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### Plotting Premeditation's Demise


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# PLOTTING PREMEDITATION'S DEMISE

KIMBERLY KESSLER FERZAN\*

## I

### INTRODUCTION

Few legal concepts are as accessible to the layman as is premeditation. Popular culture is filled with images of premeditating actors, be they Professor Moriarty, Voldemort, or even the opaquely denominated Dr. Evil. What is striking about popular culture depictions is that these characters are typically one-dimensional: they do nothing but plan the demise of the hero. No doubt exists as to the antagonist's culpability because all the actor does is plot the protagonist's death.<sup>1</sup>

Unfortunately, art sometimes does imitate life all too accurately. The events of September 11th reveal that there are human beings who truly spend significant effort deliberating over killing other people and planning those killings. Osama bin Laden, Adolf Hitler, and Saddam Hussein represent real-world embodiments of one-dimensional evildoers.

But the run-of-the-mill killing is not committed by Hitler or Voldemort. It is committed in strikingly different contexts—romantic rifts, bar fights, gang wars. One might think that, with such striking examples of premeditating actors, it would be easy to apply the common man's view of premeditation. In fact, however, theorists are exceedingly skeptical as to whether premeditation actually exists in any discernible way and, even if it can be conceptually captured, whether premeditation is an appropriate means for distinguishing between first- and second-degree murder. Indeed, Dan Kahan and Martha Nussbaum proclaim, “‘Premeditation’ is in fact one of the great fictions of the law.”<sup>2</sup>

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1. See Suzanne Mounts, *Premeditation and Deliberation in California: Returning to a Distinction Without a Difference*, 36 U.S.F. L. REV. 261, 261 (2002) (noting pop culture's influence on our understanding of premeditation).

2. Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 324 (1996).

Fiction or not, premeditation is a real problem. Despite the Model Penal Code's rejection of premeditation, twenty-nine states, the District of Columbia, and the federal government all employ a premeditation or deliberation formula as a part of their murder statutes.<sup>3</sup> In some of these jurisdictions, premeditation is the difference between life and death.<sup>4</sup> In others, premeditation may make a significant difference in prison term.<sup>5</sup>

In efforts to adjudicate the guilty mind, premeditation presents obstacles at numerous levels. First, as a normative matter, there is reason to doubt that premeditation truly distinguishes the most culpable killings. As Sir James Fitzjames Stephen imagined, 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 so drowns him."<sup>6</sup> Stephen noted that in this case there is no premeditation but that it represents "even more diabolical cruelty and ferocity" than premeditated killings.<sup>7</sup> At the other end of the spectrum is *State v. Forrest* in which the defendant killed his suffering, terminally ill father; a first-degree murder conviction was upheld by the North Carolina Supreme Court.<sup>8</sup> Premeditation thus appears to be both over- and under-inclusive in capturing the most culpable actors.<sup>9</sup>

Second, at the conceptual level, articulating a clear distinction between premeditation and an intention to kill is difficult.<sup>10</sup> In the average case, to form

3. See 18 U.S.C. § 1111(a) (2006); ARIZ. REV. STAT. ANN. § 13-1105(A)(1) (2010); ARK. CODE ANN. § 5-10-101(a)(4) (2006); CAL. PENAL CODE § 189 (West 2010); COLO. REV. STAT. ANN. § 18-3-102(1)(a) (West 2001) ("deliberation"); D.C. CODE ANN. § 22-2101 (2002); FL. STAT. ANN. § 782.04 (West 2001); IDAHO CODE ANN. § 18-4003 (West 2002); IOWA CODE § 707.2 (2002); KAN. STAT. ANN. § 21-5402 (2011); MD. CODE ANN., CRIM. LAW § 2-201 (West 2002); MASS. GEN. LAWS ANN. ch. 265, § 1 (West 2002); MICH. COMP. LAWS ANN. § 750.316 (West 2002); MINN. STAT. ANN. § 609.185 (West 2001); MISS. CODE ANN. § 97-3-19 (West 2001); MO. ANN. STAT. § 565.020 (West 2001) ("deliberation"); NEB. REV. STAT. § 28-303 (2002); NEV. REV. STAT. ANN. § 200.030 (West 2002); N.M. STAT. ANN. § 30-2-1 (West 2002); N.C. GEN. STAT. ANN. § 14-17 (West 2002); OHIO REV. CODE ANN. 2903.01(A) (West 2002); OKLA. STAT. ANN. tit. 21, § 701.7 (West 2002) (employing a formula best described as quasi-premeditative in nature); 18 PA. CONS. STAT. ANN. § 2502 (West 2002); R.I. GEN. LAWS ANN. § 11-23-1 (West 2005); S.D. CODIFIED LAWS § 22-16-4 (2002); TENN. CODE ANN. § 39-13-202 (West 2002); VT. STAT. ANN. tit. 13, § 2301 (West 2002); VA. CODE ANN. § 18.2-32 (West 2002); WASH. REV. CODE ANN. § 9A.32.030 (West 2002); W. VA. CODE ANN. § 61-2-1 (West 2002); WYO. STAT. ANN. § 6-2-101 (West 2002).

4. See, e.g., ARIZ. REV. STAT. ANN. § 13-751(A) (2010); FL. STAT. ANN. § 782.04; VA. CODE ANN. § 18.2-31.

5. In Michigan, first-degree murder is punishable by life imprisonment, but second-degree murder is punishable by *any* term of years to life. MICH. COMP. LAWS §§ 750.316-317 (West 2002). In Rhode Island, the penalty for first-degree murder is life and the penalty for second-degree murder is ten years to life. R.I. GEN. LAWS ANN. § 11-23-1. In Vermont, the difference is 35 to life for first-degree murder and twenty to life for second-degree murder VT. CODE ANN. tit. 13, § 2303 (West 2002).

6. 3 SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 94 (London, MacMillan & Co. 1883).

7. *Id.*

8. *State v. Forrest*, 362 S.E. 2d 252 (N.C. 1987).

9. These concerns are discussed *infra* section III.

10. See Mounts, *supra* note 1, at 266. Mounts observes,

the intention to kill requires desiring something, believing that one will achieve what one desires by killing, and then forming the intention to kill. Is the deliberation inherent in choosing distinguishable from premeditation? Moreover, once the intention is formed, rational agents will often have to further deliberate as to how to kill, so intention execution may also involve deliberation. The problem is that, even if all that an intentional killing requires is the choice or intention itself, it is an extraordinarily rare individual who will not engage in some additional exercise of deliberation in intention formation or intention execution.<sup>11</sup>

Third, even with viable normative and conceptual assumptions, translating this normatively charged concept into hard-edged legal rules will require that statutory drafters either opt for vague and overinclusive moralized standards (leaving “premeditation” to be filled in by juries) or underinclusive analytic styles (such as requiring specific time or ability to reflect).<sup>12</sup> The latter will inevitably fail to capture some of the worst killers. Criminal law’s mental states consistently present this problem.<sup>13</sup> Moreover, any attempt to take a continuum concept and give it hard edges will necessarily involve creating a rule, and rules

In a nutshell the problem is as follows: A deliberate and premeditated murder requires proof of express malice, generally understood to mean simply an intent to kill. In order to form the intent to kill, a person must, of course, make a decision; a decision cannot be made without at least rudimentary consideration of the alternatives. This considering of the alternatives, to kill or not to kill, logically must precede the actual decision. Thus, the court is left with the unenviable task of distinguishing between the decisionmaking inherent in forming the intent to kill and the additional “premeditation and deliberation” necessary to elevate the crime to first-degree murder.

*Id.* Later Mounts characterizes the distinction as “somewhere between elusive and non-existent.” *Id.* at 284. See, e.g., *State v. Raines*, 606 A.2d 265, 268 (Md. 1992) (“[I]f the killing results from a choice made as a consequence of thought, the crime is characterized as deliberate and premeditated.”).

11. As Benjamin Cardozo noted,

I think the distinction is much too vague to be continued in our law. There can be no intent unless there is a choice, yet by the hypothesis, the choice without more is enough to justify the inference that the intent was deliberate and premeditated . . . . [D]ecisions are to the effect that seconds may be enough. . . . If intent is deliberate and premeditated whenever there is choice, then in truth it is always deliberate and premeditated, since choice is involved in the hypothesis of intent.

BENJAMIN N. CARDOZO, *LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES* 99–100 (1931).

12. See SAMUEL H. PILLSBURY, *JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER* 79–80 (1998). As Pillsbury notes,

the allusive style of mens rea as I call it defines wrongdoing according to a general moral characteristic revealed by conduct. The mens rea expression alludes to the central wrong by moralistic description rather than by defining the particular features of the choice or conduct involved. By contrast, the analytic style defines wrongdoing by describing particular aspects of harm doing, such as the actor’s goal or state of mind, usually without explicit moral language. The analytic style aims to divide wrongdoing into component parts; if the requisite parts are present, the conclusion of legal and moral condemnation should follow automatically.

*Id.* at 84. See also Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 488 n.89 (1992) (distinguishing “local” from “global” culpability assessments).

13. See generally Alan C. Michaels, “Rationales” of Criminal Law Then and Now: Towards a *Judgment Descriptivism*, 100 COLUM. L. REV. 54 (2000) (arguing that statutory mens rea terms should contain normative and descriptive components).

themselves are by their nature over- and under-inclusive.<sup>14</sup> Hence, any statutory formulation is bound to be imperfect.

Finally, even with the best test, things can go awry. Faced with heinous killings that fall outside the statutory definition, courts and juries might still begin to stretch the concept. That is, if bad facts make bad law, heinous facts make for expansive definitions of the law.<sup>15</sup> In addition, the law may be changed for an entirely different political agenda. For instance, the desire to limit psychiatric testimony in the wake of the Twinkie defense led to restrictions in California's test that cannot easily be reconciled with any coherent understanding of premeditation.<sup>16</sup> Specifically, section 189 of the California Penal Code provides, "To prove the killing was 'deliberate and premeditated,' it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his act."<sup>17</sup>

A good understanding of philosophy of the mind may be able to solve the second problem, and the third and fourth concerns are more general problems for the criminal law. These are hurdles with which, given the topic of the symposium, legal theorists are rightly concerned. Nevertheless, they are surmountable. However, no progress can be made on any other level until premeditation's normative dilemma is solved, and premeditation is rotten at its core. The problem is that premeditation captures only some aspects of what makes some killers the most culpable; and unfortunately, as formulated, its reach is woefully under- and overinclusive. The critical question is, if premeditation should be put to death, what should replace it? Answering this question requires the dissection of the various aspects of a choice that make choices particularly culpable. Unfortunately, culpability is complex and there is no one answer. Culpability may involve at least six factors: the analysis of risks imposed; the reasons why they were imposed; the defendant's thoughts about

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14. Because rules rely on act-type generalizations, and not on particulars, there is always a possibility that a particular instance of the act-type would not be prohibited if one relied solely upon the underlying justification for the rule. See LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW* 35 (2001); FREDERICK F. SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 32 (1991). Fred Schauer enumerates three possible ways that a rule might be ill fitting—the probabilistic generalization may be incorrect on this occasion; the universal generalization turns out not to be universal; or a property suppressed by the rule is germane. SCHAUER, *supra*, at 39. Rules may also be underinclusive. That is, the reason that justifies prohibiting conduct type *a* may also extend to conduct type *b*, but the rule may apply only to conduct type *a*. *Id.* at 32–33. These jurisprudential worries will exist anytime a rule drafter attempts to take something like “quality of deliberation” and reduce it to a test that jurors can apply. Although the test increases determinacy, and increases the likelihood that like cases will be treated alike, the test will inevitably place some individuals on the wrong side of the divide.

15. Suzanne Mounts hypothesizes that one reason why the distinction between first- and second-degree murder is deteriorating is that some murders that are not premeditated are still particularly gruesome. This creates public pressure to “level up” and include all murders within the most serious category. Mounts, *supra* note 1, at 265–67.

16. This change was motivated by a desire to limit claims of mental abnormality. Mounts, *supra* note 1, at 305–06.

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

the killing—either identifying with the wrong or displaying utter indifference to it; the quality of the defendant's reasoning process; the number of choices the defendant made in killing; and the defendant's responsibility for prior choices that may lead to degradation of his later reasoning. With all of these factors, it is simply no wonder that premeditation cannot capture the most culpable killers. No one test could. Moreover, because different aspects of choice yield different conceptions of why premeditation is culpable, abandoning premeditation will result in greater doctrinal clarity than simply suggesting supplements to it.

It is best to understand the disease in order to find the cure. Part II of this article surveys the messy doctrinal terrain. Part III explains the normative objections to premeditation. Part IV performs the autopsy of the culpable choice, analyzing the various aspects of choice and why they are constitutive of culpability. Part V begins by sketching the total recasting of the criminal law that Larry Alexander and I propose in our book, but then offers suggestions for how to more modestly reform the criminal law to better capture the myriad aspects of culpability. One test cannot possibly capture all of the worst killers, and it is time that jurisdictions abandoned their efforts to contort premeditation in order to do so.

## II

### THE DOCTRINAL TERRAIN

As detailed below, the doctrinal terrain is in a state of chaos. This is of particular concern for two reasons. First, although it is not uncommon to see jurisdictions taking diverse views on moral questions, with respect to premeditation, the significant variations in time and deliberation required point to profound confusion about the moral and conceptual questions surrounding premeditation. Courts do not know what they are searching for. Second, because premeditation is practically free of content in some jurisdictions, the current state of affairs presents a real threat to rule of law values. If there is no moral and conceptual distinction between first- and second-degree murder, then juries have unfettered discretion to choose defendants' punishments. When a jurisdiction essentially defines first-degree murder as an intentional killing and second-degree murder as an intentional killing, there is room to doubt that the jury is making a principled decision about which offense the defendant committed.

In 1794, Pennsylvania was the first state to adopt a premeditation or deliberation formula, designating "willful, deliberate, and premeditated" killings as first-degree murder.<sup>18</sup> The division of murder into degrees, with premeditation serving as one of a limited number of ways to be guilty of first-degree murder, was an attempt to limit the death penalty to only the most heinous of killings.<sup>19</sup> When drafted, the words "willful," "deliberate," and

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18. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 511 (5th ed. 2009).

19. *Id.* Pennsylvania now divides murder into three degrees. 18 PA. CONS. STAT. ANN. § 2502

“premeditated” were intended to require thought and planning.<sup>20</sup> The Pennsylvania statute was widely influential, and many states followed Pennsylvania’s lead.<sup>21</sup>

However originally envisioned, the premeditation formula now bears little resemblance to the ordinary usage of the terms. Despite the use of the term *pre-meditation*, most jurisdictions do not require any specific amount of time to pass. Nine jurisdictions have statutes or case law identical or similar to the case law interpreting 18 U.S.C. § 1111, which requires an appreciable lapse of time between the formation of the design to kill and the actual execution of that design.<sup>22</sup> On the other hand, ten states allow premeditation to take place as soon as an instant before the action occurs.<sup>23</sup> And six states allow premeditation to exist instantaneously or simultaneously with the act of homicide.<sup>24</sup>

Rather than being an independent criterion, timing actually appears to be about creating an opportunity for deliberation. The California Supreme Court recently pushed back against a law review article criticizing its jurisprudence as unprincipled, emphasizing “a core principle that has guided appellate courts in assessing the sufficiency of the evidence of premeditation and deliberation for over 60 years: ‘The true test is not the duration of time as much as it is the extent of the reflection.’”<sup>25</sup> It further noted that “a killing resulting from preexisting reflection, of any duration, is readily distinguishable from a killing

(West 2002).

20. Edwin R. Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PA. L. REV. 759, 771–72 (1949) (noting that the legislative history and statutory language both support giving the terms their literal meaning).

21. DRESSLER, *supra* note 18, at 511.

22. See WASH. REV. CODE. ANN. § 9A.32.030(1)(a) (West 2002); *United States v. Frappier*, 807 F.2d 257, 261 (1st Cir. 1986); *Mitchell v. State*, 767 A.2d 844, 854 (Md. 2001); *State v. Moore*, 481 N.W.2d 355, 361 (Minn. 1992); *Byford v. State*, 994 P.2d 700 (Nev. 2000); *State v. Coffin*, 991 P.2d 477, 506 (N.M. 1999); *State v. Garcia*, 837 P.2d 862, 868 (N.M. 1992); *State v. Gillespie*, 960 A.2d 969, 976–77 (R.I. 2008); *State v. Brown*, 836 S.W.2d 530, 543 (Tenn. 1992); *State v. Guthrie*, 461 S.E.2d 163, 182 (W. Va. 1995); *Bostic v. United States*, 94 F.2d 636, 639 (D.C. Cir. 1937).

23. See OKLA. STAT. ANN. tit. 21, § 703 (West 2002); *Randall v. State*, 760 So. 2d. 892, 901 (Fla. 2000); *State v. Talbbet*, 590 N.W.2d 732, 733 (Iowa Ct. App. 1999); *Jones v. State*, 710 So. 2d 870, 877 (Miss. 1998); *State v. Cole*, 71 S.W.3d 163, 169 (Mo. 2002); *State v. Kern*, 397 N.W.2d 23, 31 (Neb. 1986); *Commonwealth v. Fisher*, 769 A.2d 1116, 1124 (Pa. 2001); *State v. Owens*, 643 N.W.2d 735, 758 (S.D. 2002); *State v. Kost*, 290 N.W.2d 482, 486 (S.D. 1980); *State v. Marshall*, 264 N.W.2d 911, 914 (S.D. 1978); *State v. Buffalo Chief*, 155 N.W.2d 914, 916 (S.D. 1968); *State v. Carr*, 53 Vt. 37 (1880); *State v. McDonnell*, 32 Vt. 491 (1860), *overruled on other grounds*, *State v. Burpee*, 25 A. 964 (Vt. 1892); *Hightower v. State*, 901 P.2d 397, 403 (Wyo. 1995). Premeditation cannot occur simultaneously with the act constituting the homicide, but the two can occur in successive instants. *Young v. State*, 849 P.2d 754 (Wyo. 1993).

24. See *State v. Thompson*, 34 P.3d 382 (Ariz. Ct. App. 2001); *Fairchild v. State*, 76 S.W.3d 884 (Ark. 2002), *overruled on other grounds*, *Grillot v. State*, 107 S.W.3d 136 (Ark. 2003); *State v. Johnson*, 39 P.3d 641 (Idaho Ct. App. 2001); *Neal v. State*, 805 So. 2d 520, 525 (Miss. 2002); *State v. Parker*, 553 S.E.2d 885, 894 (N.C. 2001); *State v. Trull*, 509 S.E.2d 178 (N.C. 1998); *Schmitt v. Commonwealth*, 547 S.E.2d 186, 197 (Va. 2001); *Akers v. Commonwealth*, 216 S.E.2d 28, 33 (Va. 1975).

25. *State v. Solomon*, 234 P.3d 501, 518 (Cal. 2010) (citations omitted). The article referred to was MOUNTS, *supra* note 1.

based on unconsidered or rash impulse.”<sup>26</sup>

In looking at the extent of reflection, juries are to make qualitative assessments of whether the killing was rash or impulsive,<sup>27</sup> or whether it was carried out in a “cool state of blood,”<sup>28</sup> “free from excitement and passion.”<sup>29</sup> Evidence of premeditation may be established by looking at the defendant’s planning activity, his motive to kill the victim, and the manner in which the killing is accomplished.<sup>30</sup>

Courts have upheld rather brief opportunities for deliberation as evidencing premeditation. For instance, in *Robinson v. State*, the defendant—who had been using “sherm,” a drug similar to PCP—walked into a friend’s house and wanted to sit on the couch.<sup>31</sup> The victim, who was lying on the couch, refused to give up his place and called the defendant a racial epithet. The defendant exited the house, came back with a gun, and shot the victim. In reviewing the sufficiency of the evidence, the court began with the typical evidentiary inferences for a finding of premeditation: “Premeditation and deliberation may be inferred from the type and character of the weapon; the manner in which the weapon was used; the nature, extent, and location of the wounds; and the accused’s conduct.”<sup>32</sup> The court then reasoned,

In this case there was more than an instant for appellant to decide to kill the victim, leave the room to get a gun, return to the room, aim at the victim, and shoot. The bullets struck the victim’s major organs including his heart, lungs, kidneys,<sup>33</sup> and liver. It is unreasonable to assume that Robinson did not intend to kill the victim.

One can criticize this case on many grounds. Does the court truly see no distinction between intention and premeditation? Is a defendant thinking meaningfully about killing another when he is under the influence and when he deliberates only for so long as it takes him to retrieve his gun? Does the amount of time itself seem sufficient?

Perhaps one of the most telling discussions of premeditation is the Western District of Texas’s discussion of what premeditation is not.<sup>34</sup> The court discussed the four categories of cases that constituted murder in the second, instead of first, degree: (1) heat of passion killings, when the defendant lacked justification; (2) impulsive killings; (3) diminished capacity killings, when the defendant was unable to deliberate and premeditate; and (4) “failure of proof” cases, when the government could not prove premeditation and deliberation.<sup>35</sup>

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26. *Solomon*, 234 P.3d at 518 (citations omitted).

27. *See, e.g.*, *Johnson v. State*, 291 S.W.3d 581 (Ark. 2009).

28. *State v. Yarborough*, 679 S.E.2d 397, 404 (N.C. Ct. App. 2009) (citations omitted).

29. TENN. CODE ANN. § 39-12-202 (West 2002).

30. *See People v. Anderson*, 447 P.2d 942, 949 (Cal. 1968). This list is not exhaustive. *Solomon*, 234 P.3d at 517. Other states have followed California’s lead in looking to these factors. *See, e.g.*, *State v. Guthrie*, 461 S.E.2d 163, 182 (W. Va. 1995); *State v. Buenaventura*, 660 N.W.2d 38, 48 (Iowa 2003).

31. 214 S.W.3d 840 (Ark. 2005).

32. *Id.* at 842.

33. *Id.*

34. *United States v. Chagra*, 638 F. Supp. 1389 (W.D. Tex. 1986).

35. *Id.* at 1401–02.



This last category is especially curious. If the court does not explicate what the government needs to prove, then how can it determine when such a showing has not been made?

### III

#### WHY PREMEDITATION APPEARS INADEQUATE

As a matter of retributive theory, the central question is whether the premeditating and deliberating actor deserves more punishment than the person who does not deliberate.<sup>36</sup> The problem is that premeditation appears to be both over- and under-inclusive. It is overinclusive because it reaches individuals who kill with good reason (mercy killers) but whose actions are nevertheless neither justified nor excused by the criminal law.<sup>37</sup> That is, even if one believes that active euthanasia is properly criminalized because of concerns about, for example, determining consent, one may still reject that these killers are among the worst killers and should be marked as deserving of *more* punishment than the average killer. Additionally, premeditation captures those who take a long time to decide to kill because they may truly value the life they end, rather than fully identifying with their killings.<sup>38</sup>

Premeditation appears underinclusive because it does not capture those who give little thought to their killings. If thoughtless killers are as culpable as premeditating ones, then the law should not draw any distinction.<sup>39</sup> Indeed, *People v. Anderson* is an infamous example of premeditation's underinclusiveness.<sup>40</sup> Anderson brutally murdered Victoria Hammond, the ten-year-old daughter of the woman with whom Anderson was living. The girl was found naked with over sixty stab wounds, some inflicted post-mortem. Although there was no evidence of sexual assault, there was evidence of sexual

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36. See MICHAEL MOORE, *PLACING BLAME: A THEORY OF CRIMINAL LAW* 87–88 (1997) (“Retributivism . . . is the view that punishment is justified by the desert of the offender.”).

37. See MODEL PENAL CODE AND COMMENTARIES, Comment to § 210.6, 127–28 (1980) (noting problems with mercy killings); see also *State v. Forrest*, 362 S.E.2d 252 (N.C. 1987) (upholding the first-degree-murder conviction of a son who killed his terminally ill father). *Contra* PILLSBURY, *supra* note 12, at 105 (reaching the conclusion that motives should matter). Mannheim suggests that the fact that every critic points to *Forrest* as his only support may indicate that “the overinclusiveness problem is largely illusory.” Michael J. Zydney Mannheim, *Not the Crime but the Cover-Up: A Deterrence-Based Rationale for the Premeditation–Deliberation Formula*, 86 IND. L.J. 879, 896 (2011). Of course, the fact that most prosecutors exercise their discretion appropriately and do not prosecute mercy killers (or that grand juries do not indict them) does not undermine the legitimate concern that the law itself is overinclusive. Mannheim then suggests that there are other issues of overinclusiveness including the concern that some states do not allow premeditation to be negated by evidence of mental disease or defect that does not rise to the level of insanity. *Id.* (discussing Mounts, *supra* note 1, at 298).

38. MODEL PENAL CODE AND COMMENTARIES, Comment to § 210.6, 127–28 (1980) (noting that prior deliberation may reflect a tortured conscience as opposed to settled character).

39. See Mordechai Kremnitzer, *On Premeditation*, 1 BUFF. L. REV. 627, 632 (1998) (noting that, to the extent premeditation asks the “should” question—when an actor *should* weigh heavily his reasons against killing—the problem is that premeditation does not capture one so “bent” on killing that “contrary considerations don’t even come to his mind”).

40. *People v. Anderson*, 447 P.2d 942 (Cal. 1968).

frustration, including post-mortem wounds to the girl's genitalia. Anderson had a blood-alcohol level of .34. The California Supreme Court found the evidence insufficient to support a finding of premeditation and reduced the conviction to second-degree murder.

As one commentator notes, *Anderson* is a compelling case against distinguishing murder based on premeditation:

The butchering of a child for reasons of sexual frustration and rage represents an extreme challenge to the value of human life. It ranks high on any intuitive scale of wrongdoing, and may explain why many appellate courts have<sup>41</sup> been so reluctant to take premeditation seriously—it leads to decisions like *Anderson*.

Indeed, two distinct claims can be made. First, someone who kills on impulse is as culpable as someone who thinks it through because the fact that one kills without any thought manifests equal indifference to human life. Second, someone who kills out of anger is as culpable as someone who thinks it through calmly because the anger may itself be a blameworthy manifestation of character. The first claim is that deliberation does not matter because deliberation is irrelevant to culpability. The second argument is that cool deliberation does not matter because hot-blooded killings can be equally culpable.<sup>42</sup>

As a matter of consequentialist theory, the bottom line is that premeditation's justification is empirically contingent. That is, its efficacy will depend on whether the benefits, which supposedly derive from punishing premeditated killings more seriously, obtain. Indeed, the question will ultimately turn on whether deterring cold, calculating, premeditating actors with more-severe punishment is more advisable than incapacitating hot-blooded, rash defendants.<sup>43</sup> This article will not attempt to make those

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41. PILLSBURY, *supra* note 12, at 104. Pillsbury also thinks that *Anderson* calls into question whether emotions discount culpability. *Id.*

42. See Kahan & Nussbaum, *supra* note 2, at 279–301 (arguing that premeditation masks the jury's normative evaluation of the defendant's emotions).

43. Two arguments point in favor of increased punishment for premeditating actors. First, actors who not only desire an end but also spend time planning to achieve that end really want to achieve it and, thus, are less likely to be deterred by the threat of punishment. Tom Stacy, *Changing Paradigms in the Law of Homicide*, 62 OHIO ST. L.J. 1007, 1026 (2001). Second, the premeditating actor is less likely to be apprehended. Because premeditation implies that the actor plans, the actor is more likely to use methods that will not be detected. See Mannheimer, *supra* note 37, at 919 (noting that planning affects probability of detection and swiftness of punishment); Kremnitzer, *supra* note 39, at 644 (stating “commission of the crime in accordance with an advance plan is usually more dangerous from the point of view of the perpetrator's success in the largest sense, including evasion of justice, than a spontaneous commission”). Indeed, poison is sometimes specifically articulated because this means is particularly difficult to detect prior to, and after, the offense. See Mannheimer, *supra* note 37, at 924–27 (discussing the singling out of poisoning as a deterrence-based concern). When the probability of detection goes down, the penalty must go up to achieve optimal deterrence. *Id.* at 917 (“It follows that, for the penal sanction to have a consistent deterrent effect, punishment severity must be increased when the certainty and swiftness of punishment are diminished.”).

Although premeditation sits comfortably with some of the empirical assumptions of a deterrence rationale, it is questionable whether it sits comfortably within the broader normative theory that underlies deterrence. Deterrence is a consequentialist theory. Crime and harm are evils, and deterrence (threatening individuals so as not to offend) is one way to reduce those evils. But the

calculations.<sup>44</sup> Rather, culpability is fundamentally a retributivist notion. Indeed, the entirety of criminal law might look quite different if structured based upon consequentialist principles.<sup>45</sup> Moreover, there are reasons to doubt the moral defensibility of a consequentialist criminal law.<sup>46</sup>

#### IV

##### UNPACKING CULPABLE CHOICE

To figure out what constitutes the most serious killings, it is necessary to unpack the content and quality of a defendant's choice to kill another. Culpability assessments derive the meaning of a defendant's choice—that it reveals insufficient concern—by looking at the content and the mechanics of that choice. For instance, it is not the defendant's cognitive state of knowing that his act will kill another that makes him culpable. Rather, it is our judgment that people who act despite this knowledge truly do not care about others. Hence, it is through looking at the content of the defendant's choices that we are able to ascertain whether he is acting culpably.<sup>47</sup>

Consider the following aspects of choice that a premeditation formula might speak to: *should* the defendant kill, *why* will the defendant kill, and *how* will the defendant kill? The premeditation formula might also speak to the quality of the defendant's deliberation—was it cool blooded or hot tempered? Assessing the act of killing also requires looking at the defendant's choices before, during, and after the act. This section reviews each of these aspects of reason to determine when a decision appears to be particularly culpable.

##### A. Should?

Before killing another human being, a defendant may ask, "Should I kill?"<sup>48</sup> The most important factor in asking this question is whether the defendant takes seriously that ending a human life is a reason *against* killing. Albert might

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question is whether consequentialists generally ought to be more concerned about premeditating killers than others. That is, as a matter of dangerousness, and incapacitation specifically, the hot-tempered, impulsive killer may be more dangerous than the premeditating actor. See Stacy, *supra*, at 1027 (noting that "the need for incapacitation can justify also putting impulsive killings in the most serious offense category").

44. Indeed, even the recent forceful argument by Michael Mannheimer that deterrence is a reason for the premeditation distinction does not attempt to do the calculations but, rather, simply asserts that the math may come out his way. See Mannheimer, *supra* note 37, at 903.

45. See generally Claire Finkelstein, *The Inefficiency of Mens Rea*, 88 CAL. L. REV. 895 (2000) (arguing economic analysis cannot explain mens rea).

46. See MOORE, *supra* note 36, at 94–97 (arguing that scapegoating and preventive detention serve as compelling counterexamples to punishment without desert).

47. See Kimberly Kessler Ferzan, *Holistic Culpability*, 28 CARDOZO L. REV. 2523, 2532 (2007) ("Our evaluation that someone is culpable is a determination that that person's action revealed insufficient concern for the interests of others, and to make this assessment we need to know the mechanics and the quality of the agent's reasoning.").

48. I owe this framing of the question to Kremnitzer, *supra* note 39, at 631 (discussing German legal theory on "premeditation [] concerned with the question 'Should?'—should the homicide be performed").

be deliberating about whether to kill his father as an act of euthanasia, and he is tortured by the idea of ending his father's life. Ben might be deliberating about whether to kill his father, but he does not value the fact that he will end another's life. Carl might choose to kill his father, giving no thought at all to the fact that he is ending a life. Carl does not even stop to ask, "Should I?"

Notice that Carl does not appear to be less culpable than Ben. That is because giving no weight to ending human life may occur either with or without deliberation. It appears that Albert is less culpable. It is questionable, however, that Albert is less culpable *because* he gives his father's life weight in his reasoning. After all, the bottom line is that Albert's reason is ultimately defeated. He chooses to kill, even after acknowledging that there is reason not to do so. Indeed, imagine David, who kills his father because he desperately needs to inherit money from his father's will. Is David less culpable if he deliberates over the fact that he should not kill his father if, ultimately, David decides to do so anyway?

When a defendant asks the "Should?" question and determines the answer is yes (as evidenced by the killing itself), the defendant determined that something was more valuable to the defendant than the life he ended. This is not insignificant. On the other hand, asking the "Should?" question is neither necessary nor sufficient for culpability. It is not necessary because giving the killing no thought can be extraordinarily culpable as in Carl's case. It is also not sufficient because some killings may, in fact, be justified, and so, the "Should?" question, without seeing what is on the other side of the scale, does not tell us enough. Thus, it appears that if premeditation is meant to ask whether the defendant asked the question "Should I kill him?", it is asking a question that is neither necessary nor sufficient for culpability.

## B. Why?

Another aspect of reasoning that premeditation may reach is the question of *why* the actor is killing another person. This aspect is highly relevant to culpability. Individuals deserve punishment when they act culpably, and an actor is culpable when he exhibits insufficient concern for others.<sup>49</sup> Actors demonstrate insufficient concern for others when they (irrevocably) decide to harm or risk harming other people (or their legally protected interests) for insufficient reasons—that is, when they act in a way that they believe will increase others' risk of harm regardless of any further action on their part, and when their reasons for unleashing this risk fail to justify doing so. If Alex decides to drive one hundred miles per hour on the highway, whether society deems Alex culpable and deserving of blame and punishment will depend upon whether he has chosen to impose this risk to impress his friends with how fast his car can drive or, alternatively, to transport a critically injured friend to the

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49. See generally LARRY ALEXANDER & KIMBERLY KESSLER FERZAN WITH STEPHEN J. MORSE, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* ch. 2 (2009).

hospital.<sup>50</sup>

The relevance of the defendant's reasons for acting is immediately apparent. Albert's decision to kill his father is less culpable than David's decision to kill his father because Albert's reason nearly justifies his action whereas David's killing for money is a poor reason (pardon the pun) to kill another person. Carl is culpable not because he acts for a bad reason, but because he acts for seemingly no reason at all. Now, this may be restructured such that one might want to say of Carl that he acted for his amusement or "to see someone die." But it might simply be that Carl did not reason beyond the act of killing. When asked why he killed, Carl might simply ask, "Why not?" The most that could be said of Carl, then, is that he killed for the sake of killing, and this appears to be a rather evil reason for action.

Notice that premeditation is not formulated to ask the "Why?" question and thus cannot distinguish the mercy killer from the cold-blooded killer. Therefore, premeditation cannot capture a critical aspect of culpability.<sup>51</sup>

### C. How?

A defendant begins by deliberating over whether to form the intention to kill. This is the "Should?" question. While weighing the reasons *against* killing, he also weighs the reasons *for* committing the act. This is the "Why?" question, and the ultimate "why" is determined when the defendant forms the intention to act for a particular reason. If he forms the intention to kill, he might then ask "How?"

After forming an intention, rational agents will typically engage in means-end reasoning about "how" to accomplish their intentions.<sup>52</sup> Of course, this sort of reasoning is not required. An agent might form the intention "to kill him with a gun" during the first deliberation about whether to kill at all. Or the agent might engage in rather irrational thoughts as to how to execute his intention.

Still, the question is whether asking the "How?" question reflects any

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50. During the discussion of this paper at the Adjudicating the Guilty Mind conference, Don Braman and Nita Farahany asked whether this view presupposes affective capacities, something that psychopaths lack. Don Braman, Assoc. Professor of Law, George Washington University Law School, & Nita Farahany, Assoc. Professor of Law, Vanderbilt University Law School, Commentary at the Duke *Law & Contemporary Problems* Symposium: Adjudicating the Guilty Mind (May 10, 2011). In my view, moral responsibility does require moral understanding of *why* an act is wrongful. For an excellent discussion, see Stephen J. Morse, *Psychopathy and Criminal Responsibility*, 1 *NEUROETHICS* 205, 209 (2008).

51. PILLSBURY, *supra* note 12, at 100 (noting that "the moral force of the doctrine comes from the way that premeditation often serves as a proxy for the worst motives to kill, and that culpability analysis should focus on those motives, not the coolness or calculation of the decision to do wrong").

52. MICHAEL E. BRATMAN, *INTENTIONS, PLANS, AND PRACTICAL REASONS* 140-43 (1999) (noting that individuals who form intentions will be rationally constrained to engage in means-end reasoning about how to bring about the result, to screen out alternative intentions inconsistent with the result, and to endeavor to bring about the result). I thank Gideon Yaffe for an extraordinarily helpful discussion of this topic.

additional culpability. Now, one facet of the “How?” question is that, if one chooses a particularly gruesome means of killing another, this may reflect on one’s culpability because one is not just killing but is causing substantial pain during the killing. That aspect of “how,” however, is covered fully by looking at the risks the defendant is imposing and his reasons for acting. Rather, what the defendant’s asking of “How?” adds to the mix is that the defendant is taking time trying to figure out how to achieve his end.

The reason why the defendant’s expenditure of time and effort in deliberating about how to execute his intention poses concern is that the more effort he expends, the more he seems to identify with his end. A defendant who not only aims at evil, but takes time and consideration to achieve this evil, appears particularly culpable. He takes this end as central to his agency.<sup>53</sup> This sort of view is most at home with the distinction that Antony Duff draws between attacks and endangerments.<sup>54</sup> Duff claims that when the defendant intends harm, he *attacks*, thus revealing a practical attitude of hostility. When the harm is just a side effect, the defendant *endangers*, thus revealing his indifference. On this view, premeditating is particularly hostile to the victim. By the same reasoning, a theorist who believes that purpose is more culpable than knowledge because the defendant’s agency is identified with the wrong should hold that premeditated killings are more culpable.<sup>55</sup> What premeditation seems to add is that, even amongst purposeful killings, some seem to be more culpable than others.

Notice that this “How?” question attributes a direct correlation between time and effort and the actor’s culpability. The more time he spends planning, the more culpable he appears to be. That is, this is not a binary question of whether the defendant deliberated, but a scalar question about the amount of deliberation. So, premeditation at least asks the right question, albeit through a binary, as opposed to scalar, test.

The problem, however, is that it is *not* the case that the absence of significant deliberation necessarily correlates with less culpability; and, even when it does, it may do so quite indirectly. Consider the following quirky case. Edward decides to kill his father and wants to figure out how to execute the perfect crime. Only, rather than spend time drawing maps, casing the scene, and

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53. See Kremmitzer, *supra* note 39, at 643 (noting that impulsive killings may tell us little about the defendant’s character but that premeditated killings “reflect[] the killer’s personality faithfully” because “[o]ne cannot separate the cold deliberate decision to kill from the perpetrator’s moral character”); see also PILLSBURY, *supra* note 12, at 102 (noting “the rationalist argument for premeditation—that the more carefully considered the decision to do wrong, the more the person commits to wrongdoing and the more the wrongdoing reveals the person’s essential nature”).

54. R.A. DUFF, *ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW* 149–53 (2007).

55. Michael S. Moore, *Prima Facie Moral Culpability*, 76 B.U. L. REV. 319, 324 (1996) (“Those who kill for the joy of killing, or who intend to kill as a means to other ends, aim themselves at evil, whereas those who know their acts will be wrongs are only willing to tolerate that fact without aiming for it. Aiming at evil in one’s particular choices makes one more culpable.”).

the like, Edward meditates—in the yoga-esque sense of meditation.<sup>56</sup> Edward “thinks” about killing his father by not thinking about it. (And, although this appears fanciful, one might consider whether law professors who seek the “Eureka” moments for their scholarship sometimes achieve these moments by doing something else instead of sitting at their computers, be that going for a run or playing Angry Birds.) This sort of case raises questions about the relationship between the conscious mind and the preconscious mind. Although the defendant is not directing his conscious attention to the killing, he is purposefully directing his conscious attention in one place so that he (in a meaningful, preconscious sense of he) can figure out the plans. Despite that his attention is not directed at the killing, his identity and planning are. He meditates in order to figure out how to kill. And this is still part of the culpability of identity, even if indirectly so.

There is the third case, however, and this returns us to Carl and Stephen’s man on the bridge. They do not deliberate. They do not think about how. They do not think that thinking about the killing is worthy of their time. They do not identify with the evil. They are indifferent to it.

Ultimately, the problem is that attacks and identity do not operate independently of an overall indifference assessment.<sup>57</sup> Normatively, endangerments can be just as culpable as attacks. To take an example from Claire Finkelstein, an actor would appear equally culpable whether he (1) burns down a house for the insurance money on the *occupants* or (2) burns down a house for the insurance money on the *house*, knowing there are people inside (whom he knows will leave in thirty minutes) but not bothering to wait.<sup>58</sup>

Conceptually, attacks ultimately collapse into endangerments. To determine whether purposefully injuring another is culpable, one must know why the injury was done. An act of self-defense may first appear to be an “attack” that manifests “hostility.” But, once the reason is known (to act in justifiable self-defense), the attack neither manifests hostility nor indifference. In other words, an attack is only culpable if it not only targets a legally protected interest (the fact that makes it an attack) but also does so for insufficient reasons. This is the indifference assessment.

Thus, when an individual has an opportunity to engage in enhanced decisionmaking, through time and reflection—but does not—he manifests indifference. *And this indifference can be just as culpable as when an individual does expend time and effort.* Indifference in not caring enough and indifference in identifying with one’s evil aim are both very culpable. That is, Anderson

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56. I owe this type of example to Michael Moore.

57. See Kimberly Kessler Ferzan, *The Structure of Criminal Law*, 28 CRIM. J. ETHICS 223, 229 (2009) (arguing that it is neither normatively nor conceptually desirable to distinguish attacks from endangerments). Notably, the way that Duff carves up culpability would characterize both the premeditated killer and Stephen’s man on the bridge as attacking their victims. This analysis would then ignore that it is the indifference evinced by Stephen’s man that is the root of his culpability.

58. Claire Oakes Finkelstein, *The Irrelevance of the Intended to Prima Facie Culpability: Comment on Moore*, 76 B.U. L. REV. 335, 340 (1996).

would have been very culpable if he had planned his brutal attack of Victoria Hammond. That he did not identify with his killing, however, but rather was completely indifferent to it, likewise manifests substantial culpability. It is hard to see why one killing would be worse than the other and, indeed, so much worse that only one is worthy of punishment as first-degree murder.

As one final example, consider a conference participant who prefaces his question with the caveat, "I haven't had time to give this much thought."<sup>59</sup> This is meant to diminish his responsibility for asking the question if his question turns out to be foolish or ill conceived. Why? Because the participant would be blameworthy if he either (1) gave the question a significant amount of thought and, yet, it was ill conceived or (2) had time to come up with a good question and did not bother to do so. It is only because he lacked either the opportunity or the actual deliberation that allows him to discount his responsibility for asking a potentially foolish question.

Premeditation cannot capture all of the most culpable killers because it only focuses on one way that an individual may manifest insufficient concern for others. The indifferent killer is culpable because he does not view human life as a reason to stop and think why not to act. The identity killer is culpable because he values the act of killing so much as to plan and deliberate it. Indifferent killers may be criticized for failing to stop and think when they had the opportunity and capacity to do so. Identity killers may be criticized for the amount of time and deliberation they devote to an act of killing. With its exclusive emphasis on individuals who identify strongly with their ends, premeditation fails to capture those individuals who are just as culpable because they never give a second thought to the harm they are doing to others.

#### D. Qualitative Culpability

Thus far, premeditation has offered only a patchwork of coverage of the most culpable actors. "Should?" is not a question to ask, but "Why?" is always a relevant question. "How?" sometimes matters. Individuals may be criticized either for identifying with the harm or evil in a way that makes them more responsible for thinking the harm through, or for being so indifferent to the evil that they view the harm to another as unworthy of any expenditure of resources, even a moment's thought. This means there will remain some individuals who have reason not to give it thought (and, thus, manifest less indifference) or have less time to give it thought (and, thus, manifest less identity). And culpability will, therefore, be scalar in both directions.

Another aspect of the defendant's choice is not the mechanics of that choice but the quality of the reasoning. When an individual's decisionmaking is degraded because of diminished capacity, emotion, or even intoxication, he lacks full access to the reasons against acting.<sup>60</sup> His diminished capacity to

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59. As in fact, one participant did when this paper was presented.

60. The relationship of emotion to the choice theory of responsibility is thought to be a difficult question. Thus, Michael Moore asks, "Does the responsible self who chooses include any emotions, or



reason diminishes his responsibility.<sup>61</sup>

Interestingly, it is in degraded decisionmaking conditions that “Should?” suddenly appears to be the relevant question. The idea is that, when someone is angry, he lacks full access to the reasons against killing and that he may therefore get the “Should?” question wrong. This is also true when an individual is drunk or suffers from a mental impairment. These individuals are ill equipped to fully reason through whether to kill another person.<sup>62</sup>

Of all the questions that premeditation is expected to answer, this is the one that the law comes closest to getting right. The courts’ desire to look for “cool blood” and an absence of “rashness” is about making sure that defendants had the capacity to reason through their decisions. The difficulty arises when the test is expected to conjoin questions such as the extent of deliberation required for identity with the opportunity for thoughtful deliberation required. These are two distinct questions.

The analysis of qualitative culpability has two further implications. The first is that jurisdictions should not, on pain of doctrinal incoherence, undermine this purpose for premeditation by barring the admission of the very sort of evidence that would negate it. There is significant skepticism about diminished capacity claims and significant resistance to any mitigation for intoxication. When jurisdictions do not allow the defendant to show that he could not have deliberated because he was drunk,<sup>63</sup> or that he has a mental illness that precludes sustained thought,<sup>64</sup> they punish the defendant for a quality of contemplation of which he was incapable.

The second implication is that a theorist looking at premeditation needs to understand that premeditation is the default position. Seeing “hot blood” as a mitigating doctrine shifts the baseline. That is, one framework problem with premeditation is that the assumption has been that premeditation is a doctrine of *aggravation*, whereas second-degree murder is the baseline. But premeditation—understood as normal mental processing—is the rule; emotionality or other cognitive disturbance is the exception.<sup>65</sup> In other words, if

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is the responsible self who chooses only to be identified with the conscious will, against which all emotions are alien and potentially disturbing (incapacitating) factors?” See MOORE, *supra* note 36, at 557. I believe our emotions do reflect our values and that we can be held accountable for them, but I would do so separately as detailed below in section E. I also believe that some emotions do prevent us from having full access to our reasons. Of course, this is, ultimately, an empirical claim.

61. See generally Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289 (2003).

62. Indeed, although Adam Candeub presents his thesis as one about consciousness, his argument is truly about capacity to access consciousness. Adam Candeub, *Consciousness and Culpability*, 54 ALA. L. REV. 113, 115–16 (2002) (arguing for replacing premeditation with a standard under which an “actor is guilty of first-degree murder if she, under the circumstances, *should have been able to or would have been expected to* premeditate upon her act”) (emphasis added).

63. See, e.g., *Adams v. State*, 62 So. 3d 432, 441 (Miss. Ct. App. 2011) (affirming refusal to give jury instruction that intoxication would negate premeditation).

64. See CAL. PENAL CODE § 189 (West 2010).

65. See also Kremnitzer, *supra* note 39, at 640 (noting that spontaneous intentions resulting from fierce emotions are the unusual cases).

most decisions to kill are not “hot blooded,” then the assumption should be that most killings fall into the same category.

#### E. Before, During, and After

The choice to kill does not operate in a temporal vacuum. Choices made prior to the choice to kill affect what the defendant does. The defendant may need to revisit his intention if his first attempt fails. And, of course, the defendant needs to clean up the mess afterwards.

The way that prior culpable choices are most relevant to choices to kill is that they may affect mitigating doctrines. This means that sometimes a defendant who causes harm may be minimally culpable at  $t_2$  when harm is caused, but very culpable at  $t_1$  when the defendant engages in conduct that creates the risk of harm at  $t_2$ . For example, an accurate culpability assessment of an intoxicated actor would punish him at  $t_1$  for the choice to get drunk and the risks the defendant perceives at that time, rather than fix the defendant's crime at  $t_2$  by whatever harm actually eventuates. That is, the Model Penal Code's substitution of the mens rea of recklessness for any crime that happens at  $t_2$  is objectionable.<sup>66</sup> This current formulation has the capacity to punish individuals incommensurate with their culpability in choosing to drink.

The punishment that the defendant deserves should be fixed at  $t_1$ .<sup>67</sup> It is simply irrelevant whether he hits someone, hits a lamppost, or never finds his car keys and hits no one.<sup>68</sup> Rather, the actor is properly held accountable for his conduct at  $t_1$ , given the likely effects it will have at  $t_2$ .

Looking at prior culpable choices, however, need not be limited to intoxication. This inquiry is equally applicable to individuals who are aware of their violent emotional tendencies. Consider a case in which a man gets violently angry and kills his wife. The husband, at the time of the killing, is less culpable because his deliberation is overwhelmed by emotion. But the husband may also be culpable if, aware of his violent tendencies, he has failed to take steps to control himself. Hence, the husband's act of killing is less culpable because he lacked full access to reason. The husband, however, is guilty of a second culpable omission: If he is aware of the fact that he is prone to violent episodes and fails to take steps to prevent harming others, then he is culpable for imposing that risk on others.<sup>69</sup> If one discovers that one is a ticking time

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66. MODEL PENAL CODE § 2.08(2) (“When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.”).

67. For a thorough examination of tracing strategies, see generally Michael S. Moore & Heidi M. Hurd, *Punishing the Awkward, the Stupid, the Weak, and the Selfish: The Culpability of Negligence*, 5 CRIM. L. & PHIL. 147, 176–82 (2011).

68. See ALEXANDER & FERZAN, *supra* note 49, at 58–59 (arguing that what the defendant deserves is established at  $t_1$  irrespective of what happens at  $t_2$ ).

69. This resolves the difficulty noted by Victoria Nourse, that men who stalk women who have rejected them seem to be entitled to instructions on mitigation, despite their extremely culpable dispositions. Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331 (1997) (arguing that the Model Penal Code's formulation of the provocation–

bomb, one has a duty to try to dismantle the bomb and one is culpable for every minute that one omits to try.<sup>70</sup> This is the problem embedded within *Anderson*. The defendant failed to take effective steps to keep himself away from the ten-year-old child about whom he had inappropriate desires, *and* he put himself in a situation in which he was around her when he was drunk. Both are a recipe for disaster.

The defendant's culpability is also affected by the choices made *during* the act of killing. In the clearest case, a defendant who shoots at his victim, misses, and then fires a second shot has made two culpable choices, not one. Each choice produced a distinct culpable act. But it is also the case that a defendant whose chosen method of killing requires multiple culpable actions—for example, repeated squeezing of the victim's neck—is also making several culpable choices.<sup>71</sup> Each willed bodily movement reflects the defendant's additional choice to harm his victim. (Notably, because duration of risk matters, Actor *A* who engages in one willed bodily movement with a ten-minute effect is indistinguishable from Actor *B* who engages in ten willed bodily movements, each with a one-minute effect.)

It may seem that a defendant cannot incur further culpability *after* the killing. It is certainly the case that, once the defendant has acted, he is not more culpable for killing the victim just because he, for example, cuts the body in pieces to hide it. Rather, methods of disposal of the body would simply be evidentiary of whether he planned it to begin with (evidentiary of the culpability of identity). On the other hand, if the defendant causes substantial injury to the victim and still has the opportunity to save him—by calling 911, for example, or by giving him the antidote to a poison—then the defendant is guilty of a second culpable omission for his failure to save.<sup>72</sup> In this way, actions or omissions after the killing are not merely evidentiary of the defendant's planning but are their own desert bases.

## F. Summary

Culpability is complex. Premeditation is capable of covering two of the factors in culpability assessments. First, in those cases in which the defendant identifies with the act of killing, the defendant appears more culpable when he actually deliberates and spends time planning the killing. Understood in this

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passion doctrine caused a regressive shift in our understanding of male–female relationships). Breaking this into two parts resolves the dilemma by entitling the men to mitigation for the killing, but aggravating their overall culpability by separately punishing their failure to control their dangerous characters.

70. See ALEXANDER & FERZAN, *supra* note 49, at 85 (suggesting that when an individual becomes aware of a dangerous character trait he may have a duty to correct it).

71. The phenomenology may be different for different defendants. A defendant who is very angry may have less control of his reasoning at the point at which he is applying pressure. Others may reaffirm their intention with each gripping of their fingers. I thank Stephen Morse and Claire Finkelstein for this point.

72. See ALEXANDER & FERZAN, *supra* note 49, at 241–42 (noting the criminal law pays insufficient attention to culpable failures to rescue).

way, premeditation should be quite concerned with the actual amount of time spent deliberating. The more deliberation, the more culpability. Second, premeditation also appears to be able to capture the qualitative assessment of the defendant's reasoning. The question of whether the defendant was able to calmly deliberate about the killing is relevant, not only when more deliberation is indicative of more identity, but also when any failure to be able to deliberate would undermine the defendant's ability to think through why he should not act.

Although premeditation can capture some aspects of culpability, it is woefully underinclusive in capturing others. It cannot reach the culpability of indifference in its entirety; it cannot look to whether the defendant's prior responsibility led to the later impairment in reasoning skills; and it cannot capture the way in which choices made during and after the defendant's action can also affect his culpability. Moreover, to the extent that premeditation fails to take into account the defendant's reasons for action, it lacks a critical aspect of nuance—the reason for which a defendant acts is critically important to culpability assessments.

Although one possibility is to retain premeditation to capture some aspects of culpability, concerns remain about exactly what premeditation is doing and why. For instance, one might think that premeditation should remain as evidence of identity-type culpability. This conception would require that courts take seriously a requirement for substantial time and planning, something they have yet to do. Premeditation might also serve as the default rule, with first-degree being the norm, and rash and impulsive acts being the exceptions that warrant a departure to second-degree murder. This is more in line with what courts are doing. Because these two conceptions compete, one would need to be chosen. And then, it would still be necessary to figure out how to account for the other complex factors that enter culpability judgments. Whatever work premeditation will do, it will not do enough to serve as the sole criterion for first-degree murder liability.

## V

### BACK TO BASICS: RETHINKING PREMEDITATION'S FOUNDATIONS

Premeditation is meant to capture the worst killers, but it cannot do so. Indeed, our current statutes are not formulated so as to look directly at questions of culpability. In *Crime and Culpability*, Larry Alexander and I argued that the criminal law requires a broad rethinking, one designed to give the defendant the punishment he deserves, which is an inquiry that focuses specifically on the defendant's culpability.<sup>73</sup> Because the criminal law itself does not adequately capture culpability, premeditation builds on a faulty structure.

Ultimately, premeditation's focus is too narrow. Individuals can be extremely culpable based upon the gravity of the risks they impose, the reasons

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73. ALEXANDER & FERZAN, *supra* note 49, at 17–19.

for imposing the risks, and the quality of their decisionmaking. Moreover, because the criminal law focuses almost exclusively on the moment the defendant's act causes death, it fails to fully capture the reasons why later emotional outbursts may appear more culpable despite degraded decisionmaking conditions—because the defendant is culpable for failing to take reasonable steps to prevent the outburst in the first place.

#### A. Culpability-Based Criminal Law

Criminal law should be designed to give individuals what they deserve. That is, criminal law should punish individuals based on a unified conception of culpability: insufficient concern.<sup>74</sup> As criteria for insufficient concern, the criminal law need not employ the Model Penal Code's four mental states—purpose, knowledge, recklessness, and negligence.<sup>75</sup> The same type of assessment is involved whether we are judging purpose, knowledge, or recklessness—a weighing of the risks the actor believes he is imposing and his reasons for doing so.<sup>76</sup> The approach Alexander and I advocate properly collapses the culpability of identity within the broader category of the culpability of indifference. When an actor purposefully aims to injure another—injuring is his conscious object in acting—his reasons are presumptively culpable. When an actor knowingly harms another—when he believes to a practical certainty that his act will cause harm—the degree of risk is presumptively culpable. But, in instances of both purpose and knowledge, these presumptions may be rebutted by showing that the actor was justified in imposing the risk that he did. In contrast, as formulated, recklessness requires the risk to be unjustified, thus building lack of justification into the mental state itself. In all of these cases, however, for a defendant to ultimately be deserving of punishment, the risks he takes must be unjustified. The current approach of separating this single criterion for culpability into three discrete mental states creates doctrinal difficulties as well as the false impression that these three mental states neatly line up in a culpability hierarchy.<sup>77</sup>

Culpable action is determined at the time that the defendant engages in a willed bodily movement or omits to act when he has a duty to do so.<sup>78</sup> The culpability of each action is determined by the risks the defendant knows he is imposing, his reasons for so doing, the quality of his decisionmaking, and the duration of the risk. Because each action is counted separately, actions at one time that create a risk of a later harm are culpable at the time the risk is first created (for instance, when one gets unjustifiably drunk).<sup>79</sup> In addition, when

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74. *Id.* at 67–68.

75. *See generally id.* ch. 2.

76. In *Crime and Culpability*, Larry Alexander and I argue that negligence is not culpable and is, thus, not properly a part of the criminal law. *See generally id.* ch. 3.

77. *See also* Simons, *supra* note 12 (discussing why the Model Penal Code's formulation of mental states does not line up into a neat hierarchy).

78. *See* ALEXANDER & FERZAN, *supra* note 49, ch. 7.

79. *Id.*

one has caused harm, one has a duty to rescue, so later actions may also enhance culpability.

Under this formulation, the criminal law would not have a crime of murder for two reasons. First, the defendant's culpability, and therefore his desert, does not turn on whether he succeeds in his actions.<sup>80</sup> That is, attempts should be punished in the same way as completed crimes. Taking this claim seriously requires broad rethinking of crimes that currently require the defendant to cause a result, such as homicide.<sup>81</sup> In its place, we would focus on the moment when the defendant understands himself to be unleashing a risk of harm to others' legally protected interests.<sup>82</sup>

Second, because the focus is on the risk the defendant unleashes at a particular moment, the defendant's culpability does not hinge on the risk to *one distinct* legally protected interest but to *all* the legally protected interests that the defendant consciously disregards.<sup>83</sup> That is, Alex is culpable for deciding to speed to impress his friends because he risks killing people, injuring people, causing property damage, and so forth; and it is unjustifiable to impose this basket of risks for the insufficient reason of impressing his friends. Because culpability is rightly concerned with all the risks the defendant chooses to impose, the current statutory framework confuses the analysis by assuming there should be distinct crimes of homicide, destruction of property, and the like.<sup>84</sup> Indeed, it is the focus on distinct harms that creates double jeopardy problems in determining when the defendant has committed one criminal act and when he has committed many.<sup>85</sup>

## B. Beyond Premeditation

Although I would advocate for an even broader rethinking of the criminal law's crime formulations, it is worth exploring how the current murder statutes could be better formulated to capture the most culpable. First, many jurisdictions currently punish reckless homicides that manifest extreme indifference to human life as second-degree murder. It is this very standard, however, that ought to be used to assess the worst killings, for purposeful crimes of identity and crimes of indifference can both manifest extreme indifference. Although courts will no doubt struggle to give some hard edges to this standard (indeed, they already do), at least they will be working with the right standard. Second, jurisdictions need to consistently allow aggravation for enhanced decisionmaking and for mitigation for degraded decisionmaking,

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80. *Id.* ch. 5.

81. *Id.* ch. 8.

82. *Id.*

83. *Id.* chs. 2, 7–8.

84. *Id.* ch. 8.

85. For example, when a defendant sets one fire, is it one act of arson or as many arsons as there are pieces of property damaged? *Compare* Land v. State, 802 N.E.2d 45, 52 (Ind. Ct. App. 2004) (counting arsons by injuries), *with* Lozano v. State, 860 S.W.2d 152, 155 (Tex. Ct. App. 1993) (counting arsons by acts). *See also* Ferzan, *supra* note 57, at 235–36 (noting this crime counting problem).

while consistently allowing for a separate offense for a culpable act or omission that risks such a later degradation. It is time to stop contorting premeditation to capture culpability's complexity.<sup>86</sup>

### 1. Extreme Indifference and Reasons for Action

Jurisdictions should set forth those killings that manifest “extreme indifference to human life” as warranting the greatest punishment, and they should articulate those reasons that are particularly blameworthy as reasons that qualify for manifesting this indifference. Many jurisdictions allow for reckless killings committed under circumstances that manifest “extreme indifference to human life”—or, under California’s more poetic standard, with an “abandoned and malignant heart”—to constitute second-degree murder instead of involuntary manslaughter.<sup>87</sup> Some jurisdictions, however, use “extreme indifference” to aggravate a killing to first-degree murder.<sup>88</sup> Jurisdictions use a range of tests to capture “extreme indifference” varying from looking at objective circumstances to looking at the defendant’s conscious choice.<sup>89</sup> The correct interpretation would look to the risks the defendant knows he is imposing and then his reasons for imposing them, and then would determine whether the relationship of risks to reasons manifests extreme indifference. This is a normative judgment of the defendant’s choice, not a determination of whether the defendant is subjectively indifferent.<sup>90</sup>

This is precisely the sort of evaluation that ought to be done with purposeful killings as well. That is, motive matters. Some killings are worse than others based on the reasons for that killing. Indeed, even without a statute that designates specific reasons as particularly blameworthy, the jury must assess in

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86. Tom Stacy advocates for a multi-factor scheme, consistent with our current death-penalty jurisprudence. Stacy, *supra* note 43, at 1032. For instance, he maintains that in *Anderson*, there were a number of aggravating factors—including the vulnerability of the victim, the brutality of the killing, the attempted sexual abuse, and the defendant’s duty of care. *Id.* at 1027. Stacy, however, favors some aggravating factors that bear on incapacitation, as opposed to desert. *Id.* This is problematic because, as a general matter, an individual may be dangerous without being deserving of punishment. Indeed, Stacy rejects mental and emotional disturbances from his list of mitigating circumstances because, although he admits that these actors may retributively deserve less punishment, these circumstances increase the consequentialist justification for incapacitation. *Id.* at 1065–66.

87. *E.g.*, MODEL PENAL CODE § 210.2(1)(b) (specifying that reckless killing is murder when it is committed under circumstances “manifesting extreme indifference to human life”); CAL. PENAL CODE § 188 (West 2010) (implying malice when killing is committed with an “abandoned and malignant heart”).

88. *E.g.*, WASH. REV. CODE ANN. § 9A.32.030(1)(b) (West 2002).

89. Of the thirty-six states that adopt a depraved-heart formula, seven use objective circumstances, six objectively evaluate the degree of risk, five look at the defendant’s subjective awareness of the risk, five require a threat to multiple victims, six look to whether the defendant had an actual mens rea of indifference to human life, five do not clearly identify the factors, except to indicate a requirement of something akin to an “abandoned and malignant heart,” and two use unidentified factors to require the Model Penal Code’s “extreme indifference.” John C. Duffy, Note, *Reality Check: How Practical Circumstances Affect the Interpretation of Depraved Indifference Murder*, 57 DUKE L.J. 425, 435–44 (2007).

90. See Kimberly Kessler Ferzan, *Don’t Abandon the Model Penal Code Yet! Thinking Through Simons’s Rethinking*, 6 BUFF. CRIM. L. REV. 185, 204–05 (2002) (articulating this distinction).

every recklessness calculation whether the defendant's reason for action made taking a risk unjustifiable. It is, thus, part of bread-and-butter culpability determinations to look at reasons.

As a moral matter, looking directly to a defendant's reasons eliminates concerns about over- and under-inclusivity. Killing for no good reason appears as culpable as killing for money. In addition, the reason why the mercy killer should not be treated as extraordinarily culpable is because the mercy killer acts with good reason (or at least not with morally condemnable reasons). Thus, he is not amongst the worst of killers. As a matter of legal rules, jurisdictions will ultimately need to articulate which reasons for acting are the most culpable.<sup>91</sup> No doubt this is a difficult task, but at least the inquiry will involve the right question.<sup>92</sup>

## 2. Extreme Indifference and Quality of Contemplation (I): Opportunity for or Exercise of Enhanced Decisionmaking

Jurisdictions should adopt aggravation doctrines based on quality of contemplation or the opportunity for such. The quality of contemplation question asks whether (1) the defendant engaged in qualitatively above-average contemplation *or* (2) the defendant had the opportunity to engage in qualitatively above-average contemplation but failed to take advantage of it. Jurors could look not just at the risk and reasons, but *how or if* the defendant weighed those risk and reasons.

Premeditation is a doctrine that focuses on identifying with one's aim. Although this factor is relevant to the culpability of identity, its absence does not equate to less culpability, because the very absence may be indicative of indifference. In other words, planning and deliberation reveal that an actor identifies with a harm or evil, and thus, he seems particularly deserving of punishment because the actor wants the death to occur. But an actor who gives no thought is not less culpable. Rather, he is culpable for a different reason—

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91. Germany allows an open-ended inquiry into reasons. The country's statute lists particular motives but has an open category for "other despicable reasons." Antje du Bois-Pedain, *Intentional Killings: The German Law*, in *HOMICIDE LAW IN COMPARATIVE PERSPECTIVE* 67 (Jeremy Horder ed., 2007). This has been criticized by German academics for overinclusiveness and character-based focus, and some of these academics advocate returning to premeditation. *Id.* at 73–74. In defense, Antje du Bois-Pedain argues,

the principle behind the provision is sound. Some of the qualifying factors are also quite appropriately perpetrator-focused. . . . They are, in essence, not about a particular character trait as such, but about a particular attitude that was evinced by the deed. Read in this way, they are perfectly compatible with the culpability principle. The generality of the notion of 'despicable motives' and the resulting elasticity of its application is indeed a problem for legal certainty: but the risks are contained by the fact that the courts apply this qualifying factor with restraint.

*Id.* at 74.

92. For a first cut at this question, see PILLSBURY, *supra* note 12, at 110 (suggesting types of reasons that are the most serious); for a critique, see Kenneth W. Simons, *Book Review: Social Meaning, Retributivism, and Homicide*, 19 *LAW & PHIL.* 407, 418 (2000) (suggesting that Pillsbury's power of "assert[ing] cruel power" is not a reason for acting but a normative assessment of the defendant's reasons).



because he does not value human life enough to give it any thought.

Both indifference and identity reasoning can manifest extraordinary culpability. Both individuals may reveal extreme indifference to human life. Some give their killings no thought. If the conditions were such that the defendant could and should have stopped to think, but did not, then he is extraordinarily indifferent to human life. On the other hand, if the defendant did deliberate, then the questions are whether the defendant failed to seriously consider that killing another human being is a reason against acting, and whether he ultimately determined that ending a human life was worthy of time, planning, and contemplation in a way that shows he strongly identified with the evil. Both sorts of killers should be deemed to be the most culpable.

### 3. Extreme Indifference and Quality of Contemplation (II): Degraded Decisionmaking

Jurisdictions should allow for mitigating doctrines for degraded decisionmaking. The defendant's cognitive abilities matter. If an individual has a mental disability, disturbance, or is overwhelmed by emotion, he cannot reflect meaningfully on his choices.<sup>93</sup> Consciousness is important because access to reasons for action is important. When someone is very upset or angry, she may lack the ability to deliberate over her action in the way she otherwise would. Indeed, criminal law recognizes this concept in its provocation doctrines to the extent that heat of passion lacking reasonable provocation is one category of second-degree murder, because the hot-blooded killing negates the cool bloodedness required under this doctrinal view of premeditation. This mitigating doctrine ought to be consistently available for those with diminished rationality.

### 4. Cognitive Quality and Prior Culpable Choices

The criminal law should more generally look to prior culpable risk impositions. Something in our moral judgment is lacking when we relegate all hot-blooded killings to second-degree murder even when the emotions are themselves blameworthy. *Anderson*, for example, may involve a hot-blooded killing, but it appears to be a particularly culpable one.

The solution to this puzzle lies in distinguishing two separate culpability judgments that are being made. One judgment focuses on the choice to act, when that choice is impaired by emotion. The second judgment is an evaluation of the actor for having had that emotion. Not only can these two be disentangled but they can also be distinct bases for desert.<sup>94</sup>

The criminal law should consistently focus on prior culpable choices and omissions, without cloaking these judgments in forfeiture doctrines. Currently,

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93. See generally *Roper v. Simmons*, 543 U.S. 551 (2005) (determining it is unconstitutional to execute juveniles, who have diminished culpability); *Atkins v. Virginia*, 536 U.S. 304 (2002) (declaring unconstitutional executions of the mentally retarded, who have diminished culpability).

94. See ALEXANDER & FERZAN, *supra* note 49, at 167 (suggesting this two-step inquiry).

many “reasonableness” determinations, such as those in provocation and self-defense analyses, function as forfeiture rules, wherein the defendant does not receive the benefit of a partial or full mitigation defense if his belief or emotion is not reasonable.<sup>95</sup> Whether the defendant chooses to drink an unjustifiable amount or fails to make reasonable efforts to rid himself of a culpable character trait, his culpability for his later loss of control is fixed at this earlier stage for his act or omission. The criminal law should not employ “forfeiture” rules that inexactly attempt to capture the culpability and responsibility for the loss of control. It should focus on the earlier culpable act or omission. This does not mean that all later acts will be the product of prior culpable choices, but when there is a prior culpable choice, it should be its own desert basis.

### 5. Application

Consider how these categories would affect the mercy killer,<sup>96</sup> Anderson,<sup>97</sup> and Robinson.<sup>98</sup> The mercy killer will not be among the most culpable because his reasons for acting do not exhibit extreme indifference to human life. Depending upon his degree of grief, further mitigation may also be available for diminished capacity. Both of these nuanced analyses are unavailable under current law. As for Anderson, if his crime was sexually motivated, this would render him quite culpable. Two other questions, however, still need to be asked. First, Anderson would be entitled to mitigation to the extent that he could not reflect due to rage and intoxication. This would make the killing less culpable than if he were clear headed. Second, Anderson should be charged with a separate criminal act or omission for putting himself in this position, not figuring out how to deal with his relationship to the child, and getting drunk around her. Premeditation asks none of these questions and simply relegates Anderson’s act to second-degree murder, thus ignoring the culpability inherent in his reasons and his prior culpable choices. The impulsive nature of the killing means that Anderson did not have an opportunity for enhanced decisionmaking. Current law only reaches the question of whether his thinking was “cold blooded” and answers in the negative, thus failing to reach why it appears that Anderson is nonetheless so blameworthy. Finally, consider Robinson. His reasons for acting are quite bad, for he kills because he was called a name (which was not atypical in his relationship with the victim) and because he wanted a seat on the couch. These trivial reasons make him extremely indifferent. Like Anderson, however, Robinson would be subject to the two-step inquiry of analyzing whether he could fully reason given that he was on drugs and whether he is also culpable for the decision to take drugs. Moreover, the fact that Robinson had the opportunity to deliberate and chose

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95. Stephen P. Garvey, *Self-Defense and the Mistaken Racist*, 10 NEW CRIM. L. REV. 119, 139–46 (2008) (arguing that the reasonable belief rule in self-defense is a forfeiture rule).

96. See discussion *supra* Part IV.A.

97. *People v. Anderson*, 447 P.2d 942 (Cal. 1968).

98. *Robinson v. State*, 214 S.W.3d 840 (Ark. 2005).

not to do so (which is more likely than that he gave the killing much thought) makes him very culpable because he is indifferent to human life. This inquiry more directly attends to Robinson's culpability than the current approach, which allows a jury to conclude that Robinson's short walk to the car and back is sufficient for premeditated murder.

## VI

### CONCLUSION

Premeditation seeks to delineate the worst killers. Although courts struggle to impose standards that reach the "worst of the worst," the problem is that multiple factors go into culpability determinations. Although the criminal law is in need of a complete overhaul if it wishes to accurately capture culpability, more-modest steps will allow the law to better adjudicate culpability. The first step is to stop using premeditation. It is simply not up to the task.