealth v. Golston, 366 N.E.2d 744 (Mass. 1979).

[248] *Id.*

[249] *See Devlin*, 126 Mass. at 255.

[250] Golston, 366 N.E.2d. at 752.

[251] *See, e.g.*, Commonwealth v. Freiberg, 540 N.E.2d 1289, 1294-96 (Mass. 1989); Commonwealth v. Doucette, 462 N.E.2d 1084, 1086 (Mass. 1984).

[252] *See Doucette*, 462 N.E.2d at 1094 (Mass. 1984) (citing Commonwealth v. Cunneen, 389 Mass. at 227 for its "recitation of a number of factors which a jury ***can*** consider when deciding whether a murder was committed with extreme atrocity or cruelty"). The *Doucette* court then remarked that the *Cunneen* factors although not exhaustive, are entirely acceptable.") *Id.*

[253] *See Hunter*, 626 N.E.2d 873.

[254] *Id.* at 877.

[255] *Id.*

vague.[256] The court agreed and found error with the judge's instructions stating that "the instructions in this case improperly permitted the jury to find extreme atrocity or cruelty without finding that any of the [*Cunneen*] factors was present."[257] To justify this pronouncement the court simply stated "[t]his is inconsistent with our case law."[258]

The Model Jury Instructions perpetuated this rule. After listing the *Cunneen* factors the Instructions read: "[y]ou can not make a finding of extreme atrocity or cruelty unless it is based on one or more of the factors I have just listed."[259]

Given the incredible number of ways in which people are cruel to one another, neither the Instructions nor case law should limit this area of law. Additionally, the court sharply limited the jury's traditional role of deciding what constitutes extreme atrocity or cruelty, as well as the jury's statutory role of deciding what degree of murder is appropriate. Once again, if we are to define and reduce to a hard and fast rule, the rule for extreme atrocity or cruelty, it is the Legislature that should undertake this task.

C. *Felony-Murder*

Murder in Massachusetts, like many jurisdictions, may also be proven by a felony-murder theory. This theory, while academically unpopular, is politically popular, and therefore, very difficult to abolish. In the last twenty years, the SJC joined the prevalent trend among courts and theorists and limited the situations where a court can sentence a person for murder on a felony murder theory. Once again, however, the court made these changes without regard to the intentions of the Legislature and fashioned these changes without necessarily reflecting the public will.

1. Unpopularity of the Felony Murder Rule

The felony-murder rule punishes all homicides committed in the perpetration of a felony whether the death is intentional, unintentional or accidental, without the necessity of proving the relation of the perpetrator's state of mind to the homicide. Justice Coke may have viewed any homicide resulting from any unlawful act as murder,[260] but few who came after him agreed. Justice Hale classified some unlawful acts that resulted in death as manslaughter.[261] Other commentators, such

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[256] *See id.*

[257] *Id.*

[258] *Id.* (citing Commonwealth v. Freiberg, 540 N.E.2d 1289, 1294-96 (Mass. 1989); Commonwealth v. Doucette, 462 N.E.2d 1084, 1094 (Mass. 1984); Commonwealth v. Podlaski, 385 N.E.2d 1379, 1385 (Mass. 1979)).

[259] MODEL INSTRUCTIONS ON HOMICIDE 14 (1999).

[260] *See* 3 COKE INST. 56 (1797).

[261] *See* 1 HALE P.C. 475 (1847).

as Foster and Blackstone, restricted murder to deaths that resulted from criminal acts that were *malum in se*, or felonies at the common law.[262] Today, many judges and legal scholars continue to view the felony-murder rule with disdain. Critics hold the felony-murder rule violates the most fundamental principle of the criminal law that states that "criminal liability for causing a particular result is not justified in the absence of some culpable mental state in respect to that result."[263] Some courts applied the felony-murder rule "where the law requires, but they do so grudgingly and tend to restrict its application where circumstances permit."[264]

With Judge Fitzjames Stephen taking the lead, England limited its traditional felony-murder rule in the late 19th century. In *Regina v. Serne,* the jury was instructed that a death resulting from the commission of a felony was only murder if the underlying felony was inherently dangerous.[265]

The limitation expressed in *Regina v. Sterne* has proven popular with several states that retain the felony-murder rule.[266] The drafters of the Model Penal Code cite several other felony-murder limitations in American statutes and case law:

> (1) The felonious act must be dangerous to life. . . . (2) The homicide must be a natural and probable consequence of the felonious act. . . . (3) Death must be 'proximately' caused. . . . (4) The felony must be *malum in se*. . . . (5) The act must be a common law felony. . . . (6) The period during which the felony is in the process of commission must be narrowly construed. . . . [and] (7) The underlying felony must be 'independent' of the homicide.[267]

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[262] *See* FOSTER C.C. 258 (1791); 4 WILLIAM BLACKSTONE COMMENTARIES *200-01 (1897).

[263] People v. Aaron, 299 N.W.2d 304, 316 (Mich. 1980) (quoting Bernard E. Gegan, *Criminal Homicide in the Revised New York Penal Law*, 12 N.Y.L.F. 565, 586 (1966)).

[264] PERKINS, *supra* note 109, at 44.

[265] See Regina v. Serne, 16 Cox Crim. Cas. 311. 313 (Cent. Crim Ct. 1887). In that case it was alleged that Serne and another set fire to a house and shop in order to collect the insurance proceeds. Serne's son died in the fire, and the prisoner was charged with murder. The jury was instructed on the felony-murder rule as follows:

> [T]he definition of the law which makes it murder to kill by an act done in the commission of a felony might and ought to be narrowed . . . . [I]nstead 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.

Id.

[266] *See, e.g.*, People v. Washington, 402 P.2d 130 (Cal. 1965); People v. Goldvarg, 178 N.E.2d 892 (Ill. 1931); State v. Moffitt, 413 P.2d 879 (Kan. 1967); State v. Thompson, 185 S.E.2d 666 (N.C. 1972); Wade v. State, 581 P.2d 914 (Okla. Crim. App. 1978); Commonwealth v. Bowden, 309 A.2d 714 (Pa. 1973); TEX PENAL CODE ANN. tit. 5, § 19.02(a)(3) (West 1974).

[267] MODEL PENAL CODE § 201.2 cmt. 4C (Tentative Draft No. 9, 1959) (citations

Some commentators, however, argue that confining the rule to inherently dangerous felonies is inadequate. For instance, Professor Perkins argues that you cannot limit the rule to just "dangerous" crimes, because one who is perpetrating a felony which does not in itself involve any element of human risk may resort to a dangerous method of committing the crime or use dangerous force to deter others from interfering.[268] Rather, Professor Perkins suggests limiting the felony-murder rule to situations where the commission of a felony creates any substantial risk of harm that actually results in the loss of life.[269] The danger of felony-murder may fall considerably short of a plain and strong likelihood that death or great bodily harm will result, but must not be so remote that no reasonable man would have taken it into consideration.[270] Since felony-murder already requires a criminal act, the situation created does not have to be so obviously dangerous as required for third prong malice. This theory assumes that a felony is reckless per se, and therefore, any *substantial* human risk is enough.

Ultimately, the drafters of the Model Penal Code eliminated the concept of felony-murder in favor of a presumption of the necessary recklessness to constitute murder drawn from the commission of certain crimes.[271] The Model Penal Code specifies robbery, arson, burglary, sexual assault by force, kidnapping and escape as the felonies whose attempt or commission creates a presumption of the recklessness required for murder.[272]

In addition to the Model Penal Code, the felony-murder rule has been besieged on other fronts as well. [273] Though often attacked, it has never been entirely defeated. For example, when the Wisconsin Judicial Council recommended a new homicide statute for its state, the Council called for the repeal of felony murder, which was considered second-degree murder in that state.[274] Several members of

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omitted).

[268] *See* Perkins, *supra* note 12, at 561.

[269] *See id.*

[270] *See id.* at 562-63.

[271] *See* MODEL PENAL CODE § 210.2 cmt. at 36-37 (1985).

> One who kills in the course of armed robbery is almost certainly guilty of murder in the form of intentional or extremely reckless homicide without any need of special doctrine. Similarly, a man who burns another's house will scarcely be heard to complain that he lacks the culpability for murder if the blaze kills a sleeping occupant. For the vast majority of cases it is probably true that homicide occurring during the commission or attempted commission of a felony is murder independent of the felony-murder rule.

Id.

[272] *See id. at* § 210.2(1)(b).

[273] *See, e.g.*, LAFAVE & SCOTT, *supra* note 40, at 560-61 (1972); MORELAND, *supra* note 6, 49-53.

[274] *See* Walter Dickey Et Al., *The Importance of Clarity in the Law of Homicide: The Wisconsin Revision*, 1989 WIS. L. REV. 1323, 1364. The rationale for this proposal was a belief that virtually any homicide committed during the course of another felony would be a serious criminal homicide under a different statute. *Id.* This article also notes that drafters

the Judicial Council argued that the felony-murder rule was a "dead letter" and allowed juries to use felony-murder as a lesser included offense, and was therefore, a compromise position.[275] This proposal, however, "proved to be politically unpopular", and was "restored to the Judicial Council draft in a revised form."[276] The revised form included recreating felony murder as a separate crime rather than as a type of second-degree murder, was limited to five specified felonies,[277] and the penalty was changed to allow for up to twenty years in addition to the penalty for the underlying felony. [278]

Although the trend is to limit or eliminate the felony-murder rule, not all commentators agree. One scholarly defense of the rule argued that there are substantial policies that are furthered by the rule.[279] Most persuasive, and perhaps the key to the felony-murder rule's resiliency, is that the rule offers a rational, proportional grading of offenses. The felony-murder rule acknowledges a widespread public perception that serious crimes, such as robbery, rape, and burglary that result in death are not simply a more serious version of the underlying felony. Rather it is a different crime altogether, one that rises to the level of murder. [280]

Despite the felony-murder rule's longstanding unpopularity with legal scholars, its continuing popularity with the public means that many jurisdictions will continue to keep it on the books. [281] The question is, if it is to exist, who should

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of the Wisconsin 1955 criminal code revision also attempted to abolish felony-murder. *Id.* at 1366.

[275] *See id.* at 1367. The abolitionists on the council argued that this "compromise" effect was a widely used defense position "premised on raising a reasonable doubt [on] intent and giving [a] jury a less serious verdict which 'fit the facts.' A jury unable to reach unanimity on intent might compromise by returning a verdict of felony murder. . . ." *Id.*

[276] *Id.* at 1364-65.

[277] Those felonies are: "armed robbery, armed burglary, arson, first-degree sexual assault, and second degree sexual assault by use or threat of force." *See id.* at 1365.

[278] *See id.*

[279] *See* David Crump & Susan Wait Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL'Y 359 (1985).

[280] *See id.* at 361-76. The other reasons given to support the existence of a felony-murder rule are: (2) it serves the interests in properly condemning as a homicide a felony that causes death; *Id.* at 367-68 (3) it "is just the sort of simple, commonsense, readily enforceable, and widely known principle that is likely to result in deterrence;" *Id.* at 370-71 (4) a felony murder statute can be drafted clearly and simply, avoiding the need to struggle with difficult or complex matters like intent, recklessness, premeditation, etc.; *Id.*(5) it has beneficial consequences on the optimal allocation of criminal justice system resources because it "simplifies the task of the judge and jury, thereby promoting efficient administration of justice" *Id.* at 375 and, (6) it minimizes the usefulness of perjury which is encouraged by relying on crimes requiring intent (which offer defendants an inducement to falsely deny acting with intent). *Id.* at 375-76

[281] For example, Professor Hobson recommends that California retain the felony murder rule if and when the statute is re-written. *See* Charles L. Hobson, *Reforming California's Homicide Law*, 23 PEPP. L. REV. 495, 530-36 (1996).

limit the rule's scope and in what way should it be limited.

2. Massachusetts Rule

By statute and case law, Massachusetts traditionally followed a wide-open felony-murder rule. "[a]s developed by the case law, the felony-murder rule in the Commonwealth imposes criminal liability for homicide on all participants in a certain common criminal enterprise if a death occurred in the course of that enterprise."[282] To prove murder the prosecutor need "only . . . establish that the defendant had committed a homicide while engaged in the commission of a felony."[283] Neither malice aforethought nor premeditation was required for a murder conviction under the felony-murder rule.[284] Furthermore, the defendant is not helped by a defense that he did not intend to kill.[285] Until 1982, the only court imposed limitation on the felony-murder rule was that a homicide committed during a felony had to be the natural and probable consequence of the act.[286] Finally, the statute clearly states that a homicide that occurs in the commission or attempted commission of a felony punishable by death or life imprisonment is first degree murder.[287]

In contradiction to the seemingly clear language of the murder statute, in 1982 the SJC limited the felony-murder rule, deciding which felonies specifically apply to the felony-murder rule. In *Commonwealth v. Matchett,* the defendant went to the

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[282] Commonwealth v. Watkins, 379 N.E.2d 1040, 1049 (Mass. 1978). *See also* Commonwealth v. Walden, 405 N.E.2d 939, 944 n.2 (Mass. 1980). Commonwealth v. Balliro, 209 N.E.2d 308, 312 (Mass. 1965).

[283] *Watkins*, 379 N.E.2d at 1049.

[284] *See, e.g.,* Commonwealth v. Judge, 650 N.E.2d 1242, 1246 (Mass. 1995); Commonwealth v. Moran, 442 N.E.2d 399, 403 (Mass. 1982); Commonwealth v. Devlin, 141 N.E.2d 269, 275-76 (Mass. 1957) (Malice aforethought not required); Commonwealth v. Gricus, 58 N.E.2d 241, 245-46 (Mass. 1944).

[285] *See* Commonwealth v. Dellelo, 209 N.E.2d 303, 307 (Mass. 1965).

[286] *See Devlin*, 141 N.E.2d at 274-75; Commonwealth v. Scott, 564 N.E.2d 370, 377-78 (Mass. 1990).

[287] *See* MASS. GEN. LAWS ch. 265 §1. Commonwealth v. Pope, 549 N.E.2d 1120, 1123 (Mass. 1990). Currently, there are 31 felonies that carry a maximum penalty of life in prison and may be considered "inherently dangerous" or likely to lead to murder. This list includes: murder; treason; manslaughter involving explosives; kidnapping for extortion; attempted poisoning; and perjury in the trial of a capital case. Seven crimes involving robbery carry maximum penalties of life in prison: armed robbery; armed assault in dwelling; home invasion; armed burglary with assault on occupants; unarmed robbery of a person over the age of 60 (subsequent offense); confine or put in fear to steal; and unarmed robbery. Several sex crimes carry possible life sentences: rape (subsequent offense); aggravated rape; rape of child with force; assault to rape child (subsequent offense); assault to rape a child; indecent assault and battery on a child under the age of 14 (subsequent offense); statutory rape of a child; and assault to rape (subsequent offense). Two life penalties are possible for firearms violations: trafficking in firearms; possession of a machine gun or sawed-off shotgun. *Id.*

victim's house armed with two loaded handguns, a sawed-off shotgun, a large dog, a knife, and a pair of handcuffs in order to collect a gambling debt. [288] The extortion ended in the shooting death of the debtor and the jury convicted the defendant of murder in the second degree.[289] The court found the felony-murder rule inapplicable to the statutory crime of extortion unless the circumstances demonstrate the defendant's conscious disregard of the risk to human life.[290] The court held that if the intent to commit the felony is to be the equivalent of malice aforethought, the intent to commit a crime must exhibit "a conscious disregard for human life, hardness of heart, cruelty, recklessness of consequences and a mind regardless of social duty."[291] The court identified several statutory felonies that did not meet this standard, such as possession of burglarious instruments and buying or receiving stolen property, which in addition to being less serious than the common law felonies, have no natural tendency to cause death. [292] Since "the crime of extortion could be committed in a way not inherently dangerous to human life," there can be no conviction of felony-murder in the second degree unless the jury finds that the extortion involved circumstances demonstrating the defendant's conscious disregard of the risk to human life.[293] This decision drew a dissenting opinion from Justice Nolan,[294] who stated that, "It borders on the fanciful to deny that one of the natural and probable consequences of such attempted extortion is homicide."[295] Justice Nolan further stated that the facts in this case indicated that the defendant's criminal activity might have been just as dangerous as crimes that are routinely used to prove felony-murder such as arson, burglary, robbery and larceny.[296] He objected to the Court's reluctance to apply extortion to felony-murder "simply because extortion was a misdemeanor at common law."[297] Rather, according to Justice Nolan, the court should have looked at the present statutory status of extortion.[298]

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[288] *See* Commonwealth v. Matchett, 436 N.E.2d 400, 402-03 (Mass. 1982).

[289] *See id.* at 404-07.

[290] *See id.* at 411. "The judge told the jury that murder in the first degree could be found based on deliberately premeditated malice aforethought or the felony-murder rule, with the underlying felony being an armed assault in a dwelling house with intent to commit a felony." *See id.* at 404.

[291] *Matchett*, 436 N.E.2d at 410 (citing Commonwealth v. Bowden, 309 A.2d 714, 719 (Pa. 1973) (Nix, J., concurring). *See also*, HOLMES, *supra* note 33, at 58; PERKINS, *supra* note 109, at 44.

[292] *See Matchett*, 436 N.E.2d at 410.

[293] *Id.* at 410 (citing Jenkins v. State, 240 A.2d 146 (Del. 1968), *aff'd*, 395 U.S. 213 (1969)).

[294] *See id.* at 412.

[295] *Id.* (citing Commonwealth v. Devlin, 141 N.E.2d 269, 275-76 (Mass. 1957)).

[296] *See id.*

[297] *Id.*

[298] *See Matchett*, 436 N.E.2d at 412. Extortion is a statutory felony punishable by imprisonment in the State prison for a term up to fifteen years. *See also* MASS. GEN. LAWS ch. 265, § 25 (1998).

Currently, the rule states that the underlying felony must have been either inherently dangerous to human life,[299] or committed with a conscious disregard for the risk to human life.[300] For example, the court has held that armed robbery, breaking and entering in the nighttime with the intent to commit a felony, and armed assault in a dwelling meet the standard for felony murder.[301] Similarly, the court declared several common law felonies inherently dangerous, such as, rape, arson, burglary, and robbery.[302] Certain other felonies including extortion,[303] unarmed robbery, attempted unarmed robbery, unarmed assault with intent to rob, larceny, and attempted larceny are not generally considered inherently dangerous by the court.[304]

In *Matchett*, the court adopted new limitations on the felony-murder rule that accorded with other jurisdictions.[305] Still, the Legislature and not the court should make these limitations. The Legislature considered the role of felony-murder when drafting the murder statute and it was well aware of the arguments for and against the felony-murder doctrine.[306] The 1844 Penal Code Commission included several examples of felony-murder being retained, limited, and disposed of in other jurisdictions.[307] The Legislature chose to retain felony-murder but limited its application to capital cases.[308] Whereas one may argue that the *Matchett* court instituted reasonable new limitations on felony-murder, the SJC clearly imposed elements that the Legislature chose to omit. This is an example of the court not simply interpreting an ambiguous term, but legislating new elements of the crime.

Although the court should have shown some deference to the Legislature's intent, it is true that felony-murder has gained broader application over the years. Far more crimes are defined as "felonies" now than in the mid 19th century.[309] In 1858, the most serious crimes were routinely made "life felonies"—with a statutory

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[299] *See* Commonwealth v. Claudio, 634 N.E.2d 902, 906 (Mass. 1994); Commonwealth v. Ortiz, 560 N.E.2d 698, 700-01 (Mass. 1990).

[300] *See* Commonwealth v. Moran, 442 N.E.2d 399, 403 (Mass. 1982); *Matchett*, 436 N.E.2d at 409-10.

[301] *See* Commonwealth v. Selby, 686 N.E.2d 1316, 1320 (Mass. 1997) (armed assault in a dwelling); Commonwealth v. Judge, 650 N.E.2d 1242, 1247 (Mass. 1995) (breaking and entering in the nighttime with the intent to commit a felony); Commonwealth v. Benjamin, 503 N.E.2d 660, 664 (Mass. 1987) (armed robbery).

[302] *See Matchett*, 436 N.E.2d 400, 408 n.15 (Mass. 1982).

[303] *See id.* at 410.

[304] *See* Commonwealth v. Walker, 457 N.E.2d 638, 640 (Mass. App. Ct. 1983).

[305] *See Matchett* 436 N.E.2d at 410 (citing Jenkins v. State, 240 A.2d 146 (Del. 1968), *aff'd*, 395 U.S. 213 (1969)).

[306] *See* MASS. COMM. ON PENAL CODE REPORT § 4 n.(c) (1844).

[307] *See id.*

[308] *See id.*

[309] An example of this is the chapter of Massachusetts crimes entitled "Crimes Against the Person". In 1860, there were 17 felonies listed as crimes against the person, six of which were "life-felonies." MASS. GEN. LAWS ch. 160 (1860). In 2001, this chapter had grown to 27 felonies, 10 of which carried a potential life sentence. MASS. GEN. LAWS ch. 265 (2001).

penalty of life or any number of years in prison.[310] Each of these felonies could, therefore, apply to the statutory requirement for first-degree murder. Whereas "life felonies" are often major, dangerous crimes, they also include some non-violent crimes.[311] These non-violent crimes were not part of felony-murder at common law and one would be hard pressed to imagine a hypothetical where fraud by a treasury employee or counterfeiting would unintentionally lead to homicide. Conversely, several extremely dangerous felonies created in the last 150 years do not carry the possibility of a life prison sentence. Deaths caused by often violent crimes including trafficking narcotics,[312] hostage taking by a prisoner,[313] car jacking,[314] malicious explosion,[315] and kidnapping,[316] do not carry the possibility of a first-degree murder conviction under the current felony-murder rule.

Given the changes to the criminal law, a crime's felony classification and life penalty status are no longer valid dividing lines for the most culpable murders. If the Legislature chooses to retain the felony-murder rule it should perhaps limit the rule, though not to the extent or in the manner the SJC has limited it. A clearer rule would specify the felonies that qualify a defendant for felony murder as the Wisconsin statute does.[317] Similarly, Massachusetts could limit the felony-murder rule by examining the underlying offense in the abstract to determine dangerousness. That is, if the underlying felony is not "inherently dangerous," a killing will still constitute murder if the crime is committed in a dangerous manner.[318] This sort of test may be more easily understood than the "conscious disregard" test created by the SJC, and it may include the armed extortion that was not included in felony-murder in the *Matchett* decision.

D. *Deliberately Premeditated*

Premeditation is the primary dividing line between first and second-degree murder in Massachusetts since 1858.[319] Inherent in this division is the belief that

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[310] *See, e.g.*, [Rape] MASS. GEN. LAWS ch. 265 § 22; [Burglary] MASS. GEN. LAWS ch. 266 § 14; [Robbery] MASS. GEN. LAWS ch. 265 § 17; [Kidnapping] MASS. GEN. LAWS ch. 265 §26; [Possessing Counterfeit Notes] MASS. GEN. LAWS ch. 267 § 9.

[311] For example, the list of "life felonies" includes Fraud by a Treasury Employee, MASS. GEN. LAWS ch. 266 § 50; Forgery of a Commonwealth Note, MASS. GEN. LAWS ch. 267 § 7; Forgery of a Bank Note or Traveler's Check, MASS. GEN. LAWS ch. 267 § 8; Possession of Counterfeit Notes, MASS. GEN. LAWS ch. 267 § 9.

[312] *See* MASS. GEN. LAWS ch. 94C § 32E (2000).

[313] *See* MASS. GEN. LAWS ch. 127 § 38A (2000).

[314] *See* MASS. GEN. LAWS ch. 265 § 21A (2000).

[315] *See* MASS. GEN. LAWS ch. 266 § 101 (2000).

[316] *See* MASS. GEN. LAWS ch. 265 §26 (2000).

[317] *See* Dickey, *supra* note 275, at 1365.

[318] In Kansas the court has limited felony-murder to felonies that are dangerous to human life. *See, e.g.*, State v. Goodseal, 553 P.2d 279, 284-85 (1976). *See also* LAFAVE & SCOTT, *supra* note 40, at 547-48.

[319] *See* MASS. GEN. LAWS ch. 265 §1.

premeditated murders are the most blameworthy and most deserving of the highest punishment.[320] "[D]eliberate premeditation" an unclear term subject to varying interpretations, it is a poor indicator of relative blameworthiness. Perhaps the use of premeditation as a dividing line between first and second-degree murder should be discarded.

1. Difficult To Interpret

A meaningful definition of "premeditation" as it is used in first-degree murder is elusive.[321] Generally, to premeditate does not require an extended time span but may be accomplished in a "matter of days, hours, or even seconds."[322] Because the human mind is capable of acting with extraordinary speed, the only requirement is that "the act must not be the result of an immediate or spontaneous impulse."[323] Other courts, however, ruled that premeditation that takes "no appreciable time" destroys the statutory distinction between first and second-degree murder.[324] For example, the high courts in Pennsylvania and California have arrived at different interpretations of what premeditation means when prosecuting murder.

In *Commonwealth v. Carroll*, the Supreme Court of Pennsylvania upheld a defendant's conviction for first-degree murder based on a theory of premeditation which states that premeditation may occur in any span of time, regardless of how brief.[325] The Pennsylvania Court rejected the defendant's argument that he did not

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[320] A review of state homicide statutes demonstrates the importance of premeditation when determining the perceived severity of a killing. In New Mexico, a premeditated and intentional murder is considered first-degree murder and is punishable by a sentence range of a minimum of thirty years in prison without parole to the death penalty. Pauley, *supra* note 40, at 147. Second-degree murder in New Mexico, in stark contrast, is merely punishable by a maximum of nine years in prison. *See id.* In Virginia, premeditation is the difference between the death penalty and a prison sentence of five to twenty years in prison, "[a] murder must fulfill all the requirements of an intentional, deliberate, and premeditated killing to be punished by death." *Id.* at 146 n.4 (citing M. Patricia Walther, *Should Virginia Put the Planning Back Into The Premeditation Required For Murder?* 40 WASH. & LEE L. REV. 341, 347 n. 33 (1983)).

[321] *See* LAFAVE & SCOTT, *supra* note 40, at 643.

[322] Commonwealth v. Tucker, 76 N.E. 127, 141-42 (Mass. 1905). *See also*, Jackson v. Virginia, 443 U.S. 307 (1979) (under Virginia law, "it is well settled that premeditation need not exist for any particular length of time, and that an intent to kill may be formed at the moment of the commission of the unlawful act." (citing Commonwealth v. Brown, 19 S.E. 447 (Va. 1894)).

[323] BENJAMIN CARDOZO, *What Medicine Can Do For Law*, LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES, 97-98 (1938).

[324] Bullock v. U.S. 122 F.2d. 213 (D.C. Cir. 1941). *See* LAFAVE & SCOTT, *supra* note 40, at 643.

[325] *See* Commonwealth v. Carroll, 194 A.2d 911, 916 (Pa. 1963). In *Carroll*, the defendant shot his wife with a .22 caliber pistol while she was lying in bed. The defendant testified that he and his wife had been arguing about his work schedule and that argument prompted the defendant to remember the alleged physiological and physical abuse his wife

have sufficient time to premeditate the crime.[326] The court held, "[w]hether the intention to kill and the killing, that is, the premeditation and the fatal act, were within a brief space of time or a long space of time is immaterial if the killing was in fact intentional, willful, deliberate, and premeditated."[327] On one level, this decision may be taken at face value that "time is irrelevant to the issue of premeditation."[328]

Under the *Carroll* approach, there are two ways to interpret premeditation .[329] Under the first interpretation, premeditation is the intention to kill and the state "need only prove that the defendant killed intentionally" for a first-degree murder conviction.[330] Under the second interpretation, however, "premeditation is still not the same thing as intent to kill."[331] "Premeditation requires an element of coolness, of calm reflection. This can happen in an instant, but it is not necessarily present just because the defendant intended to kill."[332] Some courts follow this interpretation, "often stressing the 'deliberation' in the 'willful, premeditated, and deliberate' formula." [333] Courts will refuse to find premeditation under this interpretation if the defendant lacks the capacity to premeditate because of emotional disturbance, rage, intoxication and fear.[334]

One commentator points out that there are inherent problems, however, with both interpretations of the *Carroll* rule.[335] If premeditation simply means intent to

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had committed against him and the couple's children. *Id.* at 913-14.

[326] *See id.* at 916. The defendant relied on the rule enunciated in Commonwealth v. Drum, 58 Pa. 9 (1868), that "no time is too short for a wicked man to frame in his mind the scheme of murder." *Id. Carroll* argued that a long time is necessary for a man of good reputation, like himself, to premeditate. *See id.*

[327] *Id.* at 916 (quoting Commonwealth v. Earnest, 21 A.2d 38, 40 (Pa. 1941)).

[328] Pauley, *supra* note 40, at 151-52. Pauley illustrates that this is a very common interpretation found in many states. *See, e.g.*, State v. Schrader, 302 S.E.2d 70 (W.Va. 1982); Young v. State 428 So.2d 155 (Ala. Crim. App. 1982); and Hammil v. People, 361 P.2d 117 (Colo. 1961).

[329] Pauley, *supra* note 40 at 152.

[330] *Id.* West Virginia adopts this interpretation, "[W]hat is really meant by the language 'wilful [sic], deliberate, and premeditated'. . .is that the killing be intentional." *Schrader*, 302 S.E.2d at 75. Other courts, however, "have rejected this equation of premeditation with intent to kill" *Id.*. *See, e.g.*, WHARTON'S CRIMINAL LAW at 257 ("Although an intent to kill, without more, may support a prosecution for common law murder, such a murder ordinarily constitutes murder in the first degree only if the intent to kill is accompanied by premeditation and deliberation.").

[331] Pauley, *supra* note 40 at 153.

[332] *Id.*

[333] *Id.* (citing People v. Caruso, 159 N.E. 390, 392 (N.Y. 1927) where the defendant's first degree murder conviction was overturned because, "although he had ample time to premeditate and deliberate, he did not have the capacity to premeditate—in other words, to reflect calmly on his intended act.").

[334] *See* Pauley, *supra* note 40, at 153-54 (citing Commonwealth v. Stewart, 336 A.2d 282 (Pa. 1975)).

[335] *Id* at 155.

kill, then there is no reason for a legislature to include modifiers such as premeditated, deliberate or willful for first-degree murder. The second interpretation is even more difficult— is it possible for calm reflection and deliberation to be achieved in a moment? Pauley argues that while a moment is long enough to form intent to kill, it is not long enough to calmly and deliberately weigh the alternatives.[336] Justice Cardozo seems to agree, stating "an intent to kill is always deliberate and premeditated within the meaning of the law unless the mind is so blinded by pain or rage as to make the act little more than an automatic or spontaneous reaction."[337]

The California Supreme Court took a different approach than Pennsylvania by rejecting outright the notion that premeditation was simply intent to kill.[338] The court held that "in order for a killing with malice aforethought to be first rather than second degree murder, '[t]he intent to kill must be. . .formed upon a *pre-existing* reflection' [and have] been the subject of actual deliberation or forethought. . ."[339] Therefore, first degree premeditated murder only exists if the state proves that the killing was the "result of careful thought and weighing of considerations; as a *deliberate* judgment or plan; carried on coolly and steadily, [especially] according to a *preconceived design*."[340] The California approach has been both adopted and criticized because of its limiting nature.[341]

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[336] *See id.*

[337] CARDOZO, *supra* note 323, at 98-99.

[338] *See* People v. Anderson, 447 P.2d 942, 948 (Cal. 1968). In that case, the defendant's first degree murder conviction was overturned because the evidence did not support the verdict. The victim, a ten year old girl, was stabbed over sixty times. The defendant had been living for several months with the girl's mother and the mother's two children. There was evidence that the defendant was heavily intoxicated at the time of the murder, that he tried to hide the body and clean up after the crime and that he lied to both the mother and brother of the victim to conceal his act. *Id.* at 944-46, 948.

[339] *Id.* at 948 (quoting People v. Thomas, 156 P.2d 7, 18 (Cal. 1945)).

[340] *Id.* at 447 P.2d at 948 (italics in original) (quoting People v. Bender, 163 P.2d 8, 19 (Cal. 1945). The *Anderson* decision goes on to describe three types of evidence that can be used to prove premeditation and deliberation:

> (1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing—what may be described as 'planning' activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim . . .; [and] (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way. . . .

Id. at 949 (italics in original). The California Supreme Court noted that in cases that lacked evidence in all three circumstances, the courts should demand "at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3)." *Id.*

[341] *See* Pauley, *supra* note 40, at 158. Examples of other states that take the same view as *Anderson* are New Mexico and Michigan. Several New Mexico decisions have "looked to

The Massachusetts rule on premeditation is similar to the Pennsylvania rule in that there is no specific requirement for the length of time deliberation must occur.[342] As early as 1905, the SJC recognized that deliberate premeditation may occur in a matter of seconds.[343] Still, just as in Pennsylvania, it is difficult to ascertain the precise definition of "deliberate premeditation". Is it simply intent to kill, or is there more to premeditation? Since the SJC has seemingly merged the terms "deliberately premeditated" and "malice aforethought" into one term of art, the answer is apparently intent to kill. This raises the question of why the Legislature included the deliberate premeditation requirement in the murder statute. Regardless, questions of interpretation almost certainly will arise in the future. The court could choose to take a new approach as it has done with malice, and adopt a California style test. Rather than trying to define premeditation properly in new legislation, it may be useful to ascertain the term's utility in determining the degree or severity of murder.

2. Premeditation as a Poor Indicator Of Severity

Even if it was possible to adopt a clear and practical definition of premeditation, there may be better methods for determining which killings are worthy of society's most severe penalties. "Premeditated" killings are not necessarily the worst crimes, in fact, many unpremeditated killings shock society's conscience more than premeditated murders.

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evidence of motive, plan, method of killing, and sufficient time to engage in careful thought and weighing of considerations." *Id.* *See also* Romero, *supra* note 151, at 84. One Michigan case states that the "interval between initial thought and ultimate action should be long enough to afford a reasonable man time to subject the nature of his response to a 'second look.'" *Id.* (citing People v. Morrin, 187 N.W2d 434, 449 (Mich. Ct. App. 1971)). The main criticism of the *Anderson* standard is that it is an extremely difficult standard for the prosecutor to meet, even in cases that would traditionally be viewed as "first degree" murder. *See* Pauley, *supra* note 40, at 160. The California court seems to accept this position, and has softened the *Anderson* standard to some extent. In People v. Perez, 831 P.2d 1159 (Cal. 1992), the court upheld a first degree murder conviction and found that "[t]he *Anderson* factors, while helpful for purposes of review, are not a sine qua non to finding first degree premeditated murder, nor are they exclusive." *Perez*, 831 P.2d at 1163.

[342] *See* Commonwealth v. Diaz, 689 N.E.2d 804, 806-08 (Mass. 1998); Commonwealth v. Jiles, 698 N.E.2d 10, 14-15 (Mass. 1998); Commonwealth v. Otsuki, 581 N.E.2d 999, 1006-07 (Mass. 1991); Commonwealth v. Caine, 318 N.E.2d 901, 907-908 (Mass. 1974); Commonwealth v. Brooks, 32 N.E.2d 242, 243 (Mass. 1941).

[343] *See* Commonwealth v. Tucker, 76 N.E. 127 (Mass. 1905).

In substance the view expressed is that while it must be shown that a plan to murder was formed after the matter had been made a subject of deliberation and reflection, yet in view of the quickness with which the mind may act, the law cannot set any limit to the time. It may be a matter of days, hours, or even seconds. It is not so much a matter of time as of logical sequence. First the deliberation and premeditation, then the resolution to kill, and lastly the killing in pursuance of the resolution; and all this may occur in a few seconds.

Id. at 141.

The inclusion of premeditation in first-degree murder statutes indicates that a person who plans ahead is worse than is the person who kills on sudden impulse. Several types of murder contradict this assumption. One form of premeditated killing, mercy killing, society may not view as particularly "blameworthy."[344] On the other hand, in *History of the Criminal Law of England*, Judge Stephen pointed out that some of the most atrocious murders could be unplanned:

As much cruelty, as much indifference to the life of others, a disposition at least as dangerous to society, probably even more dangerous, is shown by sudden as by premeditated murder . . . [Imagine a man], passing along the road, sees a boy sitting on a bridge over a deep river and, out of mere wanton barbarity, pushes him into it and drowns him. A man makes advances to a girl who repels him. He deliberately but instantly cuts her throat . . . In none of these cases is there premeditation unless the word is used in a sense as unnatural as "aforethought" in "malice aforethought," but each represents even more diabolical cruelty and ferocity than that which is involved in murders premeditated in the natural sense of the word.[345]

Such problems led to calls for abandonment of the premeditation requirement and for the adoption of different methods of assessing the severity of homicides.[346] Justice Cardozo called the premeditation formula "defective and unreal psychology."[347] As a result, some jurisdictions have refused to adopt the distinction between deliberation and premeditation.[348] Commentators from California,[349] and New Mexico[350] argued against the incorporation of premeditation in any new murder statute. Likewise, the Model Penal Code rejects the use of degree structure based on deliberation or premeditation standards.[351]

A more effective method of grading murders may entail listing within the statute the circumstances, in addition to malice, which would justify to the most severe

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[344] *See* Hobson, *supra* note 281, at 521 (citing State v. Forrest, 362 S.E.2d 252 (N.C. 1987) in which the defendant murdered his terminally ill father because he could not bear to see his father suffer any longer. The defendant shot his father four times.). The North Carolina Supreme Court upheld the defendant's conviction for first-degree murder because the facts of the case clearly indicated that the killing was premeditated. *See* Forrest, 362 S.E.2d at 258.

[345] 3 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 94 (1883).

[346] *See* Pauley, *supra* note 40, at 166-69.

[347] *See* CARDOZO, *supra* note 324, at 100.

[348] England has consistently refused to include premeditation in its law of murder. *See* ROYAL COMMISSION ON CAPITAL PUNISHMENT, REPORT 182-189 (1949-1953). Several American jurisdictions also have rejected the premeditation formula. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 53a-54b (West 1985); DEL. CODE ANN. tit. 11, § 636 (1979 & Supp. 1986); 38 ILL. COMP. STAT. ANN. 91 (West 1987); TEX. PENAL CODE ANN. § 19.03 (West 1974 & Supp. 1987); WIS. STAT. ANN. § 940.01 (West 1982).

[349] *See* Hobson, *supra* note 282, at 520-21, "Even if premeditation were readily definable, it is not he best way to distinguish between first- and second- degree murder. Length of deliberation is not a consistent indicator of moral blame."

[350] *See* Romero, *supra* note 151, at 92.

[351] *See* MODEL PENAL CODE § 210.2 Part II (1980).

penalty.[352] Professor Romero suggests including murders for pay, murders by prisoners, murders committed to avoid or prevent a lawful arrest or for the purpose of facilitating a prisoners escape from lawful custody, and perhaps murders that occur during the commission of rape or robbery.[353] Under this scheme, the legislative process would replace interpretation of malleable phrases such as "deliberate premeditation" and determine which instances of murder warrant the most severe punishment.

IV TOWARDS A NEW MURDER STATUTE FOR MASSACHUSETTS

"But to get [the dragon] out is only the first step. The next is either to kill him, or to tame him and make him a useful animal."[354]

Given the length of time since the enactment of the Massachusetts murder statute, and the number of differing interpretations by the courts of that original statute, the time has come to either clarify or redraft the murder statute. The Massachusetts District Attorneys Association suggested that Massachusetts define the common law terms within the murder statute. Nevertheless, this measure may not be enough to fully address the statute's problems. If the Legislature is to undertake its first re-write of the murder statute in nearly 150 years, the redraft should be comprehensive. Any reform of this statute should occur with the intention of: 1) making the terms and elements of murder clear to both practitioners and the public alike; 2) clearly delineating between murder and manslaughter; and 3) prioritizing the severity of various types of murder and assigning the appropriate penalty to these different grades.

During the 1999-2000 session of the Massachusetts General Court, the Massachusetts District Attorneys Association sponsored a bill that addressed some of the recent changes to the definition of malice imposed by the SJC. The bill, House Bill 3430 "An Act Further Defining The Crime Of Murder" (H. 3430), proposed a new section to General Laws chapter 265 § 1 that defined three important terms: "malice aforethought,"[355] "deliberately premeditated"[356] and

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[352] *See* Romero, *supra* note 151, at 93-94 (quoting G. FLETCHER, RETHINKING CRIMINAL LAW, 2563 n.23 (1978), ". . .so far as the classification of murder into degrees was designed to isolate cases in which the death penalty was justified, that goal appears to be better served by listing the aggravating circumstances and mitigating considerations that bear on the gravity of a proven murder").

[353] *See* Romero, *supra* note 150, at 93-4.

[354] Holmes, *supra* note 5, at 469.

[355] *See id.*

> Malice aforethought' may be inferred from evidence that the defendant without legal justification or excuse (1) acted with intent to kill another, or (2) acted with intent to do grievous bodily harm to another, or (3) acted in a manner such that a reasonably prudent person, with the defendant's knowledge of the circumstances of the intended act, would have realized that the intended act created a plain and strong likelihood of death or grievous

"extreme atrocity or cruelty."[357] At the Criminal Justice Committee hearing on H. 3430, Plymouth Assistant District Attorney Geline Williams pointed out the difficulties faced by both prosecutors and the judiciary in properly and clearly defining the various elements of murder.[358] By defining the common law terms the Legislature could put the uncertainty of this law to rest, stop the shifting standards adopted by the SJC, and restore some recently changed aspects of the law of murder. According to Ms. Williams, H. 3430 was meant to "open a discussion" on how the legislature should revise the murder statute.[359]

A good opposing argument is that instead of simply redefining the common law terms, the Legislature should undertake the task of fully redrafting the murder statute. This process could produce a clearer, more precise statute, but also will produce a long overdue reexamination of what is more culpable criminal behavior and determine how to punish that behavior. Instead of re-codifying the common law, as was done in the 1850's, or returning the murder statute to its meaning of twenty, fifty or a hundred years ago, the legislative process could be the vehicle by which important policy decisions are made so that the new statute represents the public's attitudes and desires regarding how to punish various forms of homicide. By properly redrafting the homicide statutes, the Legislature can also end the shifting standards adopted by the court in recent years. Finally, the Legislature can set out proportionate and appropriate penalties for homicide. Without question, a clear, well-defined murder statute will be of great benefit to trial judges, prosecutors, defense attorneys and the jurors who must decide these homicide

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> bodily harm to another, or (4) knowingly used deadly force with intent to do bodily harm to another, or (5) acted with conscious disregard of the risk to the life of another during the commission or attempted commission of a felony, or (6) knowingly participated in the commission or attempted commission of an inherently dangerous felony.

Id. at 469.

[356] *See id.*

> An act is 'deliberately premeditated' if the person who commits the act (1) either did consider or did consciously disregard that the intended act would create a plain and strong likelihood of death or grievous bodily harm to another, and (2) did decide to commit the intended act, and (3) did commit the act in furtherance of that decision.

Id.

[357] *See id.*

> Murder is committed 'with extreme atrocity or cruelty' if the jury may conclude from the evidence that the death was caused in a manner which reflected cruelty on the part of the defendant which greatly surpassed that inherent in any unjustified or unlawful taking of life, or the jury concludes, the circumstances known to the defendant, the unjustified or unlawful taking of life was exceedingly shocking, brutal, appalling, horrifying, or revolting.

Id.

[358] Criminal Justice Committee Hearing, June 8, 1999.

[359] *See id.*

cases.

1. Goals and Priorities

If the Legislature takes up the challenge of rewriting the murder statute, what should the new statute look like? Below are several objectives for which the Legislature should strive.

a. Eliminate common law terms.

This is perhaps the most important goal in that it will have the greatest reform effect. As discussed above, the reason Bentham urged that government codify criminal statutes were not only to make them clear, but also to keep the important power of deciding what was and was not criminal behavior in the hands of elected officials, instead of in the hands of an appointed and removed judiciary.[360] When Massachusetts enacted the current murder statute with the common law terms and ideas intact, the judiciary continued to have power over defining the essential terms of the statute. While this was not a problem for the 150 years that the definition of "malice" remained the same as it had been in the time of Blackstone, the Court's recent pronouncements have made the law of murder at the very least difficult to understand and at worst impossible to predict. Furthermore, there is no assurance that the Court's definitions of "malice," "premeditation," "felony-murder," and "extreme atrocity or cruelty" will not continue to change. A well-drafted statute that does not rely on the common law terms and properly defines the terms it does employ will go a long way toward making the statute clear and stable.

b. Eliminate premeditation as a requirement for first degree murder.

The original proposal for premeditation as a requirement for first-degree murder attempted to separate the more heinous crimes from those that were spur of the moment, and therefore less culpable. The time has come to abandon this inadequate dividing line. First, premeditation has become little more than a legal fiction because a killing may be "premeditated" in less than a moment. In fact, the only real influence "premeditation" has had is that as an element of first-degree murder, the SJC used it to limit the definition of first-degree malice to intent to kill standard. Second, since 1858 it has become clear that certain premeditated killings may be deemed "understandable" by the general public, and deserve a lesser sentence, whereas other killings committed without premeditation are among the most loathsome of crimes. A woman who kills her terminally ill and suffering husband as an act of mercy committed first-degree murder and must serve life in prison without the possibility of parole because it is clearly a premeditated killing. In stark contrast, and according to recent SJC decisions, a man who beats a baby until it bleeds to death may be convicted of involuntary manslaughter and may

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[360] *See* Kadish, *supra* note 51, at 1099-06.

serve less than four years in prison.[361] A new dividing line should be drawn to accurately reflect the public attitudes toward different types of killings.

c. Eliminate the degrees of murder.

Most states define murder by statute, and have, like the federal statute, divided the crime into two degrees. Murders perpetrated by means of poison, by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or those killings committed during the perpetration of an arson, rape, robbery or burglary, are commonly deemed "murder of the first degree."[362] These states have deemed any other form of murder to be less serious, and therefore "murder of the second-degree," which is punished less severely.[363] In Massachusetts, the difference in penalty between first and second-degree murder is great; those convicted of second- degree murder are eligible for parole after serving fifteen years of a life sentence while those convicted of first-degree murder have no chance at parole. As discussed above, degrees of murder were introduced to allow some killers, whose killings were less reprehensible or more sympathetic, to escape the death penalty.[364] Furthermore, in Massachusetts, the jury was specifically empowered to determine the degree of murder, so that the penalty would better reflect the will of the public at large.[365] Given the archaic and confusing state of the law of murder, the sentence can rarely be said to reflect the public will.

A strong argument may be made that degrees are not necessary at all. The English criminal justice system demonstrates that it is possible to separate capital murders from non-capital murders, or to categorize some murders as deserving of a heightened penalty without dividing the crime into degrees. The English Homicide Act of 1957 stated that murders committed in certain ways are punishable by death and that all other murder is subject to life imprisonment.[366] Similarly, the Model Penal Code also dispenses with the degree structure, and does not distinguish between purposeful, knowing, or reckless homicides.[367] This decision was based on a theory that purposeful knowledge and recklessness have a common theme of indifference to human life.[368] Some commentators have argued that the Code's dispensation of degrees is poor policy because the original need for degrees; distinguishing capital from non-capital crimes, is still very much a necessity.[369] However, because the death penalty currently is not an issue in Massachusetts,[370] a

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[361] *See Vizcarrondo*, 693 N.E.2d 677.

[362] *See* MODEL PENAL CODE §210.2 cmt. 16.

[363] *Id.*

[364] *See id.*

[365] *See, e.g.*, Address of His Excellency George N. Briggs to the Two Branches of the Legislature of Massachusetts (Mass. 1846).

[366] *See generally* LAFAVE & SCOTT, *supra* note 40, at 642.

[367] *See* MODEL PENAL CODE, § 210.2 cmt. 3.

[368] *See id. at* §210.2 cmt. 4.

[369] Hobson, *supra* note 281, at 527.

[370] The reinstatement of the death penalty was rejected by the Legislature in each of the

capital murder provision is unnecessary.

Perhaps a better method of punishing any homicide is to have a range of years available to the judge or jury to assign according to enumerated aggravating and mitigating circumstances. The current trend in Massachusetts, however, has been to give less latitude to the sentencing judge through the use of mandatory minimum sentences. For this reason, giving the judge more flexibility may not be politically feasible. Nevertheless, it should be explored as an option.

d. Allow for proportionality of punishment according to the relative blameworthiness of the killing.

Closely related to the degrees of murder is how to punish killings that have different levels of culpability and severity. Perhaps the time has come to take the power of determining the degree of the crime away from the jury. By setting out clear punishments for the most serious forms of murder, such as murder for financial gain, the Legislature can be sure that what the public perceives as the most reprehensible crimes will always receive the most severe penalty. For all other forms of murder, the Legislature could establish a penalty range and empower the trial judge to sentence according to the particular facts of the case. Not only is this one of the traditional roles of the judge, the trial judge would be in a better position to punish proportionally to other murders. Address the amount of burden this system would have on the Court This flexibility will allow the judge to treat behavior that is murder, but may have some mitigating circumstances such as the battered wife who kills her abusive husband or the spouse who kills her suffering husband, differently from other murders. The new statute could specify that the trial judge must give a rationale for his sentencing decision, which lists the aggravating and mitigating circumstances that influenced his decision. Such an explanation, which may be impossible to solicit from a jury, would be useful in the public's understanding of why a particular punishment for certain behavior was warranted. Finally, by providing sentences based upon aggravating and mitigating circumstances, it may be possible to dispense with voluntary manslaughter as a separate crime. The sentencing judge could consider the mitigating factors that make an intentional killing manslaughter and not murder and an appropriate sentence could be imposed. By introducing greater judicial discretion—with clear guidelines—the Legislature could introduce a better sense of proportionality between criminal culpability and punishment.

e. The Legislature should retain felony-murder and specifically list those felonies that will be considered inherently dangerous.

Although commentators argued against retaining the theory of felony

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last several sessions. Still, in the 1998 session, reinstatement was defeated by only one vote in the House of Representatives. The death penalty, therefore, may again become an issue within the murder debate.

murder [371] there are several reasons why it should be retained. Not only is felony-murder politically popular, it adds an element of proportionality.[372] In addition, the felony murder rule remains politically popular despite academic criticism because "[it] is just the sort of simple, commonsense, readily enforceable, and widely known principle that is likely to result in deterrence."[373] Some commentators consider a heightened penalty for a felony that ended in death a suitable replacement for felony-murder.[374] In such cases the killer might receive the same prison time but escape public scorn because he is not labeled a "murderer." The removal of felony-murder from the statute thus minimizes the victim's death in that the commission of a crime that results in death may be equated with the commission of a similar crime that lacks death. [375] In addition, the commission of a felony is the most dangerous form of recklessness. If someone undertakes a major felony, he should and must assume the risks that accompany that dangerous and illegal activity.

However, felony-murder should be limited. The changing nature of both the term "felony" and the sentences assigned to felonies, suggests that a plain meaning reading of the current statute is not appropriate. The limitations, however, should be easily understood and the statute should enumerate specific "inherently dangerous" felonies, which if the commission of the felony results in death, will qualify the defendant for a mandatory life sentence. This provision will both limit judicial redefinition and allow the Legislature to clearly state which felonies are so dangerous that a resulting homicide will expose the defendant to a mandatory life sentence.

2. Proposed Language

Given the five goals above, a possible murder statute may take the following form:

M.G.L. c. 265 §1 Murder.

A. Definitions.

"Extreme Atrocity or Cruelty," includes, but is not limited to, indifference to or taking pleasure in the victim's suffering, consciousness and degree of

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[371] *See, e.g.*, PERKINS, *supra* note 108, at 44 ("the reason for the rule has ceased to exist"); LaFave &Scott, *supra* note 40, at 560-61 (1972) ("[it] is arguable that there should be no such separate category of murder").

[372] *See* Crump, *supra* note 279, at 363 ("Felony murder reflects a societal judgment than an intentionally committed robbery that causes the death of a human being is qualitatively more serious than an identical robbery that does not.")

[373] *Id.*

[374] *See, e.g.*, Dickey, *supra* note 275 at 1366-70 (discussing the recent history of the felony-murder rule within the Wisconsin murder statute).

[375] *See* Crump, *supra* note 279, at 367-69.

suffering of the victim, extent of physical injuries to the victim, number of blows inflicted on the victim, manner and force with which the blows were delivered, the instrument employed, and disproportion between the means needed to cause death and those employed.

"Torture" means the intentional infliction of extreme and prolonged physical pain for the purposes of revenge, extortion, persuasion, or for any other purpose.

Comment: In addition to exercising the proposed statute of common law terms, the first paragraph should define legal terms that require clarification.

B. Murder is the killing of one human being by another without lawful justification or excuse, and unless the defendant acts upon sufficient provocation upon a sudden quarrel, or in the heat of passion, by any of the following means:

(1) the defendant specifically intended to kill the victim;

(2) the defendant specifically intended to cause the victim grievous bodily harm;

(3) in the commission of or attempt to commit a felony that is inherently dangerous to human life or is committed in a dangerous manner;

(4) the defendant recklessly creates an unreasonable and substantial risk of death or great bodily injury under circumstances indicating extreme indifference to the value of human life.

Comment: This statute defines murder without using the phrase "malice aforethought," yet the scope of murder includes the traditional, wide range of killings that the public considers "murder." Specifically, this includes restoring the reckless creation of risk of grievous bodily injury to the definition of murder. Additionally, the statute retains felony murder but in a limited fashion. The limitation differs from the current Massachusetts rule that states that the crime be either inherently dangerous or be committed with a conscious disregard for the risk to human life. The proposed felony murder rule retains the first limitation, but changes the second limitation to a standard that can be clearly established by the objective facts of a crime, rather than creating a second recklessness standard that may differ from clause (4).

C. Any murder that is committed:

(1) for the purpose of financial gain;

(2) for the purpose of obstructing the judicial system;

(3) by the use of explosives;

(4) by torture;

(6) in the commission of or attempt to commit one of the following felonies:

(i) arson;

(ii) rape;

(iii) trafficking narcotics;

(iv) armed burglary;

(v) armed robbery;

shall be punished by imprisonment in state prison for a term of life. No person shall be eligible for parole under section 133A of chapter 127 while he or she is serving a life sentence for murder, but if his or her sentence is commuted there from by the governor and council under the provisions of section 152 of said chapter 127 he or she shall thereafter be subject to the provisions of law governing parole for persons sentenced for lesser offenses.

Comment: This provision reserves the most severe penalty currently available under Massachusetts law—life in prison without the possibility of parole for those murders that many people consider particularly heinous for. The proposed section accomplishes this without broadly stating that intentional or premeditated murders are automatically the most serious murders. This penalty is a form of a "mandatory minimum" penalty, which has become a popular sentencing tool in recent years.[376] The minimum sentence will assure that those murders that the public considers particularly wicked or blameworthy, including the most serious instances of felony murder, are punished proportionally. This is essentially "first degree murder," but is purposely not referred to as such because the maximum penalty is not exclusive to these circumstances. In fact, a sentence of life imprisonment will be available to the sentencing judge in every homicide where if she finds the presence of aggravating circumstances which warrant such a serious sentence. This possibility is discussed below.

D. 1) All other murders shall be punished by imprisonment in state prison for a term of not less than 20 years and not more than life. A sentence of life shall not be reduced to less than 20 years nor shall the person be eligible for probation, parole, furlough, work release or receive any deduction from his sentence for good conduct until having served 20 years.

Comment: This provision makes all murder not covered in paragraph C subject to a range of punishment from 20 years to life imprisonment. A new murder statute should recognize that murder can take many forms, both in the method by which it is accomplished, the circumstances which surround the killing, and the mental state or motive of the killer. For example, the traditional forms of extreme atrocity or cruelty, with the exception of torture, are now aggravating circumstances to be balanced against any mitigating circumstances, such as mental condition. Accordingly, this provision gives the sentencing judge some flexibility when deciding the proper penalty. The opportunity exists, however, for the imposition of a life sentence in deserving cases not covered in paragraph C. Such sentencing flexibility is essential to create a sense of proportionality and fairness because of the complicated nature of so many homicides. This structure allows proportional sentencing without relying on artificial and inflexible factors such as premeditation.

2) The sentencing judge shall state the reasons, including any aggravating or mitigating circumstances, for the sentence imposed. The sentencing judge shall not be required to conduct an evidentiary hearing in determining aggravating or mitigating circumstances.

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[376] For example, the Massachusetts Legislature has imposed mandatory minimum sentences in regards to trafficking narcotics. Mass. Gen. Laws ch. 94C, § 32E.

a) Aggravating circumstances shall include, but are not limited to:

i) The victim's vulnerability due to age or physical or mental disability;

ii) The murder was committed with extreme atrocity or cruelty;

iii) The defendant was a leader in the commission of an offense involving two or more criminal actors;

iv) The defendant committed the offense while on probation, on parole, or during escape; or

v) The defendant has committed repeated offenses against the same victim.

b) Mitigating circumstances shall include, but are not limited to:

i) the defendant was a minor participant in the criminal conduct;

ii) the defendant was suffering from a mental or physical condition that significantly reduced the culpability of the defendant for the offense;

iii) the sentence was imposed in accordance with a jointly agreed recommendation;

iv) the age of the defendant at the time of the offense; or

v) the victim provoked the defendant, but the provocation does not amount to a defense to murder.

Comment: These aggravating and mitigating circumstances derive largely from the proposed Massachusetts Sentencing Guidelines.[377] These are not exclusive lists as the sentencing judge has flexibility to adequately fit the facts of the murder into aggravating or mitigating circumstances. The provocation-mitigating factor may cover situations where the "provocation" occurs over several years, such as the case of an abused spouse. Whereas the provocation does not excuse the crime, or even lessen it to manslaughter, the sentencing judge may give a lesser sentence in light of those facts.

V. Conclusion

The dragon is old. Born of an ancient tradition, it was given a territory to roam, but was subsequently ignored by the Legislature. Recently hobbled by the courts, the dragon is now a gnarled, obscure and unpredictable creature. The time has come to slay this dragon and put a new one in its place to punish society's gravest crime.

The Massachusetts murder statute is complicated, tied to archaic language, and constantly changing in meaning and standards. As discussed above, the definition of malice, the line between murder and manslaughter, and what constitutes felony-murder have all undergone significant changes. These shifts have come at the hands of a SJC that systematically limited the reach of the murder statute through a series of decisions within the last twenty years. Although one could argue that the activism created this situation, it is the Legislature's inactivity over the last 150 years that gave the Court a free hand to redefine murder as they saw fit. In

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[377] *See* REPORT OF THE MASSACHUSETTS SENTENCING COMMISSION at 19 (1996).

addition, the Legislature, by enacting a statute that relies on common law terms such as "malice," allowed the court to reinterpret and redefine murder. The statute also continues to employ the arbitrary and outmoded concept of premeditation to define the most serious forms of murder. The shifting nature of murder has made the statute nearly impossible for even judges, prosecutors and defense attorneys to understand. Finally, and perhaps most importantly, the statute is unpredictable in that the statute will almost certainly continue to "evolve" with every decision handed down by the SJC. Until the statute is stable and predictable problems will continue to plague judges when instructing juries, prosecutors when seeking indictments and all litigators when preparing for murder trials.

The Legislature must reform the murder statute so that it will not only be understandable, but will also punish killers according to their relative blameworthiness and the threat they pose to society. The proposed statute above represents a vast improvement over the current statute. This language eliminates the term "malice," it does away with the concept of premeditation, clearly states what criminal conduct will expose a person to a felony murder charge, and mandates the most severe penalty for the most blameworthy homicides. Not only will the proposed language be more easily understood by practitioners and jurors, it will be not be as open to judicial reinterpretation as the current statute.

The Legislature cannot ignore this dragon any longer. It must fulfill its obligation to clearly and concisely set forth what does and what does not constitute murder in the state of Massachusetts and how murderers will be punished.