University of Pennsylvania Law Review

FOUNDED 1852

Formerly
American Law Register

VOL. 99

DECEMBER, 1950

No. 3

A PROBLEM OF FIRST DEGREE MURDER: FISHER v. UNITED STATES¹

By EDWIN R. KEEDY †

I.

The first statute to divide the crime of murder into degrees was enacted in Pennsylvania on April 22, 1794.² Murder in the first degree was defined as follows:

"That all murder, which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery, or burglary, shall be deemed murder of the first degree."

In a recent article³ the history of this statute was traced and it was shown that it was the intention of the Assembly to give the words "deliberate" and "premeditated" their ordinary meaning.⁴

† A.B., 1899, Franklin and Marshall College; LL.B., 1906, Harvard University; LL.D., 1926, Franklin and Marshall College, 1950, University of Pennsylvania; Professor of Law Emeritus, University of Pennsylvania; Dean, University of Pennsylvania Law School 1940-1945; author of *The Decline of Traditionalism and Individualism*, 65 U. OF PA. L. REV. 764 (1917); *The Third Degree and Legal Interrogation of Suspects*, 85 U. OF PA. L. REV. 761 (1937); *A Petition of Right: Archer-Shee v. the King*, 87 U. OF PA. L. REV. 895 (1939); *The Preliminary Investigation of Crime in France*, 88 U. OF PA. L. REV. 385, 692, 915 (1940); *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. OF PA. L. REV. 759 (1949); *George Sharswood—Professor of Law*, 98 U. OF PA. L. REV. 685 (1950); and articles in other legal periodicals.

1. 80 U.S. App. D.C. 96, 149 F.2d 28 (D.C. Cir. 1945); 328 U.S. 463 (1946). A petition for rehearing was denied, 329 U.S. 818 (1946).

2. 4 JOURNAL OF THE SENATE 242 (Pa. 1794).

3. Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. OF PA. L. REV. 759 (1949).

4. "Deliberate—formed, arrived at, or determined upon as a result of careful thought and weighing of considerations." "Premeditate—to think on, and revolve in the mind, beforehand; to contrive and design previously." WEBSTER, NEW INTERNATIONAL DICTIONARY (2d ed. 1949).

A statute, similar to the Pennsylvania Act, was enacted in Virginia in 1796⁵ and in Maryland in 1809.⁶ Since then the legislatures of 35 states have adopted statutes defining first degree murder. The statutes of Connecticut,⁷ Iowa,⁸ Kansas,⁹ Michigan,¹⁰ Missouri,¹¹ Montana,¹² New Jersey¹³ and Vermont¹⁴ employ the following wording from the Pennsylvania statute of 1794: "by poison or lying in wait, or by any other kind of wilful, deliberate and premeditated killing." In Arizona,¹⁵ California,¹⁶ Colorado,¹⁷ Idaho,¹⁸ Nevada,¹⁹ New Mexico²⁰ and North Dakota²¹ the same wording is used except that "torture" is added to "poison or lying in wait." In North Carolina²² "imprisonment, starving or torture" is added, and in West Virginia²³ "imprisonment or starving." In New Hampshire²⁴ "lying in wait" is omitted while "starving or torture" is added. In Arkansas,²⁵ Rhode Island,²⁶ Tennessee²⁷ and Utah²⁸ "malicious" is added to "wilful, deliberate and premeditated."

In New York²⁹ the killing must result from a "deliberate and premeditated design to effect death," while Florida,³⁰ Minnesota,³¹ Washington³² and Wisconsin³³ require only a "premeditated design." In Alabama³⁴ in addition to a "premeditated design" the killing must have been done "unlawfully and maliciously." Other wordings are "purposely and with premeditated malice" in Indiana,³⁵ "express malice

5. Acts of Virginia c. 2, § 2 (1796).

6. Laws of Maryland, 1809 c. 138, § 3 (Kilty, Harris and Watkins).

7. CONN. GEN. STAT. § 8350 (1949).

8. IOWA CODE § 690.2 (1950).

9. KAN. GEN. STAT. ANN. § 21-401 (Corrick, 1935).

10. MICH. STAT. ANN. § 28.548 (Henderson, 1938).

11. MO. REV. STAT. § 4376 (1939).

12. MONT. REV. CODE ANN. § 94-2503 (1947).

13. N.J. STAT. ANN. § 2:138-2 (1939).

14. VT. REV. STAT. § 8240 (1947).

15. ARIZ. CODE ANN. § 43-2902 (1939).

16. CAL. PENAL CODE pt. 1, tit. 8, c. 1, § 189 (Deering, 1941).

17. COLO. STAT. ANN. c. 48, § 32 (1935).

18. IDAHO CODE vol. 4, c. 40, § 18-4003 (1948).

19. NEV. COMP. LAWS ANN. § 10068 (Hillyer, 1929).

20. N.M. STAT. ANN. § 41-2404 (1941).

21. N.D. REV. CODE § 12-2712 (1943).

22. N.C. GEN. STAT. ANN. § 14-17 (1943).

23. W.VA. CODE ANN. § 5916 (1949).

24. N.H. REV. LAWS c. 455, § 1 (1942).

25. ARK. STAT. ANN. § 41-2205 (1947).

26. R.I. GEN. LAWS c. 606, § 1 (1938).

27. TENN. CODE ANN. § 10768 (Williams, 1934).

28. UTAH CODE ANN. § 103-28-3 (1943).

29. N.Y. PENAL LAW § 1044 (1944).

30. FLA. STAT. § 782.04 (1949).

31. MINN. STAT. § 619.07 (Henderson, 1949).

32. WASH. REV. STAT. ANN. § 2392 (Remington, 1932).

33. WIS. STAT. § 340.02 (1947).

34. ALA. CODE ANN. tit. 14, § 314 (1940). The section also includes "poison, lying in wait and any other kind of wilful, deliberate, malicious, and premeditated killing."

35. IND. STAT. ANN. § 10-3401 (Burns, 1933).

aforethought" in Delaware,³⁶ "deliberately premeditated malice aforethought or with extreme atrocity or cruelty" in Massachusetts,³⁷ "purposely and of deliberate and premeditated malice" in Nebraska³⁸ and Oregon,³⁹ "purposely and with premeditated malice . . . or by administering poison or causing the same to be done" in Wyoming⁴⁰ and "purposely and either of deliberate and premeditated malice or by means of poison" in Ohio.⁴¹

It is important for the present discussion to trace the history of the sections on first degree murder in the District of Columbia Code, which are as follows:

"Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison . . . is guilty of murder in the first degree.

"Whoever maliciously places an obstruction upon a railroad or street railroad, or displaces or injures anything appertaining thereto, or does any other act with intent to endanger the passage of any locomotive or car, and thereby occasions the death of another, is guilty of murder in the first degree."⁴²

In November, 1895, the Board of Trade of Washington, D. C. invited Justice Walter S. Cox of the Supreme Court of the District of Columbia to prepare a code for the District of Columbia.⁴³ Judge Cox

36. DEL. REV. CODE § 5157 (1935).

37. MASS. ANN. LAWS, c. 265, § 1 (1933).

38. NEB. REV. STAT. vol. 2, § 28-401 (1943).

39. ORE. COMP. LAWS ANN. § 23-401 (1940).

40. WYO. COMP. STAT. ANN. § 9-201 (1945).

41. OHIO GEN. CODE ANN. § 12400 (Page, 1938).

42. D.C. CODE §§ 22-2401 and 22-2402 (1940). The D.C. CODE was enacted in 1901, 31 STAT. c. 854. The sections on first degree murder were then numbered 798 and 799.

43. A number of previous efforts, three of which are of interest in the present connection, were made to secure the enactment of a code of laws for the District of Columbia. In 1816 Congress passed an act authorizing the judges of the Circuit Court and the attorney for the District of Columbia to prepare a code of jurisprudence, both civil and criminal, for the District and to submit the draft of the code to Congress. Acts of the 14th Congress, 1st Sess., c. 143, April 29, 1816. Judge Cranch, one of the judges of the Circuit Court, presented on Nov. 19, 1818 to the Hon. Henry Clay, Speaker of the House of Representatives, the draft of a code, prepared by himself, stating that the other officials, specified in the act of April 29, 1816, were prevented by their engagements from participating in the drafting of the code. Code of Laws for District of Columbia, 3 (1819). It was provided in the code that no crime should be punished by death, the penalty for murder being imprisonment for not less than two nor more than twenty years. *Id.* at 235. Congress did not adopt this code.

A joint committee of Congress, appointed in 1832 by a Resolution of the 22nd Congress, presented on February 23, 1833 "A System of Civil and Criminal Law for the District of Columbia." The punishment for murder, recommended in this draft, was solitary confinement for life. SEN. DOC. No. 85, 22nd Cong., 2nd Sess. 384. This code was not adopted by Congress.

In 1855 Congress passed a statute providing that the President of the United States should appoint two persons learned in the law to codify the laws of the District of Columbia and further providing that after the draft of the Code was completed and distributed a vote of the citizens of the District should be taken to determine whether the Code should be adopted. Act of Mar. 3, 1855, 10 STAT. 642. The

accepted this invitation and prepared the draft of a code which was privately printed in 1898.⁴⁴ In the preface to this draft Judge Cox stated the following:

"The chapter on crimes and punishments is, in some respects, important. It creates degrees in the crime of murder, which do not exist here now and it gives definitions of the different kinds of homicide, after the statutes of New York."⁴⁵

The provision on first degree murder, as drafted by Judge Cox, was as follows:

"Homicide, when not justifiable, is murder in the first degree, whether effected by direct violence, poisoning, starvation, exposure, or other means, when:

"First.—It is committed from a deliberate design to effect the death of the person killed or of another.

"Second.—It is committed by one engaged in the commission of, or attempt to commit, any felony; . . .

"Third.—When it is an act imminently dangerous to others and committed with a reckless disregard of human life."⁴⁶

This with several changes of wording followed the corresponding provision of the New York Code.⁴⁷

After Judge Cox had completed the draft of the Code it was referred by the Board of Trade to its Committee on Legislation and by the Bar Association of the District to its Legal Committee.⁴⁸ The latter committee studied the whole code and agreed upon a number of changes. After the committee had completed its revision, the judges of the District, including Judge Cox, met with the members of the com-

President appointed, as draftsmen of the Code, Robert Ould and William B. B. Cross of the District of Columbia Bar. The Code, as drafted, divided murder into degrees and defined first degree murder in part as follows: "If any person shall purposely and of deliberate and premeditated malice . . . or by administering poison . . . kill another." Rev. Code of D.C. 1857, pt. IV, tit. II, c. 130, § 1. This provision followed the wording of the Ohio Act. At the election held in 1857, in accordance with the provision of the statute of 1855, the code was not adopted. The vote was 1576 for, and 3110 against, the proposed code. EXEC. DOC. NO. 74, 35th Cong., 1st Sess. 5.

44. WALTER S. COX, CODE OF LAW FOR THE DISTRICT OF COLUMBIA. Printed by Thomas W. Cadick in Washington, D.C., 1898 for the Bar Association and the Board of Trade of Washington. A copy of this book was located in the Public Library of the District of Columbia.

45. *Id.* Preface, p. xi.

46. *Id.* at 297.

47. The corresponding provision of the New York statute read as follows:

"The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed either

1. From a deliberate and premeditated design to effect the death of the person killed, or of another; or

2. By an act imminently dangerous to others, and evincing a depraved mind, regardless of human life. . . . N.Y. PENAL CODE § 183, 3 Laws 1881, p. 44."

48. 9 REP. WASHINGTON BOARD OF TRADE 21 (1899). See also D.C. CODE, Historical (Introduction) xiv (1940).

mittee and considered the revised draft. Additional modifications were suggested by the judges. After further discussion the members of the Committee and the judges "finally agreed upon the terms of every section of the code with the understanding that in the form in which it was then left, it should be introduced in Congress and printed, and that thereupon a second revision should be made in substantially the same way."⁴⁹ Accordingly a bill embodying the proposed code was introduced in the Senate on February 18, 1899.⁵⁰

The provision on first degree murder in the Senate bill was markedly different from the section as drafted by Judge Cox. The provision in the Senate bill was in two sections, the first of which read as follows: "Whoever, being of sound memory and discretion, purposely, and either of deliberate and premeditated malice or by means of poison . . . kills another is guilty of murder in the first degree and shall suffer death."⁵¹ This section, with the addition of the requirement of "sound memory and discretion" is in the exact wording of the corresponding provision of the Ohio statute.⁵² The second section, which with two slight changes of wording likewise followed the Ohio statute,⁵³ was as follows: "Whoever maliciously places an obstruction upon a railroad or street railroad, or displaces or injures anything appertaining thereto, or does any other act with intent to endanger the passage of any locomotive or car, and thereby occasions the death of another, is guilty of murder in the first degree and shall suffer death."⁵⁴

After the Senate bill was printed the committee of the Bar Association made a number of changes, which were considered by a joint committee composed of the members of the Bar Association committee and a committee of the judges of the District.⁵⁵ When agreement was reached by the joint committee the revised draft was introduced as a bill in the House of Representatives on March 21, 1900. The provision on first degree murder in the House bill was in the exact wording of the provisions of the Senate bill except that the last four words, "and shall suffer death," at the end of both sections were omitted.⁵⁶ The House bill was passed on May 28, 1900⁵⁷ and was introduced in

49. H.R. REP. No. 1017, 56th Cong., 1st Sess. 5 (April 14, 1900).

50. S. 5530, 55th Cong. 3rd Sess. 174 (1899).

51. *Ibid.*

52. 2 OHIO REV. STAT. § 6808 (1880).

53. The section of the Ohio statute, on which the section of the Senate bill was based, read as follows: "Whoever maliciously places an obstruction upon a railroad, or displaces or injures anything appertaining thereto, with intent to endanger the passage of any locomotive or car, and thereby occasions the death of another, is guilty of murder in the first degree, and shall be punished accordingly." *Id.* § 6809.

54. S. 5530, 55th Cong., 3rd Sess. 174 (1899).

55. 10 REP. WASHINGTON BOARD OF TRADE 138 (1900).

56. H.R. 9835, 56th Cong. 1st Sess., §§ 798 and 799 (1900).

57. 33 CONG. REC. 6182 (1900).

the Senate on May 31, 1900⁵⁸ where it was passed on March 2, 1901.⁵⁹ It was signed by the President on the following day.

An extensive investigation⁶⁰ has failed to show why the Ohio provision on first degree murder was substituted for the section drafted by Judge Cox, which followed the New York statute. It is clear that Judge Cox had studied the Ohio statutes, for he so stated in a letter to the Board of Trade.⁶¹ No reason has been discovered for adding the requirement of "sound memory and discretion." This added requirement has particular significance, since it is not found in any other statute on first degree murder.

Since deliberation and premeditation are elements of first degree murder under most statutes the basic proposition is that they must be proved affirmatively by the prosecution and that any evidence tending to show the absence of either of them is relevant and must be considered by the jury in reaching a verdict.⁶² Thus it has been held that evidence of feeble-mindedness,⁶³ provocation,⁶⁴ influence of drugs⁶⁵ and passion induced by various causes⁶⁶ should be admitted and weighed

58. 33 CONG. REC. 6265 (1900).

59. 34 CONG. REC. 3497 (1901).

60. The following sources of information were consulted: Library of Congress, Senate Library, Washington Public Library, Library of D.C. Bar Association and the Washington Board of Trade.

61. REP. WASHINGTON BOARD OF TRADE 23 (Nov. 14, 1898).

62. "The word 'deliberate' is derived from two Latin words, which mean, literally, 'concerning,' and 'to weigh.' When used as an adjective in the English, it means that the manner of the performance was determined upon after examination and reflection—that the consequences, chances and means were weighed, carefully considered and estimated. The term 'premeditated' literally means plan, contrive or scheme beforehand. Considering these definitions, the intention of the lawgiver must be very apparent. It is not only necessary that the accused shall plan, contrive and scheme, as to the means and manner of the commission of the deed, but that he shall consider different means of accomplishing the act. He must 'weigh' the modes of consummation which his premeditation suggests, and determine which is the most feasible. Such is the literal import of the terms used, and there is nothing in the act which indicates that they are to be understood in a different sense. . . .

"The deliberation and premeditation must be proved as well as the malice. . . . They are never, by the law, presumed or implied." Crozier, C. J. in *Craft v. State*, 3 Kan. 450, 483, 486, 487 (1866).

To same effect see *Ezell v. State*, 102 Ala. 101, 112, 15 So. 810, 814 (1893); *People v. Thomas*, 25 Cal.2d 880, 898, 156 P.2d 7, 17 (1945).

63. "Feebleness of mind or will, even though not so extreme as to justify a finding that the defendant is irresponsible, may properly be considered by the triers of the facts in determining whether a homicide has been committed with a deliberate and premeditated design to kill, and may thus be effective to reduce the grade of the offense." *Per Curiam*, in *People v. Moran*, 249 N.Y. 179, 180, 163 N.E. 553 (1928). *Accord*: *State v. Schilling*, 95 N.J.L. 145 (1920). *Contra*: *Commonwealth v. Scott*, 14 Pa. D. & C. 191 (1930).

64. *People v. Thomas*, 25 Cal.2d 880, 903, 156 P.2d 7, 19 (1945).

65. *State v. English*, 164 N.C. 497, 80 S.E. 72 (1913); *State v. Close*, 106 N.J.L. 321, 148 Atl. 764 (1930) *semble*.

66. Passion produced by insult, *Watson v. State*, 82 Ala. 10, 2 So. 455 (1886); *People v. Barberi*, 149 N.Y. 256, 43 N.E. 635 (1896); *State v. Jackson*, 344 Mo. 1055, 130 S.W.2d 595 (1939); by grief and provocation, *People v. Caruso*, 246 N.Y. 437, 159 N.E. 390 (1927); by unlawful search of house, *Winton v. State*, 151 Tenn. 177, 268 S.W. 633 (1924); by any cause, *Andersen v. State*, 43 Conn. 514 (1876).

by the jury. It has also been stated that "bodily disease, want of sleep and rest,"⁶⁷ "rash impulse, headlong fury, sudden and overwhelming grief,"⁶⁸ and "sudden and uncontrollable emotion"⁶⁹ and "impetuous rage"⁷⁰ are proper matters to be considered by the jury in determining whether the required elements of deliberation and premeditation have been proved. The problem has most frequently arisen with regard to voluntary intoxication and it has been held in twenty states and the District of Columbia that this may prevent a killing from being deliberate and premeditated.⁷¹ The Supreme Court of the United States in the leading case of *Hopt v. People*⁷² adopted this view. One of the decisions of the Court of Appeals for the District of Columbia is particularly significant. In *Sabens v. United States* it was decided that the defendant, who formed a deliberate and premeditated design to kill the deceased and then in pursuance of such design "voluntarily made himself drunk for the purpose of nerving himself for the accomplishment of the design," could not be guilty of first degree murder if at the time of the killing he was so intoxicated that he was unable to deliberate upon and premeditate the murder.⁷³

With regard to the question whether mental disease, which admittedly does not relieve the defendant from responsibility, should be

67. *State v. Close*, 106 N.J.L. 321, 331, 148 Atl. 764, 769 (1929).

68. O'Brien, J. (dissenting) in *People v. Moran*, 249 N.Y. 179, 182, 163 N.E. 553, 554 (1928).

69. O'Brien, J. in *People v. Barberi*, 149 N.Y. 256, 267, 43 N.E. 635, 638 (1896).

70. Agnew, C. J. in *Green v. Commonwealth*, 83 Pa. 75, 79 (1876).

71. *People v. Belencia*, 21 Cal. 544 (1863); *People v. Williams*, 43 Cal. 344 (1872); *Brennan v. People*, 37 Colo. 256, 86 Pac. 79 (1906); *State v. Johnson*, 40 Conn. 136 (1873); *State v. Kupis*, 37 Del. 27, 179 Atl. 640 (1935); *Garner v. State*, 28 Fla. 113, 9 So. 835 (1891); *Aszman v. State*, 123 Ind. 347, 24 N.E. 123 (1890); *O'Neil v. State*, 216 Ind. 21, 22 N.E.2d 825 (1939); *State v. Wilson*, 234 Iowa 60, 11 N.W.2d 737 (1943); *Commonwealth v. Parsons*, 195 Mass. 560, 81 N.E. 291 (1907); *Commonwealth v. Soaris*, 275 Mass. 291, 175 N.E. 491 (1931); *Maynard v. State*, 81 Neb. 301, 116 N.W. 53 (1908); *Wilson v. State*, 60 N.J.L. 171, 37 Atl. 954 (1897); *State v. Cooley*, 19 N.M. 91, 140 Pac. 1111 (1914); *State v. Brigance*, 31 N.M. 436, 246 Pac. 897 (1926); *People v. Leonardi*, 143 N.Y. 360, 38 N.E. 372 (1894); *People v. Koerber*, 244 N.Y. 147, 155 N.E. 79 (1926); *State v. English*, 164 N.C. 497, 80 S.E. 72 (1913); *State v. Ross*, 193 N.C. 25, 136 S.E. 193 (1927); *Long v. State*, 109 Ohio St. 77, 141 N.E. 691 (1923); *Rucker v. State*, 119 Ohio St. 189, 162 N.E. 802 (1928); *State v. Weaver*, 35 Ore. 415, 58 Pac. 109 (1899); *Jones v. Commonwealth*, 75 Pa. 403 (1874); *Commonwealth v. McCausland*, 348 Pa. 275, 35 A.2d 70 (1944); *Pirtle v. State*, 9 Humph. (Tenn.) 663 (1849); *Haile v. State*, 11 Humph. (Tenn.) 154 (1850); *Willis v. Commonwealth*, 32 Gratt. (Va.) 929 (1879); *Johnson v. Commonwealth*, 135 Va. 524, 115 S.E. 673 (1923); *State v. Hertzog*, 55 W.Va. 74, 46 S.E. 792 (1904); *Sabens v. United States*, 40 App. D.C. 440 (1913); *McAfee v. United States*, 72 App. D.C. 60, 111 F.2d 199 (1940).

Contra: *State v. Dearing*, 65 Mo. 530 (1877); *State v. Tatro*, 50 Vt. 483 (1877). 72. 104 U.S. 631 (1881).

73. 40 App. D.C. 440 (1913). *Contra*: *State v. Robinson*, 20 W.Va. 713 (1882). On page 741 Johnson, Pres. said: "A person who has formed, a willful deliberate and premeditated design to kill another, and in pursuance of such design voluntarily makes himself drunk for the purpose of nerving his animal courage for the accomplishment of the design, and then meets the subject of his malice, when he is so drunk, as not then to be able to deliberate on and premeditate the murder, and kills the person, it is murder in the first degree."

considered in determining if all mental requirements of first degree murder have been established there is a marked difference of opinion among the courts. An affirmative answer has been given to the question in Colorado,⁷⁴ Connecticut,⁷⁵ Indiana,⁷⁶ Maryland,⁷⁷ Ohio,⁷⁸ Rhode Island,⁷⁹ Utah,⁸⁰ Virginia⁸¹ and Wisconsin.⁸² The opposite conclusion

74. "To be guilty of murder of the first degree a person must not only be sane, but in killing he must have acted wilfully, deliberately and with premeditation. Whether he so acted is for the jury to determine after a consideration of all the facts and circumstances in evidence, including those affecting his mental condition at the time." Butler, J. in *Ingles v. People*, 92 Colo. 518, 525, 22 P.2d 1109, 1112 (1933). See also *Battalino v. People*, 118 Colo. 587, 199 P.2d 897 (1948).

75. *Andersen v. State*, 43 Conn. 514 (1876).

76. "It would be a legal as well as a logical incongruity to hold that the crime of murder in the first degree could only be committed after deliberate thought or premeditated malice, and yet that it might be committed by one who was without mental capacity to think deliberately or determine rationally." Mitchell, C. J. in *Aszman v. State*, 123 Ind. 347, 352, 24 N.E. 123, 125 (1890). To same effect see *Everett v. State*, 208 Ind. 145, 150, 195 N.E. 77, 79 (1935). Compare *Sage v. State*, 91 Ind. 141 (1883).

77. *Spencer v. State*, 69 Md. 28, 13 Atl. 809 (1888) *semble*.

78. In the leading case of *Clark v. State*, 12 Ohio 483 (1843), the defendant was tried for first degree murder and the defense was insanity. Two justices of the Supreme Court presided at the trial. The charge to the jury, which was reduced to writing and approved before delivery by all the justices of the Supreme Court, contained the following:

"The statute defining this crime, is in these words:—'If any person shall purposely, and of deliberate and premeditated malice, kill another, every such person shall be guilty of murder in the first degree.' The words *purposely*, of *deliberate* and *premeditated malice*, as applied to the act of killing, have much meaning. *Purposely* implies an act of the will; an intention; a design to do the act. It presupposes the free agency of the actor. *Deliberation* and *premeditation* require action of the mind. They are operations of the intellectual faculties, and require an exercise of reason, reflection, judgment and decision, and cannot happen in any case where the faculties of the mind are deranged, destroyed, or do not exist. The crime of murder in the first degree can, therefore, only be perpetrated by a free agent, capable of acting or of abstaining from action—free to embrace the right and to reject the wrong. He must have a sound intellect, capable of reason, reflection, premeditation, and under the control of the will." At 494.

The above statement regarding deliberation and premeditation was repeated by the trial judge in his charge to the jury in *State v. Maxwell*, Dayton 362, 363 (1867) and in *Cottell v. State*, 12 Ohio C.C. 467, 479 (1896).

In *Pigman v. State*, 14 Ohio 555 (1846) at page 556 the Supreme Court of Ohio stated the following: "If . . . the degree of guilt depends upon the calm and deliberate state of the mind at the time of the commission of the act, it is proper to show any state or condition of the person that is adverse to the proper exercise of the mind, and the undisturbed possession of the faculties."

79. "Assuming that defendant was not insane there is evidence that he was not in his normal mental state. This fact, although not an excuse for the homicide, is relevant on the question of the fixity and duration of the conscious intent or premeditation." Stearns, J. in *State v. Fenik*, 45 R.I. 309, 315, 121 Atl. 218, 221 (1923).

80. "While the jury found that his condition in that respect was not such as to affect his mental capacity to relieve him from responsibility, yet it may have been such as to affect his mental capacity to coolly deliberate and premeditate on his acts . . . While one's mental condition may not excuse the act, it may nevertheless affect the degree of guilt." Frick, J. in *State v. Anselmo*, 46 Utah 137, 145, 148 Pac. 1071, 1074 (1915).

81. *Dejarnette v. Commonwealth*, 75 Va. 867, 880 (1881) *semble*.

82. *Terrill v. State*, 74 Wis. 278, 42 N. W. 243 (1889); *Hempton v. State*, 111 Wis. 127, 86 N.W. 596 (1901).

has been reached in Arizona,⁸³ California,⁸⁴ Idaho,⁸⁵ Massachusetts⁸⁶ and Missouri.⁸⁷ In New Jersey⁸⁸ and Pennsylvania⁸⁹ the opinions

83. "The degree of the crime is not dependent upon defendant's intelligence or lack of intelligence, his power to reason or not to reason. If he knew the nature and quality of his act and that it was wrong, he is amenable to punishment therefor to the same extent as if he were one whose sanity is not questioned." Ross, J. in *Foster v. State*, 37 Ariz. 281, 290, 294 Pac. 268, 271 (1930).

84. "The insanity of a defendant cannot be used for the purpose of reducing his crime from murder in the first degree to murder in the second degree. If responsible at all in this respect, he is responsible in the same degree as a sane man, and if he is not responsible at all he is entitled to an acquittal in both degrees." Waste, C. J. in *People v. Troche*, 206 Cal. 35, 47, 273 Pac. 767, 772 (1928).

The above statement was approved in *People v. Cordova*, 14 Cal.2d 308, 311, 94 P.2d 40, 42 (1939).

85. *State v. Van Vlack*, 57 Idaho 316, 65 P.2d 736 (1937).

86. *Commonwealth v. Cooper*, 219 Mass. 1, 106 N.E. 545 (1914). Approved in *Commonwealth v. Clark*, 292 Mass. 409, 414, 198 N.E. 641, 644 (1935).

87. *State v. Holloway*, 156 Mo. 222, 56 S.W. 734 (1900).

88. "If, by law, deliberation and premeditation are essential elements of the crime, and, by reason of drunkenness or any other cause, it appears that the prisoner's *mental state* is such that he is incapable of such deliberation and premeditation, then the crime has not been committed; there is a failure on the part of the state to prove the crime into which premeditation must enter." Van Syckel, J. in *Wilson v. State*, 60 N.J.L. 171, 184, 37 Atl. 954, 958 (1897). Emphasis added.

In *State v. Maioni*, 78 N.J.L. 339, 341, 74 Atl. 526, 528 (1900), the Court of Errors and Appeals in affirming a judgment of conviction of first degree murder approved by a vote of eight to five the following instruction to the jury by the trial court:

"The insanity of the defendant can not be used for the purpose of reducing his crime from murder in the first degree to murder in the second degree. If responsible at all in this respect, he is responsible in the same degree as a sane man, and if he is not responsible at all, he is entitled to an acquittal in both degrees."

In *State v. Noel*, 102 N.J.L. 659, 133 Atl. 274 (1926), the defendant was indicted for murder in the first degree. The defense was insanity. A conviction of first degree murder was reversed, a majority of the court being of the opinion that the defendant was so insane as to be entirely irresponsible. Kalisch, J. in a concurring opinion approved the statement of Van Syckel, J. in *Wilson v. State*, *supra*, and stated the following: "The law is not the creation of such barbarous and insensible animal nature as to extend a more lenient legal rule to the case of a drunkard, whose mental faculties are disturbed by his own will and conduct, than to the case of a poor demented creature afflicted by the hand of God. . . . Moreover, a review of the cases cited on this topic clearly indicate that the legal rule as applied to the drunkard charged with the commission of murder, relating to the degree of guilt, is equally applicable to the mentally afflicted." At 694.

See *State v. Rodia*, 132 N.J.L. 199, 39 A.2d 484 (1944). In this case the trial judge admitted evidence of the defendant's mental age to show that he "was incapable of planning, premeditating or designing an intent to kill."

89. In *Jones v. Commonwealth*, 75 Pa. 403 (1874) the defendant was convicted of murder in the first degree. On appeal the Supreme Court reversed the judgment on the ground that the murder was second degree. On page 410 Agnew, C. J. stated the following: "Looking then at the state of Jones's mind from the 10th until the 19th of June, and down to the very moment he fired the pistol, and, also, at the suddenness of his quarrel with Mrs. Hughes, her call for the poker, and lifting the stool, it seems to us a matter of grave doubt whether his frame of mind was such that he was capable either of deliberation or premeditation. It appears to have been rather the sudden impulse of a disordered brain, weakened by potations of laudanum and spirits, and of a distorted mind, led away from reason and judgment by dwelling upon the conduct of his wife, influenced by his continued state of excitement. It presents a case of the preparation of a weapon, and an undefined purpose of violence to some one, where the time for reflection was ample; but where the frame of mind was wanting, which would enable the prisoner to be fully conscious of his purpose, or to resolve to take the life of the deceased, with deliberation and premeditation." In *Commonwealth v. Werling*, 164 Pa. 559, 30 Atl. 406 (1894) the trial judge directed the jury to determine

expressed in the cases are conflicting. The Supreme Court of the United States in the leading case of *Hopt v. People*,⁹⁰ decided in 1881, announced the following proposition:

"But when a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness or otherwise,⁹¹ as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury." If the word "otherwise" is given its normal meaning in the context, it will include mental derangement.⁹²

In *McAffee v. United States*, decided in 1940,⁹³ the Court of Appeals of the District of Columbia, in an opinion by Miller, J., stated the following:

"There was conflicting evidence upon the subject of appellant's intoxication and of his *mental condition*. Under the circumstances the question was one of fact and was properly submitted to the jury to determine whether, *by reason of drunkenness or otherwise, appellant's condition was such as to make him incapable of deliberation or premeditation.*"⁹⁴

"whether his mental condition was such as to reduce the grade of the crime from murder of the first degree to murder of the second degree, by reason of the fact he was incapable of that deliberation and premeditation which the law requires." At 562. A similar instruction was given the jury in *Commonwealth v. Hillman*, 189 Pa. 548, 42 Atl. 196 (1899).

The contrary view was announced in *Commonwealth v. Wireback*, 190 Pa. 138, 42 Atl. 542 (1899). On page 151 Dean, J. stated the following:

"Either the jury remain convinced of the prisoner's sanity, by the legal presumption against him, or they are convinced of his insanity by the preponderance of evidence in his favor; there is no middle ground which the law recognizes; nor does a doubt of sanity reduce the grade of the crime to murder of the second degree. From the very nature of the mental disease, there can be no grading of it by degrees so as to accord with a degree in crime." No reference was made to *Jones v. Commonwealth*, *supra*.

Commonwealth v. Wireback was approved in *Commonwealth v. Hollinger*, 190 Pa. 155, 161, 42 Atl. 548, 550 (1899). A similar conclusion was reached in *Commonwealth v. Szachewicz*, 303 Pa. 410, 154 Atl. 483 (1931).

On page 416 Kephart, J. stated the following:

"The doctrine of partial responsibility adopted in some other states would turn loose on society a class of dangerous citizens who, because of their legalized immunity, would prey on other members of society without much restraint." *Jones v. Commonwealth* was not cited.

In *Commonwealth v. Stabinsky*, where it was held that mental disorder should be considered by the jury in determining the penalty in case of a conviction for first degree murder, Linn, J. cited with approval the following: "Diminished responsibility is a scientific fact, scientifically established and capable of being analyzed." 313 Pa. 231, 238, 169 Atl. 439, 442 (1933). This statement would seem to be applicable to the present problem.

90. 104 U. S. 631 (1881).

91. Emphasis added.

92. *Id.* at 634. See Keedy, *Insanity and Criminal Responsibility*, 30 HARV. L. REV. 535, 552 (1917).

93. 72 App. D.C. 60, 111 F.2d 199 (1940).

94. *Id.* at 66, 111 F.2d at 205. Emphasis added.

It should be noted that this statement not only contains the phrase "drunkenness or otherwise," as used by the Supreme Court in *Hopt v. People*, but specifically includes "mental condition" as well as "drunkenness." Miller, J. repeated the language of the *McAfee Case* in *Mergner v. United States*, decided in 1945.⁹⁵

II.

Julius Fisher was brought to trial in the District Court of the United States for the District of Columbia on June 28, 1944 charged with first degree murder in the killing of Catherine Reardon, the indictment being based on the provision of the statute requiring that the killing be committed "purposely either of deliberate and premeditated malice" by a person "of sound memory and discretion." The fact of the killing was admitted. The deceased was the librarian of the Cathedral of Saint Peter and Saint Paul in Washington, D. C. The defendant, a Negro, was the janitor of the library building. The deceased had complained to the verger about the defendant's care of the building and the verger had informed defendant of the complaint. On the following day, when the deceased and the defendant were alone in the library, the killing occurred. The only testimony regarding the circumstances of the killing was that of the defendant, who testified as follows:

"She asked me if I had dusted her desk, and I said 'Yes'. Then she said, 'It certainly doesn't look like it.' I walked out from behind the stacks and in front of her desk. I said, 'I have dusted the desk. I always try to keep the place clean,' and I asked her if she was trying to make trouble for me. I also asked her if she had reported to the boss about her desk. She said, 'No', that she had seen dust and dirt around her floor. She then spoke up and said, 'You black "nigger" you should be able to keep this place clean. That is what they are paying you for.' I got angry at what she said. Then I smacked her. I felt like I got angry inside. I felt like something rose up in my chest like that [in-

95. *Mergner v. United States*, 79 App. D.C. 373, 374, 147 F.2d 572, 573 (1945).

The Penal Codes of most Latin-American countries provide that mental derangement, which is not sufficient to relieve the defendant from responsibility, may constitute an extenuating circumstance. Argentina, bk. I, tit. V, art. 40; Brazil, tit. III, art. 22 (may cause reduction of punishment); Chile, bk. I, tit. I, arts. 10(1) and 11(1); Costa Rica, bk. I, tit. II, c. IV, art. 28(2) (mental debility produced by old age); Cuba, bk. I, tit. III, arts. 35(A) and 37(A); Ecuador, bk. I, tit. III, c. I, art. 35 (may cause reduction of penalty); Guatemala, bk. I, tit. I, arts. 21(1) and 22(1); Honduras, bk. I, tit. I, arts. 7(1) and 8(1); Nicaragua, bk. I, tit. I, arts. 21(1) and 22(1); Panama, bk. I, tit. IV, art. 45; Paraguay, bk. I, arts. 18(3) and 30(1); Peru, bk. I, tit. X, art. 90; El Salvador, bk. I, tit. I, arts. 8(1) and 9(1); Uruguay, bk. I, tit. II, c. II, art. 30, and tit. III, c. I, art. 46(1); Venezuela, bk. I, tit. V, art. 63. JIMÉNEZ DE ASÚA, *CÓDIGOS PENALES IBEROAMERICANOS* (1946).

dicating]. I smacked her and she ran out from behind the desk, around toward the back of the stacks. No white person had ever called me a 'nigger' before. I had been called that by my own colored people. I had never been called that before an (*sic*) in opprobrium, anger or criticism. She ran out from behind her desk, down toward the back, screaming. I started upstairs, to run up. The screaming seemed to have gotten on my nerves. I got scared and nervous. I was running on up the steps, with her all the time screaming. When I got up to the top of the steps, the noise got so loud, it kept scaring me. I ran into the library, got the stick of wood, ran back downstairs and started to striking her with it. The stick broke. She was still screaming, and I began choking her then. She seemed to have become unconscious and I taken her by the hand and started to drag out. When I struck her she was standing about a little table down back of the stacks; a little table was down there on the right-hand side, as you go down towards the window. At that time it looked as though she had started trying to come back up towards me. When I struck her with the stick I was not trying to kill her, I was just trying to keep her from making a noise. When I began choking her, I was not trying to kill her; she started hollering and I tried to stop her from hollering. When she went limp, she evidently fainted. She went down on the floor. Then I began choking her because she was still hollering. She stopped finally and I did not strike her any more after the noise had ceased. The next thing I did was to take her by the hand and start dragging her through the stacks. Her ring pulled off in my hand. I dropped it in my pocket and continued to drag her on into the bathroom, where I left her laying and dove out the bathroom and got some toilet tissues to clean up the spots of blood. I wanted to clean up the spots of blood because I didn't want to leave the library dirty, leave awful spots on the floor. I wanted to clean them up. While I was up there with the tissue paper cleaning up the spots on the floor, she started hollering again. She kept hollering, seemed like to me. She kept trying to holler. I took out my knife and stuck her in the throat. My idea was just trying to stop her from hollering, is all I can think about. The noise kept on getting on my nerves. After that she stopped hollering." ⁹⁶

Dr. Ernest Y. Williams of the Faculty of the Howard University Medical School was called as a witness for the defendant. He stated that he examined the defendant on four different occasions.⁹⁷ With regard to the defendant's mental condition he testified in part as follows:

96. Transcript of Record, 59. This testimony of the defendant was on cross-examination. His testimony on direct examination was less detailed.

97. *Id.* at 87.

"Psychiatric examination showed a limitation of information, judgment and comprehension. I think this man shows definitely evidence of what I call a *psychopathic personality*, and that the alcoholism is but a symptom of the total picture. This picture, so far as the psychopathic personality is concerned, shows the predominantly aggressive type of behavior, purely of an impulsive nature." ⁹⁸ On cross-examination Dr. Williams further stated: "I doubt whether he was able to entertain an intent to kill her. His inability to entertain that intent was partly due to a deranged mental condition. . . . You have here a psychopathic personality associated with chronic alcoholism and with early schizoid tendencies. They are three diseases: a psychopathic personality, chronic alcoholism, early schizoid tendencies. . . . At the time Fisher killed Miss Reardon he had all the elements of an insane person." ⁹⁹ When recalled as a witness for the defense Dr. Williams testified that he found "evidence of organic disease of the brain." ¹⁰⁰

Dr. Edgar D. Griffin, Senior Medical Officer at St. Elizabeth's Hospital, Washington, D. C., testified for the Government in rebuttal. His testimony was in part as follows: "I haven't examined the defendant and would not want to say definitely whether he was of sound or unsound mind. *A psychopathic personality is a person of unsound mind.*" ¹⁰¹

After the completion of the evidence the defense requested that the following instruction be given:

"The jury is instructed that in considering the question of intent or lack of intent to kill on the part of the defendant, the question of premeditation or no premeditation, deliberation or no deliberation, whether or not the defendant at the time of the fatal acts was of sound memory and discretion, it should consider the entire personality of the defendant, his mental, nervous, emotional and physical characteristics as developed by the evidence in the case." ¹⁰²

This request was refused by the trial judge, who in his instructions to the jury defined first degree murder as follows:

98. *Id.* at 89. Emphasis added.

99. *Id.* at 90.

100. *Id.* at 97.

101. *Id.* at 92. Emphasis added.

Before giving the above testimony Dr. Griffin testified as follows:

"I have read all the defendant's testimony as of yesterday. I was in the courtroom today until about 11:22 and heard most of the cross-examination of the defendant. I returned to the courtroom about 11:38 when the psychologist was on the stand. I heard most of her testimony and all the rest of the testimony up to the present time. I have heard nothing, read nothing about the case which would lead me to believe that the defendant was of unsound mind." *Id.* at 92.

102. *Id.* at 102; 328 U.S. at 470n.

"Murder in the first degree is the killing of a human being purposely and with deliberate and premeditated malice. The crime involves these elements:

"First, the fatal act purposely done. Of that, nothing more need be said.

"Second, malice.

"Third, premeditation.

"Fourth, deliberation." ¹⁰³

He then defined "malice", "premeditation" and "deliberation" at length but did not refer to the testimony to be considered by the jury in determining whether these requirements of the statute were proved. In defining first degree murder he did not mention the provision of the statute requiring that the defendant be "of sound memory and discretion." ¹⁰⁴ The defendant was convicted and sentenced to death.

On appeal to the Court of Appeals of the District of Columbia the judgment of conviction was affirmed. ¹⁰⁵ The opinion of the Court, which consisted of Miller, Edgerton and Arnold, Associate Justices, was written by Arnold, J. who did not discuss the requirements of the statute but stated the following:

"With respect to the issue of deliberation the psychiatric testimony went no further than to say that appellant was the kind of person who was apt to conceive and carry into effect a brutal murder of this character because of his psychiatric aggressive tendencies and his low emotional response to situations which would deter ordinary men. But it is obvious that brutal murders are not committed by normal people." ¹⁰⁶

He made no reference to the testimony of the Government's witness that "a psychopathic personality is a person of unsound mind."

Judge Arnold cited ¹⁰⁷ with approval the following statement by his colleague, Judge Miller, in *Hart v. United States*: "The rule suggested by appellant would become a refuge for ill-tempered, irresponsible citizens; it would put a premium upon lack of self-control and would penalize the reasonable man, . . . because of the restraint which he practices in his dealings with his fellows." ¹⁰⁸ The question

103. *Id.* at 107; 328 U.S. at 468n.

104. In the early part of his charge the judge stated to the jury the following:

"The prosecution contends that the defendant being of sound memory and discretion did kill Catherine Reardon purposely and of his deliberated and premeditated malice and is guilty of murder in the first degree." At 105.

105. 80 App. D.C. 96, 149 F.2d 28 (1945).

106. *Id.* at 97, 149 F.2d at 29.

107. *Id.* at 97n., 149 F.2d at 29n.

108. 76 App. D.C. 193, 195, 130 F.2d 456, 458 (1942).

in that case was whether there was sufficient provocation to reduce the offense from murder to manslaughter—a question entirely different from that in the principal case.

Judge Arnold, however, did not refer to the following statement of Judge Miller in *McAffee v. United States*¹⁰⁹ in which the question, like that in the principal case, was whether the defendant was guilty of first degree murder: "There was conflicting evidence upon the subject of appellant's intoxication and of his mental condition. Under the circumstances the question was one of fact and was properly submitted to the jury to determine whether, by reason of drunkenness or otherwise, appellant's condition was such as to make him incapable of deliberation or premeditation."¹¹⁰ The phrase "drunkenness or otherwise" follows the wording of the Supreme Court in *Hopt v. People*.¹¹¹ The statement in so far as it dealt with the question of the defendant's "mental condition" was directly applicable to the principal case. This statement was repeated by Judge Miller in *Mergner v. United States*¹¹² decided February 19, 1945, just two months before the *Fisher* case was decided.

The following statement by the Court of Appeals of the District is likewise applicable to the evidence in the *Fisher* case:

"Statutes like ours, which distinguish deliberate and premeditated murder from other murder, reflect a belief that one who meditates an intent to kill and then deliberately executes it is more dangerous, more culpable or less capable of reformation than one who kills on sudden impulse; or that the prospect of the death penalty is more likely to deter men from deliberate than from impulsive murder. The deliberate killer is guilty of first degree murder; the impulsive killer is not."¹¹³

109. 72 App. D.C. 60, 111 F.2d 199 (1940).

110. *Id.* at 66, 111 F.2d at 205.

111. See note 72 *supra*.

112. 79 App. D.C. 373, 374, 147 F.2d 572, 573 (1945).

113. Edgerton, J. in *Bullock v. United States*, 74 App. D. C. 220, 221, 122 F.2d 213, 214 (1941). The Court in this case held erroneous an instruction by the trial court that "though 'deliberate and premeditated malice' involves turning over in the mind an intention to kill, 'it does not take any appreciable length of time to turn a thought of that kind over in your mind.'" Regarding this instruction Edgerton, J. said: "To speak of premeditation and deliberation which are instantaneous, or which take no appreciable time, is a contradiction in terms. It deprives the statutory requirement of all meaning and destroys the statutory distinction between first and second degree murder." At 220. In *Jones v. United States*, 175 F.2d 544 (1949), the Court of Appeals for the Ninth Circuit held erroneous the following instruction by the District Court for the Territory of Alaska: "'Deliberate and premeditated malice' is presumed by law to exist where the intention to unlawfully take life is deliberately formed in the mind of the actor, and thereafter such intention is carried out. There need be no appreciable length of time between the formation of the intent to kill and the killing, itself; it may be as instantaneous as successive thought." At 549. Regarding this instruction Pope, Cir. J. speaking for the Circuit Court of Appeals stated the following: "The words 'deliberate and premeditated' are not such words of art as to be without meaning to jurors. Left to their own devices, with nothing but the language of the statute to guide them, the jury might be able to appreciate the essen-

On certiorari to the Supreme Court the judgment was affirmed¹¹⁴ by a vote of five (Stone, C. J. and Black, Reed, Douglas and Burton, JJ.) to three, Justice Jackson not participating and Justices Murphy,¹¹⁵ Frankfurter¹¹⁶ and Rutledge¹¹⁷ dissenting in separate opinions. The opinion of the majority was written by Justice Reed.

In his discussion of the evidence presented at the trial Justice Reed disposed of the testimony of defendant's medical witness that the defendant was "a psychopathic personality" by quoting the following statement¹¹⁸ from a magazine article by two English physicians:

"The only conclusion that seems warrantable is that, at some time or other and by some reputable authority, the term psychopathic personality has been used to designate every conceivable type of abnormal character."¹¹⁹

Justice Reed did not, however, refer to the testimony of the Government's medical witness that "a psychopathic personality is a person of unsound mind."¹²⁰

The opinion of the majority was based to a large extent upon the case of *United States v. Lee*,¹²¹ decided by the Supreme Court of

tial difference between first and second degree murder. But when the court, which might properly advise the jury that no particular length of time is necessary, proceeds to define deliberation and premeditation in terms which lay emphasis upon 'no appreciable time' and 'instantaneous,' the statutory distinctions are rendered meaningless." At 551.

114. The decision of the Supreme Court in *Fisher v. United States* is discussed in the following:

Taylor, *Partial Insanity as Affecting the Degree of Crime—A Commentary on Fisher v. United States*, 34 CALIF. L. REV. 625 (1946); Weihofen and Overholser, *Mental Disorder Affecting the Degree of a Crime*, 56 YALE L. J. 959 (1947); note, *Premeditation and Mental Capacity*, 46 COL. L. REV. 1005 (1946); note, *Mental Defect—Partial Responsibility*, WIS. L. REV. 109 (1947); Case note, *Partial Insanity*, 20 SO. CALIF. L. REV. 95 (1946); Recent Case, 20 TEMP. L. REV. 155 (1946); Comment, 25 TEX. L. REV. 295 (1947).

115. Justice Murphy dissented on the grounds (1) that the "correct answer" to the issue in the case was given by the Supreme Court in *Hopt v. People*, when it said that "the question whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury" and (2) that mental impairment should be given the same effect as intoxication and passion in negating deliberation and premeditation.

116. Justice Frankfurter concurred in Justice Murphy's opinion and added the following grounds:

(1) The charge of the trial judge did not adequately present to the jury the issue of premeditation and (2) "The evidence in its entirety hardly provides a basis for a finding of premeditation." At 480.

117. Justice Rutledge concurred in Justice Murphy's opinion and also stated his agreement with the first ground given by Justice Frankfurter.

118. At 467.

119. Curran and Mallinson, *Psychopathic Personality*, 90 J. MENT. SCI. 266, 278 (1944).

120. Transcript of Record, 92.

121. 4 Mackey 489 (1886).

the District of Columbia in 1886 before the statute dividing murder into degrees was enacted. The indictment in the *Lee* case was for murder and counsel for the defense requested the trial judge to charge that "if the jury find from the evidence that there was such a degree of mental unsoundness existing at the time of the homicide as to render the defendant incapable of premeditation and of forming such an intent as the jury believe the circumstances of this case would reasonably impute to a man of sound mind, they may consider such degree of mental unsoundness in determining the question whether the act was murder or manslaughter."¹²² The trial judge refused to give this instruction and this refusal was held not to be error. The decision was clearly correct as "premeditation" is not a requisite of murder. Justice Reed considered the decision applicable to the present case and expressed the opinion that the separation of murder into degrees did not introduce "a new situation into the law of the District of Columbia."¹²³ In so doing he confused "malice aforethought", which is the requisite of both first and second degree murder, with the "premeditation" required for murder in the first degree. This distinction was clearly recognized by the Court of Appeals for the District in a case decided in 1939. Vinson J. speaking for the Court stated the following: "Under the District of Columbia statute, a homicide committed purposely and with deliberate and premeditated malice is murder in the first degree. A homicide committed with malice aforethought, without deliberation and premeditation, is murder in the second degree."¹²⁴ Justice Frankfurter pointed out in his dissenting opinion that the decision in *United States v. Lee* was not applicable to the present case¹²⁵ and called attention to the following statement by counsel for the Government in the *Lee* case: "In jurisdictions where murder is divided into two degrees—murder in the first degree requiring deliberation and premeditation; in other words, actual malice—it has been frequently held that evidence of mental excitement resulting from drunkenness and, perhaps, also of other abnormal conditions of the mind not amounting to insanity, may reduce an unprovoked homicide to murder in the second degree; but it has always been held that such evidence cannot of itself reduce the crime to manslaughter."¹²⁶

One of the most important statements in the opinion of the majority is the following:

122. *Id.* at 492.

123. *Fisher v. United States*, 473.

124. *Bishop v. United States*, 71 App. D.C. 132, 135, 107 F.2d 297, 301 (1939).

125. *Fisher v. United States*, 489n.

126. *United States v. Lee*, 4 Mackey 489, 493 (1886).

"It is urged, also, that since evidence of intoxication to a state where one guilty of the crime of murder may not be capable of deliberate premeditation requires in the District of Columbia an instruction to that effect (*McAffee v. United States*, 72 App. D.C. 60, 111 F. 2d 199), courts from this must deduce that disease and congenital defects, for which the accused may not be responsible, may also reduce the crime of murder from first to second degree." ¹²⁷

Justice Reed answered this contention by referring to the language employed by the Supreme Court in *Hopt v. People*.¹²⁸ He attempted to lessen the effect of this statement by saying :

"The cases cited by this Court to support this statement are all instances of intoxication. Since drunkenness alone is specifically mentioned, the 'or otherwise' may refer to various stages of intoxication." ¹²⁹

Although all the cases cited by the Supreme Court in support of their pronouncement involved intoxication there were in three of them statements broad enough to cover mental states other than intoxication.¹³⁰ It was undoubtedly for this reason that the Court used the phrase "or otherwise." Justice Reed's contention that "or otherwise" may refer to various stages of drunkenness cannot be supported by the

127. At 473n.

128. "But when a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury." Gray, J. in *Hopt v. People*, 104 U.S. 631, 634 (1881).

129. At 475n. Emphasis added.

The Supreme Court of Wisconsin in two cases expressed the opinion that the statement of Justice Gray in *Hopt v. People* was applicable to a disordered mental condition as well as to intoxication. *Terrill v. State*, 74 Wis. 278, 287 (1889) and *Hempton v. State*, 111 Wis. 127, 135 (1901).

130. "If the mental status required by law to constitute crime be one of deliberation and premeditation, and drunkenness or *other cause* excludes the existence of such mental state, then the crime is not excused by drunkenness or such other cause, but has not in fact been committed." Turley, J. in *Pirtle v. State*, 9 Humph. (Tenn.) 663, 670 (1849). Emphasis added.

"But when the question is, whether a party is guilty of murder in the first degree, it becomes indispensable that the jury should form an opinion as to the actual state of mind with which this act was done. All murder in the first degree (except that committed by poison, and by lying in wait) must be perpetrated wilfully, deliberately, maliciously and premeditatedly. The jury must ascertain, as a matter of fact, that the accused was in this state of mind, when the act was done. Now, according to the cases of *Swan v. the State* (4 Humph. 136) and *Pirtle v. the State* (9 Humph. 663), *any fact* that will shed light upon this subject may be looked to by them, and may constitute legitimate proof for their consideration." Green, J. in *Haile v. State*, 11 Humph. (Tenn.) 154, 157 (1850). Emphasis added.

"If it was deliberate and premeditated, it was murder of the first degree; otherwise it was murder of the second degree; and in determining the degree *any evidence* tending to show the *mental status* of the defendant was a proper subject for the consideration of the jury." Cope, J. in *People v. Belencia*, 21 Cal. 544, 545 (1863). Emphasis added.

cases cited nor by any proper meaning of the word "otherwise". With regard to the case of *McAfee v. United States* it has already been pointed out that the language of the opinion applies to "mental condition" as well as to "intoxication" and includes the phrase "intoxication or otherwise", as used by the Supreme Court in *Hopt v. People*.¹³¹

Justice Reed reached the conclusion, from a study of the decisions of the District of Columbia courts, that "it is the established law in the District that an accused in a criminal trial is not entitled to an instruction based upon evidence of mental weakness short of legal insanity, which would reduce his crime from first to second degree murder."¹³² In none of the cases cited by Justice Reed to sustain his conclusion is this problem raised.¹³³ On the other hand the cases of *McAfee v. United States*¹³⁴ and *Mergner v. United States*,¹³⁵ in which the opinion of the Court supports the opposite conclusion, were not cited. In both of these cases, as already pointed out, the Court said:

"There was conflicting evidence upon the subject of appellant's intoxication and of his mental condition. Under the circumstances the question was one of fact and was properly submitted to the jury to determine whether by reason of drunkenness or otherwise, appellant's condition was such as to make him incapable of deliberation or premeditation."¹³⁶

Justice Reed made the following statement: "It may be that psychiatry has now reached a position of certainty in its diagnosis and prognosis which will induce Congress to enact the rule of responsibility for crime for which petitioner contends. For this Court to force the

131. *Supra* page 276.

132. *United States v. Fisher*, 473.

133. The cases cited are *United States v. Lee*, 4 Mackey 489, 495; *Guiteau's Case*, 10 Fed. 161, 168, 182; *Bolden v. United States*, 63 App. D.C. 45, 69 F.2d 121; *Owens v. United States*, 66 App. D.C. 104, 85 F.2d 270, 272; *Hill v. United States*, 22 App. D.C. 395, 401; *Hamilton v. United States*, 26 App. D.C. 382, 386-391; *Burge v. United States*, 26 App. D.C. 524, 527-30; *Hart v. United States*, 76 U.S. App. D.C. 193, 130 F.2d 456, 458; *Bishop v. United States*, 71 App. D.C. 132, 107 F.2d 297, 302-303. As already pointed out, *United States v. Lee* was a prosecution for murder before the statute dividing murder into degrees was enacted. *Guiteau's Case* was also a prosecution for murder. In *Owens v. United States* the defendant was convicted of second degree murder and contended that the evidence did not support this finding. In *Bolden v. United States* and *Hart v. United States* the question was whether there was sufficient provocation to reduce an intentional killing from murder to manslaughter. In *Bishop v. United States* it was decided that voluntary drunkenness would not reduce murder to manslaughter. Vinson, J. in his opinion clearly pointed out the difference between first and second degree murder under the District of Columbia statute. At 135.

In *Hill v. United States*, *Hamilton v. United States* and *Burge v. United States* the question under discussion by the court concerned the sufficiency of the indictment for first degree murder.

134. 72 App. D.C. 60, 111 F.2d 199 (1940).

135. 79 App. D.C. 373, 147 F.2d 572 (1945).

136. *McAfee v. United States* at 66; *Mergner v. United States* at 374.

District of Columbia to adopt such a requirement for criminal trials would involve a fundamental change in the common law theory of responsibility." ¹³⁷

This statement involves a misunderstanding of the meaning of "responsibility," which does not depend upon any theories of psychiatry but is a purely legal conception. This was clearly expressed by Stephen in his *History of the Criminal Law* when he said:

"The question, 'What are the mental elements of responsibility'? is, and must be, a legal question. It can not be anything else, for the meaning of responsibility is liability to punishment; and if criminal law does not determine who are to be punished under given circumstances, it determines nothing." ¹³⁸

Responsibility does not exist in the abstract. In each case the problem is whether a particular defendant has the state of mind required for the commission of a particular crime—in this case whether Julius Fisher at the time he did the killing was of sound memory and discretion and acted purposely with deliberate and premeditated malice, as required by the District of Columbia statute defining first degree murder.

As already pointed out the provision of the statute, which was the basis of the charge against Fisher, reads as follows: "Whoever being of sound memory and discretion, kills another purposely, of deliberate and premeditated malice . . . is guilty of murder in the first degree." It will be readily noted that this provision contains five mental requirements, *vis.*, (1) sound memory, (2) discretion, (3) purposely, (4) deliberate malice and (5) premeditated malice. In his request for instructions counsel for the defense included all five of the requirements, but the trial judge when charging the jury mentioned only the last three. He defined first degree murder as "the killing of a human being purposely and with deliberate and premeditated malice", omitting the requirements of "sound memory" and "discretion". This provision of the statute was not referred to in the opinion of the Court of Appeals nor in any of the opinions rendered in the Supreme Court. This omission was not in accord with the fundamental rule of statutory construction, frequently announced by the Supreme Court, that effect should be given to every word of a statute. ¹³⁹

137. At 476.

138. 2 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND, 183 (1883),

"Mental disease constitutes a medical problem, and the diagnosis and symptomatology of it should be determined by physicians. Criminal responsibility, on the other hand, is a legal question, and the rules for determining such responsibility should be fixed by the law, and administered by the legal profession." Keedy, *Insanity and Criminal Responsibility*, 30 HARV. L. REV. 535, 737 (1917).

139. "We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's

It may possibly be contended that the requirements, "sound memory" and "discretion", do not add to the effect of the other mental requirements of first degree murder since it is sometimes said that they are requisites of common law murder.¹⁴⁰ Such a contention can not be accepted for two reasons: (1) It would make the added provisions meaningless and of no effect, which would be contrary to an established

Abridgement, sect. 2, it was said that 'a statute ought, upon the whole, to be construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' This rule has been repeated innumerable times." Strong, J. in *Market Company v. Hoffman*, 101 U.S. 112, 115 (1879). *Accord*: *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1882); *Petri v. Commercial National Bank*, 142 U.S. 644, 650 (1892); *Louisville and Nashville Railroad Company v. Mottley*, 219 U.S. 467, 475 (1911); *Ex parte The Public National Bank of New York*, 278 U.S. 101 (1928). In the last case *Sutherland, J.* stated the following: "No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that 'significance and effect shall, if possible, be accorded to every word.'" At 104.

This rule has been followed in the Circuit Court of Appeals for the District of Columbia. *United States ex rel. Gribble v. Ballinger*, 33 App. D.C. 211, 215 (1909); *Fisher v. District of Columbia*, 82 App. D.C. 371, 372, 164 F.2d 707, 708 (1947).

140. Coke defined murder as follows: "Murder is when a man of sound memory, and of the age of discretion, unlawfully killeth . . . any reasonable creature . . . with malice forethought." 3 INST. 47 (1644). Emphasis added. Blackstone quotes Coke as saying that murder is "when a person of sound memory and discretion killeth . . . any reasonable creature . . . with malice aforethought." 4 BL. COM. 195 (1769). Emphasis added. It will be noted that Blackstone misquoted Coke, substituting "discretion" for "age of discretion."

The definitions of murder by the following early writers and courts do not contain either "sound memory" or "discretion": 1 HAWKINS P. C. c. 31, § 3 (1716); 1 HALE P. C. 425 (1736); FOSTER C. L. 256 (1767); 1 EAST P. C. 214 (1803); *Regina v. Mawgridge*, Kel. (J.) 119, 124 (1707); *Rex v. Oneby*, 2 Ld. Raym. 1487 (1727).

The leading English writer on Criminal Law, Russell, on the basis of the above citations, defined murder as "the killing any person under the king's peace, with malice prepense or aforethought, either express or implied by law." RUSSELL, CRIMES AND MISDEMEANORS, 613 (1819). This definition was continued through six editions. In the seventh (1910) edition the editors, without any explanation, added after the word "killing" the phrase "by any person of sound memory and discretion." P. 655. This addition to the original definition was continued in the eighth (1923) and ninth (1936) editions. The following English writers do not include the elements of "sound memory" and "discretion" in the definition of murder: CHERRY, OUTLINE OF CRIMINAL LAW 35 (1892); STEPHEN, DIGEST OF CRIMINAL LAW 225 (7th ed. 1926); KENNY, OUTLINES OF CRIMINAL LAW 146 (15th ed. 1936); WILSHERE, CRIMINAL LAW AND PROCEDURE 80 (3d ed. 1922); HARRIS AND WILSHERE, CRIMINAL LAW 194 (15th ed. 1933).

In this country Wharton, citing the same authorities as Russell, gives a definition of murder, which includes "sound memory and discretion." LAW OF HOMICIDE c. 1, § 2 (3d ed. 1907). The following American authors, unlike Wharton, do not include either "sound memory" or "discretion" in their definitions: 2 BISHOP, CRIMINAL LAW § 627-2 (1892); BURDICK, LAW OF CRIME § 415 (1946); CLARK AND MARSHALL, LAW OF CRIMES § 239 (3d ed. 1927); CLARK, CRIMINAL LAW 206 (3d ed. Mikell 1915); KERR, HOMICIDE 65 (1891); MAY, CRIMINAL LAW § 163 (4th ed. 1938); MILLER, CRIMINAL LAW 262 (1934).

Cox, J. in his charge to the jury in *Guiteau's Case* stated that "murder is committed where a person of sound memory and discretion unlawfully kills a reasonable creature in being, and in the peace of the United States, with malice aforethought." 10 Fed. 161, 162 (1881). He also stated that sound memory and discretion is "only a technical expression for a sound mind." At 165.

In *Hill v. United States*, 22 App. D.C. 395 (1903), where the question involved was the sufficiency of an indictment for first degree murder Alvey, C.J. expressed the opinion, based on the statement by Blackstone, that "sound memory and discretion" were requisites of common law murder.

rule of interpretation.¹⁴¹ (2) As defined in the statute first and second degree murder combined are coextensive with common law murder, but the requirements of sound memory and discretion are employed only in the definition of first degree murder, the only mental requirement for second degree murder being malice aforethought.¹⁴² It clearly follows from the foregoing that Congress intended that effect should be given to the requirements of "sound memory" and "discretion" in the statute on first degree murder. In this connection "memory" means mental capacity¹⁴³ and "discretion" means "the power of deciding or acting according to one's judgment."¹⁴⁴ It is thus clear that there is a direct connection between the statutory requirements of "sound memory" and "discretion" and the testimony of the medical witness for the defendant that he was a "psychopathic personality" combined with the testimony of the Government's medical witness that "the psychopathic personality is a person of unsound mind." Consequently the conclusion seems to follow inescapably that it was substantial error for the trial judge to refuse to charge that the jury should consider the mental characteristics of the defendant in determining whether he at the time of the killing was of sound memory and discretion.

141. *United States v. Southern Pacific Company*, 230 Fed. 270 (1916); *Eversole v. Eversole*, 169 Ky. 793, 185 S.W. 487 (1916); *Southern Railway Company v. United States Casualty Company*, 136 Va. 475, 118 S.E. 266 (1923).

142. "Whoever with malice aforethought, except as provided in sections 22-2401, 22-2402, kills another, is guilty of murder in the second degree." D. C. CODE § 22-2403. Sections 22-2401 and 22-2402 relate to murder in the first degree.

143. "If an infant under age alienates and dies under age, his heir can enter because his father could have entered at all times. But it is otherwise where a man who is not of sane memory alienates, for he himself could [not] enter, nor, consequently, his heir. And this in a Formedon, etc." STATHAM, ABRIDGMENT OF THE LAW, 1467(?), (transl. by Klingensmith) 618.

"*Nota si home qui est de non sane memorie, que est a dit en latin, qui non est compos mentis . . .*" LITTLETON, TENURES, 185 (Rastell, 1534).

Ceo est quant un tua auter oue felonious volunte ou intente, quel chose home de non sane memorie, ne peut faire. STAUNDFORDE, LES PLEES DEL CORON, lib. I, c. 9 (1583).

"But if a man being of good memorie make a Charter of Feofment of certaine lands whereof hee is seised . . . that is a good feoffment." PERKINS, PROFITABLE BOOK § 22 (1642).

"If a man in his sound memory commits a capital offense . . . and after his plea and before his trial, become of *none sane memory*, he shall not be tried; or, if after his trial he become of *non sane memory*, he shall not receive judgment; or, if after judgment he becomes of *non sane memory*, his execution shall be spared; for were he of sound memory, he might allege somewhat in stay of judgment or execution." 1 HALE P. C. 34 (1736). Emphasis added.

"MEMORY. Mental Capacity; . . . This word, as used in jurisprudence to denote one of the psychological elements necessary in the making of a valid will or contract or the commission of a crime, implies the mental power to conduct a consecutive train of thought, or an orderly planning of affairs, by recalling correctly the past states of the mind and past events, and arranging them in their due order of sequence and in their logical relations with the events and mental states of the present." BLACK'S LAW DICTIONARY (3d ed. 1933).

144. OXFORD DICTIONARY.

The Supreme Court has repeatedly decided that whenever Congress in legislating for the District of Columbia has adopted the wording of a state statute the construction given to this statute in the state has also been adopted and should be followed. In a leading case, decided in 1897, *Gray, J.* stated the following: "The resemblance between the provisions of the Massachusetts statute of 1860 and the act of Congress of 1864 is so remarkable, that it is evident that the latter was taken from the former. This being so, the known and settled construction, which those statutes had received in Massachusetts before the original enactment of the act of Congress, must be considered as having been adopted by Congress with the text thus expounded."¹⁴⁵

It has been shown that the District of Columbia statute on first degree murder follows the wording of the Ohio statute and that the Ohio courts have decided that mental derangement must be considered in determining whether the defendant was able to deliberate and premeditate. It follows from the above rule of the Supreme Court that the same construction should be given to the statute of the District of Columbia.

It is submitted that the following reasons would have fully supported a reversal by the Supreme Court of the decision of the District Court of Appeals:

1. The opinion of the Supreme Court in *Hopt v. People* regarding "drunkenness or otherwise".¹⁴⁶ This view was expressed by the three dissenting Justices, Murphy, Frankfurter and Rutledge.

2. The clearly expressed opinion of the Court of Appeals in *McAffee v. United States* and *Mergner v. United States*.¹⁴⁷

3. The erroneous refusal of the trial court to charge, as requested, that the jury should consider the mental characteristics of the defendant in determining whether he was of "sound memory and discretion" as required by the statute.¹⁴⁸

4. The opinion of the Supreme Court of Ohio, that the mental condition of the defendant should be considered by the jury in

145. *Willis v. Eastern Trust and Banking Company*, 169 U.S. 295, 307 (1897). To the same effect see *Metropolitan Railroad Company v. Moore*, 121 U.S. 558 (1887) and *Capital Traction Company v. Hof*, 174 U.S. 1 (1899). In the latter case *Gray, J.* stated the following: "By a familiar canon of interpretation, heretofore applied by this court whenever Congress, in legislating for the District of Columbia, has borrowed from the statutes of a State provisions which had received in that State a known and settled construction before their enactment by Congress, that construction must be deemed to have been adopted by Congress together with the text which it expounded, and the provisions must be construed as they were understood at the time in the State." At 36.

146. See *Keedy, Insanity and Criminal Responsibility, op. cit. supra* note 138, at 552; *GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW*, 202 (1925).

147. See pages 281 and 285.

148. See pages 286-288.

determining whether he was able to deliberate and premeditate, was controlling since the District of Columbia statute on first degree murder follows the wording of the Ohio statute.¹⁴⁹

III.

It is difficult to determine by what process of reasoning some courts can decide that self-produced intoxication is a proper matter for consideration by the jury in determining whether the mental elements of first degree murder are present but that mental disease may not be so considered.¹⁵⁰ It would seem that there was more reason for giving consideration to mental disease than to intoxication. This idea was expressed more forcefully by a New Jersey judge when he said "The law is not the creation of such barbarous and insensible animal nature as to extend a more lenient legal rule to the case of a drunkard, whose mental faculties are disturbed by his own will and conduct, than to the case of a poor demented creature afflicted by the hand of God."¹⁵¹ It is interesting to speculate how this judge would characterize the action of the Court of Appeals of the District of Columbia in deciding that mental disease should not be considered when it had previously decided that where a killing was definitely planned and intoxication was deliberately produced as an aid in accomplishing the killing the crime could not be murder in the first degree if at the time of the killing the intoxication prevented the killer from deliberating and premeditating.¹⁵²

The writer will hazard an explanation why some courts have become confused in their reasoning when confronted with the problem of determining the effect of various forms and degrees of mental disease on the mental requirements of particular crimes. The confusion started when the English judges were asked in 1843 by the House of Lords, following the acquittal of M'Naghten of a charge of murder by reason of his insanity, to state the law regarding insanity as a defense to a charge of crime. As this law had not been previously formulated the judges in their answers to the questions of the Lords stated as rules of law the theories of medical witnesses who had previously testified in the trial of homicide cases.¹⁵³ These medical theories are now obsolete

149. See page 289.

150. The authors of a scholarly article ask the following pertinent question: "how can one justify holding a person guilty of a deliberate and premeditated killing when he did not deliberate and premeditate, and, indeed was incapable of deliberating and premeditating?" Weihofen and Overholser, *Mental Disorder Affecting Degree of Crime*, *op. cit. supra* note 114, at 972.

151. Kalisch, J. in *State v. Noel*, 102 N.J.L. 659, 694, 133 Atl. 274, 285 (1926).

152. *Sabens v. United States*, 40 App. D.C. 440 (1913).

153. In the trial of Hadfield for treason in firing a pistol at King George III Dr. Creighton testified that Hadfield was suffering from an insane delusion. As a result of the opinion formed by Dr. Creighton, Hadfield's counsel, Thomas Erskine,

and are opposed to present scientific knowledge,¹⁵⁴ but the rules of law based on them are still followed by many courts in this country.

Another source of confusion in this country was the charge to the jury by Chief Justice Shaw of the Supreme Court of Massachusetts in the case of *Commonwealth v. Rogers*¹⁵⁵ in 1844, one year after the answers of the judges in *M'Naghten's Case*. This charge contained a jumble of psychological, medical, ethical and legal conceptions. Following is a list of these conceptions in the order in which they appear in the charge: intelligence, intent, purpose, reason, mental powers, will, conscience, mental disease, intellectual power, morality, partial insanity, memory, judgment, delusion, impressions, responsibility, right, wrong, knowledge, consciousness, justice, duty, punishment, impulse, melancholy, propriety, monomania, belief, design, motives, hallucination, paroxysm, accountability, responsibility and insanity. Chief Justice Shaw's charge, apparently because it suggests much learning, has had an extensive influence with courts and even legal writers.¹⁵⁶ The

stated to the jury that "Delusion, where there is no frenzy or raving madness, is the true character of insanity." *Hadfield's Case* 27 How. St. Tr. 1282, 1314 (1800). In the case of *Queen v. Oxford* in 1840 Dr. John Connolly testified that the defendant was unable "to distinguish right from wrong." *Queen v. Oxford*, 4 St. Tr. (N. S.) 498, 540. In the trial of *M'Naughton* in 1843 Dr. E. T. Monro testified that the act of the defendant in killing the deceased was committed "whilst under a delusion." He was then asked: "Is it consistent with the pathology of insanity, that a partial delusion may exist, depriving the person of all self-control whilst the other faculties may be sound?" The answer was "Certainly; monomania may exist with general sanity." *Queen v. M'Naughton*, 4 St. Tr. (N. S.) 847, 919. The name of the defendant is spelled "*M'Naghten*" in 10 Cl. & Fin. 200.

"A great variety of symptomatic tests of responsibility was early announced as is shown by the following statement: Thence has arisen so many ridiculous and untenable opinions, unsound and illogical propositions, unsafe and dangerous precedents. A regards motive as sufficient test; B requires knowledge of morality or immorality of act; C demands a comprehension of its relations to the law; D argues from the presence or absence of self-restraint; E considers the existence of delusion essential; F associates delusion with act; G rejects the mental unless corroborated by the physical condition; H commingles insanity with crime; and ALL contribute somewhat to involve the question in almost inextricable perplexity. We might extend this list: to do so would be merely to repeat what we have already propounded." WILLIAMS, *UN SOUNDNESS OF MIND*, 205 (London, 1856).

154. "The knowledge test in all its forms, and the delusion test, are medical theories introduced in immature stages of science in the dim light of earlier times, and subsequently, upon more extensive observations and more critical examinations, repudiated by the medical profession." Doe, J. in *State v. Pike*, 49 N.H. 399, 437 (1870). To the same effect see Somerville, J. in *Parsons v. State*, 81 Ala. 577, 584 (1886). For citation of other authorities see Keedy, *Insanity and Criminal Responsibility*, *op. cit. supra* note 138, at 736.

155. 7 Metc. (Mass.) 500 (1844).

156. The charge of Chief Justice Shaw to the jury in the *Rogers* case has been described as a "lucid exposition of the criminal law of insanity." 2 GREENLEAF, *EVIDENCE* § 372 note (16th ed. 1899).

"It (the charge) is in harmony with the rule stated by Chief Justice Shaw more than half a century ago, and which has been incorporated into the text-books and become elementary." Cassoday, C.J. in *Eckert v. State*, 114 Wis. 160, 163 (1902).

"Perhaps the most quoted of the early cases is Chief Justice Shaw's charge to the jury in *Commonwealth v. Rogers*, in 1844." WEIHOFEN, *INSANITY AS A DEFENSE IN CRIMINAL LAW* 47 (1933).

See also *Spencer v. State*, 69 Md. 28, 38 (1888).

jurors, to whom the charge was addressed, were not greatly impressed with its clarity, because after hearing the charge and considering it for several hours, they returned to the court room and asked the Chief Justice the following question: "What degree of insanity will amount to a justification of the offence"? ¹⁵⁷

In the *Fisher Case* Justice Reed cited *M'Naghten's Case*, he quoted the opinion of two English physicians,¹⁵⁸ he spoke of the diagnosis and prognosis of psychiatry,¹⁵⁹ he referred to classifications of mentality¹⁶⁰ and to the views of criminologists and psychologists,¹⁶¹ he discussed "partial responsibility"¹⁶² and "insanity in the legal sense",¹⁶³ but he did not refer to the provision of the statute requiring "sound memory and discretion" nor to the fact that this requirement is specifically included in the requested instruction, nor did he mention the testimony of the Government's medical witness that "a psychopathic personality is a person of unsound mind."

When the problem of the *Fisher Case* again arises a correct solution can be expected if the judges will not try to be amateur psychiatrists¹⁶⁴ but will reason as lawyers, applying the requirements of the statute to the evidence of the particular case.

157. At 506.

158. *United States v. Fisher* at 467n.

159. *Id.* at 476.

160. *Id.* at 475.

161. *Ibid.*

162. *Id.* at 470 and 475. See convincing criticism of "partial responsibility" by Taylor, *Partial Insanity as Affecting the Degree of Crime, A Commentary on Fisher v. United States*, *op. cit. supra* note 114, at 630n.

163. *United States v. Fisher* at 470.

164. Justice Frankfurter, dissenting in the *Fisher Case*, aptly said: "This case has been much beclouded by laymen's ventures into psychiatry." At 477.

"The difficulty has been that the courts in dealing with the defense of insanity have been concerned to such a degree in describing psychological phenomena, that they inhibited themselves from seeing the application of general principles of law to the problem before them." Keedy, *Insanity and Criminal Responsibility*, *op. cit. supra* note 138, at 553.