Articles

Premeditation and Deliberation in California: Returning to a Distinction Without a Difference

By Suzanne Mounts*

In the public mind a “deliberate and premeditated murder” involves careful and precise planning by a cold, detached, ruthless killer—the archetypal killing “in cold blood.” This image has been nurtured by literature, film, and popular culture of all forms, which have long been preoccupied with such killers and their deeds—who they are, where they come from, and the havoc they wreak on others.1 As a defining characteristic of aggravated murder within the legal framework of homicide law, the phrase “deliberate and premeditated murder” bears virtually no relationship to this popular image.

The phrase came into modern prominence in this country in connection with an early movement to limit the use of the death penalty. For centuries murder had been a unitary crime with all convicted murderers subject to the death penalty.2 In 1794, with the express purpose of limiting the death penalty, Pennsylvania became the first

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1. Literature and film, both modern and classical, reveal the persistent fascination with such killings. See generally William Shakespeare, MacBeth; Fyodor Dostoevsky, Crime and Punishment; Truman Capote, In Cold Blood (Vintage Int’l 1994); Compulsion (20th Century Fox 1959) (based on the 1924 murder committed by Nathan Leopold, Jr. and Richard Loeb); Rope (MCA 1948) (based on the 1924 murder committed by Nathan Leopold, Jr. and Richard Loeb); Crimes and Misdemeanors (MGM 1989); Patricia Highsmith, The Talented Mr. Ripley (Vintage Books 1992); The Talented Mr. Ripley (Paramount Pictures 1999).

2. Murder has remained a unitary crime (i.e. one not divided into degrees) in England. See Royal Commission on Capital Punishment, Report 182–89 (1949–53).
state to enact a statute that divided murder into degrees. The statute defined three categories of first degree murder. Of those, "deliberate and premeditated murder" was the category that applied most broadly.

In 1856 California followed Pennsylvania’s lead and enacted a nearly identical statute. When the statute was enacted and for more

3. The preamble to the Pennsylvania statute read:
   Whereas the design of punishment is to prevent the commission of crimes, and
   repair the injury that hath been done thereby to society or the individual, and it
   hath been found by experience that the objects are better obtained by moderate
   but certain penalties, than by severe and excessive punishments. And whereas it is
   the duty of every government to endeavor to reform, rather than exterminate
   offenders, and the punishment of death ought never to be inflicted, where it is
   not absolutely necessary to the public safety . . . .

4. See Pa. Laws 1794, ch. 257, §§ 1, 2 (providing:
   All murder, which shall be perpetrated by means of poison, or by lying in wait, or
   by any other kind of willful, 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.)

5. California’s statute provided:
   All murder which shall be perpetrated by means of poison, or lying in wait, torture,
   or by any other kind of willful, 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; and all other
   kinds of murder shall be deemed murder in the second degree.

The General Laws of the State of California, Crimes & Punishments, 5 Div., § 21 (Theodore H. Hittell ed., 1868). The statute, now Cal. Penal Code section 189, survives, unchanged in all of its essential features. The statute has been altered in substance only by the addition of several specified means and additions to the list of felonies. See infra text accompanying notes 20–21.

than a hundred years thereafter, a verdict of first degree murder gave the jury complete discretion as to whether to impose the death penalty. Today, although no longer in itself a basis for the imposition of the death penalty, conviction of first degree murder remains a necessary predicate. Furthermore, independent of possible death penalty exposure, conviction of first degree murder has significant consequences beyond conviction of second degree murder. Yet, during most of the century and a half of the statute’s history, deliberate and premeditated first degree murder has been functionally indistinguishable from second degree intentional murder.

This problem is not new, nor is it unique to California. Virtually every jurisdiction with a similar statute has had the same experi-


6. The constitutionality of this scheme was upheld in McGautha v. California, 402 U.S. 183 (1971).

7. In 1972 the United States Supreme Court decided Furman v. Georgia, 408 U.S. 238 (1972), a case that laid the groundwork for substantial change in the role of first degree murder vis-a-vis the death penalty. Furman struck down the death penalty schemes of Georgia and Texas, and by implication, those of other states as well. See id. Although the basis for the Furman decision initially was unclear, later cases, particularly Gregg v. Georgia, 428 U.S. 153 (1976), clarified that the constitutional defect lay in unguided juror discretion in imposing the death sentence.

Although there is no indication that the imprecise definition of premeditation and deliberation was considered explicitly, this inevitably amplified the problem of unguided juror discretion by extending the possibility of a death sentence to a large segment of what, in theory, was second degree murder.

Prior to the Furman decision the California Supreme Court had struck down the California death penalty scheme on the grounds that it violated the state constitutional ban on cruel and unusual punishment. See People v. Anderson, 493 P.2d 880 (Cal. 1972). In response to this decision, the voters quickly amended the state constitution to provide that the death penalty did not violate the ban on cruel and unusual punishment. See Steven F. Shatz & Nina Rivkind, The California Death Penalty Scheme: Requiem for Furman?, 72 N.Y.U. L. REV. 1283, 1307 (1997) (providing a detailed history and analysis of California’s death penalty scheme) [hereinafter Shatz & Rivkind]. The legislature then responded by enacting a mandatory death penalty upon conviction of first degree murder and one of ten special circumstances. See id. After the Supreme Court declared mandatory death penalty statutes unconstitutional in Woodson v. North Carolina, 428 U.S. 280 (1976), the legislature enacted a new death penalty scheme, returning discretion to the jury but limiting that discretion by requiring the jury to find one of twelve special circumstances before it could consider imposing the death penalty. See Shatz & Rivkind, supra, at 1307.


9. See id. (providing that first degree non-capital murder is punishable by a sentence of twenty-five years to life; second degree murder by fifteen years to life).

The Model Penal Code abandoned the division of murder into degrees and particularly noted the unsatisfactory history of premeditation and deliberation as a basis for distinguishing between first and second degree murder.\footnote{13}

The failure of the legal system meaningfully to implement the division of murder into degrees can be explained, at least in part, by a pervasive tension within homicide law. On the one hand, the law aims to take into account the individual killer's comparative blameworthiness resulting in the most characteristic feature of the modern homicide scheme—its hierarchical structure of culpability.\footnote{14} California's homicide scheme, for example, defines three forms of manslaughter, two degrees of murder, and further subdivides first degree murder into capital and non-capital murder.\footnote{15} Possible punishment for these varying forms of homicide can range from a relatively brief time in a local jail for some forms of manslaughter, to the ultimate penalty of death for the most culpable murders.\footnote{16}

On the other hand, a murder represents a profound violation of community standards and public response to that violation challenges society's commitment to the individualized justice inherent in the homicide law structure.\footnote{17} If the killer is charged with or is convicted of less than the maximum offense, this is often taken not as an indication of the killer's relative lack of personal culpability, but rather as an explicit devaluation of the life of the victim. A significant prison term, even a sentence of life without the possibility of parole, may generate a public response suggesting the killer has not been punished at all, that he has somehow "gotten away with murder." The verdict must be for murder, for first degree murder, for capital murder, and the sentence must be death or cries are heard that "justice has not been

\begin{footnotes}
  \footnotetext[11]{See Wechsler & Michael, supra note 5, at 707–09.}
  \footnotetext[13]{See Model Penal Code § 210.1 cmt. at 2 (1980).}
  \footnotetext[14]{See, e.g., George Fletcher, Rethinking Criminal Law 350–55 (Little Brown & Co. 1978).}
  \footnotetext[17]{See Fletcher, supra note 14, at 235–38 (noting the continuing significance of the historical conception of homicide as an attack on the sacred natural order).}
\end{footnotes}
done." Particularly in the contemporary political context, such public reaction creates a nearly irresistible pressure to expand the boundaries of more serious categories of homicide and in so doing, undercuts the hierarchical structure of the overall scheme by a process of upward leveling.

In California this tendency is visible on many fronts. Recent decades have seen repeated actions both by the legislature and the electorate to expand the categories of capital murder. Although originally intended to limit the application of the death penalty to a small number of particularly heinous forms of first degree murder, the statutes now define thirty-three separate ways to commit capital murder.

The same upward leveling is apparent in the statutory definition of first degree murder itself. In the years since section 189 was enacted, eleven new forms of first degree murder have been added to the statute, eight of those in the last twenty years. These have included three new "means" provisions, as well as eight additional felony murders. The legislature further expanded the reach of first degree murder by abolishing defenses to premeditation and deliberation developed by the California Supreme Court.

Judicial application of "deliberate and premeditated" first degree murder also has been a mechanism for this upward leveling. Decisions of the California Supreme Court always have paid lip service to the need to distinguish between the degrees of murder, but the court by and large has applied the statute in a manner that makes these degrees indistinguishable.

The executive branch recently made its own contribution to upward leveling. Shortly after taking office, Governor Gray Davis announced he would deny parole to anyone sentenced to life

18. See discussion infra Part V.

19. See Shatz & Rivkind, supra note 7, at 1318.


imprisonment,\textsuperscript{23} a category that includes those convicted both of first and second degree murder. By this categorical opposition to parole, Governor Davis functionally has imposed the same punishment for both degrees of murder—life without the possibility of parole.\textsuperscript{24}

Beyond this general tendency to expand the reach of aggravated homicides, two more specific explanations for expansive judicial application of the "deliberate and premeditated" requirement are suggested. One is simply that there is no principled basis for distinguishing between an intentional killing and one that is premeditated and deliberated—i.e., that no matter how conscientiously a court attempted to make this distinction, its efforts inevitably would fail. 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.\textsuperscript{25} In order to form the intent to kill, a person must, of course, make a decision; a decision can not 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.\textsuperscript{26}

\textsuperscript{23} Proposition 89, passed by the California electorate in 1988, gave the governor the final decision regarding parole of convicted killers. See \textit{Cal. Const.} art. V, § 8b. Shortly after his election, Governor Davis announced that no murderers would be paroled under his watch. See Jennifer Warren, \textit{Parole Board Defies Davis by Freeing Some Killers}, \textit{L.A. Times}, July 23, 2001, at A1. See \textit{In re Rosenkrantz}, 95 Cal. Rptr. 2d 279 (rejecting the Governor's argument that his decision to deny parole is not reviewable).

\textsuperscript{24} Note that this is the same punishment given to those convicted of murder with special circumstances who do not receive the death penalty. See \textit{In re Rosenkrantz}, 95 Cal. Rptr. 2d 279 (2001). See also Kevin Livingston, \textit{A High Court Fight Over Killer's Parole}, \textit{The Recorder}, June 27, 2001, at 1.

\textsuperscript{25} See People v. Saille, 820 P.2d 588, 594 (Cal. 1991).

\textsuperscript{26} Perhaps the best known articulation of this problem was made by Justice Benjamin Cardozo:

Both first and second degree murder . . . require an intent to kill, but in the one instance it is deliberate and premeditated intent, and in the other it is not . . . . The difficulty arises when we try to discover what is meant by the words deliberate and premeditated. A long series of decisions, beginning many years ago, has given to these words a meaning that differs to some extent from the one revealed upon the surface. To deliberate and premeditate within the meaning of the statute, one does not have to plan the murder days or hours or even minutes in advance . . . . The human brain, we are reminded, acts at times with extraordinary celerity. All that the statute requires is that the act must not be the result of immediate or spontaneous impulse.
A second possible explanation is that, regardless of the theoretical feasibility of drawing a distinct line, it has not been drawn because the court is not convinced of its correlation to culpability. Decisions of the court suggest this is at least a partial explanation. Where killings are particularly heinous, despite the absence of any significant evidence of premeditation and deliberation, the court regularly has upheld first degree murder convictions by stretching both the facts and the law to come to the desired outcome. 27

Regardless of the explanation, it is manifestly apparent that, for most of their history in the California homicide scheme, use of these elements has not distinguished meaningfully between first and second degree murder.

This Article analyzes the history and evolution of premeditation and deliberation as defining elements of first degree murder in California, and proceeds as follows. Part I sets out a brief history of the common law of homicide and the development of the elements of premeditation and deliberation within that law, particularly as these elements interconnect with malice aforethought, traditionally, and still in California, the defining characteristic of murder.

Part II describes California’s statutory scheme insofar as it relates to premeditation and deliberation as defining elements of first degree murder. It explores a fundamental ambiguity of the statutory scheme—whether the designation of premeditated and deliberated murder of the first degree was intended to identify one particular form of malicious homicide from several existing forms as being the most culpable, or was instead intended to identify a new, more aggra-

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. The presence of a sudden impulse is said to mark the dividing line, but how can an impulse be anything but sudden when the time for its formation is measured by the lapse of seconds? Yet the decisions are to the effect that seconds are enough.


27. See discussion infra Part V. It would not be surprising if the legislature itself no longer agreed with the statutory distinction but had not bothered to revise the relevant statutes because the court essentially had done the legislature’s work for it. In a number of situations the legislature appears to have deferred to the court and then after the fact either affirmed or repudiated the court’s actions. See Suzanne Mounts, Malice Aforethought in California: A History of Legislative Abdication and Judicial Vacillation, 33 U.S.F. L. REV. 313, 359 (1999).
vated form of murder. Ultimately, this Article concludes that the latter interpretation is the more plausible of the two.

Parts III, IV, and V explore three distinct phases in the California Supreme Court's application of these elements. Part III covers the period from 1856, when the predecessor of section 189 was adopted, through 1944. During this long period the court did little to insure any real distinction between the degrees of murder. First, the court failed to clearly adopt either one or the other of the two possible interpretations of the statutes discussed in Part II. Second, the court obscured any potential difference between the two positions by repeated emphasis on the speed with which premeditation and deliberation could be accomplished. Third, the court engaged in little or no meaningful review of the factual sufficiency of first degree murder convictions.

Part IV addresses the period from 1944 to 1980. In distinct contrast to the preceding period, the court actively undertook to clarify the definition of premeditation and deliberation and the ambiguous relationship of these elements to malice aforethought. This clarification addressed both quantitative and qualitative aspects of premeditation and deliberation. Further, during this period the court engaged in significant oversight of jury decisions through review of evidentiary sufficiency, culminating in the decision in case of People v. Anderson\(^2\) where the court articulated a three factor test for assessing evidentiary sufficiency.

Part V covers the period from 1980 to the present. This part begins with a discussion of the change in political climate in the early 1980s and the impact of that change on the California Supreme Court. During this period the court made no doctrinal changes—it neither revised jury instructions regarding proof of premeditation and deliberation, nor offered an alternative to the Anderson test for reviewing sufficiency of the evidence. Nonetheless, in a series of result-oriented decisions, the court rejected challenges to evidentiary sufficiency. These decisions, along with one additional decision in which the court interpreted the law of conspiracy to commit murder, have effectively returned the law to the state it was in during the earliest period, that is, when first and second degree murder essentially were indistinguishable and the decision regarding the degree of murder was left entirely to the discretion of the jury.

\(^2\) 447 P.2d 942 (Cal. 1968).
This Article concludes that the legislature should revisit both the specific decision to make premeditation and deliberation distinguishing elements of first degree murder, as well as the division of murder into degrees generally. California’s one hundred and fifty years of experience with premeditation and deliberation suggests these elements will not consistently be applied on a principled basis. Furthermore, there is a considerable question as to whether these elements necessarily identify the most culpable murders. On the general question of whether murder should be divided into degrees, the law’s development in the wake of the decision in *Furman v. Georgia* has undermined the rationale for that division. Such questions are clearly appropriate for legislative resolution; however the California legislature has long ignored these and other issues regarding the state’s homicide law. Because there is little reason to anticipate that the legislature will act on this in the near future, the statute in its current form will continue to appear on the court’s agenda. The court must apply this statute so as to maintain a principled distinction between the degrees of murder, both in articulated legal doctrine and evidentiary review.

I. Common Law Origins

The roots of premeditation and deliberation as characteristics identified with an aggravated form of murder lie in the earliest days of the common law of homicide. Initially, neither the method of killing nor the mental state with which the killing was carried out affected liability. Prior to the twelfth century, as long as a person caused the death of another, he was responsible. In this early period homicide was not a “crime” in the modern sense of an offense against the state. Most “wrongs” of the time, including homicide, were matters to be settled between the individuals involved, or in the case of homicide, with the kin of the person killed. With the exception of the most aggravated forms, homicide could be settled through “emendments” or payments to the relatives of the person killed. Over time a more

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30. The legislature has ignored profound problems throughout the entire homicide scheme which is long overdue for a complete overhaul. See generally Mounts, supra note 27.
31. This was true even if the killing was entirely accidental or committed in self-defense. See II Frederick Pollock & Frederic W. Maitland, The History of English Law (2d ed.) 479–83 (1968) [hereinafter Pollock & Maitland]; Roy Moreland, The Law of Homicide 1–2 (1952).
32. In this early period no clear distinction existed between the law of torts or civil wrongs and the law of crimes. A wrong to the social order elicited one of four responses:
complex system developed that included compensation not only to kin, but also to the lord and to the king.\(^3\)

Certain forms of aggravated homicide were never emendable.\(^3\) Initially, homicides were distinguished based on the means used to carry out the killing—those committed by secrecy, under cover of night, or otherwise untraceable to the perpetrator were subject to punishment by death and not resolvable through emendment. A killing committed by stealth or secrecy implied reflection, planning, and lack of spontaneity by the perpetrator, but the mental attitude toward the killing was not the basis for defining the killing as aggravated. Rather, these killings were viewed as aggravated because they caught the victim off guard and deprived him of the opportunity to defend himself.\(^3\) The term "murder" or "murdrum," which later came to be associated with a broad spectrum of aggravated homicides, originated from the more ancient "morth," an expression that applied to secret crimes generally.\(^3\) The expression "morth-works" referred to so-called "deeds of darkness."\(^3\) The term "moro" appears to have been used to describe homicides committed secretly;\(^3\) a typical case involved a killing by means of poison.\(^3\)

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(1) outlawry—the offender was excluded from the protections of the law, and the citizenry entitled and obligated to pursue and slay the offender and to take his land and other possessions; (2) "blood-feud"—the kin were authorized to revenge themselves; (3) the tariffs or fines of bot and wite, and (4) death or some other form of physical punishment. See Pollock & Maitland, supra note 31, at 449-51. With the exception of killings that were particularly aggravated, homicides could be settled through financial compensation. The fact that a serious offense such as homicide could be settled by a payment of money or property might seem surprising; this leniency probably was due to the influence of the church. Death was a convenient punishment for a society without prisons or penitentiaries, but the church was generally opposed to bloodshed and favored a system of atonement. See id. at 452.

33. See id. at 458. The payment to the kin was the wer, to the lord was the manbot, and to the king the wite. See id.

34. See id. at 451. "Clearly a mere willful homicide, when there has been no treachery, no sorcery, no concealment of the corpse, no sacrilege, no breach of royal safe-conduct, is not unemendable." Id. at 458.


37. See Stephen, supra note 36, at 25. Secrecy seems generally to have been an aggravating circumstance. For example, in early history theft was considered to be more dishonorable than robbery because robbery was the open crime, whereas theft involved stealth. See Pollock & Maitland, supra note 31, at 493-94.

38. The use of this term seems to have predated the division of unlawful homicide into murder and manslaughter. See Pollock & Maitland, supra note 31, at 485-86.

39. See id. at 458 n.1. Early laws designated as "inexpiable" killings by "poison, witchcraft, or fascination," a list that reveals something of the world view of the time and of
Following the Norman invasion of England, the term “murder” came to be associated particularly with killings committed while “lying in wait.” Anglo-Saxon hatred of the conquering Normans often was expressed in secret killings accomplished by lying in wait. Such killings were particularly troublesome to the Norman monarchs, who responded by imposing a heavy fine called the “murdrum,” which was imposed on the community if the killer was not produced. The fine was abolished by statute in 1340. The term “murder” lived on, and was associated with what was imprecisely defined as the worst forms of unlawful homicide.

The common law moved gradually away from this emphasis on the means of the killing, such as secrecy, crime of the night, poisoning, or lying in wait, and under the influence of Roman and Canon law, began to focus on the mental state with which the killing was done, particularly on the moral blameworthiness associated with that mental state. Homicide, along with other offenses, increasingly became a matter of state concern. No matter what its form, homicide was a capital crime, punishable by death or mutilation; thus homicide was no longer emendable in any form, and further, the kin of the person slain were not entitled to compensation of any sort. Ultimately, the requirement of moral blame was incorporated into “malice aforethought,” the defining element of murder at common law. The history of premeditation and deliberation is closely tied to the history of malice aforethought which, in turn, is tied to “benefit of clergy.”

“Benefit of clergy” developed in the middle ages as a device for ameliorating the harshness of criminal penalties. Between 1496 and

societal concerns that caused secret killings to be seen as more aggravated than other forms of unlawful killing. See supra note 36, at 27. Killings by poison continued to have a special status. In 1530, a statute was passed making the offense of poisoning high treason, with a penalty of death by boiling. See supra note 36, at 44.

40. See Moreland, supra note 31, at 9.
41. See id.
42. See Pollock & Maitland, supra note 31, at 487.
43. See id. at 488.
44. See supra note 36, at 40.
45. See Pollock & Maitland, supra note 31, at 458; Moreland, supra note 31, at 5.
46. See Pollock & Maitland, supra note 31, at 459, 483. The system of payment was at best hypocritical even before this change; the tariff amounts were far beyond the capacity of the average individual to pay, and when the offender failed to make the payment, he was either outlawed or sold as a slave. See id. at 460.
47. Benefit of clergy has been described as follows:
In ancient times the lay courts did not have criminal jurisdiction over the clergy in felony cases. The members of the clergy could be tried only in the ecclesiastical
1547 a series of statutes were passed excluding from benefit of clergy certain forms of unlawful homicides. The excluded homicides were referred to as "murder[s] committed with malice aforethought." While these homicides continued to be punishable by death, other unlawful homicides came to be known as manslaughter and were punished by a brand on the brawn of the thumb and imprisonment for no more than a year.

The term "malice aforethought" emerged substantially prior to the time of its role vis-à-vis benefit of clergy. Although its origins are long since lost in time, and its meaning in the early law of homicide is subject to controversy, most agree that at one period in its development, the meaning of malice aforethought was relatively literal, requiring proof of "ill will existing prior to the killing" and was distinguished from deliberate killings resulting from an instantaneous decision. Thus, murder was being defined by the presence of prior reflection; i.e., "premeditated" killings were murder, "unpremeditated" killings were manslaughter. In fact, the terms malice and premeditation were often used interchangeably—*malice prepense* and *malice aforethought*.

The law failed to maintain the distinction between intentional killings that were premeditated and those that were spontaneous or unpremeditated. An important step away from that distinction came via the law's willingness to infer malice in sudden killings without prior provocation. As a purely factual matter, this inference made

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49. *See* Perkins, *supra* note 47, at 544. The brand was to insure that a person did not receive benefit of clergy more than once. *See* J.M. Kaye, *The Early History of Murder and Manslaughter*, 83 L.Q. Rev. 365 (1967).
52. *See* Kaye, *supra* note 49, at 365. Malice aforethought evolved in conjunction with the early form of self-defense (homicide *se defendendo*). In order to raise the defense, the accused was required to show that the killing was done in self-defense and not by felony or with "malice aforethought." *See* Stephen, *supra* note 36, at 41; Kaye, *supra* note 49, at 373.
54. *See* id. at 365–66.
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some sense. When a person suddenly killed another and the surrounding circumstances suggested no reason for the killing, it was often true that a previous grudge or misunderstanding led the perpetrator to plan the killing. Of course, this was not always the case; sometimes a killing resulted simply from a sudden decision that was both unplanned and unprovoked. However, the courts came to treat this inference as one of law rather than of fact, and in the process, included within the definition of malice aforethought killings which did not result from prior planning.

The process of expansion continued. Other kinds of unplanned killings were included within the definition of malice aforethought, including killings done with an "abandoned and malignant heart"—killings that not only were not planned, but also not done with an intent to kill. The expression "malice aforethought" lost all semblance of connection to the meaning of the words themselves and evolved into a term of art, encompassing mental states that required no proof either of "malice" or "forethought"—in other words, premeditation.

The modern elements of premeditation and deliberation bear a strong resemblance to the early, more literal version of malice aforethought. This resemblance has caused considerable confusion in contemporary attempts to distinguish first and second degree murder, both of which require proof of malice aforethought. However, to consider the distinction between degrees of murder is to get ahead of things because the common law recognized no divisions within the law of murder; that step was accomplished by statute.

II. The Statutory Foundation—Premeditation and Deliberation Within the Homicide Scheme

In 1856, California enacted Penal Code section 21, later reenacted as section 189, which divided murder into two degrees as follows:

All murder which shall be perpetrated by means of poison, lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall

56. See id. at 552-57.
57. See discussion infra Part II.
be deemed murder of the first degree; and all other kinds of murder shall be deemed murder in the second degree.58

Like the nearly identical Pennsylvania statute on which it was modeled,59 California's statute designated as first degree any murder that was premeditated and deliberated, that was perpetrated by specified means, or that occurred during certain enumerated felonies.60 With no further definition, the statute provided that any form of murder not specifically listed was second degree.61 The statute did not change the pre-existing definition of murder, nor did it affect other aspects of the interrelated homicide scheme. Consideration of the broader structure of California's homicide law helps put this statute, particularly the designation of premeditated and deliberated murder as first degree, in perspective.

California defines murder as a killing with malice aforethought.62 Malice aforethought, in turn, is defined as follows: "[M]alice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart."63 As applied, the statutory definitions mean that express malice exists when a killing is done with the intent to kill and without any

59. See supra note 4. The only significant difference between the California and Pennsylvania statutes was the addition to the California statute of murder by "torture" to the list of specified means included in first degree murder.
60. Section 189 provides that murders committed in certain felonies are first degree murders—i.e., it does not by its literal language include the felony murder rule which makes any killing committed in the course of a felony, murder. See Cal. Penal Code § 189 (Lexis Supp. 2002). In People v. Dillon, the court reviewed the history of felony murder and held that section 189 codifies the felony murder rule. See People v. Dillon, 668 P.2d 697, 715 (Cal. 1983). The history as laid out by the court in Dillon suggests that the problem lay in the transition from California's early partial code, which included section 21, to the new complete code adopted in 1872 that included section 189. See id. at 714–15.
63. Cal. Penal Code § 188 (Deering 1985). Section 188 goes on to provide:
When it is shown that the killing resulted from the intentional doing of an act with express or implied malice . . . no other mental state need be shown to establish . . . malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite such awareness is included within the definition of malice.
Id. This provision was added by the legislature in 1981 in order to repudiate the decision in People v. Conley, 411 P.2d 911 (Cal. 1966).
legally recognized mitigating or exonerating circumstances, and implied malice exists when a killing results from a highly dangerous act done with awareness of that danger. Thus, a malicious killing can be either intentional or unintentional—both are equally murder. To premeditate and deliberate about killing, one must inevitably have a "deliberate intention" to kill—i.e., express malice. Thus, all premeditated and deliberated murders are committed with express, not implied malice.

Manslaughter is distinguished from murder by the absence of malice aforethought. Manslaughter is itself subdivided into three forms, voluntary, involuntary, and vehicular. The latter two forms of manslaughter do not include the intent to kill, and therefore bear no relationship to premeditated and deliberated killings. Voluntary manslaughter generally, though not inevitably, includes the intent to kill.

Thus, California's homicide scheme clearly includes intentional manslaughter and intentional murder. Whether it also includes two degrees of intentional murder is less clear, both in theory and practice. Two different interpretations of the relevant statutes are at least plausible. First, when the legislature designated premeditated and deliberated murder as first degree, it may have intended to identify a new, aggravated form of intentional murder, one which required mental elements beyond express malice. Under this interpretation, a "bare" intentional killing would be second degree murder. An intentional killing committed in the heat of passion caused by adequate provocation (and thus without deliberate intention) would be volun-


65. See Mounts, supra note 27, at 369-73.


67. See id.

68. Voluntary manslaughter is defined as an unlawful killing without malice aforethought, resulting from a heat of passion caused by adequate provocation. See §§ 188, 192. Recently the California Supreme Court confirmed that voluntary manslaughter does not inevitably include the intent to kill. See People v. Blakeley, 999 P.2d 675 (Cal. 2000); People v. Lasko, 999 P.2d 666 (Cal. 2000). However, typically the killing is intentional—the killer experiences some form of intense provocation that creates a highly volatile emotional state, which in turn leads to the decision to kill.

The California Supreme Court has also reaffirmed the existence of another form of voluntary manslaughter—a killing done with an unreasonable belief in the need to use deadly force in self-defense, so-called "imperfect self-defense." See In re Christian S., 872 P.2d 574, 583 (Cal. 1994). Section 192 contains no reference to imperfect self-defense; the court appears to have relied on common law and section 188's definition of express malice in recognizing this form of manslaughter. See Christian S., 872 P.2d at 576-81.
tary manslaughter. If the killing was intentional and that intent resulted from significant forethought (premeditation) and careful consideration of alternative courses of action (deliberation), it would be first degree murder.

As the following chart illustrates, this first interpretation results in three forms of intentional unlawful homicide—first degree murder, second degree murder, and voluntary manslaughter.

Aggravated Express Malice = First Degree Murder

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<tbody>
<tr>
<td>First degree murder</td>
<td>• express malice* PLUS premeditation and deliberation</td>
</tr>
<tr>
<td>Second degree murder</td>
<td>• express malice* [OR implied malice—upon an abandoned and malignant heart—i.e., WITHOUT intent to kill]</td>
</tr>
<tr>
<td>voluntary manslaughter</td>
<td>• killing upon adequate provocation resulting in a heat of passion**</td>
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<td></td>
<td>* defined as deliberate intent unlawfully to kill</td>
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<td></td>
<td>** a heat of passion killing generally, though not inevitably, is done with intent to kill</td>
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An alternative interpretation would suggest that, rather than identifying a new form of murder, the legislature simply intended to select one form of murder as the most aggravated from those forms already recognized. That is to say, the legislature intended to designate malicious intentional killings (express malice) as first degree murder and all other malicious killings (implied malice) as second degree. Thus, only two forms of intentional homicides would exist—first degree murder and voluntary manslaughter. If intent to kill is mitigated (i.e., is without malice), the killing would be voluntary manslaughter; if not, it would be first degree murder.

Express Malice = First Degree Murder

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<td>First degree murder</td>
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At first impression, section 189 seems more consistent with the first interpretation—the intent to identify a new form of aggravated murder. Nothing in the statute refers to express malice, nor suggests a legislative intent to select among theories of malice. If the legislature
intended to make killings with express malice first degree murder, would it not have simply said so?

Closer consideration of the wording of section 189, particularly in connection with the definition of express malice in section 188, lends some support to the second interpretation. Section 189 used three adjectives to identify this form of first degree murder—"willful," "deliberate," and "premeditated." From the beginning, "willful" has been interpreted to mean nothing more than "intentional," already a requirement of express malice ("deliberate intention unlawfully to kill"). The second adjective, "deliberate," also appeared in the definition of express malice. So of the three adjectives, only "premeditation" apparently added to what was already required for express malice. Premeditation might be read to require significant advance planning or foresight, in which case it added to what was required for express malice. However, premeditation might also mean simply "to think of beforehand," in which case premeditation would differ little, if at all, from the simple act of making the decision inherent in forming intent to kill. So on its face the wording of section 189 was not inconsistent with the second interpretation.

The history of malice also lends some support to this latter interpretation. As discussed in Part I, the element of malice aforethought originally meant something akin to the common understanding of the constituent words—ill will, conceived beforehand. In turn, this definition is similar to the meaning of the deliberate and premeditated language of the new statute. In fact, historically the expressions malice aforethought and malice prepense were used interchangeably. Over the centuries malice aforethought came to include other mental states.


70. The court has consistently rejected arguments that the word "deliberate" in express malice adds anything to the intent to kill. See, e.g., Saille, 820 P.2d at 595.

71. Interestingly, despite nearly a century and a half of dispute regarding premeditation and deliberation, the court has paid little attention to the actual language of the relevant statutes. Perhaps this is because the court agrees with this author that, because of the common law roots of California's homicide statutes, this sort of statutory analysis is not terribly productive. See generally, Mounts, supra note 27.

72. According to Moreland, the most striking thing about the Pennsylvania statute was its substitution of word "premeditation" for the common law word "aforethought." See Moreland, supra note 31, at 200. He went on to note that although the dictionary definition of both words is the same, "aforethought," as used in the common law crime of murder, had been "drained of its natural meaning" and had become "an empty word." Id. The law makers "substituted another word which in its natural sense has exactly the same connotation of pre-design . . . [and] in effect, resurrected the original meaning of 'aforethought.'" Id.
having nothing to do with a planned or preconceived idea of killing.\textsuperscript{73} Given this evolution, the legislature might logically have identified the foundational form of malice—express malice or the “deliberate intention unlawfully to kill”—as first degree murder and left later-developed theories of malice as murder in the second degree.\textsuperscript{74}

Despite these arguments, on balance, the interpretation suggesting the creation of a new aggravated form of murder seems more plausible. If the legislature meant to make all intentional murder first degree, it seems improbable that it would have chosen such an indirect way of saying so. It could simply have said “murders committed with express malice are of the first degree.” In addition, the reiteration that the killing had to be “willful, deliberate, and premeditated” suggests that substantially more than the deliberate intent to kill was intended. For most of the history of this statute, the court has agreed, at least nominally, that this was the legislature’s intention.

Prior to 1856 when the California legislature enacted its own degree-fixing statute, Pennsylvania case law had already revealed the inherent ambiguity of such a statute.\textsuperscript{75} Rather than using this advance notice to avoid the same pitfall, the California legislature simply enacted a duplicate of Pennsylvania’s statute. In 1872, when it incorporated the statute into California’s new comprehensive Penal Code, the legislature again had an opportunity to consider the first degree/second degree murder distinction; instead, it re-enacted the earlier statute without change. Additionally, from 1872 to the present, the legislature has done nothing to address this basic structural flaw in the statute.\textsuperscript{76} Legislative inaction left the problem at the court’s doorstep.

\textsuperscript{73} See discussion supra Part I. See also Mounts, supra note 27, at 317–20.

\textsuperscript{74} If this interpretation was adopted, the court might then have had to give some real meaning to “deliberate” in the definition of express malice. To date, this term has been given no significance in the definition of express malice. See, e.g., Saille, 820 P.2d at 594.


\textsuperscript{76} The only action by the legislature during this entire time was an amendment to the statute explicitly repudiating one decision of the court. See discussion infra Part V. This legislative neglect extends to virtually all aspects of California’s homicide scheme. See Mounts, supra note 27, at 352–75.
III. Premeditated and Deliberated Murder Applied—1856 to 1944

For the better part of a century, three aspects of California Supreme Court decisions applying premeditation and deliberation combined to ensure that the division of murder into degrees had little meaningful effect. First, the court never clearly adopted either one or the other of the possible interpretations of the statute; its statements on the issue were consistent only in their inconsistency. Second, the theoretical difference between the two positions was undermined by emphasis on the speed with which premeditation and deliberation could be accomplished. Third, the court engaged in little meaningful review of factual sufficiency of first degree murder convictions.

A. An Unsettled Start

In People v. Bealoba, the first case to apply the new statute, the court described its goal as insuring that “the doctrine [regarding the degrees of murder] may be definitely settled, and be . . . of easy comprehension.” In retrospect, this goal seems remarkably hopeful and naive. Instead, the Bealoba decision, in combination with a second case decided only three years later, People v. Sanchez, insured precisely the opposite—that the doctrine would be definitely unsettled and nearly impossible to comprehend.

On the distinction between first and second degree murder, the trial court in Bealoba instructed the jury as follows:

[T]he difference between murder in the first and second degree is so subtle as frequently to puzzle the mind, and render difficult the solution. When the term premeditation or deliberation is used, the juror is apt to consider that some time is necessary for deliberation; but this is not necessary; it is only requisite that the design to kill has been formed, and it may be executed in a minute, in an hour, or a day, and it is murder; while in all cases of murder in the second degree there must not be any mixture of deliberation . . . . The first inquiry, therefore, of a California jury, after a felonious and malicious homicide is established, and not committed by means of poison or lying in wait, is to determine whether the mortal shot was fired with intent to take life, or merely to do bodily harm; if with the intent to take life, it is murder in the first degree; if merely to inflict bodily harm, it is only murder in the second degree.

77. 17 Cal. 389 (1861).
78. Id. at 399.
79. 24 Cal. 17 (1864).
80. Bealoba, 17 Cal. at 393.
The instruction made two key points: (1) that no particular length of time was required to deliberate and premeditate on killing; and (2) the distinction between first and second degree murder was based on the intent to kill versus the intent to do bodily harm.

The California Supreme Court found no error with either aspect of the instruction. The court first noted that, absent mitigation sufficient to reduce the homicide to voluntary manslaughter, proof of intent to kill established first degree murder. The statute, of course, required elements that the killing be "willful," "deliberate," and "premeditated." The Bealoba court concluded that all these adjectives were "nearly synonymous," and underscored this point when it observed that

[a] man may do a thing willfully, that is, intentionally and deliberately, from a moment’s reflection, as well as after pondering over the subject for a month or a year; he can premeditate, that is, think before doing the act, the moment he conceives the purpose, as well as if the act were the result of long preconcert or preparation.

Although the court never said so explicitly, its elaboration of the meaning of willful, deliberate, and premeditated suggested these terms were indistinguishable from the "deliberate intention" of express malice.

81. The opinion relied on the early Pennsylvania case of Commonwealth v. Green. The Green decision described the purpose of Pennsylvania’s nearly identical statute as being to limit the common law doctrine of "constructive murder," and observed that, under the new statute, to constitute murder of the first degree the unlawful killing must be done with a "clear intent to take life." The Green opinion described the law of England as including within the crime of murder unlawful acts of violence resulting in death where there was no intent to kill, but rather only an intent to do bodily harm—this being the doctrine of "constructive malice." The court said that in Pennsylvania this "constructive malice" or the intent to do bodily harm established only second degree murder. In approving the above instruction, the Bealoba court approved the same distinction between the intent to kill and intent to do bodily harm under the California statute. See id. at 395.

82. Id. at 394.

83. Id. The court’s comments regarding the lack of a specified time required for premeditation and deliberation continued:

There is nothing in the statute which indicates that the Legislature meant to assign any particular period to this process of deliberation or premeditation, in order to bring the act within the first degree. Nor could it well have done so. A ruffian, out of mere wantonness, firing into a crowd upon a sudden motion, is as guilty as if he had lain in wait for his victim.

Id. The last sentence exemplifies the imprecision that often characterizes the court’s consideration of premeditation and deliberation and the inter-relationship of these elements with malice aforethought. Having first taken the questionable step of equating premeditation and deliberation with express malice, the court here used an example of what was probably an implied malice murder to justify its conclusion that express malice/premeditation and deliberation could be accomplished instantaneously. See id.
Sanchez, decided a mere three years later, proceeded on a different course. In this case the trial court instructed the jury that "murder is divided into two degrees—the first includes every unlawful killing of a human being done maliciously or intentionally." Even under Bealoba's standard, in allowing a first degree murder conviction for a killing that was either malicious or intentional, this instruction was incorrect. First, because malice includes unintentional as well as intentional killings, this instruction allowed conviction of first degree murder with no proof of intent to kill. Second, the instruction erred in allowing a first degree murder conviction for any intentional killing; some intentional killings, such as those committed upon adequate provocation in a heat of passion, are manslaughter rather than murder. The Sanchez court thus held that the prior instruction was clearly erroneous.

The court then went on to describe what was required for a first degree murder. The court noted that second degree murder must be done with malice and may include the intent to kill, and that in order to be first degree murder, the killing must be more than intentional and malicious. Relying on the legislative purpose in dividing murder (identifying the most aggravated forms of murder) and the overall structure of the statute that included three forms of first degree murder, the court suggested all forms of first degree murder must reflect similar culpability. Two of the forms, the various atrocious means (poison, torture, and lying in wait) and murder in the course of an enumerated felony, carried what the court referred to as "conclusive evidence of premeditation." The third category, described by the court as a "much larger class of cases... which are of equal cruelty and aggravation," required independent proof of a "deliberate and preconceived intent to kill."

Thus, according to the Sanchez decision, proof of an unmitigated intentional killing was not, on that basis, sufficient to sustain a convic-
tion of first degree murder. Something more, a “deliberate and preconceived intent to kill,” had to be proven to elevate the intentional murder from second to first degree. The line drawn by the Sanchez court—between intent to kill and “deliberate and preconceived intent to kill”—was clearly different than the line drawn by the court in Bealoba—between the intent to kill and the intent to inflict bodily injury.

The court described any difficulty in drawing a distinction between an intentional second degree murder and a deliberate premeditated first degree murder as “more apparent than real.” In describing the grounds for distinction, the court said the following:

The unlawful killing must be accompanied with a deliberate and clear intent to take life, in order to constitute murder of the first degree. The intent to kill must be the result of deliberate premeditation; it must be formed upon a pre-existing reflection and not upon a sudden heat of passion sufficient to preclude the idea of deliberation.

The court’s reassurance regarding the ease of line drawing turned out to be poorly grounded, and its attempt at guidance raised as many questions as it answered. First, the court said that the intent to take life must be “deliberate” and “clear.” What did these requirements add over and above the “deliberate intention unlawfully to take life” necessary for express malice? Since both must be “deliberate,” it was difficult to see much difference. Did the requirement that the intent be “clear” add anything? Intent to kill is the critical element of second degree murder. Presumably, a second degree murder conviction would have to be based on “clear” proof of intent to kill. Second, the court said the intent to kill must be the result of deliberate premeditation. This, of course, merely repeated the words of the statute. Finally, the court said the intent must be formed on “pre-existing reflection” and “not upon a sudden heat of passion.” The idea that the killing must be formed upon pre-existing reflection sounds helpful; it suggests the idea of at least some prior consideration of the decision. The court contrasted such prior reflection with the existence of a “sudden heat of passion sufficient to preclude the idea of deliber-

90. See id. at 30.
91. Although the court decided Bealoba only three years earlier, it makes no mention of that decision in its Sanchez opinion.
92. Sanchez, 24 Cal. at 30.
93. Id.
95. See Sanchez, 24 Cal. at 30.
96. Id.
DELIBERATE AND PREMEDITATED MURDER

On the surface this also seems to make sense—cool reflection as contrasted to heat of passion. However, in actuality the historical role of “heat of passion” has been to differentiate between voluntary manslaughter and murder—to establish the presence or absence of malice aforethought, not premeditation and deliberation. By alluding to heat of passion as the contrast to premeditation and deliberation, the court further muddied the distinctions between these three intentional homicides—first and second degree murder and voluntary manslaughter. So, despite the court’s apparent position that first degree murder required proof of something more than intent to kill, the nature of that “something more” remained unclear.

One last element of the Sanchez decision undermined prospects for a clear distinction between intent to kill and premeditation and deliberation. In language that was reiterated for decades, the court emphasized the speed with which this “deliberate and preconceived intent to kill” could be formed, stating:

> There need be no appreciable space of time between the intention to kill and the act of killing; they may be as instantaneous as successive thoughts of the mind. It is only necessary that the act of killing be preceded by a concurrence of will, deliberation, and premeditation on the part of the slayer; and if such is the case, the killing is murder of the first degree, no matter how rapidly these acts of the mind may succeed each other, or how quickly they may be followed by the act of killing.

The most persistent difficulty regarding the first degree/second degree murder distinction lies here: To premeditate and deliberate requires advance thought about the decision to kill, reflection on that decision, consideration of alternatives—careful decisionmaking—at least any commonly understood meaning of these words would require this. Of course, forming the “intent to kill” requires decisionmaking too. Depending on the time span required to engage in premeditation and deliberation, the distinction between a premi-

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97. Id.

98. An intentional killing done in response to adequate provocation is voluntary manslaughter. See CAL. PENAL CODE § 192 (Lexis Supp. 2002). If the provocation is determined not to be legally adequate, the killing cannot be voluntary manslaughter but rather must be murder. Will it be second or first degree? If first degree murder requires only “clear proof of intent to kill,” then the answer should be first degree. If, however, deliberate and preminted are elements separate and in addition to the intent to kill, then absent proof of those elements, the murder would be of second degree. The relationship between these three forms of homicide was not resolved clearly until the case of People v. Heslen, 163 P.2d 21 (Cal. 1945). See discussion infra Part IV.

tated and deliberated intent to kill and a bare intent to kill can be described as somewhere between elusive and non-existent.

Regardless of theoretical differences between the standards adopted in the Bealoba and Sanchez opinions, language highlighting how fast deliberate premeditation can take place both confused the theoretical distinction and undermined any difference in practice. If a killer can form this more aggravated mental state in a matter of moments, how can the jury differentiate aggravated intent to kill from non-aggravated intent to kill?100

B. 1864 to 1944: Continued Ambiguity, Confusion, and Contradiction

For eighty years after the Sanchez decision the court did little to alleviate the state of confusion engendered by its first two decisions. Both in setting forth legal doctrine and in applying doctrine to facts, the court continued to give conflicting messages. A few examples illustrate.

Two cases decided within the first decade after Sanchez demonstrate the confused state of the legal doctrine. In People v. Long101 the court said the following regarding the distinction between first and second degree murder:

[T]here must be not only an intention to take life, but it must also be a “deliberate and premeditated killing;” nor is it true that in murder of the second degree there must, of necessity, be an absence of all intention to take life. On the contrary, the true distinction between the two grades of the offense is, that in murder of the first degree, unless it was committed in perpetrating or attempting to perpetrate arson, rape, robbery or burglary, the killing must be deliberate and premeditated, whilst in murder of the second degree the killing is not deliberate or premeditated.102

Here the court seemed to follow the Sanchez approach, holding that intent to kill alone was insufficient to prove first degree murder.

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100. The Bealoba decision also emphasized the rapidity with which the required mental state could be formed. See People v. Bealoba, 17 Cal. 389, 394 (1861). However, in Bealoba the effect was merely to underscore the fact that nothing more than a bare intent to kill was required. In Sanchez, however, the court distinguished between a deliberate premeditated intent to kill and a simple intent to kill. See generally Sanchez, 24 Cal. at 30. Emphasizing how rapidly deliberation and premeditation can occur undercut the distinction the court had just made.
101. 39 Cal. 694 (1870).
102. Id. at 696. As in the Sanchez decision, however, the court immediately went on to undercut the apparent clarity of the distinction by adding that such premeditated, preconceived design, can be "formed in the mind immediately before the mortal wound [is] given . . . ." Id.
People v. Doyell, 103 decided only four years after Long, appeared to reverse direction again when the opinion said the following regarding the statute which divided murder into degrees: "[I]t prescribes a more severe punishment for those murders in which the express intent to take life is affirmatively proved, than for those in which the express malice not being proved, the malice aforethought is implied." 104

The court further explored the definition of implied malice and noted that second degree murder existed "unless the facts prove the existence in the mind of the slayer of the specific intent to take life." 105 Regarding the language from Long quoted above, the court stated:

If it is there (in Long) intimated that in murder of the second degree there may be an intention to take life, this is to be considered as referring to the intent which the law imputes by reason of the corrupt motive of the slayer, or otherwise, and not to an actual preconceived design to kill. 106

So in Doyell the court seemed to abandon the Sanchez position and return to the approach of Bealoba.

The opinion in People v. Manzo 107 illustrates that the passage of an additional sixty years failed to bring additional clarity. There the trial court had instructed the jury as follows:

The unlawful killing must be accomplished with a deliberate and clear intent to take life in order to constitute murder in the first degree. The intent to kill must be the result of deliberate premeditation. It must be formed upon a pre-existing reflection and not upon a sudden heat of passion sufficient to preclude the idea of deliberation. 108

This portion of the instruction emphasized deliberation and pre-existing reflection, suggesting that first degree murder required more than a simple intent to kill.

The instruction continued:

If the unlawful killing is done without the provocation and sudden passion which reduces the offense to manslaughter, . . . this is murder of the second degree, unless the evidence proves the existence in the mind of the slayer of the specific intent to take life. If such specific intent exists at the time of such unlawful killing the offense committed would of course, be murder of the first degree. 109

103. 48 Cal. 85 (1874).
104. Id. at 96.
105. Id.
106. Id.
107. 9 Cal. 2d 594 (1937).
108. Id. at 599.
109. Id.
This part of the instruction addressed the role of provocation, but apparently did not explain that the offense would be reduced to manslaughter only if the provocation was legally adequate and also did not address the consequences of provocation that was legally inadequate. The instruction seemed to suggest that provocation could result in a conviction of second degree murder (i.e., suggested an intentional but non-premeditated and deliberated murder was possible). However, the last sentence, stating that a "specific intent to take life . . . would, of course, be murder of the first degree," appears to be inconsistent with the possibility of a second degree murder verdict, since even a killing in response to provocation, whether or not legally adequate, is likely to be done with the intent to kill. The court in Manzo found no error in this instruction.

Cases challenging the sufficiency of the evidence similarly failed to clarify the distinction between intention on the one hand and premeditation and deliberation on the other. In case after case, the court affirmed first degree murder convictions based on facts that demonstrated nothing beyond the intent to kill. In fact, for seventy-one

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110. Id. at 599-600.
111. See id. at 600.
112. Convictions of first degree murder were affirmed regularly where evidence suggested an essentially spontaneous decision to kill. Facts in the following cases illustrate.

In People v. Mahatch, 82 P. 779 (Cal. 1905) defendant and the victim spent much of the day drinking together and apparently got into a fight. Defendant went to a nearby residence and told the occupant he “had had a row with [the victim].” Id. at 779. In response to a question about a mark on his face, defendant said the victim hit him. See id. The cause of death was determined to be a stab wound to the heart, and a knife identified as previously having been in defendant's possession was found in the general vicinity of the body. See id. at 780. In response to defendant's argument that there was no evidence of a deliberate and premeditated killing, the court simply responded that the jury was entitled to infer premeditation and deliberation, “from the character of the weapon used, the nature of the wound inflicted, and the acts and conduct of the accused, [and] the existence of a deliberate purpose on his part to kill the deceased . . . .” Id. The court made no attempt to connect these observations to the facts of the case. See id. at 781. The dissenting opinion argued that these facts were insufficient even to establish express malice. See id.

In People v. Fleming, 23 P.2d 28 (Cal. 1933), the murder took place at a combined gas station and roadhouse, where a friend of defendant's worked as a prostitute. The friend approached the victim, a customer at the gas station, and asked him to buy her a drink. See id. at 29. The victim declined and made derogatory comments to the friend. See id. Defendant demanded that the victim apologize. See id. The victim refused and pushed defendant out of his way, in the process pushing defendant through the door. See id. The victim also proceeded through the door and shots were heard immediately thereafter. See id. The court found that proof of malice was established based on defendant's resentment of the victim for his statements to his friend and based on the fact that no justification existed for defendant's use of force. See id. at 31. In response to defendant's further argument that, even if malice was established, no proof existed of premeditation and deliberation, the court responded simply that no significant amount of time was needed to premeditate and
years after murder was divided into degrees, the court did not reverse a single first degree murder conviction based on insufficiency of the evidence. In 1927 the legislature enacted Penal Code section 1181, a statute that allowed the court to modify a judgment, without ordering a new trial, if the evidence was insufficient to sustain the conviction of the degree of the crime charged but was sufficient to establish guilt of a lesser degree. After this the court reduced the degree of the homicide from first to second degree in two cases; the reason the court chose to reduce these two convictions was unclear. In each case there was evidence that the killing may have occurred during the course of a spontaneous argument, although there was also evidence to the contrary. Even if the killings did occur spontaneously, this fact did not materially distinguish these two cases from others in which convictions were affirmed.

The decision in People v. Donnelly provides a final example from this period of the court’s resistance to making any real distinction between the degrees of murder. Donnelly was convicted of first degree murder and sentenced to death based on a killing that took place in the state prison at Folsom. The facts suggested that defendant’s deadly act followed immediately after the statement that precipitated the killing. The jury was apparently instructed in the “no appreciable space
deliberate. See id. at 31–32. The court applied this observation to the facts in the following manner:

[W]hile the testimony . . . shows that the defendant shot almost, if not immediately, after the two men went through the door, still there was time for the defendant to think before he acted, to deliberate between the intention to kill and the act of killing. Defendant had time to draw his gun and fire the shots. He formed the intention to draw his gun, and then acted upon that intention . . . . He thus had time to think and to act. This is all that is necessary in order to show premeditation.

Id. at 32. These comments suggest either that the court still adhered to the Bealoba position that any intentional killing is first degree murder, or that it made no meaningful distinction between the intent to kill of express malice and the premeditated and deliberated intent to kill of first degree murder.

The facts of many cases from this era cannot be evaluated meaningfully. Opinions consisting of one or two pages affirmed convictions of first degree murder and the imposition of the death penalty with virtually no reference to the facts of the case. See, e.g., People v. Rico, 181 P. 663 (Cal. 1919); People v. Hart, 64 P.2d 952 (Cal. 1937); People v. Aranda, 83 P.2d 928 (Cal. 1938); People v. Shaw, 146 P.2d 231 (Cal. 1944).

114. See People v. Howard, 295 P. 333 (Cal. 1930); People v. Moreno, 58 P.2d 629 (Cal. 1936).
115. See supra note 112.
116. 210 P. 523 (Cal. 1922).
of time" language of Sanchez. Defendant requested the following additional instruction:

But while the fatal purpose or intent and its execution may follow thus rapidly upon each other, it is proper for you to take into consideration the shortness of such interval, if such be the fact, in considering whether such sudden and speedy execution may not be attributed to sudden passion and anger, rather than to the deliberation and premeditation, which must characterize the higher offense.\textsuperscript{117}

This proposed instruction accepted the premise that premeditation and deliberation could occur in a short amount of time, but would have told the jury that the fact of such a brief time period might be relevant to whether he actually premeditated and deliberated. The trial court refused this instruction and the supreme court found no error in that refusal.\textsuperscript{118}

In 1936, an article by James Pike was published in the Southern California Law Review entitled \textit{What Is Second Degree Murder in California}?\textsuperscript{119} The article asked what was the nature of an "intentional homicide without deliberation?" Stated differently, the question was "what is a premeditated and deliberated murder and how does it differ from a murder that is only intentional?" This, of course, is the question at the heart of the degree-fixing statute—has the statute drawn a workable line between first and second degree murder? The article concluded that, both from a psychological and legal viewpoint, an intentional undeliberated murder could not exist; or, in other words, any intentional homicide inevitably involved deliberation.\textsuperscript{120} At least as applied by the court up to that point, the distinction between first and second degree murder was illusory. Shortly thereafter, the court began the task of making the distinction real.

IV. An Era of Judicial Clarification—1944 to 1980

Pike's article may well have been a triggering event. Within a few years, the court's opinions changed markedly. Both in regard to legal doctrine and application of doctrine to facts, the court consistently emphasized the need to draw a clear distinction between the two de-

\textsuperscript{117.} \textit{Id.} (citations omitted).
\textsuperscript{118.} \textit{See} \textit{id.} at 524.
\textsuperscript{119.} \textit{See} Pike, \textit{supra} note 10, at 112.
\textsuperscript{120.} Pike's analysis of cases that resulted in second degree murder verdicts led him to conclude that in virtually every case sufficient facts existed to support a verdict of first degree murder, but that the second degree murder verdict stemmed from some mitigating facts or doubt about the accused's guilt of any homicide. \textit{See id.} at 128--32.
degrees of murder. The decision in People v. Holt\textsuperscript{121} signaled the beginning of this era. There, in the course of reducing the defendant's conviction to second degree murder, the court clearly articulated an interpretation of section 189 that required proof of more than a bare intent to kill. In a series of decisions that reversed first degree murder convictions based on instructional error, the court re-emphasized this position.\textsuperscript{122} To this point, the court had examined premeditation and deliberation primarily as a quantitative question. In People v. Wolff\textsuperscript{123} the court addressed the qualitative nature of premeditation and deliberation. In the last major case of this era, People v. Anderson,\textsuperscript{124} the court set out guidelines for reviewing the sufficiency of the evidence of premeditation and deliberation.

A. People v. Holt: The Beginning of a New Era

After decades of applying section 189 with little regard for how the statute figured into the larger homicide scheme, the court, in Holt, relied heavily on contextual analysis. In a seminal statement the court observed that

\textit{[d]ividing . . . homicides into murder and . . . manslaughter was a recognition of the infirmity of human nature. Again dividing the offense of murder into two degrees is a further recognition of that infirmity and of difference in the quantum of personal turpitude of the offenders. The difference is basically in the offenders but is to be measured by the character of the particular homicide. The victim of manslaughter or second degree murder is just as dead as is the victim of first degree murder.}\textsuperscript{125}

In this passage, the court emphasized the essential structure of modern homicide law—stratification based on the relative culpability of the killer. Given this structure, first degree murder obviously must reflect markedly greater blameworthiness than other forms of homicide, particularly greater than that of second degree murder.

The court then turned to the structure of section 189 and the place of premeditation and deliberation within that statute. Referring back to Sanchez, the court observed that section 189 positively identified two classes of first degree murder—one class identified by the means used (poison, lying in wait, torture) and the second identified by the felony in which the perpetration (or attempted perpetration)

\begin{itemize}
\item [\textsuperscript{121}] 153 P.2d 21 (Cal. 1944).
\item [\textsuperscript{122}] See discussion infra Part IV.B.
\item [\textsuperscript{123}] 394 P.2d 959 (Cal. 1964).
\item [\textsuperscript{124}] 447 P.2d 942 (Cal. 1968).
\item [\textsuperscript{125}] Holt, 153 P.2d at 37.
\end{itemize}
of the homicide occurred. The court then quoted directly from Sanchez and said,

but there is another and much larger class of cases included in the definition of murder in the first degree, which are of equal cruelty and aggravation with those enumerated, and which, owing to the different and countless forms which murder assumes, it is impossible to describe [enumerate] in the statute. In this class the Legislature leaves to the jury to determine, from all the evidence before them, the degree of the crime, but prescribes, for the government of their deliberations, the same test which has been used by itself in determining the degree of the other two classes—to wit: the deliberate and preconceived intent to kill. Thus the three classes of cases which constitute murder of the first degree are made to stand upon the same principle.126

Based on this contextual analysis, the court concluded that premeditation and deliberation were intended to be elements distinct from the intent to kill. In the words of the court, "the verdict of guilty of murder of the first degree depends upon proof not only of a malicious intent unlawfully to take life but also that such malicious intent was willful, deliberate, and premeditated."127 Even more explicitly, the court stated "the phrase 'malicious intent' is not synonymous with 'willful, deliberate, and premeditated' intent."128 Relying heavily on Pike's article,129 the court criticized earlier decisions for their "lack of clarity and consistency" and for having "substantially emasculated the difference between murder of the first degree and that of the second degree."130 The court concluded that, to be sufficient to establish first degree murder, the evidence must show that the killing was done with a "deliberate and clear intent to take life"131 and that "the homicide is of equal cruelty and aggravation with those enumerated in the statute . . . ."132

The court then turned to the facts and began by observing that at first impression the evidence of premeditation and deliberation seemed sufficient. On the day of the murder, defendant, a railroad telegraph operator, was drinking heavily and picked a series of unprovoked disputes with other employees of the railroad, including the victim. At one point, several hours in advance of the killing, the defendant threatened to go home, get his gun, "and shoot [the victim's]

126. Id. at 38 (quoting People v. Sanchez, 24 Cal. 17, 28–30 (1864)).
127. Id. at 27.
128. Id.
131. Id. at 38 (citing People v. Howard, 295 P. 333, 336 (Cal. 1930)).
132. Id. (emphasis omitted).
God damn heart out and wipe it across his mouth."\textsuperscript{133} This remark, coupled with the fact that defendant later got his gun and shot the victim, suggested premeditation and deliberation regarding the possibility of deadly action.\textsuperscript{134}

However, the court found this analysis too superficial and described the critical facts of the final deadly encounter as follows:

[The record] . . . establishes that the deceased was advancing toward the defendant; that the latter at close range fired one shot apparently not aimed at and which did not strike the deceased; that defendant then shouted a further warning, "Stay back, don’t come any closer, or I will kill you;" that after the first shot was fired the deceased continued to advance although he apparently was in the act of stopping or turning at the precise moment the second shot was fired; that the second shot was fired and that the bullet, of small calibre, struck the deceased; that the deceased then stopped, turned, and walked around the train and to the station; that defendant with eight loaded cartridges remaining in his rifle stopped firing when the deceased stopped advancing and that he then permitted the deceased to proceed to the station without further molestation.\textsuperscript{135}

Noting the uncontested fact that defendant fired no additional shots once the victim stopped coming toward defendant, the court concluded that the circumstances of the shooting were overwhelmingly inconsistent "with a deliberate and clear intent to take life."\textsuperscript{136} The court further found that the circumstances of the murder generally did not establish a homicide of "‘equal cruelty and aggravation with those enumerated’ in the statute,"\textsuperscript{137} and accordingly, reduced Holt’s conviction to second degree murder.\textsuperscript{138}

This analysis seems correct insofar as the court concluded that the facts of the encounter did not convincingly establish premeditation and deliberation. However, Holt’s failure to fire additional shots at the victim, specifically relied upon by the court, suggests not only that Holt did not deliberate and premeditate on killing the deceased, but further that he may not have intended to kill. If that were true, the case could be no more than second degree based on implied malice. In that sense, the Holt case did not provide a clear example of an intentional murder committed without premeditation and deliberation.

\textsuperscript{133} Id. at 27.
\textsuperscript{134} See id. Certainly these facts are more suggestive of prior planning and deliberation than the facts of many cases confronting the court in more recent years. See infra Part V.
\textsuperscript{135} Id. at 38.
\textsuperscript{136} Id. at 39.
\textsuperscript{137} Id.
\textsuperscript{138} See id.
Despite this limitation, the decision in *Holt* was important for several reasons. First, after years of inconsistency, the court held unambiguously that premeditation and deliberation were distinct elements from the intent to kill. Second, the court construed the statute within the broader context of the constituent parts of section 189, and also the structure of relative culpability of the homicide scheme as a whole. Third, the decision demonstrated the court’s willingness to engage in a meaningful review of the facts, in contrast to the pro forma review characteristic of the vast majority of previous cases.

B. The Jury Instructions

Given eighty years of “substantial inconsistencies and obfuscation of concept as to the elements of the two degrees of murder,” the fact that jury instructions of the time generally did not measure up to the standard articulated in the *Holt* decision came as no great surprise. This was the next arena for the court, and it addressed jury instructions related to three topics: (1) the need to distinguish between intent to kill and premeditation and deliberation; (2) the persistently troubling “timing element”; and (3) the relationship of provocation to the degree of murder.

*People v. Thomas* was the first case in the wake of the *Holt* decision to consider the propriety of instructions regarding the distinction between intent to kill and premeditation and deliberation. In language taken from the *Bealoba* decision, the trial court instructed the jury that premeditation was established by proof of a specific intent to kill. The state argued that the instruction was proper because “specific intent” referred to in the instruction was synonymous with the “deliberate intent” referred to in the *Holt* decision.

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139. People v. Thomas, 156 P.2d 7, 10 (Cal. 1945).
140. Id.
141. The instruction stated:
If the unlawful killing is done without the provocation and sudden passion which reduces the offense to manslaughter, or is done in the commission of an unlawful act, the natural consequences of which are dangerous to life, or is committed in the attempt to perpetrate a felony other than those mentioned in the description of murder in the first degree, or the circumstances of the killing show an abandoned heart, this is murder of the second degree, unless the evidence proves the existence in the mind of the slayer of the specific intent to take life. If such specific intent exists at the time of such unlawful killing, the offense committed would of course be murder of the first degree.

*Id.* at 14. See also *People v. Valentine*, 169 P.2d 1 (Cal. 1946) (reversing a first degree murder conviction in part because the jury was given a similar instruction that allowed conviction of first degree murder based solely on proof of a specific intent to kill).
The court rejected this argument on the grounds it ignored the difference in the plain meaning of the words "specific" and "deliberate," and omitted any consideration of the further statutory requirement of premeditation. The court described the instruction as "egregiously erroneous," and emphasized that, by conjoining the words "willful, deliberate, and premeditated," the legislature intended to require substantially more reflection than is involved in forming a specific intent to kill.

The second topic of concern, the time required for premeditation and deliberation, had been a recurrent problem from the beginning. Instructions emphasizing the speed with which that premeditation and deliberation could occur obscured the dividing line between the two degrees of murder. If, as these instructions stated, premeditation and deliberation could occur "as instantaneous[ly] as successive thoughts of the mind," how could a killing that involved only the intent to kill be distinguished from one which also was premeditated and deliberated?

The court addressed this dilemma in People v. Bender. In language taken directly from Sanchez, the jury had been told that there

142. In the words of the court,
To support it would belie any difference in the plain import of the words "specific" and "deliberate" and would emasculate the statutory difference between first and second degree murder. The word "specific" (adjective) means "Precisely formulated or restricted; . . . definite, . . . explicit; of an exact or particular nature" . . . while "deliberate" (as an adjective) means "formed, arrived at, or determined upon as a result of careful thought and weighing of considerations; as, a deliberate judgment or plan; carried on coolly and steadily, esp. according to a preconceived design; . . . Given to weighing facts and arguments with a view to a choice or decision; careful in considering the consequences of a step; . . . Slow in action; unhurried . . . Characterized by reflection; dispassionate; not rash . . . . The verb "deliberate" means "to weigh in the mind; to consider the reasons for and against; to consider maturely; reflect upon; ponder; as, to deliberate a question . . . to weigh the arguments for and against a proposed course of action . . . ."
It has been judicially declared that "Deliberation means careful consideration and examination of the reasons for and against a choice or measure."

Thomas, 156 P.2d at 17 (citations omitted).

143. See id. (defining premeditation according to its dictionary usage as "to think on, and revolve in the mind, beforehand; to contrive and design previously.").
144. Id.
145. See id. at 18. Because there was a substantial factual dispute regarding whether the killing, in fact, was the result of planning and reflection or instead the product of hot anger, the court reversed defendant's first degree murder conviction and remanded for a new trial. See id. at 20.
146. As discussed above, such instructions found their roots in both the Bealoba and Sanchez decisions. See discussion supra Part III.A.
147. People v. Bender, 163 P.2d 8, 19 (Cal. 1945) (quoting the jury instructions).
148. Id.
need be "no appreciable space of time between the intention to kill and the act of killing—they may be as instantaneous as successive thoughts of the mind." The court observed that, in the abstract, this instruction correctly stated the law—assuming a killer premeditated and deliberated in advance of his final decision to kill, no additional time would be required for contemplation between forming the intent and acting on that intent. However, the instruction went on to say that "[a] man may do a thing willfully, deliberately and intentionally from a moment's reflection as well as after pondering over the subject for a month or a year," and "[h]e can premeditate, that is, think before doing the act, the moment he conceives the purpose, as well as if the act were the result of long preconcert or preparation." The first part of the instruction theoretically left open the possibility that premeditation and deliberation occurred prior to the formation of the intent to kill. The latter two parts, however, told the jury that any such prior premeditation and deliberation could occur instantaneously. In the words of the Bender court, this instruction "wholly deleted the only difference, in this type of case, between first and second degree murder."

People v. Honeycutt involved a challenge to the same instruction. The court in Honeycutt again described the first part as abstractly correct, but also noted it was likely to be misleading. The court’s characterization of the last two sentences of the instruction was both negative and blunt, finding them to be "clearly erroneous." The court said, "[i]t is misleading to encourage a jury to find that an act is truly deliberate though it come [sic] instantaneously from but 'a moment's reflection . . .'." And it shames the law as it violates the truth to say that a man can premeditate the moment he conceives the purpose."

In Bender the state argued that the legislature had indicated no intent to require a certain amount of time for premeditation and deliberation. The court agreed and noted that appropriate instruc-

149. Id. at 19.
150. Id. Similar instructions were considered in People v. Heslen, 163 P.2d 21 (Cal. 1945); People v. Valentine, 169 P.2d 1 (Cal. 1946); People v. Honeycutt, 172 P.2d 698 (Cal. 1946); People v. Hilton, 174 P.2d 5 (Cal. 1946); People v. Carmen, 228 P.2d 281 (Cal. 1951); People v. Chavez, 234 P.2d 632 (Cal. 1951).
151. Bender, 163 P.2d at 20 (finding such instructions particularly problematic where, as in this case, the jury was not instructed regarding the definition of premeditation and deliberation). See also People v. Heslen, 163 P.2d 21 (Cal. 1945).
152. 172 P.2d 698 (Cal. 1946).
153. Id. at 702-03.
154. See Bender, 163 P.2d at 19.
tions could be drafted to reflect this. However, it also noted that there was no indication that the legislature intended to use the words “deliberate” and “premeditate” in anything other than their ordinary sense, and that in order to counterbalance the suggestion that such mental processes could occur rapidly, the jury should be instructed regarding the true meaning of those words. The court suggested the following definitions:

The adjective “deliberate” means “formed, arrived at, or determined upon as a result of careful thought and weighing of considerations; as a deliberate judgment or plan; carried on coolly and steadily, especially according to a preconceived design . . . . Given to weighing facts and arguments with a view to a choice or decision; careful in considering the consequences of choice or decision; careful in considering the consequences of a step; . . . unhurried; . . . . Characterized by reflection; dispassionate; not rash . . . .” The word is an antonym of “[h]asty, impetuous, rash, impulsive.” It has been judicially declared that “Deliberation means careful consideration and examination of the reasons for and against a choice or measure.” The verb “premeditate” means “[t]o think on, and revolve in the mind, beforehand; to contrive and design previously.”

Thereafter, the court held that it was error to refuse to instruct the jury regarding the definitions of premeditation and deliberation, particularly where any instruction was given suggesting that these elements could be arrived at rapidly.

Once the court stated unambiguously that the elements of premeditation and deliberation were distinct from the intent to kill, underlying questions regarding the relationship of provocation to the degrees of murder became apparent. Provocation had long played an important role in determining the degree of murder.

155. In this regard the court said the following:
For example, the jury may be told that “Neither the statute nor the court undertakes to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent which is truly deliberate and premeditated. The time would vary with different individuals and under differing circumstances. The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly, but the express requirement for a concurrence of deliberation and premeditation excludes from murder of the first degree those homicides (not specifically enumerated in the statute) which are the result of mere unconsidered or rash impulse hastily executed.”

Id. at 20 (quoting People v. Thomas, 156 P.2d 7, 18 (Cal. 1945)).
156. See Bender, 163 P.2d at 19.
157. See id. at 20.
158. Id. at 19 (citations omitted).
159. See People v. Carmen, 228 P.2d 281, 287 (Cal. 1951).
important role in the larger homicide scheme by distinguishing between murder and manslaughter.\textsuperscript{160} Whether provocation also played a role in determining the degree of murder was less clear. The problem arose when a defendant was in a "heat of passion," but the triggering provocation was not legally adequate. In these circumstances, the defendant could not successfully argue for a manslaughter conviction.\textsuperscript{161} Could he nonetheless argue that he should be convicted only of second degree murder? As long as premeditation and deliberation were, in essence, synonymous with intent to kill, the answer was no, since despite (or perhaps more accurately, because of) the heat of passion, the offender generally did intend to kill. However, such an enraged intent to kill could not meet the \textit{Holt/Bender} standards of cool weighing of alternatives. Hence, in a number of cases, the court held that failure to instruct the jury regarding the potential effect of provocation on the existence of premeditation and deliberation was error.\textsuperscript{162}

To summarize, in \textit{Holt} and the jury instruction cases, the court resolved that premeditation and deliberation were elements to be proved in addition to the intent to kill. This holding, in turn, confirmed the existence of intentional second degree murder. The court reaffirmed that premeditation and deliberation do not require any set amount of time, but also affirmed that the state must produce evidence of real forethought and reflection to establish these elements, and that if, for whatever reason, including provocation, the accused did not actually engage in such forethought and reflection, he could not be convicted of a crime greater than second degree murder.\textsuperscript{163}

C. A Qualitative Aspect to Premeditation and Deliberation

The decisions in \textit{Holt} and the other cases were premised on the role of first degree murder within the overall structure of the homicide scheme and were designed to assure that first degree murders were meaningfully different than those of the second degree. Yet a sense remained that the existence of premeditation and deliberation—that is, of forethought and consideration of alternatives—was

\textsuperscript{160} See \textsc{Cal. Penal Code} § 188 (Deering 1985); \textsc{Cal. Penal Code} § 192 (Lexis Supp. 2002).
\textsuperscript{161} Provocation must be sufficient that a reasonable person would be in a heat of passion. See \textsc{People v. Berry}, 556 P.2d 777 (Cal. 1976).
\textsuperscript{162} See \textsc{People v. Thomas}, 156 P.2d 7 (Cal. 1945); \textsc{People v. Valentine}, 169 P.2d 1 (Cal. 1946). See also \textsc{People v. Heslen}, 163 P.2d 21 (Cal. 1945).
\textsuperscript{163} Unless some other theory is established—for example, felony murder or atrocious means.
not in all cases necessarily correlated with a high level of moral turpi-
tude. Particularly in cases that involved mental disease or defect, im-
maturity, intoxication, or a combination of these factors, premeditation and deliberation seemed often to be a matter of "going through the motions," with no real connection to culpability. In *Wolff*\(^{164}\) the court addressed this qualitative aspect of premeditation and deliberation.

The groundwork for the *Wolff* decision was laid in a series of cases that gradually transformed the rules regarding proof of mental state in the California homicide scheme. These decisions established what became known as the Wells-Gorshen Rule\(^{165}\) and appear, in large part, to have been generated by concern about the relationship of mental disability to culpability. Prior to the development of these cases evidence of mental disease was strictly limited to the issue of sanity and explicitly prohibited in the guilt phase of the trial.\(^{166}\) The Wells-Gorshen Rule removed the barrier between mental state and mental disease, allowing the introduction of psychiatric evidence at the guilt phase to prove the absence of critical mental states.

Most of the cases applying Wells-Gorshen involved the element of malice aforethought.\(^{167}\) Because the definition of malice has been profoundly elusive, identifying the relationship between the evidence of mental disability and/or intoxication to its presence or absence was not an easy task.\(^{168}\) At least superficially, application of the Wells-Gorshen Rule to the elements of premeditation and deliberation was simpler. The words themselves were common and familiar. Further, when the court attempted to define these elements more precisely, it turned to dictionary definitions.\(^{169}\) Hence the technical legal meaning and the common understanding of these words coincided, and juries were told that they must find that the accused thought about the decision.

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\(^{164}\) People v. Wolff, 394 P.2d 959 (Cal. 1964).

\(^{165}\) The Wells-Gorshen Rule derived its name from the first two of the series of cases establishing this doctrine. See People v. Gorshen, 336 P.2d 492 (Cal. 1959); People v. Wells, 202 P.2d 53 (Cal. 1949). See also People v. Poddar, 518 P.2d 342 (Cal. 1979); People v. Cantrell, 504 P.2d 1256 (Cal. 1973); People v. Conley, 411 P.2d 911 (Cal. 1966); People v. Wolff, 394 P.2d 959 (Cal. 1964); People v. Henderson, 386 P.2d 677 (Cal. 1963).

\(^{166}\) This strict segregation was a product of a 1927 amendment to the Penal Code which established a bifurcated trial system. The issue of sanity was tried at a separate proceeding following a determination of guilt; all evidence of mental disease or disorder was relegated to the hearing on the determination sanity. See cal. Penal Code § 1026 (Lexis 1998) (as added in 1927).

\(^{167}\) See supra note 165.

\(^{168}\) See Mounts, supra note 27, at 387–51.

\(^{169}\) See supra text accompanying notes 156–59.
to kill beforehand, that the decision to kill resulted from careful thought and weighing of considerations, that it was characterized by reflection and dispassion, and was not hasty, impetuous, or rash.\(^{170}\) Thus, the issue should have been a simple one of identifying the kinds of evidence that were inconsistent with such cool, deliberate planning.

However, if examined from the perspective of the purpose behind the division of murder into degrees—identifying the most culpable forms of murder so as to limit the reach of the death penalty—the issue becomes more complicated. As defined, these particular elements focus heavily on cognition. The notion that cognitive abilities necessarily correlate with culpability increasingly was questioned based on the recognition that mental illness can often leave cognitive abilities unaffected, while seriously undermining emotional and volitional capacities.\(^{171}\)

The decision in *Wolff* attempted to integrate the legislative purpose of identifying full moral culpability with evolving understanding of mental disease and defect in the context of premeditation and deliberation. The defendant, a fifteen year old boy, was charged with the murder of his mother. The defendant entered a plea of not guilty by reason of insanity. Four psychiatrists testified without contradiction that defendant suffered from schizophrenia.\(^{172}\) The evidence indicated that, in the year prior to the killing, the defendant spent a lot of time thinking about sex, that he decided his mother was an obstacle to carrying out his rather bizarre plans to have sex with various girls in the community, and accordingly planned and executed her killing.

\(^{170}\) See People v. Bender, 163 P.2d 8, 19 (Cal. 1945).

\(^{171}\) Psychological theory of the time increasingly rejected the idea that cognition could be separated from other mental capacities and instead saw the individual as a complex whole whose mental disease might have a variety of effects, including impairment of cognition, emotional awareness, and volitional control. See, e.g., Manfred S. Guttmacher & Henry Weihofen, *Psychiatry and the Law* 409 (W.W. Norton & Co., Inc. 1952) [hereinafter Guttmacher & Weihofen]; Bernard L. Diamond, *Criminal Responsibility of the Mentally Ill*, 14 Stan. L. Rev. 59 (1961); Gerhard O. W. Mueller, *On Common Law Mens Rea*, 42 Minn. L. Rev. 1043 (1958); Winfred Overholser, *The Place of Psychiatry in the Criminal Law*, 16 B.U. L. Rev. 322 (1986); Henry Weihofen & Winfred Overholser, *Mental Disorder Affecting the Degree of Crime*, 56 Yale L. Rev. 959 (1947). Guttmacher and Weihofen described the law as being influenced by an outworn conception of man’s mental processes, a concentration of attention upon *intellectual* power to comprehend the nature of the transaction involved, and a failure to appreciate the importance of temperament, the driving force of the emotions, the development and strength of inhibitions and the soundness of the central nervous system in determining how the human organism reacts to situations.

Guttmacher & Weihofen, *supra*, at 323.

\(^{172}\) See People v. Wolff, 394 P.2d 959, 964 (1964).
The court found the evidence sufficient to support the jury's verdict of sanity, and on the surface the evidence also established that defendant planned and deliberated his mother's killing. Nonetheless, the court reduced the judgment from first to second degree murder. As it had in Holt and Thomas, the court emphasized the importance of assessing individual culpability within the overall proportionality required by the homicide structure, including the need to ensure that a "willful, deliberate, and premeditated" murder was of the same cruelty and aggravation as the more specific forms of first degree murder set out in section 189.

The California Supreme Court opinion reflected concern not just with the defendant's ability to go through the motions involved in premeditation and deliberation, but also with the extent of his understanding of his contemplated actions. Referring to the defendant's youth and mental impairment, the court observed that "the extent of his understanding, reflection upon it and its consequences, with realization of the enormity of the evil, appears to have been materially—as relevant to appraising the quantum of his moral turpitude and depravity—vague and detached," and emphasized "the somewhat limited extent to which this defendant could maturely and meaningfully reflect upon the gravity of his contemplated act." The true test of

173. See id. Several days before the crime, the defendant obtained from the garage an axe handle which he then hid under his mattress. See id. at 966. The evening before the crime he took the axe handle from under his mattress, approached his mother from behind, and raised the weapon to strike her. Sensing his presence behind her, his mother asked what he was doing. See id. He said "nothing," and returned the axe handle to its place under his mattress. The next morning he again approached his mother from behind with the axe handle, and this time hit her on the back of her head. See id. They struggled in the kitchen; defendant attempted to strangle her. She broke away from him and ran into the front room where he pursued her and eventually strangled her to death with his hands. See id. Shortly thereafter, the defendant walked to the police station to turn himself in, saying "I just killed my mother with an axe handle." Id. at 966.

174. See id. at 976.

175. The court said, "[d]ividing intentional homicides into murder and voluntary manslaughter was a recognition of the infirmity of human nature. Again, dividing the offense of murder into two degrees is a further recognition of that infirmity and of difference in the quantum of personal turpitude of the offenders . . . ." Id. at 974.

176. See id. at 975.

177. Id. at 976.

178. Id. at 975. See also discussion infra Part V (discussing the later legislative "repeal" of this aspect of the Wolff decision). The reference to the ability to "maturely and meaningfully reflect" came to be associated strongly with the Wolff decision as a sort of judicial gloss on the statutory elements of premeditation and deliberation. However, in fact, this language seems to derive from the definition of "deliberate" provided in Webster's New International Dictionary (2d ed.) cited as early as People v. Thomas, 156 P.2d 7 (Cal. 1945), decided almost twenty years before Wolff. That definition included "to weigh in the mind;
premeditation and deliberation, according to the court, was not the
duration of time as much as the extent of the reflection.

The defense bar quickly recognized the potential presented by
the Wolff decision, and over the next several years, the court con-
fronted a number of challenges under the new standard to the suffi-
ciency of the evidence of premeditation and deliberation.\textsuperscript{179} The
opinions in each of these cases recited facts that strongly suggested a
planned killing, in some a meticulous plan. Each also de-
scribed a killer whose significant mental and emotional disturbances,
often the product of a horrendous personal history, affected the plan-
ing in some significant respect. The court rejected the challenges
and affirmed a first degree murder conviction in some cases,\textsuperscript{180} and in
others it reduced the conviction to second degree murder.\textsuperscript{181} This
might suggest that the court was having at least some success in distin-
guishing those cases where the forethought and planning truly indi-
cated culpability from those that did not.

Another aspect of these cases, however, raised serious questions.
In Wolff all four experts agreed the defendant was schizophrenic.\textsuperscript{182} Such
agreement may have derived from the fact that nothing hinged
on it. Wolff's schizophrenia was not inconsistent with being found
sane under the M'Naghten standard,\textsuperscript{183} nor, prior to the decision in
his case, was it inconsistent with premeditation and deliberation. After
Wolff such agreement was rare, and decisions soon were filled with
descriptions of the opinions of competing experts; in one case as

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\textsuperscript{179} See People v. Nicolaus, 423 P.2d 787 (Cal. 1967); People v. Goedcke, 423 P.2d 777
(Cal. 1967); People v. Risenhoover, 447 P.2d 925 (Cal. 1968); People v. Bassett, 443 P.2d
777 (Cal. 1968); People v. Cruz, 605 P.2d 830 (Cal. 1980). \textit{See also} People v. Ford, 416 P.2d
132 (Cal. 1966).

\textsuperscript{180} See Risenhoover, 447 P.2d at 925; Cruz, 605 P.2d at 830.

\textsuperscript{181} See Nicolaus, 423 P.2d at 787; Goedcke, 423 P.2d at 777; Bassett, 443 P.2d at 777.

\textsuperscript{182} See Wolff, 394 P.2d at 964.

\textsuperscript{183} Under the M'Naughten test of insanity, an accused could be found legally insane
if, at the time of committing the act, he was "laboring under such a defect of reason, from
disease of the mind, as not to know the nature and quality of the act he was doing; or, if he
did know it, that he did not know he was doing what was wrong." M'Naughten Case, 10
Clark & Fin. 200, 210 (8 Eng. Rep. 718, 722) (1843). California had followed this test of
insanity since 1864. See People v. Coffman, 24 Cal. 230 (1864).
many as ten experts were called by the defense and prosecution. The specter of resolving this fundamental question of culpability through dueling experts was troubling.

How this might have been sorted out in the long run we will never know. In the early 1980s, the California legislature and the electorate took action in a manner that fundamentally altered the necessary proof of the mental elements of murder, including premeditation and deliberation.

D. Assessing Evidence of Premeditation and Deliberation: People v. Anderson

Before addressing those changes, another seminal case, People v. Anderson, must be considered. This case laid out guidelines for assessing the sufficiency of the evidence of premeditation and deliberation separate from issues of mental deficiency and is one of the most renowned opinions issued by the California Supreme Court.

Even with the guidance of improved instructions, the task of determining whether the evidence proved the existence of premeditation and deliberation or only the intent to kill continued to be a challenge for the courts. The following instruction, crafted in response to the Thomas decision, captures the fundamental problem:

The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances. The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it include[s] an intent to kill, is not such deliberation and premeditation as will fix an unlawful killing as murder of the first degree. To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, decide to and commit the unlawful act causing death.

This instruction is a substantial improvement over earlier instructions. By its reference to a “cold, calculated judgment” and the “weigh[ing] and consider[ing of] the question of killing and the reasons for and

184. See Risenhoover, 447 P.2d at 929–31. See also Nicolaus, 423 P.2d at 787 (five experts); Goedecke, 423 P.2d at 777 (four experts); Basset, 443 P.2d at 777 (six experts).
185. See discussion infra Part V. See also, Mounts, supra note 27, at 352–59.
186. 447 P.2d 942 (Cal. 1968).
187. See People v. Thomas, 156 P.2d 7 (Cal. 1945).
188. People v. Carmen, 228 P.2d 281, 287 (Cal. 1951).
against such a choice,” the instruction emphasizes the true nature of the elements of premeditation and deliberation. However, the underlying problem remained. Since “the law does not undertake to measure in units of time the length of the period” necessary to truly premeditate and deliberate, and since the “cold, calculated judgment” can be arrived at in a “short period of time,” a finding of virtually instantaneous premeditation and deliberation was still very much a possibility. In such circumstances, there must be a determination of whether the facts reveal only a bare intent to kill or instead an intent to kill that derives from the kind of cold, considered calculation described in the instruction.

In *Anderson* the court considered the question of how to assess the sufficiency of the facts to prove a cold, considered intent to kill. The defendant was convicted of first degree murder and sentenced to death for the brutal killing of a young, vulnerable victim, his ten year old stepdaughter. The facts established that the defendant was drinking heavily for several days, including the day of the killing, and was home alone with the victim. The victim’s nude body was found in her bedroom, hidden under some blankets and boxes. Over sixty stab wounds, some superficial, some severe, had been inflicted. Blood was discovered in every room in the house. The victim’s torn and bloodied dress and her panties, out of which the crotch had been torn, were found, but there was no evidence of sexual assault.\(^\text{189}\) Defendant argued evidence of premeditation and deliberation was insufficient to support the verdict.

The court noted that, although premeditation and deliberation could be proved by circumstantial evidence, the brutality of a killing without more did not prove these elements.\(^\text{190}\) The court outlined what it referred to as “standards, derived from the nature of premeditation and deliberation as employed by the Legislature and interpreted by this court, for the kind of evidence which is sufficient to sustain a finding of premeditation and deliberation,”\(^\text{191}\) and described three categories of evidence relevant to determining the existence of premeditation and deliberation:

1. facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing—what may be characterized as “planning” activity; 2. facts about the defendant’s *prior* relationship and/or conduct with the victim from

\(^{189}\) See *People v. Anderson*, 447 P.2d 942, 944–45 (Cal. 1968).

\(^{190}\) See *id.* at 947.

\(^{191}\) *Id.* at 948.
which the jury could reasonably infer a "motive" to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of a "pre-existing reflection" and "careful thought and weighing of considerations" rather than "mere unconsidered or rash impulse hastily executed . . .:" (3) facts about the nature of the killing from which the jury could infer that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a "preconceived design" to take his victim's life in a particular way for a "reason" which the jury can reasonably infer from facts of type (1) or (2).192

The court reviewed earlier cases with this analytical framework in mind and concluded that verdicts of first degree murder were typically sustained when there is evidence of all three types, or failing that, where there is extremely strong evidence of type (1) or evidence of type (2) in conjunction with either type (1) or (3).193

Applying the above analysis to the facts of Anderson, the court found no evidence of conduct preceding the killing which suggested planning, rejected the prosecution's argument that the killing was sexually motivated,194 and found that the nature of the killing, while very brutal, did not circumstantially suggest a planned killing. Rather, the court found the multiple stab wounds equally consistent with a "hasty and impetuous" act of killing and thus could not reasonably support a finding of premeditation and deliberation.195 Because it found proof of premeditation and deliberation insufficient, the court reduced Anderson's conviction to second degree murder.196

Factually, Anderson is an extremely troubling case. The murder was particularly violent and unprovoked, and the victim was a vulnerable child. But in terms of the court's application of the statute, it is hard to argue with the decision. The problem with the result in Anderson, if there is one, results from the legislative definition of first degree

192. Id. at 949 (citations omitted).
193. See id.
194. The prosecution had argued a sexual motive for the killing, based on the victim's having been found nude, the crotch having been torn out of the victim's panties, knife wounds in the vaginal area, and the evidence which suggested that the defendant was not fully dressed at the time of the killing (the only clothes belonging to defendant which were found with blood on them were a pair of socks with blood encrusted on the soles and a pair of boxer shorts). See id. The court found this evidence insufficient to support a reasonable inference of a sexual motive. See id. at 952.
195. See id.
196. See id. at 958. The jury was instructed on two possible theories of first degree murder: (1) premeditation and deliberation; and (2) murder which is committed in the perpetration or attempted perpetration of an act punishable under California Penal Code section 288 (sexual perversion with a child). The court found the evidence on this latter theory insufficient also. See id. at 953–56.
murder. The legislature designated deliberate and premeditated murders as being of the first degree; it did not so designate particularly violent, unprovoked murders of vulnerable victims. If the conclusion that Anderson’s killing was not first degree murder is wrong, the fault lies in the legislative definition of first degree murder, not in the court’s application of that definition to the facts of the case. The opinion reflected a serious attempt to give meaningful effect to the statutory distinction between first and second degree murder. Nothing about the decision was particularly groundbreaking; it appeared merely to say, perhaps more clearly, what the court often had said before.

V. Political Climate Heralds a “Retro” Era—1980 to the Present

By the early 1980s the decisions of the California Supreme Court suggested the beginning of another major shift in the court’s approach to premeditation and deliberation, a shift in a distinctly backward direction. Cases decided since then have more in common with decisions from one hundred years ago than with cases decided in the 1950s and 1960s.

Although pinpointing the multiple forces that contributed to this change is not easy, one piece of the puzzle is clear. In 1981, the legislature amended section 189 by adding the following provision: “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.”

198. For example, in People v. Holt the court observed that “it has been held that the existence of a deliberate purpose to kill may be inferred from the character of the weapon used, the circumstances surrounding and showing the relationship of the parties, and the acts and conduct of the accused.” People v. Holt, 153 P.2d 21, 34 (Cal. 1944) (citing People v. Cook, 102 P.2d 752 (Cal. 1940)). See also People v. Smith, 104 P.2d 510 (Cal. 1940). In People v. Tubby, the court noted the following as being important in assessing the sufficiency of evidence of premeditation and deliberation, “the previous relations between defendant and the victim, the actions of the defendant before as well as at the time of the killing, and the means by which the homicide is accomplished.” People v. Tubby, 207 P.2d 51, 55 (Cal. 1949).
199. Cases decided during the 1970s generally did not involve challenges related to premeditation and deliberation. Many changes in California’s death penalty law occurred during that decade and appellate challenges focused primarily on the constitutionality of the various death penalty schemes. See Shatz & Rivkind, supra note 7, at 1307.
Without question, this amendment was intended to undo the Wolff decision. By this amendment, the legislature, in effect, said mental abnormalities are irrelevant; no matter what the quality of the thought processes, if the accused thinks about the killing in advance and considers alternatives, premeditation and deliberation are proved.

This statutory change cannot explain the broader shift in the direction of the court's decisions. Cases involving qualitative challenges—those where the defendant claims he planned the killing but did so without the "mature and meaningful reflection" required—were always a distinct and limited subgroup. Most premeditation and deliberation challenges have been based on claims that the decision to kill was spontaneous, without prior reflection—i.e., that there simply was no premeditation and deliberation. The amendment to section 189 had no effect on these cases.

The more general change is likely tied to a shift in the political climate in the society at large, a shift that had a profound impact on the criminal justice system. Lawrence M. Friedman, a prominent legal historian, described the times as follows:

In retrospect, the 1950s and 1960s represented a peak or high point in the movement to make criminal justice more humane, and to tilt the balance away from the police and prosecution. A backlash or reaction then set in. A wave of conservatism swept over the country. It had its roots in the great fear: the fear and hatred of crime. This wave led to the collapse of the campaign against the death penalty; it brought about a reaction against parole and the indeterminate sentence; it engulfed the Durham rule, and put an end to "progress" in the insanity defense.201

The fear and hatred of crime was rooted in reality. The rate of violent crime, always high in the United States, had risen dramatically.202 The country had moved into a period of disorienting political upheavals including the civil rights movement and the anti-war movement. Cities experienced major race riots. Robert Kennedy and Mar-

201. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 404 (1993). The reference to the Durham rule is to a test of insanity adopted in People v. Durham, 214 F.2d 862 (D.C. Cir. 1954). In an opinion by Judge Bazelon, the court in Durham rejected the M'Naghten rule and adopted in its stead a new "test," theoretically more modern and scientifically advanced. The test provided that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." Durham, 214 F.2d at 874-75. This rule was later abandoned by the D.C. Circuit in United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972). After the insanity acquittal in the trial of John Hinckley for the attempted murder of President Reagan, Congress enacted legislation returning to something akin to the M'Naghten Rule in federal courts. See 18 U.S.C. § 17 (1994).

202. See Friedman, supra note 201, at 451.
tin Luther King, Jr. were assassinated. The public perceived itself as besieged by crime, both of the traditional and political variety.

Playing to an understandable anxiety and anger about crime proved to be an unbeatably successful formula for politicians. Fear of crime also provided a constant source of attention-grabbing headlines for the media. Although most thoughtful observers concur that the causes of crime and of variations in the rate of crime are complex, simplistic explanations are often appealing. In this era, both politicians and the media often pointed the finger of blame at the courts and the criminal justice system generally.

Although the shift in the political climate was a nationwide phenomenon, the effects of the shift seemed particularly pronounced in California. One particular case, the murder of George Moscone, a popular San Francisco mayor, and Harvey Milk, a member of the Board of Supervisors and leader in the gay community, by Dan White, a former member of the Board of Supervisors, became a symbol to California citizens of all that was wrong with the courts and the criminal justice system.

This case, and the public outrage it engendered, led directly to a series of actions by the legislature (including the amendment to section 189), as well as initiatives passed by the electo-

203. The public appears to have an insatiable appetite for news of violent crime, an appetite the media is willing to feed. A San Francisco Chronicle article reported that from 1993 to 1996, the homicide rate in the United States dropped twenty percent. During that same time period, the evening network news reports of killings increased by an average of seven hundred twenty-one percent over the preceding three years. This article also reported that media coverage of crime clearly affects public attitudes. A 1994 poll conducted by the Los Angeles Times reported that sixty-five percent of those surveyed said their feelings about crime were based primarily on what they saw in the media, as compared with twenty-one percent who cited personal experience and thirteen percent who said both equally. See Howard Kurtz, Homicide Rate Down, Except on the Evening News, S.F. CHRON., Aug. 13, 1997, at A8.

204. In 1979, Dan White, a former member of the San Francisco Board of Supervisors, shot and killed Mayor George Moscone and Supervisor Harvey Milk, a leader in the gay community. White was arrested and charged with first degree premeditated and deliberated murder. White had clearly fired the shots that had killed these two political leaders; his defense was that he suffered from clinical depression and did not act with malice aforethought. Testimony in support of that defense suggested that a manifestation of his disease was the tendency to consume an unbalanced diet, including large amounts of junk food; one such item of food mentioned was "Twinkies." See People v. White, 172 Cal. Rptr. 612 (Ct. App. 1981). This testimony was seized upon by the press and blown entirely out of proportion, so that when the jury convicted White of voluntary manslaughter, the case became infamous as having established the "Twinkie defense." The San Francisco community and the broader California population reacted with outrage at what was perceived to be a gross miscarriage of justice.
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rate, aimed at abolishing the Wells-Gorshen Rule and other judicial innovations of the preceding era.

The death penalty also became a lightning-rod political issue in this period. Beginning in 1972, decisions by the California Supreme Court and the United States Supreme Court invalidated, either directly or by implication, several California death penalty schemes. Each time, the legislature and/or the electorate responded swiftly to enact new legislation to restore and often to expand the death penalty. Frustrated by the California Supreme Court's resistance to the application of the death penalty, the electorate took the unprecedented step of removing the Chief Justice and two of her colleagues from the court in 1986. California's Republican governor replaced the ousted members of the court with justices of markedly more conservative judicial philosophy. The first decisions, signaling the court's most recent stance on premeditation and deliberation, appeared a few years before this historic election. But these decisions came after a decade or more of changing political winds that may have had a more or less subtle influence on the court's decisions. After the 1986 election, in many ways, California had an entirely new supreme court.

A. The "Retro" Era in Practice

Given the profound changes both outside and inside the court, its philosophical shift may well have been predictable. Nevertheless, given limits imposed by stare decisis, some justification for the new tack had to be articulated. Other than the repudiation of Wolff, no statutory changes pointed to a new course. The court has not rejected directly earlier seminal cases—neither those that articulated legal doc-

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206. See Mounts, supra note 27, at 553-59.


209. See Shatz & Rivkind, supra note 7, at 1306-17.

210. See Friedman, supra note 201, at 321.

211. See id.

212. In part the court was "new" based on the simple fact of the personnel changes that resulted from the 1986 election. Beyond the change in the membership, the court was undoubtedly impacted by this unprecedented politicization of the court and the real possibility of public ouster of individual justices.
trine through review of jury instructions, nor those reversing convictions based on insufficiency of the evidence.\textsuperscript{213} Yet in the sixteen years since 1986, when the Chief Justice and her two colleagues were removed from the court, not a single case has been reversed based on the insufficiency of the evidence to establish premeditation and deliberation. The court has rejected such challenges and affirmed first degree convictions where evidence of premeditation and deliberation was either non-existent or the product of appellate speculation. In practical effect, the current court simply has undone judicial clarification accomplished in the era that began with \textit{Holt} and returned the law to a state in which first and second degree murder are indistinguishable and the choice between them is left to the complete discretion of the jury. Unfortunately, given the grisly nature of the killings involved, the facts of the cases must be analyzed at some length.

1. \textbf{The "Anderson-like" Cases}

Evidence of the court's new attitude first became apparent in the 1980s with decisions in several cases that shared similar fact patterns. In \textit{People v. Alcala},\textsuperscript{214} \textit{People v. Frank},\textsuperscript{215} \textit{People v. Hovey},\textsuperscript{216} and \textit{People v. Pensinger},\textsuperscript{217} the defendants argued that there was insufficient evidence of premeditation and deliberation. In each case, the defendant abducted a young girl or infant under circumstances that indicated greater or lesser amounts of planning regarding the abduction. Evidence was introduced in each case to establish that the defendant's purpose was to engage in some sort of sexual conduct with the victim. Each of the victims was killed in circumstances with no apparent eyewitnesses. Each victim was subjected to a variety of horrible injuries.

As this brief description reveals, factually the cases in this group had much in common with the \textit{Anderson} case itself. However, in contrast to the decision in \textit{Anderson}, in each of these cases, the court found sufficient evidence of premeditation and deliberation.

In each case, the court cited as evidence of "planning activity" facts which did not relate directly to a plan regarding the ultimate fate of the victim but rather supported the inference that the child's ab-

\begin{itemize}
\item \textsuperscript{213} This includes what was surely its most controversial decision in this area, \textit{People v. Anderson}. See discussion \textit{infra} Part IV.D.
\item \textsuperscript{214} 685 P.2d 1126 (Cal. 1984).
\item \textsuperscript{215} 700 P.2d 415 (Cal. 1985).
\item \textsuperscript{216} 749 P.2d 776 (Cal. 1988).
\item \textsuperscript{217} 805 P.2d 899 (Cal. 1991).
\end{itemize}
duction was planned. Such evidence is not inconsistent with a plan to kill but, in itself, did not establish the abductor's ultimate intention. In Alcala, the court cited as additional evidence the fact that the defendant brought along a weapon that was ultimately used against the victim. However, the weapon was a knife, an item not uncommonly carried without deadly intention. In Hovey, the court made a similar argument, although the evidence regarding the type of weapon that inflicted the wounds was equivocal.

As to evidence of motive, in Alcala, Frank, and Hovey, the court suggested that defendants killed the victims in order to eliminate the only witness to the defendants' crimes. In Pensinger, because the victim was only five months old and thus too young to be a witness, this rationale did not apply. Instead, the court cited two possible motives, one apparently argued by the district attorney at trial and another.

218. See Alcala, 685 P.2d at 1131-32; Frank, 700 P.2d at 427; Hovey, 749 P.2d at 781; Pensinger, 805 P.2d at 909.

219. See Alcala, 685 P.2d at 1137.

220. Prosecution evidence indicated the injuries were inflicted either by a "blunt object" or by a "sharp instrument such as a knife." Hovey, 749 P.2d at 780.

221. See Alcala, 685 P.2d at 1138; Frank, 700 P.2d at 427; Hovey, 749 P.2d at 782. It should be noted that only in Hovey was there any evidence that specifically pointed to this motive. In that case there was testimony that the defendant blindfolded the victim and that the injuries were inflicted after the blindfold slipped and the victim was able to see the defendant. See Hovey, 749 P.2d at 782. Although in these cases it appears that the court was referring to the fact that the victim was a witness to the preceding crime of kidnapping and sexual molestation, the court later applied this rationale even where it was unclear that any crime other than the murder itself took place. See, e.g., People v. Perez, 851 P.2d 1159 (Cal. 1992). If applicable in this latter situation, this rationale could apply to every killing that takes place outside the presence of other witnesses, a category that includes a large percentage of homicides.

222. The defendant let the five year old brother of the victim out of the vehicle and left him on the side of the road before molesting and killing his sister. See Pensinger, 805 P.2d at 904. This fact was noted by the court as evidence that the defendant planned the killing. The court stated, "[the defendant] dropped off the child who was old enough to be able to hinder him in any way or identify him and testify to his acts." Id. at 909. In fact, this child later did testify against the defendant at trial. Had the defendant, rather than dropping the child off, instead killed him, it seems the court would then maintain that the defendant's motive for that killing was to eliminate the only witness who could identify him.

223. Earlier in the evening, the children's mother and the defendant went into a bar, leaving the victim and her five year old brother in the truck the defendant was driving. While the adults were in the bar, the victim's brother apparently pointed the defendant's rifle at a man who was in the parking lot. That man confiscated the rifle. The defendant became enraged when he discovered the rifle missing and made various attempts to find the rifle. See id. at 904. At trial the district attorney argued that the victim's death was somehow committed in revenge for what the defendant believed was the theft of his rifle. See id. at 909.
other by the state on appeal. In apparent recognition that evidence
of either motive was not terribly persuasive, the court stated that “the
incomprehensibility of the motive does not mean that the jury could
not reasonably infer that the defendant entertained and acted on
it.”

The court last assessed evidence regarding the manner of killing.
As noted, each victim was subjected to an array of injuries, some of
nearly unspeakable brutality. Such viciousness is generally contrasted
with the kind of cool efficiency typical of premeditated and deliber-
ated killings; certainly that was the court’s position in Anderson, where
the court suggested that the “only inference which the evidence rea-
sonably supports . . . is that the killing resulted from a random, vio-
lent, indiscriminate attack rather than from deliberately placed
wounds inflicted according to a preconceived design.” While it may
be true that a brutal method of killing is not inconsistent with a
planned murder, it is also true that brutality, in itself, is not particu-
larly suggestive of a planned killing. The opinion in Alcala typifies
the court’s approach in this group of cases. The court noted the brutal
injuries and then said, with no further explanation, “[w]hen consid-
ered in light of the planning and motive evidence, this brutal method
of killing supports the inference of a calculated design to ensure
death, rather than an unconsidered ‘explosion’ of violence.”

Having thereby established Alcala as precedent, in later cases, where
the court was confronted with similar injuries, the court then simply cited
Alcala as precedent for the position that such injuries may suggest a
premeditated and deliberated killing.

In Anderson the child was killed in her own home. In each of
these cases the child was taken from somewhere else. Little else dis-
tinguishes the facts of these cases from those of Anderson. The killings
in these cases were clearly of appalling brutality. Whether these kill-

224. Perhaps realizing the weakness of the prosecution’s motive argument at trial, on
appeal the state argued a different motive—that the defendant killed the child in order to
have sexual intercourse with her. See id. at 909.
225. Id.
228. See People v. Hovey, 749 P.2d 776, 782 (Cal. 1988); Pensinger, 805 P.2d at 909.
229. In fact, in Pensinger, it could be argued that defendant did not really take the
child, that the mother left the child in defendant’s truck, and defendant merely drove off
with the child in the truck. See Pensinger, 805 P.2d at 904. In 1990 the legislature added
kidnapping to the list of felonies in section 189. See Cal. Penal Code § 189 (Lexis Supp.
2002). Presumably from that time on cases like these will be prosecuted on a first degree
felony murder theory rather than as premeditated and deliberated.
ings were the product of careful planning and cool reflection is much less clear.²³⁰

2. The "Miscellaneous" Cases

The watered down application of the Anderson categories in the cases described above laid the groundwork for a second group of cases decided in the 1990s. These later decisions involved a variety of factual circumstances and appear to have in common only the court's willingness to stretch facts, to engage in speculation, and on occasion to assume facts that did not exist, in order to find sufficient evidence of premeditation and deliberation. These cases provide clear evidence that, without expressly rejecting Anderson, the court has construed it into insignificance. In the earlier cases the court applied the Anderson analysis without criticism but found evidence of premeditation and deliberation sufficient on the most minimal facts. In later cases, the court explicitly down-played the significance of the Anderson factors,

²³⁰ One additional case, People v. Lucero, 750 P.2d 1342 (Cal. 1988), was similar in that it involved the murder of two young girls. However, the circumstances of the killings were more puzzling. There was no abduction. The victims lived near defendant's home and were missing for only a short period of time before they were killed in the defendant's home. There was no evidence that the girls were sexually molested, nor was there evidence of any other readily apparent motive. One victim was killed by blows to her head by a blunt object; the other was killed by ligature strangulation, likely with a necklace the victim was wearing. In sustaining the verdict of first degree murder, the court observed that, because it was "unlikely" that the girls would have gone into the home of a strange man willingly, a jury might reasonably infer that the defendant "lured or compelled" the girls to enter, though no such evidence was introduced. See id. at 1348. The court conceded that evidence of motive was weak and again relied on the "elimination of witness" rationale. See id. Since there was no evidence of kidnapping or other crime against the girls, it was unclear what crime the girls had witnessed. As to the manner of killing, the court did not suggest that a blow from a blunt object suggested premeditation and deliberation. As to the ligature strangulation, on the one hand, the court agreed that this manner of killing did not always evidence preconceived design, but went on to say, without explanation, that "a jury could have viewed the strangulation as a deliberate manner of killing sufficient to show a 'preconceived design.'" Id. at 1349.

The decision in Lucero is particularly troubling because of the absence of any hint of a reason for the killings. The victims were not sexually molested and none of the other common motivations for murder were involved. Based on the majority's opinion, the murder is entirely incomprehensible and without explanation. Facts set out in Justice Mosk's concurring and dissenting opinion suggest a cause. Prior to the charges in this case, Lucero had never been in trouble with the law. He entered military service at the age of sixteen and spent seven and one half years in the Army, with much of his service in combat in Vietnam. According to the evidence, Lucero experienced two particularly traumatic experiences during combat which, according to expert testimony, resulted in a classic case of post-traumatic stress syndrome. There was evidence that some of the circumstances preceding the murders of the girls may have triggered a combat flashback. See id. at 1958 (Mosk, J., concurring).
noting that they were not intended to be exclusive measures of the presence of premeditation and deliberation. However, the court did not identify other types of relevant evidence and instead simply applied the factors already identified in a less rigorous fashion. These cases suggest the court's real quarrel with the Anderson decision was not the exclusivity of the categories of evidence, but rather with the strict application of those categories to the facts.

The decision in People v. Wharton\(^2\) was the first unmistakable indicator of the court's turnaround. The defendant was charged with murdering his live-in girlfriend. Both apparently had serious alcohol and drug problems. The victim's body was found in a large cardboard barrel covered with a plastic bag in the kitchen of the residence. The autopsy revealed that the victim was struck three times on the head with a blunt instrument, probably a hammer. In the opinion of the pathologist, the victim died of asphyxia rather than from the cerebral contusions. A toolbox was found in the garage and a hammer found in the house under a day bed. Evidence suggested that, in order to buy cocaine, defendant sold some of the victim's property after her death, and perhaps before as well. Defendant confessed to the killing but claimed it occurred during the heat of an argument and was not the product of premeditation and deliberation.\(^3\)

The court noted that evidence of premeditation and deliberation was not overwhelming, but nevertheless sufficient.\(^4\) In a superficially straight-forward Anderson analysis, the court first focused on the relationship of the hammer and the toolbox to show evidence of planning, arguing that one of two scenarios existed. First, defendant may have removed the hammer from the toolbox ahead of time and placed it in a convenient spot, "planning to be in a rage."\(^5\) Alternatively, when defendant and the victim argued, the defendant became angry and went to the garage to get the hammer, intending to use it to kill the victim.\(^6\) Under the latter scenario, the act of going to retrieve the hammer would indicate planning. The court found evidence of a plausible motive from the fact that defendant may have been stealing from the victim before her death.\(^7\) The court conceded that the manner of killing revealed nothing about the existence of premedita-

\(^{231}\) 809 P.2d 290 (Cal. 1991).
\(^{232}\) See id. at 300–01.
\(^{233}\) See id. at 303–04.
\(^{234}\) Id.
\(^{235}\) See id.
\(^{236}\) See id.
tion and deliberation. However, the court observed that the Anderson decision did not require evidence in all three categories and stated that evidence of planning in conjunction with motive evidence was sufficient.

The court’s observation, however, ignored the absence of any substantial evidence of planning; the evidence both of planning activity and of motive was extremely weak. The prosecution introduced no evidence regarding the location of the hammer prior to the killing. There was no evidence that the hammer was ever in the toolbox, or that if it was, that it was removed from that location shortly before the killing. Nor was there any evidence that defendant went to the garage or anywhere else to get the hammer during the course of an argument. The court based its alternative scenarios on the prosecutor's argument rather than any evidence introduced in the case. Without evidence of planning activity, the extremely weak evidence of motive clearly would have been insufficient to support a finding of premeditation and deliberation. The evidence might have been sufficient to support a finding that defendant intended to kill the victim, but there was no evidence that he coolly considered the killing in advance.

More recently, the court, while continuing to engage in the Anderson analysis, has discounted openly the decision as any substantive limitation on the proof of premeditation and deliberation. In People v. Thomas the court stated that

unreflective reliance on Anderson for a definition of premeditation is inappropriate. The Anderson analysis was intended as a framework to assist reviewing courts in assessing whether the evidence supports an inference that the killing resulted from preexisting reflection and weighing of considerations. It did not refashion the elements of first degree murder or alter the substantive law of murder in any way.

In Perez, the court reiterated what it had said in Thomas and went on to say, "[t]he Anderson guidelines are descriptive, not normative . . . . In identifying categories of evidence bearing on premeditation and deliberation, Anderson did not purport to establish an exhaustive list.
that would exclude all other types and combinations of evidence that
could support a finding of premeditation and deliberation.\textsuperscript{244}

The court may be correct that the descriptive categories in the
\textit{Anderson} decision were not intended to be exclusive. In describing
the categories, the court stated in \textit{Anderson}, "[t]he type of evidence which
this court has found sufficient to sustain a finding of premeditation
and deliberation falls into three basic categories"\textsuperscript{245} perhaps sug-
gesting that other relevant evidence might exist outside these basic
categories. Even if it did not intend in \textit{Anderson} to leave room for
other categories of evidence, the court would be remiss if it failed to
consider other types of evidence relevant to the existence of premedi-
tation and deliberation. It is clearly true that the \textit{Anderson} decision, in
setting forth an analytic framework, did not purport to, nor could it
have affected the statutory elements of premeditation and deliber-
ation. Yet an honest reading of cases such as \textit{Thomas} and \textit{Perez} suggests,
not that the court has discovered new categories of evidence that tend
to prove premeditation and deliberation, but rather that it is simply
applying the existing categories in a less rigorous fashion.

Consideration of the facts in the \textit{Thomas} and \textit{Perez} cases illustrates
this point. In \textit{Thomas}, the defendant was charged with two counts of
premeditated and deliberated first degree murder. The jury returned
a verdict of one count of first degree and one count of second degree
murder.\textsuperscript{246} Over strong dissenting opinions by Justices Mosk and Ken-
nard, the majority in \textit{Thomas} found sufficient evidence of premedita-
tion and deliberation to support the one conviction of first degree
murder. Defendant and the two victims all resided in "Rainbow Vil-
lage," an area set aside by the city of Berkeley to provide living space
for people previously living in their vehicles on the public streets. De-
fendant was seen in the company of the victims near the area where
the two were killed and owned a rifle consistent with the type of
wounds inflicted.\textsuperscript{247} The victims were first beaten and then shot in the
head at point-blank range.\textsuperscript{248}

\textsuperscript{244} \textit{Id.} at 1163 (citations omitted).
\textsuperscript{245} \textit{People} v. \textit{Anderson}, 447 P.2d 942, 949 (Cal. 1968) (emphasis added).
\textsuperscript{246} The majority opinion never clearly indicates the fact that, although charged with
two counts of first degree murder, the jury convicted defendant of first degree murder only
as to one victim. The first clear statement of this fact appeared in Justice Kennard’s dissent.
\textsuperscript{247} \textit{Thomas} was seen with the rifle a few hours before the killings. \textit{See id.} at 107. When
questioned by the police, he claimed that the rifle was stolen the night of the murders. \textit{See id.}
at 109, 111.
\textsuperscript{248} \textit{See id.} at 106.
The following evidence was noted as indicative of planning. A witness testified that he saw defendant with the victims at approximately 2:30 A.M., but did not testify that defendant had a rifle with him. From this, according to the majority, the jury could infer that defendant returned to his car to get the rifle and the ammunition before committing the murders. Further, evidence indicated that the rifle lacked a clip, and in order to fire a second shot, one had to eject the expended case by opening the bolt and hand loading a second round into the chamber. The majority found that the actions required for loading and reloading the rifle suggested planning. Last, the majority pointed to the fact that the murders took place outside “Rainbow Village,” at a location where a weapon would not be readily accessible.  

There was little evidence of motive. At sentencing the trial court declared the killings to have been committed “without apparent motive, nor any rhyme or reason.” The majority, however, found motive evidence in that defendant may have felt the need to eliminate a witness to the first of the two murders.  

In assessing the evidentiary value of the manner of killing, the majority noted that the single contact shot to the victim’s neck suggested premeditation. The majority conceded that the beatings inflicted on both victims prior to their killings suggest rage, but concluded that such beatings do not preclude an inference of premeditation, observing that “[t]houghts may follow each other with great rapidity, and cold, calculated judgment may be arrived at quickly . . . .”  

*Thomas* is a good example of the extent to which the court is willing to go in order to sustain a conviction of first degree murder. Evidence in each of the *Anderson* categories was highly problematic. As
to evidence of planning, three areas of evidence were relied on in the majority opinion: (1) evidence that defendant was not armed when he was with the victims earlier, and thus must have had to return to his vehicle to get the rifle; (2) the actions involved in loading and reloading the rifle; and (3) the location of the killings.

As to the first, the witness relied on by the majority as having provided the testimony which was the basis for the conclusion that defendant had to return to his car to get the rifle was never asked whether defendant possessed a rifle. He merely described seeing defendant at a particular location and time and made no mention of whether defendant was armed. As Justice Kennard noted, “failure to respond to a question that was never asked is not evidence of anything.”

The argument based on the reloading of the rifle presents at least three problems. First, the majority opinion stated that the facts regarding the operation of the rifle “suggest planning in the loading and reloading of the rifle.” No evidence whatsoever was offered as to when the rifle was initially loaded. So the majority’s argument, even if accepted, would be limited to the actions involved in reloading the rifle. Second, if the argument is restricted to reloading the rifle, the evidence is highly problematic as a basis for finding premeditation and deliberation as to the victim whose death resulted in the first degree murder conviction. No evidence was introduced from which the jury could determine the order in which the victims were killed. In order for the first degree murder victim to have been killed after Thomas reloaded the rifle, he would, of course, have to have been killed second. There was simply no evidence from which the jury could have come to that conclusion. The third problem with the “reloading” conduct as showing planning is more fundamental. Assuming the first killing was intentional but unplanned (i.e., second degree murder), was a sufficient additional quantum of culpability established by reloading and shooting a second time? Is this really what is meant by premeditation and deliberation? Courts have struggled with the question of whether evidence of repeated blows or stabbings is sufficient to prove premeditation and deliberation. The argument in favor would be that, with each stab or blow, the perpetrator again decided to inflict a deadly wound and thus premeditated and deliberated on the act of killing. Anderson itself is an example of a case in which such an argument apparently was made and rejected. If re-

255. Id. at 137 (Kennard, J., dissenting).
256. Id. at 115 (emphasis added).
peated blows are insufficient, are repeated shots different? If not, is
the mere fact of reloading a weapon sufficient additional indication of
cool planning and consideration beforehand?

The last piece of evidence relied on by the majority to show plan-
ning—the location of the killing—is important primarily because of
its relationship to the need to return to get the weapon. Since, as
noted above, there was no affirmative evidence that Thomas did not
have the weapon with him, the location of the murder has little evi-
dentiary value.

The motive evidence was similarly weak. At trial, the prosecution
argued a sexual motive for the killing. The evidence supporting this
seems to have been limited to the fact that the female victim’s shorts
were unbuttoned and the zipper partially unzipped, but there was no
evidence of sexual trauma.257 The majority declined to resolve
whether this theory, the one which was argued to the jury, could rea-
sonably have been the basis for an inference that defendant had a
motive to kill the victim.258 The majority chose instead to rely on the
theory that defendant’s motive might have been to “eliminate a wit-
ness to [the defendant’s] crimes.”259 Because there is no way of know-
ing which killing took place first, there is simply no evidence in the
case which would support this inference.

As to the manner of killing evidence, in general, a single, point-
blank shot to a vital body part might suggest a planned killing, for
example, an “‘execution-style’ killing—which is ‘particular and exact-

257. See Thomas, 828 P.2d at 115.
258. See id. Note that this evidence related to a motive to kill only one of the victims.
The defendant was convicted of second degree murder as to that victim, so presumably the
jury had a reasonable doubt as to the existence of premeditation and deliberation in her
killing. Nonetheless, a motive to kill this victim might have been relevant to the review of
evidence as to the other killing. If defendant was shown to have a motive to kill the first
victim, perhaps that would suggest that he killed her first and then killed the other victim
to eliminate a witness. See id. at 138 (Kennard, J., dissenting).
259. Justice Kennard vigorously disputed the majority’s argument that People v. Alcala,
685 P.2d 1126 (Cal. 1984), supports the “witness elimination” motive in this case. Justice
Kennard argued,

[i]there, this court reasoned that “when one plans a felony against a far weaker
victim, takes her by force or fear to an isolated location, and brings along a deadly
weapon which he subsequently employs,” advance planning to kill may be reason-
ably inferred. Here, there is no evidence of a separate planned felony against [the
first degree murder victim], no evidence that [the first degree murder victim] was
a victim far weaker than defendant, and no evidence that he was taken by force or
fear to an isolated location. And as Alcala cautions, use of a deadly weapon is not
necessarily evidence of a plan to kill.

Thomas, 828 P.2d at 157 (Kennard, J., dissenting) (citations omitted).
The evidence as to the killing here, however, was different—both victims were badly beaten prior to being killed. The evidence of injuries taken as a whole was more consistent with a brutal attack than an exacting manner of killing.

In summary, the evidence in *Thomas* of each of the three *Anderson* factors was either weak or nonexistent. Despite the introductory remarks to the effect that the *Anderson* factors were not exclusive, the majority suggested no other evidence that would close the evidentiary gap.

The decision in *Perez* reveals a similar effort to conjure up premeditation and deliberation from minimal facts. Defendant, the victim, and the victim's husband were high school acquaintances ten years earlier. Defendant lived nearby and periodically drove by the residence of the victim and her husband. The husband routinely left the home early in the morning to go to work several hours before the victim left. The victim was killed in her home during the time period after her husband left for work. There was no sign of forced entry. The physical evidence indicated a violent struggle; blood was found in nearly every room in the house. The victim was first beaten on the head and shoulders, probably with a fist, and then repeatedly stabbed. She suffered thirty-eight stab wounds, none to vital organs. She bled to death from a cut on her neck which nicked the carotid artery. A single-edged knife blade was found near the victim's head and a piece of the handle by her foot. This knife resembled steak knives which were kept in the kitchen. A pathologist testified that he believed two different knives, one double-edged, were used. The wounds inflicted with the double-edged knife appeared to have been inflicted after death. The defendant sustained several serious cuts to his right hand and also less serious cuts to his left.

A divided court of appeal concluded that the facts were indistinguishable from those in *Anderson* and reduced the conviction to second degree murder. A majority of the supreme court disagreed, and reinstated the first degree murder conviction. Evidence of plan-

260. *Id.* at 135 (Kennard, J., dissenting).
261. 831 P.2d 1159 (Cal. 1992). As they did in *Thomas*, Justices Mosk and Kennard again dissented here. The supreme court decision reversed a split decision of the court of appeal which found insufficient evidence of premeditation and deliberation. See *id.* at 1166, 1178.
262. See *id.* at 1160–61.
263. See *id.* at 1160, 1163.
ning was found in five “facts:”

1. Defendant’s car was not observed in the victim’s driveway;
2. Defendant “surreptitiously entered” the home;
3. Defendant obtained a knife from the kitchen;
4. Defendant later obtained a second knife; and
5. Defendant’s conduct after the killing, “such as the search of dresser drawers, jewelry boxes, kitchen drawers and the changing of a Band-Aid on his bloody hand that would appear to be inconsistent with a state of mind that would have produced a rash, impulsive killing.”

On closer scrutiny, it becomes apparent that some of these “facts” were not supported by the evidence at all; others, though perhaps reasonable inferences from the facts proved, were not particularly probative of premeditation and deliberation. As to the first fact, no evidence was presented that defendant drove to the victim’s residence. Even if he did, the fact that defendant did not park in the driveway hardly suggests that he went there intending to kill the victim. As to the second fact, surreptitious entry, the only evidence presented was that entry was not forced. An assumption that defendant entered surreptitiously might be reasonable, though it was certainly not the only possible assumption. However, such surreptitious entry again may not suggest even an intent to kill, let alone premeditation and deliberation on such intent. The third and fourth facts regarding the two knives present similar problems. The defendant might have gotten the steak knife from the kitchen, though there was minimal evidence suggesting he did so. Likewise, defendant may have obtained the second knife, but no evidence was introduced as to the source of that knife. There was no evidence that such a double-edged knife was kept in the kitchen, and in fact, the prosecutor argued that defendant brought the second knife with him, not that he retrieved it from the

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264. More accurately, these are at best described as inferences from facts. As to some, even that description is questionable.
265. See id. at 1164.
266. Id.
267. See id.
268. See id.
269. Id. at 1165.
270. As Justice Crosby observed in the court of appeal decision, “there was no evidence at all that Perez entered unlawfully or uninvited.” Id. at 1176.
271. The only evidence on this subject was that the single-edged knife matched a set of steak knives kept in the kitchen drawer and that there was a drop of blood in the drawer. See id. at 1161, 1164. There was no testimony that a knife was missing from the drawer. Nor was there any way of determining whether defendant obtained the knife or whether instead, the victim took up the knife, perhaps in self-defense, and defendant subsequently overpowered her and then used the knife against her. See id. at 1174.
kitchen. Thus, little about defendant’s use of a second knife suggested prior planning. The last "fact"—the defendant’s activities after the killing—does not appear to support the conclusion urged by the majority. In fact, these actions seem frantic and disorganized, and to the extent that post-killing actions shed light on intent relating to the killing, these actions would suggest an unplanned killing.

There was virtually no evidence of motive. The court relied on the witness elimination theory, but no evidence was offered of any crime which the victim witnessed, necessitating her elimination. Further, at least as to murders committed without witnesses—a category that includes a large percentage of murders—this rationale would inevitably apply and would elevate many run-of-the-mill second degree murders to first degree. At that, such a motive may only support a finding of intent to kill, not of premeditation and deliberation. The manner of killing, nearly identical to that in Anderson, could hardly be characterized as an "exacting manner of killing." In short, there was no substantial evidence of premeditation and deliberation.

In Perez, the court distinguished Anderson and found the case more analogous to Wharton. However, as suggested by the discussion of Wharton, this analysis founders on the fact that, in the first instance, there was no real basis for distinguishing Wharton from Anderson. As the court continues to engage in analyses of the sort seen in Wharton, Thomas, and Perez, it has an increasing number of cases on which it can rely to distinguish Anderson based on indistinguishable facts.

The case of Sanchez illustrates this process at work. Defendant was convicted of first degree murder and sentenced to death based on his

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272. See id. at 1173–74.
273. See id. at 1164.
274. See id. at 1177 (Mosk, J., dissenting).
275. In his dissent, Justice Mosk suggested an alternative interpretation of the evidence which seemed more in accordance with what the evidence actually indicated. He suggested the following:

Considered as a whole, the record tells one reasonable tale. Defendant and the victim had an undisclosed friendship. As she was attempting to conceive a child through artificial insemination with donor sperm, the victim terminated the relationship. Around that time, defendant began driving past her house frequently. On the day in question, he went to the house and entered without force. There was soon a confrontation. Defendant started to beat the victim with his fists. She took up a knife. In the ensuing struggle, he sustained defensive wounds to his hands. He got hold of the knife, stabbed her, and broke the weapon. He seized another knife. In the meantime, she died. He proceeded to stab her now-dead body. He searched through the house for some item or items that might betray his identity. He then fled.

Id. at 1175 (Mosk, J., dissenting).
actions as an accomplice. The principal and defendant went to the home of the parents of the principal. The principal intended either to borrow money or to rob his parents, and became embroiled in an argument with his father, ultimately causing his father's death by inflicting numerous stab wounds.

The court began its analysis of the sufficiency of the evidence in a similar manner as in Thomas and Perez, downplaying the restrictions imposed by the Anderson decision, stating that "[t]he Anderson factors, while helpful for purposes of review, are not a sine qua non to finding first degree premeditated murder, nor are they exclusive." Yet in the subsequent analysis, as was also the case in Thomas and Perez, the court considered each of the Anderson categories and did not reference any other type of evidence.

In describing planning activity, the court suggested that the principal formed an intent to kill, at the latest, during the argument with his father, and that he then obtained a knife with which to carry out his intention. The court apparently believed the decision to get the knife and its subsequent use demonstrated planning. Despite the fact that Sanchez was acquitted on the robbery charge, the court cited robbery as the motive for the killing. As to the manner of killing, the attack occurred over a number of rooms, indicating, in the words of the court, that the victim's "repeated attempts to break away from his murderers were consistently thwarted by the attackers' relent-

276. See People v. Sanchez, 906 P.2d 1129 (Cal. 1996). A considerable factual dispute existed regarding whether defendant participated personally in the killings and if so, the extent to which he participated. See id.
277. See id. at 1139.
278. Id. at 1149.
279. See id. The evidence as to the identity of the murder weapon and its original location was not at all clear. The opinion states,

police found a knife block with four empty spaces in the kitchen. Two knives, without bloodstains, were in the kitchen sink. There were slash marks on the cabinets directly above the knife holder. That same evening, the police recovered a knife and sharpening stone that appeared to have blood on them. No fingerprints were found on these items.

Id. at 1140. The opinion continues that the victims "died as a result of massive hemorrhaging due to multiple stab wounds, although the type of instrument that inflicted the wounds could not be conclusively determined." Id.
280. While the court never said this explicitly, it simply noted that the principal obtained a knife and then used it. Immediately thereafter the court said, "[o]ur cases hold that planning activity occurring over a short period of time is sufficient to find premeditation." Id. at 1149.
281. See id. at 1139.
282. See id. at 1149-50.
less pursuit of him, even after he was gravely wounded." The court invoked the ever-useful language regarding the brief time period necessary to premeditate and deliberate and then concluded that the above described evidence was sufficient to sustain the conviction of first degree murder.

It is important to focus once again on just how minimal the evidence of premeditation and deliberation was in this case. In terms of "planning activity," the court offered no evidence other than "obtaining the knife." As proof of prior planning, this evidence is flawed at many levels. First, there is no evidence that the killer "obtained" the knife. The police found a knife that "appeared to have blood on [it]," but there was no proof regarding the location of this knife before the killing. So, for example, it is impossible to determine whether the principal carried this knife as a matter of routine. The court referred to the police having found a knife block with four empty spaces in the kitchen and two knives with no blood stains in the kitchen sink. The court also referred to "slash marks . . . above the knife holder," but made no reference to any evidence tying these slash marks to the altercation in this case. Second, even if the killer did "obtain the knife," there is no proof of the killer's location when the knife was obtained. The evidence established that the struggle took place throughout the house. Thus it is entirely possible that the victim and the killer were struggling in the kitchen, and the "obtaining" of the knife consisted merely of picking up a readily available weapon. Finally, after relying exclusively on this most minimal activity to establish premeditation and deliberation, the court then noted without further comment that "the type of instrument that inflicted the wounds could not be conclusively determined."

Regarding evidence of motive, as noted above, the court cited robbery as the motive for the murder. The evidence that defendant

283. Id. at 1150.
284. Id. at 1140. The police also apparently found a "sharpening stone." See id. The court did not explain the relevance of this piece of evidence.
285. See id. Presumably these knives had nothing to do with the murders, but they were relevant only to the extent that they accounted for two of the empty slots in the knife block.
286. Id. at 1140.
287. There was no indication of whether the slash marks were fresh or old, whether they appeared to have been made by the knife that police suspected was used in the killing, or whether these slash marks were relevant to this case at all.
288. Id.
289. See id.
290. Id.
and the principal went to the residence intending to commit robbery was marginal, and in fact, Sanchez was acquitted of robbery.\textsuperscript{291} Even if sufficient evidence existed, the fact that they planned a robbery is not necessarily evidence that they planned to kill. Because this was not a felony murder prosecution, the state must show, independent of the robbery, a deliberate and premeditated decision to kill.

Last, the manner of killing was by multiple stab wounds, apparently inflicted in the frenzy of an immediate altercation, hardly a manner of killing that suggested a cool, deliberate killing. The court's rationale, apparently that the killer made repeated decisions to kill as the struggle moved around the house, would apply equally to the nearly identical circumstances of the killing in \textit{Anderson}.\textsuperscript{292} There the court concluded that such facts suggested a killing in a frenzy and not the kind of premeditated killing suggested by section 189.\textsuperscript{293}

\textbf{B. The "Retro" Era in Perspective}

\textit{Anderson} and other decisions from that "middle" period appeared to reflect the court's belief that, for better or for worse, in enacting section 189 the legislature had spoken. The legislature decreed that a small circumscribed category of murders were markedly more culpable than others, and premeditated and deliberated murders were among that category. Further, given the broader homicide structure, the elements of premeditation and deliberation had to be applied in a manner that distinguished them from the intent to kill. Of equal importance, in section 189 the legislature did not provide that some other types of killings—for example, brutal killings of vulnerable victims committed without premeditation and deliberation—were simi-

\textsuperscript{291} See \textit{id.} at 1139. The case was not prosecuted on a robbery felony murder theory, presumably because the evidence of the intent to rob was so weak. The only evidence of a plan to rob came from the jailhouse informant who testified regarding Sanchez's statements to him. \textit{See id.} at 1141. According to this informant, Sanchez either said they were going to rob or to borrow money. \textit{See id.} at 1141.

\textsuperscript{292} This rationale could easily be extended to nearly every murder that involved the infliction of multiple wounds.

\textsuperscript{293} See \textit{People v. Anderson}, 447 P.2d 942 (1968). The court also affirmed the sufficiency of the evidence for the first degree murder of the principal's mother. Little can be discerned from the opinion about the circumstances of her killing. What evidence there was derived mostly from defendant's statements as related by the jailhouse informant. Like her husband, she received extensive stab wounds and head injuries. In addition a piece of fabric was tied loosely around her neck, and another piece was found on her right wrist. Her body was found in her sewing room; evidence indicated that was the location of her death. The court indicates that the evidence that she was killed in order to keep her from being a witness to the murder of her husband was sufficient to support the verdict. \textit{See Sanchez}, 906 P.2d at 1150.
larly serious. In the words of one opinion of that period, "we deem it preeminently our duty not to seek to extend the statute but rather to understand it and give it effect as written by the legislature."

In distinct contrast to its approach in these middle period cases, the court now seems to regard the category of premeditated and deliberated murders as a sort of "catchall" for murders that the court deems particularly reprehensible but that are not committed by one of the other means specified in section 189.

Recent opinions attempt to minimize the impact of Anderson by emphasizing that "[Anderson] did not refashion the elements of first degree murder or alter the substantive law of murder in any way" and that the "[t]he Anderson guidelines are descriptive, not normative." The court has described the goal of Anderson as being "to aid reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse." Yet, rather than seeing Anderson as an "aid" to its evidentiary review, the court now appears to view it as an obstacle to overcome, a hoop that must be jumped through. While paying lip service to the application of the categories of relevant evidence, the court has ignored Anderson's underlying message, namely the necessity for meaningful distinction between murders of the first and second degree.

The court in Anderson said,

> [g]iven the presumption that an unjustified killing of a human being constitutes murder of the second, rather than of the first, degree, and the clear legislative intention to differentiate between first and second degree murder, we must determine in any case of circumstantial evidence whether the proof is such as will furnish a reasonable foundation for an inference of preméditation and deliberation, or whether it "leaves only to conjecture and surmise the conclusion that defendant either arrived at or carried out the intention to kill as the result of a concurrence of deliberation and preméditation."

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294. Some states explicitly incorporate such concerns into their homicide schemes. See, e.g., OKLA. STAT. tit. 21 § 701.7 C (West Supp. 2001) (stating that "[a] person commits murder in the first degree when the death of a child results from the willful or malicious injuring, torturing, maiming or using of unreasonable force by said person . . . .").


298. id.

The court seems to have stood this observation on its head. Now, rather than protecting against it, the court itself engages in such "conjecture" and "surmise" in order to sustain first degree murder convictions against sufficiency of the evidence challenges.

A brief review focusing on shared characteristics of recent decisions illustrates the court's current approach to evidentiary review. Beginning with the "manner of killing" evidence, each of these recent cases have in common the fact that the manner in which the killing was accomplished provided no evidence of prior thought and reflection. Some involved killings carried out with great violence and brutality,\(^{300}\) in others the manner of killing was somewhat less violent and brutal.\(^{301}\) But in none did the means of the killing, in itself, provide evidence of premeditation and deliberation.\(^{302}\) In the Anderson opinion the court said,

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\text{it is well established that the brutality of a killing cannot in itself support a finding that the killer acted with premeditation and deliberation. "If the evidence showed no more than the infliction of multiple acts of violence on the victim, it would not be sufficient to show that the killing was the result of careful thought and weighing of considerations."}^{303}
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Recent opinions do not indicate that the court now disagrees with this view, at least theoretically. So in each of these cases, the court had to look elsewhere, to planning activity and/or motive evidence, to establish proof of premeditation and deliberation.

However, evidence of planning and motive in these cases was similarly problematic. Planning activity is the category of evidence most directly probative of premeditation and deliberation. In each of these cases the evidence of planning was flawed in one respect or another. In some, the evidence was just remarkably weak and based on infer-

\(^{300}\) See People v. Alcala, 685 P.2d 1126 (Cal. 1984); People v. Frank, 700 P.2d 415 (Cal. 1985); People v. Hovey, 749 P.2d 776 (Cal. 1988); People v. Pensinger, 805 P.2d 899 (Cal. 1991); Thomas, 828 P.2d at 101; Perez, 831 P.2d at 1159; People v. Sanchez, 906 P.2d 1129 (1995).

\(^{301}\) See People v. Wharton, 809 P.2d 290 (Cal. 1991); People v. Lucero, 750 P.2d 1342 (Cal. 1988).

\(^{302}\) The deaths in Alcala, Hovey, Frank, and Pensinger were a result of bizarre and perverse violence. In Lucero, the deaths were caused by blunt trauma and strangulation, apparently accomplished with the victim's necklace. In Wharton the victim suffered blows from a blunt instrument and died from asphyxia. In Thomas, although death was caused by gunshot, the victim was first severely beaten. In both Perez and Sanchez, the deaths were caused by numerous stab wounds.

\(^{303}\) Anderson, 447 P.2d at 947 (quoting People v. Caldwell, 279 P.2d 539 (Cal. 1955)).
ence and speculation. In others there was significant evidence of planning, but the evidence did not necessarily suggest a plan to kill. At a minimum, the evidence must be clear that defendant considered and resolved that he was willing to kill if the need to do so arose. Evidence that the defendant planned for another crime cannot, in itself, establish premeditation and deliberation to kill. Not one of the cases involved the kind of clear, unequivocal planning activity evidence that could establish premeditation and deliberation on its own, without assistance from either evidence regarding the manner of killing (concededly not present in any of these cases) or strong motive evidence.

Motive evidence in these cases was even more elusive than planning evidence. In several of the cases the court suggested that the motive had been to eliminate a witness. In the first case in which this argument was made, there was some evidence that defendant may have had such an intent. Later this rationale was used indiscriminately, where facts did not indicate other eyewitnesses to the homicide and with no suggestion that the victim had witnessed a crime other than the potential homicide itself. In such circumstances this rationale is, in essence, merely a restatement of the fact that defendant intended the fatal attack. In other cases, the motive evidence cited by the court was little more than speculation.

304. For example, in Wharton the “evidence” consisted primarily of unsupported prosecutorial speculation regarding the whereabouts of the hammer before the killing. Wharton, 809 P.2d at 303. In Thomas the court found planning based primarily on the assumption that the accused had to go get a rifle prior to the killing. This assumption, in turn, was based on a witness's failure to say whether, when he saw him earlier, the defendant had a rifle, this despite the fact that the witness was not asked this question. In Perez, the court relied primarily on evidence that the defendant's car was not parked in the driveway of the residence, that entry into the residence was not forced, and that the defendant might have obtained a second knife from the kitchen at some point in the deadly assault. See Alcala, 685 P.2d at 1134; Hovey, 749 P.2d at 776; Frank, 700 P.2d at 415; Pensinger, 805 P.2d at 899 (planning regarding abduction for sexual assault); Sanchez, 906 P.2d at 1129 (possible plan to commit robbery); Lucero, 750 P.2d at 1342 (possible plan to lure victims into defendant's home).

305. See Alcala, 685 P.2d at 1134; Hovey, 749 P.2d at 776; Frank, 700 P.2d at 415; Pensinger, 805 P.2d at 899 (planning regarding abduction for sexual assault); Sanchez, 906 P.2d at 1129 (possible plan to commit robbery); Lucero, 750 P.2d at 1342 (possible plan to lure victims into defendant's home).

306. In Hovey, the defendant's cellmate testified to statements made by defendant indicating that he killed the victim because the blindfold he had placed over her eyes slipped and enabled her to see defendant so that she could later identify him to the police. See Hovey, 749 P.2d at 780.


308. In Wharton, the court suggested the motive might have been theft, based on the fact that defendant had apparently taken property from the victim earlier, although the court itself admitted such evidence was weak. See Wharton, 809 P.2d at 351. In Thomas, the prosecutor had argued a sexual motive, though no evidence of a sexual assault was offered. The trial judge described the killing as "without apparent motive, nor any rhyme or reason." People v. Thomas, 828 P.2d 101, 138 (Cal. 1992). On appeal the court relied upon
According to the *Anderson* opinion, cases in which the court found sufficient evidence of premeditation and deliberation typically had evidence in all three categories. Not one of these cases had substantial evidence in *any* of the categories.

One other aspect of recent decisions echoes the court's earliest doctrinal period—that is the re-emergling emphasis on the potentially instantaneous nature of these mental states. With increasing regularity, after a review of evidence that suggests a last minute decision to kill, the court then notes, "[t]he true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly." From the beginning, this issue of the time required to premeditate and deliberate has plagued any effort to distinguish these elements from the intent to kill. If the thoughts constituting premeditation and deliberation can occur with such "great rapidity," what distinguishes them from the intent to kill? Can any ephemeral difference that might exist have been intended to justify the determination of whether someone lived or died? In this regard, the court's suggestion that actions taken in the midst of a deadly assault may support an inference that a cool, reflective thought process sufficient to constitute premeditation and deliberation occurred is especially troubling.

The court no longer makes any serious pretense of distinguishing first from second degree murder. Its result-oriented manipulation of *Anderson* factors, coupled with repeated reliance on the "great rapidity" with which an accused can deliberate and premeditate, has resulted in first degree murder convictions being affirmed where there was no substantial evidence of premeditation and deliberation, where the crime is indistinguishable from an intentional but unplanned murder. The *Anderson* categories are important not because they were listed in an opinion written more than thirty years ago. Rather, they are important, indeed critical, because these categories describe the kinds of evidence that are logically relevant to determining whether the accused engaged in the kind of forethought and reflection involved in premeditation and deliberation. As the court's recent deci-

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310. *Sanchez*, 906 P.2d at 1149 (*quoting* *Perez*, 831 P.2d at 1159, *quoting* *Thomas*, 156 P.2d at 7).
311. *See* id. at 1149.
sions demonstrate, if these factors are not applied honestly and rigorously, the current statutorily defined difference between first and second degree murder simply evaporates.

C. A Coda: People v. Cortez

The most recent evidence of how far the court has retreated toward its earliest doctrinal period came in People v. Cortez, a case in which the court considered the requirements for proof of conspiracy to commit murder, rather than direct consideration of the elements of murder itself. The defendant was charged with murder for the death of a companion based on allegations that his actions provoked the response of rival gang members who killed the companion. He was also charged with conspiracy to commit murder on the theory that he agreed with his companion (the victim of the murder) to murder one or more members of the rival gang. The jury was unable to reach a verdict on the murder charge but did convict on the conspiracy charge. On appeal the defendant argued that the trial court had erred in failing to require the jury to determine the degree of the murder alleged as the target offense of the conspiracy. The court considered whether the crime of conspiracy to commit murder is divisible into degrees with differing punishments, or instead, is a unitary crime, with the same penalty as first degree murder.

In a conspiracy to murder, the participants must intend to kill. In Cortez the majority held that intent to kill plus conspiratorial agreement equals conspiracy to commit first degree murder. In so holding,
the majority appeared to equate conspiratorial agreement with premeditation and deliberation.\textsuperscript{317}

Closer examination of the majority’s underlying assumptions highlights the implications of this equation. While agreeing that most conspiracies to commit murder would be to commit first degree murder, in dissent Justice Kennard argued that a conspiracy to commit second degree murder was theoretically possible. To illustrate her point, she suggested the following situations:

[W]ith a shout of “let’s get him,” two friends who have been drinking all night in a bar can, without premeditation and deliberation, impulsively form and share the intent to kill when their sworn enemy walks in. Similarly, a sudden and unexpected encounter on disputed turf between groups from two different gangs can similarly lead to a spontaneous and unreflective agreement to kill.\textsuperscript{318}

The majority opinion expressed no disagreement with Justice Kennard’s supposition that these examples illustrate conspiracies, and thus apparently was willing to assume that these informal, spontaneous understandings were sufficient to constitute “agreement” for purposes of conspiracy liability. Given the majority’s equation of conspiratorial agreement with premeditation and deliberation, one can infer that the majority’s view of premeditation and deliberation is similarly limited.\textsuperscript{319}

Using a slight variation on Justice Kennard’s example, the implications of \textit{Cortez} beyond the realm of conspiracy become apparent. Assume one man at the bar sees his enemy enter and impulsively decides to and does kill him. Presumably he has committed intentional

\textsuperscript{317} See \textit{Cortez}, 960 P.2d at 548 (Mosk, J., concurring). There is no indication in the \textit{Cortez} decision that the court has reverted to a position that equates premeditation and deliberation with the intent to kill.

\textsuperscript{318} Id. at 554 (Kennard, J., dissenting).

\textsuperscript{319} The majority’s approving quote from Justice Mosk’s concurring opinion in \textit{Swain}, supports this inference:

\textit{[Conspiracy to commit murder] does not require, as a factual matter, a premeditated and deliberate intent to kill unlawfully. But an intent of such character is present in the context of a conspiracy, practically by definition, because it does not arise of a sudden within a single person but is necessarily formed and then shared by at least two persons.}

\textit{Cortez}, 960 P.2d at 543.

What Justice Mosk meant when he said “an intent of such character is present in the context of a conspiracy, \textit{practically by definition}” is not clear. The inclusion of the word “practically” suggests there might be circumstances in which such an intent would not be present (otherwise he simply could have said “by definition”). However, if Justice Mosk was suggesting this possibility, then he presumably would have agreed with Justice Kennard whose dissent was premised on her belief that a conspiracy to commit second degree murder is theoretically possible.
second degree murder. If, before acting on his decision, he pauses long enough to say to himself, "I'm going to do it," has he then committed premeditated and deliberate first degree murder? The rationale of the decision in Cortez suggests the majority's answer would be yes.

In deciding Cortez, the court considered at length two earlier decisions: People v. Kynette\(^{320}\) and People v. Horn.\(^{321}\) Kynette, decided in 1940 near the end of the earliest doctrinal period, held that conspiracy to commit murder was, as a matter of law, conspiracy to commit first degree murder.\(^{322}\) Horn, decided thirty-four years after Kynette, held that an agreement between two persons to kill, if reached without malice aforethought, would constitute conspiracy to commit voluntary manslaughter.\(^{323}\) The Horn opinion criticized the reasoning in Kynette and suggested that, if two persons agreed to kill but did so without premeditation and deliberation, the resulting conspiracy would be to commit second degree murder.\(^{324}\)

The majority in Cortez concluded that the authority of the Horn decision had been undercut by two later developments—the 1981 amendment to section 189 providing that premeditation and deliberation did not require "mature and meaningful reflection"\(^{325}\) and the statutory abolition of the "diminished capacity" defense.\(^{326}\) The court therefore concluded Horn was no longer good law.\(^{327}\) This argument is simply a red herring. Neither of these changes affected in any way the central question of Cortez—"whether proof of an agreement to kill necessarily and inevitably establishes premeditation and deliberation

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320. 104 P.2d 794 (Cal. 1940).
321. 524 P.2d 1300 (Cal. 1974).
322. The issue before the court in the Kynette case was whether the trial court acted improperly when it excused certain jurors who were conscientiously opposed to the death penalty. Kynette, 104 P.2d at 801. The court held that that there was no error because conspiracy to commit murder was, by definition, conspiracy to commit first degree murder, at that time a capital crime subject to the death penalty or life imprisonment. See id.
323. The defendants in Horn had argued that, because of their state of intoxication, they did not act with malice aforethought and premeditation and deliberation as would be required to constitute conspiracy to commit first degree murder. That is, they contended that the proof of their intoxication tended to prove the nonexistence of required mental states. Introduction of such evidence to "disprove" mental state came to be referred to as a "defense of diminished capacity." (See Mounts, supra note 27, at 353–59 for discussion of why this label was a "misnomer.") The facts in the Horn case and the legal doctrine applicable at the time the case was decided made the opinion's use of the premeditation and deliberation terminology of Wolff and of diminished capacity terminology a given.
324. See Horn, 524 P.2d at 1305–06.
325. See discussion supra Part V.
326. See discussion supra Part V.
327. See Cortez, 960 P.2d at 544.
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or their equivalent?"\(^{328}\) This question is impossible to answer without first clearly resolving the related questions of "what is meant by premeditation and deliberation?" How are these elements affirmatively defined?

The amendment to section 189, by its express language, addressed only the question of what is not required to prove premeditation and deliberation; it made no pretense of defining what is required to prove these mental elements. In other words, the amendment sheds no light on the affirmative definition of these elements. The argument based on the "abolition" of the diminished capacity defense similarly misses the point. The defendant's argument in Cortez was not a "diminished capacity" argument. He made no argument that intoxication or mental disease or defect interfered with his ability to premeditate or deliberate (or engage in similar mental processes vis-à-vis the agreement). Rather, he argued that the state had not met its affirmative burden of proving the mental state required.

Horn's relevance to Cortez had nothing to do with the Wolff definition of premeditation and deliberation or the diminished capacity defense. Rather its relevance was premised on a more essential message—reaffirmation of what was first explicitly articulated in People v. Holt.\(^{329}\) decided four years after Kynette and thirty years before Horn. There the court observed: "Dividing . . . homicides into murder and . . . manslaughter was a recognition of the infirmity of human nature. Again dividing the offense of murder into two degrees is a further recognition of that infirmity and of difference in the quantum of personal turpitude of the offenders."\(^{330}\) Horn reaffirmed this message by its clear recognition of the three distinct forms of intentional homicide created by California's statutory scheme—second degree murder based on intent to kill, voluntary manslaughter based on a mitigated intent to kill,\(^{331}\) and first degree murder based on intent to

\(^{328}\) Later cases involving malice aforethought show that "abolition" of the diminished capacity defense does nothing to eliminate such questions. See People v. Saille, 820 P.2d 588 (Cal. 1991); People v. Whitfield, 868 P.2d 272 (Cal. 1994); In re Christian S., 872 P.2d 574 (Cal. 1994). See also Mounts, supra note 27, at 359–69.

\(^{329}\) 153 P.2d 21 (Cal. 1944).

\(^{330}\) Id. at 37.

\(^{331}\) In People v. Horn, 524 P.2d 1300 (Cal. 1974), the mitigation was based on intoxication; this form of mitigation may no longer be recognized. See People v. Saille, 820 P.2d 588, 598–99 (Cal. 1991). However, the intent to kill may still be mitigated by adequate provocation. See CAL. PENAL CODE § 192(a) (Lexis Supp. 2002); or imperfect self-defense, In re Christian S., 872 P.2d 574, 583 (Cal. 1994). If two persons agree to kill in circumstances involving a recognized form of mitigation, presumably the rationale of Horn would still apply and lead to a conviction of conspiracy to commit voluntary manslaughter.
kill plus premeditation and deliberation—and by its further recognition of the court's obligation to apply the law in a manner that meaningfully implemented that statutory structure.

The majority opinion in Cortez reflects little interest in, or appreciation of, that message. Indeed, the majority's ability to resolve the case with so little consideration of the meaning of premeditation and deliberation is startling. In the entire opinion, the court's only reference to the definition of premeditation and deliberation was a reiteration of the dictionary definitions of those words. As if to banish any serious reflection on those definitions, the opinion followed immediately with the familiar admonishment that "[t]he process of premeditation and deliberation does not require any extended period of time[;] . . . [t]houghts may follow each other with great rapidity and cold calculated judgment may be arrived at quickly."\(^{332}\)

**Conclusion**

The entire question of degrees of murder is ripe, indeed overripe, for legislative attention. Were it to address the issue, the legislature first would face a critical decision whether to simply eliminate degrees of murder, or instead retain the two degrees but revise and/or clarify the bases of distinction. Changes in the homicide scheme driven by the decisions in Furman v. Georgia and Gregg v. Georgia,\(^{333}\) may argue in favor of eliminating the degrees of murder. The original role of first degree murder, limiting application of the death penalty, has been supplanted substantially by the "special circumstances" scheme enacted in response to these decisions. As a result, a persuasive argument could be made that the degrees of murder no longer play any essential role in the larger homicide scheme.\(^{334}\)

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333. See discussion supra Part I.
334. See Model Penal Code §§ 210.1 cmt. at 2, 3; 210.6 cmt. at 1 (1980) (takes no position regarding the death penalty; recommends elimination of degrees of murder). Alabama, Florida, Georgia, Indiana, Kentucky, Mississippi, Montana, New Jersey, New York, Ohio, Oregon, South Carolina, Texas, and Utah define capital murder and non-capital murder, with no further subdivision of non-capital murder. See supra note 5. In addition, Maine, which has no death penalty, does not subdivide murder into degrees. See id.

In California, with the exception of premeditation and deliberation, virtually all factors that define first degree murder (by means of a destructive device or explosive, torture, lying in wait, poison, in the course of the enumerated felonies, by discharging a firearm from a motor vehicle with the intent to kill) are incorporated already to a greater or lesser degree within the special circumstances scheme. See Cal. Penal Code § 190.2 (West Supp. 2002).
Alternatively, the legislature could decide that non-capital murder encompasses a sufficiently broad range of culpability to justify retaining its division into degrees. If so, the legislature would next decide whether the current grounds should be maintained or other bases for distinction adopted. If the current grounds are retained, the legislature must resolve existing ambiguities. Are premeditation and deliberation elements distinct from the intent to kill? If so, on what basis is a premeditated and deliberated murder distinguished from one that is simply intentional? If not, what distinction between the two degrees of murder was intended? If the legislature elected to discard the current bases of distinction, it must then find alternative grounds that both reflect current societal consensus regarding the right balance between culpability and harm and also allow for principled application.

Little suggests that the legislature is inclined to address these issues. The defects in California's homicide scheme have been apparent for decades, if not centuries, and for well over fifty years scholars and members of the court regularly have called for legislative action. Despite glaring flaws in all aspects of the statutory homicide scheme, the legislature persistently has refused to respond in any meaningful way.

The court cannot escape the issue as easily as the legislature. As it faces evidentiary challenges to premeditation and deliberation the court must be mindful of the broader homicide scheme and apply these elements in a manner that ensures first degree murder measurably differs from second degree. The court must resist the temptation to rewrite the statute to incorporate its own standards of culpability, even if those standards are arguably superior to those incorporated in the statute as written and are shared by society at large. While in the short run, such judicial rewriting might lead to the "right result," in the long run, it perpetuates the impenetrable, byzantine quality of California's homicide law, where nothing is ever as it seems, and un-

335. Among the states which have two or more degrees of murder, a number have moved away from reliance on premeditation and deliberation as a basis for distinguishing first degree murder and adopted new criteria in line with more modern notions of culpability. See, e.g., Alaska, Arkansas, Delaware, Hawaii, Louisiana, New York, North Dakota, Oregon, Texas, Utah, Wisconsin. See supra note 5.


337. See discussion supra Part V.
dermines any integrity of the overall statutory scheme.\textsuperscript{338} Furthermore, by getting to the "right result" without statutory authorization, the court eliminates the pressure on the legislature to address California's profoundly flawed homicide statutes. Over two decades ago, a leading criminal law scholar identified California as the only major state with a nineteenth century penal code.\textsuperscript{339} Since then, a new century has arrived and nothing has changed.

\textsuperscript{338} See Mounts, supra note 27, at 375, 377.
\textsuperscript{339} See Fletcher, supra note 14, at 241.