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# A CRITIQUE OF THE WILLFUL, DELIBERATE, AND PREMEDITATED FORMULA FOR DISTINGUISHING BETWEEN FIRST AND SECOND DEGREE MURDER IN NEW MEXICO

LEO M. ROMERO\*

## I. INTRODUCTION

Although the New Mexico statutes include two degrees of murder—murder in the first degree<sup>1</sup> and murder in the second degree<sup>2</sup>—they are not adequately defined. Both degrees of murder embrace intentional homicides and unintentional homicides, but neither statutory law, uniform jury instructions, nor case law give adequate guidance for determining which homicides fall within the first degree category and which fall within the second degree category. In addition, in its ranking of homicides, New Mexico law fails to reflect the relative culpability of persons who commit different killings.

This Article examines the New Mexico law on intentional murder as it appears in the statutes, the uniform jury instructions, and the reported appellate cases. It evaluates the law in New Mexico in terms of the assignment of intentional homicides to the first or second degree categories of murder. In particular, this Article analyzes the “willful, deliberate and premeditated”<sup>3</sup> formula for distinguishing a first degree from a second degree intentional murder. This Article shows the problems that attend the application of the deliberation and premeditation distinction and the flaws in the premise supporting the distinction. Finally, the Article concludes with proposed legislative revisions that will eliminate the distinction and remedy the problems in the current law. Unintentional murders will not be addressed in this Article. Felony murder and depraved mind murder will be the subject of a later article. Furthermore, this Article does not address the New Mexico law on voluntary or involuntary manslaughter except as they relate to the subject of murder.

## II. NEW MEXICO MURDER STATUTE

The current New Mexico murder statute<sup>4</sup> includes amendments made by the legislature in 1980.<sup>5</sup> Section 30-2-1 of the New Mexico Statutes

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1. N.M. STAT. ANN. § 30-2-1(A) (Repl. Pamp. 1984).

2. *Id.* § 30-2-1.

3. This language appears in N.M. STAT. ANN. § 30-2-1(A)(1) (Repl. Pamp. 1984), defining one of the three types of first degree murder.

4. *Id.* § 30-2-1 (Repl. Pamp. 1984).

5. Laws 1980, ch. 21, § 1 (codified at N.M. STAT. ANN. § 30-2-1 (Repl. Pamp. 1984)).

Annotated provides for three types of murder in the first degree and for one type of murder in the second degree.<sup>6</sup> Unlike the pre-1980 statute that defined murder in terms of malice aforethought and then specified the murders that qualified as first degree murders,<sup>7</sup> the current statute does not use the term "malice aforethought" for defining murder. Instead, it defines the homicides that qualify as murder in the first degree and those that qualify as murder in the second degree. First degree murder is defined as the killing of another "(1) by any kind of willful, deliberate and premeditated killing; (2) in the commission of any felony; or (3) by any act greatly dangerous to the lives of others, indicating a depraved mind regardless of human life."<sup>8</sup> Murder in the second degree is committed under the current statute when a person "in performing the acts which cause the death, . . . knows that such acts create a strong probability of death or great bodily harm to that individual or another."<sup>9</sup>

The structure of the New Mexico homicide statute can be best analyzed by dividing homicides into intentional killings and unintentional killings because both types of killings may fall within three different homicide offenses. An intentional homicide includes only those killings where the actor desires the death of another human being; it does not include a killing where the actor acts intentionally but without the purpose of bringing about death.<sup>10</sup> For example, a person who intentionally shoots at the victim to scare him, but without intending the result of death, does not commit an intentional homicide if the discharge should hit the victim and the victim should die. Even though the act causing death, the shooting, was intentional, the killing amounts to an unintentional homicide because the person did not intend the consequence of death. Hence, it is important to distinguish between intentional shooting and intentional killing.<sup>11</sup>

Intentional killings without justification or excuse may be murder in the first degree,<sup>12</sup> murder in the second degree,<sup>13</sup> or voluntary manslaughter.<sup>14</sup> Unintentional killings may be murder in the first

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6. N.M. STAT. ANN. § 30-2-1 (Repl. Pamp. 1984).

7. N.M. STAT. ANN. § 40A-2-1 (Repl. Pamp. 1975) (recodified at N.M. STAT. ANN. § 30-2-1 (1978) (amended 1980)).

8. N.M. STAT. ANN. § 30-2-1(A) (Repl. Pamp. 1984).

9. *Id.* § 30-2-1(B) (Repl. Pamp. 1984).

10. See generally 2 W. LAFAYE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW 191 (1986) (hereinafter LaFave & Scott). Although the traditional view of intent included knowledge that the result of death was substantially certain to occur, the modern view limits intent "to instances where it is the actor's purpose to cause the harmful result. . . ." *Id.*

11. See R. PERKINS & R. BOYCE, CRIMINAL LAW 83 (3d ed. 1982) (hereafter Perkins & Boyce), for a discussion of the difference between intentional and unintentional acts and intentional and unintentional killings.

12. See N.M. STAT. ANN. § 30-2-1(A)(1) (Repl. Pamp. 1984); N.M. STAT. ANN. U.J.I. Crim. 14-201 (Recomp. 1986).

13. See *State v. Johnson*, 103 N.M. 364, 707 P.2d 1174 (Ct. App. 1985), and the discussion of second degree intentional murder *infra* in text at pp. 11-18.

14. N.M. STAT. ANN. § 30-2-3(A) (Repl. Pamp. 1984); N.M. STAT. ANN. U.J.I. Crim. 14-220 and 14-221 (Recomp. 1986). Although the definition of voluntary manslaughter does not specifically

degree,<sup>15</sup> murder in the second degree,<sup>16</sup> or involuntary manslaughter.<sup>17</sup> Significant differences in punishment attach to the specific degrees of murder and types of manslaughter. For example, an intentional homicide classified as firstdegree murder is a capital felony subject to a maximum punishment of death or life imprisonment.<sup>18</sup> An intentional homicide classified as voluntary manslaughter is subject to a maximum penalty of three years imprisonment.<sup>19</sup> The range of punishment for unintentional homicides is equally broad. An unintentional killing may qualify as a murder in the first degree subject to life imprisonment<sup>20</sup> or as involuntary manslaughter subject to a prison term of 18 months.<sup>21</sup>

The following chart illustrates the current New Mexico homicide scheme

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require an intent to kill, this offense encompasses intentional killings committed in the heat of passion upon adequate provocation. *See generally* 2 LaFave & Scott, *supra* note 10, at 252-53; Perkins & Boyce, *supra* note 11, at 83. Voluntary manslaughter may also embrace intent-to-inflict serious bodily injury. *Id.* For a discussion of voluntary manslaughter, see Romero, *Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice*, 12 N.M.L. REV. 747 (1982) (hereinafter Romero).

15. N.M. STAT. ANN. §§ 30-2-1(A)(2) and 30-2-1(A)(3) (Repl. Pamp. 1984). Neither felony murder, as defined in subsection (2), nor depraved mind murder, as defined in subsection (3), of the first degree murder statute requires an intent to kill *mens rea*. *See also* the uniform jury instructions for felony murder, N.M. STAT. ANN., U.J.I. Crim. 14-201 (Recomp. 1986), and for depraved mind murder, N.M. STAT. ANN., U.J.I. Crim. 14-203 (Recomp. 1986). *See generally* 2 LaFave & Scott, *supra* note 10, at 199-200 (depraved heart murder) and 206 (felony murder); Perkins & Boyce, *supra* note 11, at 59-60 (depraved mind murder) and 61 (felony murder).

16. N.M. STAT. ANN. § 30-2-1(B) (Repl. Pamp. 1984). *See also* N.M. STAT. ANN. U.J.I. Crim. 14-210 and 14-211 (Recomp. 1986). Appellate decisions also confirm that second degree murder does not require an intent to kill. *See, e.g.,* State v. Doe, 100 N.M. 481, 484, 672 P.2d 654, 657 (1983); State v. Tapia, 81 N.M. 274, 276, 466 P.2d 551, 652-53 (1970).

17. N.M. STAT. ANN. § 30-2-3(B) (Repl. Pamp. 1984). *See also* N.M. STAT. ANN. U.J.I. Crim. 14-230 and 14-231 (Recomp. 1986). Neither of the two types of involuntary manslaughter specified in the statute and the subject of separate instructions, *id.*, requires an intent to kill. For cases that state that involuntary manslaughter involves unintentional homicides, *see, e.g.,* State v. Pruett, 27 N.M. 576, 203 P. 840 (1921); State v. King, 90 N.M. 377, 563 P.2d 1170 (Ct. App. 1977).

18. N.M. STAT. ANN. § 30-2-1(A) (Repl. Pamp. 1984) classifies first degree murder as a capital felony. N.M. STAT. ANN. § 31-18-14(A) (Repl. Pamp. 1987) provides that a capital felony may be punished by death or imprisonment for life. Whether a defendant should be sentenced to death or life imprisonment depends on the existence of one or more specified aggravating circumstances and the absence of mitigating factors. *Id.* §§ 31-20A-2, 31-20A-5, 31-20A-6 (Repl. Pamp. 1987). The procedure for determining whether the death penalty should be imposed for a capital felony is set forth in N.M. STAT. ANN. §§ 31-20A-1 to -6 (Repl. Pamp. 1987).

19. N.M. STAT. ANN. § 30-2-3(A) (Repl. Pamp. 1984) classifies voluntary manslaughter as a third degree felony. N.M. STAT. ANN. § 31-18-15 (Repl. Pamp. 1987) authorizes a basic sentence of three years imprisonment for a third degree felony. The judge may, however, increase the basic sentence by one-third if aggravating circumstances exist or reduce the basic sentence by one-third if mitigating circumstances exist. *Id.* § 31-18-15.1 (Repl. Pamp. 1987). The judge may also choose to defer sentencing or to suspend the sentence and place the defendant convicted of a third degree felony on probation. *See id.* § 31-20-3 (Repl. Pamp. 1987).

20. N.M. STAT. ANN. § 30-2-1(A)(2)(3) (Repl. Pamp. 1984) classifies felony murder and depraved mind murder as capital felonies. N.M. STAT. ANN. § 31-18-14(A) (Repl. Pamp. 1987) provides that a capital felony may be punished by death or imprisonment for life.

21. N.M. STAT. ANN. § 30-2-3(B) (Repl. Pamp. 1984) classifies involuntary manslaughter as a fourth degree felony. N.M. STAT. ANN. § 31-18-15(A) (Repl. Pamp. 1987) authorizes a basic sentence of 18 months imprisonment for a fourth degree felony. The judge may increase, decrease, suspend, or defer a sentence in accordance with the provisions in N.M. STAT. ANN. §§ 31-18-15.1, 31-20-3 (Repl. Pamp. 1987). *See also supra* note 19.

by listing the types of homicides and the penalties attached to each:

<i>Type of Homicide</i>	<i>Felony Degree</i>	<i>Penalty</i>
Murder—First Degree	Capital Felony	Death or Life
Murder—Second Degree	Second Degree	9 years
Voluntary Manslaughter	Third Degree	3 years
Involuntary Manslaughter	Fourth Degree	18 months

### III. NEED FOR CLEAR AND WORKABLE DISTINCTIONS BETWEEN FIRST AND SECOND DEGREE INTENTIONAL MURDER

The New Mexico homicide statute establishes a hierarchy of homicides for purposes of allocating punishment.<sup>22</sup> Although all homicides involve a killing of another human being, the division of homicides into four categories reflects the view that not all killings deserve the same punishment because killings can be distinguished in terms of their relative gravity.<sup>23</sup> The more reprehensible the homicide, the greater the punishment the killing should warrant. The grading of homicides on the basis of relative seriousness also reflects differences in stigma and moral wrongdoing.<sup>24</sup>

Although all homicides are in some sense different, the division of homicides into categories should be based on principled, clear, and workable distinctions. Distinctions are principled in the sense that first degree murder includes killings that are more heinous than those killings encompassed by second degree murder. Distinctions are clear to the extent that they meaningfully differentiate the two degrees of murder; for example, the line between murder in the first degree and murder in the second degree should be clearly recognizable. Finally, distinctions are workable if the lines between the different classifications are understandable by a jury of lay people in applying the distinctions and determining the degree of homicide. Because the different classifications of homicides should reflect differences in culpability, culpability terms should be defined precisely to clarify the distinctions.

The current New Mexico murder statute fails to provide clear and

22. N.M. STAT. ANN. § 30-2-1 and 30-2-3 (Repl. Pamph. 1984). See also the chart illustrating the hierarchical scheme of the various homicides in terms of relative punishment at *supra* text p. 4.

23. See C. CLARKSON AND H. KEATING, CRIMINAL LAW: TEXT AND MATERIALS 559 (1984) (hereinafter Clarkson & Keating) for a discussion of the reasons for differentiation among homicides in terms of their perceived seriousness. The seriousness or gravity of an offense is generally defined in terms of the culpability of the killer. For example, planning and calculating the death of another has traditionally been viewed as a particularly heinous form of killing. G. FLETCHER, RETHINKING CRIMINAL LAW 253 (1978) (hereinafter Fletcher). Also, killing in the heat of passion upon adequate provocation reflects a lesser culpability because "it is generally thought that the actor's self-control is sufficiently impaired to warrant classification as a lower degree of criminal homicide." *Id.* at 243.

24. See Clarkson & Keating, *supra* note 23, at 559.

workable distinctions between the degrees of murder and between murder and manslaughter because the terms used to make the distinctions are undefined.<sup>25</sup> The New Mexico Criminal Code does not define the types of culpability that distinguish first from second degree murder or even murder from manslaughter.<sup>26</sup> For example, the present murder statute employs the following culpability terms to denote the type of culpability required: knows, willful, deliberate, premeditated, and depraved mind.<sup>27</sup> The absence of definitions for these terms makes it unclear whether the words refer to different types of culpability. The Uniform Jury Instructions do not even use the statutory phrase of "willful, deliberate and premeditated killing" for first degree murder.<sup>28</sup> Instead, the instruction redefines this type of first degree murder in terms of a "deliberate intention to take away the life . . . ,"<sup>29</sup> and then defines "deliberate."<sup>30</sup> The Uniform Jury Instructions' definition of deliberate does not appear in the New Mexico statute or in any reported New Mexico cases. None of the other culpability terms used to describe the different degrees of homicide are defined in the Uniform Jury Instructions.

The need for clear definitions to distinguish the degrees of homicide exists because both intentional and unintentional killings may range from manslaughter to first degree murder.<sup>31</sup> An intentional killing may fall within three different statutory classifications of homicide offenses under the New Mexico Criminal Code.<sup>32</sup> A person who intentionally kills another human being, in the sense that he not only acts intentionally but also acts with the purpose of bringing about the result of death, may be convicted of the crimes of first degree murder, second degree murder, or voluntary manslaughter in New Mexico.<sup>33</sup> Yet, only the first degree murder statute in New Mexico refers to an intent to kill in its definition.<sup>34</sup> The "willful,

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25. The homicide sections of the New Mexico Criminal Code, N.M. STAT. ANN. §§ 30-2-1 to 30-2-9 (Repl. Pamp. 1984) contain no section defining the terms used in the homicide provisions.

26. The New Mexico Criminal Code has no section specifying the mens rea concepts applicable to the code and no section defining the culpability terms used in the definitions of the criminal offenses in the code. For a critique of the New Mexico mens rea doctrines, see Romero, *New Mexico Mens Rea Doctrines and the Uniform Jury Instructions: The Need for Revision*, 8 N.M.L. REV. 127 (1978); Thompson & Gagne, *The Confusing Law of Criminal Intent in New Mexico*, 5 N.M.L. REV. 63 (1974).

27. "Knows" appears in the second degree murder statute. N.M. STAT. ANN. § 30-2-1(B) (Repl. Pamp. 1984). The other terms appear in the first degree murder statute. *Id.* § 30-2-1(A) (1984).

28. N.M. STAT. ANN. § U.J.I. Crim. 14-201 (Recomp. 1986).

29. *Id.* at paragraph 2.

30. *Id.* following paragraph 3.

31. See *supra* notes 12-17 and accompanying text.

32. See *supra* notes 12-14 and accompanying text.

33. *Id.*

34. The use of the phrase "willful . . . killing" in N.M. STAT. ANN. § 30-2-1(A)(1) (Repl. Pamp. 1984), suggests an intent to kill although the statutory language does not include the words "intent" or "intentional."

deliberate and premeditated killing" language in the first degree murder statute connotes an intent to kill.<sup>35</sup> Indeed, the New Mexico Supreme Court has interpreted this degree of homicide as requiring a specific intent to kill.<sup>36</sup> The second degree murder statute includes no language suggesting an intent to kill. Instead, this offense is defined in terms of knowing that one's acts create a strong probability of death or great bodily harm.<sup>37</sup> Likewise, voluntary manslaughter is defined, not in terms of intent, but in terms of sudden quarrel and heat of passion.<sup>38</sup> The following chart illustrates the three statutory classifications within which an intentional homicide may fall and the statutory definitions upon which these classifications are based.

<i>Types of Intentional Homicides</i>	<i>Statutory Definitions</i>
Murder—First Degree	Willful, deliberate, and premeditated killing
Murder—Second Degree	Causing death knowing that one's acts create a strong probability of death or great bodily harm
Voluntary Manslaughter	Killing committed upon a sudden quarrel or in the heat of passion

#### IV. SECOND DEGREE INTENTIONAL MURDER

The current New Mexico murder statute appears to exclude intentional homicides from the category of second degree murder and to relegate intentional killings to first degree murder. The second degree murder statute does not use any terms that suggest that intentional killings fall within this crime,<sup>39</sup> but the New Mexico appellate courts have construed this offense to include intent-to-kill homicides.<sup>40</sup>

##### A. *History of the 1980 Amendments to New Mexico Murder Statutes*

Before the 1980 amendments, murder was defined as a killing with

35. *Id.*

36. *See, e.g.*, State v. Privett, 104 N.M. 79, 80, 717 P.2d 55, 56 (1986).

37. N.M. STAT. ANN. § 30-2-1(B) (Repl. Pamp. 1984).

38. *Id.* § 30-2-3(A).

39. *Id.* § 30-2-1(B) defines second degree murder in terms of "knows that such acts create a strong probability of death or great bodily harm . . ." This language defines what treatises and the Model Penal Code refer to as "recklessness." *See e.g.*, 1 LaFave & Scott, *supra* note 10, at 336-37; Perkins & Boyce, *supra* note 11, at 849-51; G. WILLIAMS, CRIMINAL LAW 53 (2d ed. 1961); J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 116 (2d ed. 1960); MODEL PENAL CODE § 2.02(2)(c) (Official Draft 1962).

40. State v. Johnson, 103 N.M. 364, 707 P.2d 1174 (Ct. App. 1985).

malice aforethought.<sup>41</sup> This common law term denoted the several types of mental states sufficient to establish murder.<sup>42</sup> Malice included an intent to kill.<sup>43</sup> Under the statutory definitions of murder before the 1980 changes, an intentional killing established malice for murder;<sup>44</sup> and if the intentional killing were deliberate and premeditated, the homicide became murder in the first degree.<sup>45</sup> Thus, the pre-1980 law included intentional homicides within both first and second degree murder and distinguished between them on the basis of the "willful, deliberate and premeditated" language.

The New Mexico legislature amended the murder statute in 1980 to eliminate malice as the critical element defining murder.<sup>46</sup> Instead, the legislature separately defined each degree of murder. The amendments retained the "willful, deliberate and premeditated" language in the definition of first degree murder, but did not include intent to kill as part of the definition of second degree murder.<sup>47</sup> The current statute provides that a person commits second degree murder "if in performing the acts which cause the death he knows that such acts create a strong probability of death or great bodily harm to that individual or another."<sup>48</sup>

### *B. Implications of the 1980 Amendments*

The definition of second degree murder after the 1980 amendments may suggest that the New Mexico legislature intended to differentiate

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41. N.M. STAT. ANN. § 40A-2-1 (Repl. Pamp. 1975) (amended 1980) defined murder as the "unlawful killing of one human being by another with malice aforethought, either express or implied, by any of the means with which death may be caused." *Id.* § 40A-2-2 defined malice as follows:

A. Malice is express malice, when there is a deliberate intention, unlawfully to take away the life of a fellow creature and which is manifested by external circumstances capable of proof.

B. Malice shall be implied when no considerable provocation appears, or when all circumstances of the killing show a wicked and malignant heart.

42. "Malice aforethought" no longer approximates its literal meaning. It has come to embrace the various types of murder which the common law recognized: (1) intent-to-kill murder; (2) intent-to-inflict-serious bodily harm murder; (3) depraved mind murder; and (4) felony murder. *See* 2 LaFave & Scott, *supra* note 10, 181-84; Perkins & Boyce, *supra* note 11, at 57-61.

43. *See* 2 LaFave & Scott, *supra* note 10, at 181, 192; Perkins & Boyce, *supra* note 11, at 58-59.

44. N.M. STAT. ANN. § 40A-2-2(A) (Repl. Pamp. 1975) (amended 1980) included an intentional killing within the definition of "express malice." New Mexico appellate cases before the 1980 amendments also viewed an intentional killing as a homicide with malice. *See, e.g.,* State v. Hamilton, 89 N.M. 746, 749, 557 P.2d 1095, 1098 (1976); State v. Sanchez, 27 N.M. 62, 196 P. 175 (1921).

45. N.M. STAT. ANN. § 40A-2-1(A) (Repl. Pamp. 1975) (amended 1980). *See also* State v. Valenzuela, 90 N.M. 25, 559 P.2d 402 (1976); State v. Vigil, 87 N.M. 345, 533 P.2d 578 (1975); State v. Aragon, 85 N.M. 401, 512 P.2d 974 (1973); State v. Smith, 26 N.M. 482, 194 P. 869 (1921). According to these cases, "deliberation" served to distinguish first from second degree intentional murder.

46. Laws 1980, ch. 21, § 1 (codified at N.M. STAT. ANN. § 30-2-1 (Repl. Pamp. 1984)).

47. *Id.*

48. N.M. STAT. ANN. § 30-2-1(B) (Repl. Pamp. 1984).



first and second degree murder on the presence or absence of intent to kill. All intentional killings would be first degree murder. Unintentional killings, where the possibility of great bodily harm or even death was understood but death was not intended, would be second degree murder. This literal reading of the New Mexico murder statute would mean that the legislature intended to make a major change from the pre-1980 law which included intentional killings within second degree murder.

Excluding intentional homicides from the second degree murder category would create a problem when an intentional killing does not rise to the level of "willful, deliberate and premeditated. . . ." <sup>49</sup> Such a homicide would not fall within first degree murder or second degree murder because the "deliberation" requirement for first degree murder would not be met and the "knowing" requirement for second degree murder would not be established. If the intentional killing were committed without sufficient provocation, the homicide would not amount to voluntary manslaughter. <sup>50</sup> Thus, an intentional homicide that was neither deliberate nor sufficiently provoked would go unpunished under the New Mexico homicide law if the murder statute were read literally to exclude intentional killings from the definition of second degree murder.

The legislature may have intended to distinguish between first and second degree murder on the basis of intent to kill when it eliminated the common law term of malice from the definition of murder. By defining second degree murder in terms of knowledge that one's "acts create a strong probability of death or great bodily harm . . .," <sup>51</sup> the legislature may have intended to exclude intentional killings from second degree murder and to reserve intentional homicides for murder in the first degree. On the other hand, the legislature may have intended to eliminate the malice language in the definition of murder when it revised the statute without intending to change the concept of murder. Although no legislative history exists to support either interpretation of the 1980 amendments, the omission of malice may represent an effort to eliminate the confusion in jury instructions caused by the words "malice", "express malice", and "implied malice." <sup>52</sup> The New Mexico Uniform Jury Instructions, which became effective September 1, 1975, had eliminated "mal-

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49. *Id.* § 30-2-1(A)(1).

50. N.M. STAT. ANN. § 30-2-3(A) (Repl. Pamph. 1984); N.M. STAT. ANN. U.J.I. Crim. 14-220 and 14-221 (Recomp. 1986). Sufficient provocation is defined in N.M. STAT. ANN. U.J.I. Crim. 14-222 (Recomp. 1986). For a discussion of the types of evidence that will establish sufficient provocation, see *Romero, supra* note 14.

51. N.M. STAT. ANN. § 30-2-1(B) (Repl. Pamph. 1984).

52. See *State v. Hamilton*, 89 N.M. 746, 557 P.2d 1095 (1976), for a discussion of the problem of confusion raised by terms such as "implied malice" in instructions to the jury.

ice" from the jury instructions on murder,<sup>53</sup> and the legislature may have intended to change the statutory definition of murder to conform to the uniform instructions. The deletion of malice from the murder definition, therefore, may indicate no legislative intent to exclude an intent-to-kill type of second degree murder.

The New Mexico Court of Appeals, in *State v. Johnson*,<sup>54</sup> rejected a literal reading of the murder statute that would necessarily exclude intentional homicides from second degree murder. In construing the murder statute, the court held that intentional killings could satisfy the knowledge requirement in the second degree murder provision. The court reasoned that an intentional killing would always include the elements of second degree murder.<sup>55</sup> The Court of Appeals did not interpret the 1980 amendments, which eliminated the term malice and redefined second degree murder in terms of knowledge, to mean that intentional killings are excluded from second degree murder. In essence, the court in *Johnson* viewed the revisions as a codification of the pre-1980 case law which included intentional killings within second degree murder.<sup>56</sup>

The Court of Appeals' interpretation of the second degree murder statute in *Johnson* is also supported by the logic that suggests that a higher degree of culpability should always be able to satisfy the *mens rea* requirement of a lower degree of culpability. Thus, intent could always satisfy a knowledge requirement, because if one intends the consequences of his actions then, *a priori*, the actor also knows the probable consequences of those actions. In the context of the second degree murder statute, a person who kills intentionally would know that his acts create a strong probability of death or great bodily harm to that individual or another. A number of states, following the lead of the Model Penal Code,<sup>57</sup> have enacted statutory provisions allowing the substitution of a more culpable mental state for the mental state required by a particular statute.<sup>58</sup>

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53. N.M. STAT. ANN. U.J.I. Crim. 14-201 to -203 (Recomp. 1986). The committee commentary offers the following explanation for the elimination of "malice" in the second degree murder instruction:

The jurors are not aided by being told that they must find . . . malice aforethought. Indeed, those terms then have to be defined at great length. Consequently, those terms, and definitions such as "implied malice," are eliminated and the concepts incorporated within the phrase "intent to kill or do great bodily harm."

*Id.* U.J.I. Crim. 2.10 commentary (1978).

54. 103 N.M. 364, 707 P.2d 1174 (Ct. App. 1985).

55. *Id.* at 370, 707 P.2d at 1180.

56. *See, e.g.*, *State v. Aragon*, 85 N.M. 401, 512 P.2d 974 (1973); *State v. Sanchez*, 27 N.M. 62, 196 P. 175 (1921).

57. MODEL PENAL CODE § 2.02(5) (Official Draft 1962).

58. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-202(c)(1978); COLO. REV. STAT. § 18-1-503(3) (1986); OR. REV. STAT. § 161.115(3) (Repl. 1985); TEX. PENAL CODE ANN. § 6.02(e) (Vernon 1974).

## V. WILLFUL, DELIBERATE AND PREMEDITATED FORMULA FOR DISTINGUISHING BETWEEN FIRST AND SECOND DEGREE MURDER

The inclusion of intentional killings in both first and second degree murder presents a problem of determining which intentional homicides fall within which degree of murder. The New Mexico statute uses the "willful, deliberate and premeditated" formula to distinguish first from second degree intentional murder.<sup>59</sup> An intentional killing will be first degree murder if willful, deliberate and premeditated; any other intentional homicide will be second degree murder unless sufficient provocation reduces the homicide from murder to voluntary manslaughter.<sup>60</sup>

The willful, deliberate and premeditated language is not unique to New Mexico. It first appeared in a 1794 Pennsylvania statute<sup>61</sup> that limited the death penalty by dividing murder into two degrees. The Pennsylvania statute reserved the death penalty for deliberate and premeditated murder and certain felony murders.<sup>62</sup> Other states copied the Pennsylvania scheme of dividing murder into two degrees based on the deliberation and premeditation distinction, and the scheme became a common feature in murder statutes in the United States.<sup>63</sup> Although the deliberation and premeditation formula has been the subject of scholarly criticism<sup>64</sup> and court frustration,<sup>65</sup> it has been resilient and remains in many penal codes to date.<sup>66</sup>

59. N.M. STAT. ANN. § 30-2-1(A)(1) (Repl. Pamph. 1984). The "willful, deliberate, and premeditated" language has appeared in the New Mexico statutes since at least 1921. See *State v. Smith*, 26 N.M. 482, 194 P. 869 (1921).

60. See *supra* note 50 and accompanying text.

61. Act of April 22, 1794, 3 Smith Laws 187, § 2 (current version at PA. CONS. STAT. ANN. tit. 18, § 2502(a)). See Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PA. L. REV. 759 (1949) (hereinafter Keedy).

62. See Keedy, *supra* note 61.

63. See Perkins & Boyce, *supra* note 11, at 127.

64. See, e.g., Fletcher, *supra* note 23, at 254; B. CARDOZO, LAW LITERATURE AND OTHER ESSAYS 99-100 (1931) (hereinafter Cardozo); MODEL PENAL CODE § 210.6, Comment at 127 (1980); Michael & Wechsler, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701, 707-09 (1937) (hereinafter Michael & Wechsler); 3 J. STEPHEN, HISTORY OF THE CRIMINAL LAW, 94 (1883) (hereinafter Stephen); Clarkson & Keating, *supra* note 23, at 562-64; Brenner, *The Impulsive Murder and the Degree Device*, 22 FORDHAM L. REV. 274, 280-86 (hereinafter Brenner); KNUDSON, *Murder by the Clock*, 24 WASH. U.L.Q. 305, 305-08 (1939) (hereinafter Knudson).

65. See, e.g., *People v. Anderson*, 70 Cal.2d 15, 447 P.2d 942, 73 Cal. Rptr. 550 (1968), for a discussion of the California Supreme Court's attempts to make meaningful the legislative distinction between first and second degree murder based on deliberation and premeditation. See also Note, *Should Virginia Put The Planning Back Into the Premeditation Required for Murder?*, 40 WASH. & LEE L. REV. 341 (1983), for a history of the Virginia courts' efforts to apply the deliberate and premeditated distinction. For other discussions of problems in applying the deliberate and premeditated formula, see, e.g., Brenner, *supra* note 64; Knudson, *supra* note 64.

66. According to 2 LaFave & Scott, *supra* note 10, at 241, most of the recent state criminal codes have retained the deliberation and premeditation distinction. For a list of jurisdictions retaining the deliberation and premeditation distinction, see the statutes collected in LaFave & Scott, *supra* note 10, at 241 n.36.

The willful, deliberate and premeditated formula for distinguishing between first and second degree murder is not a good basis for either practical or theoretical reasons. Willful, deliberate and premeditated homicides do not necessarily include the most heinous killings that deserve the greater punishment reserved for first degree murder. In addition, the vagueness of the terms makes it difficult to identify which intentional killings are willful, deliberate and premeditated.

Neither the homicide nor the murder statute includes a definition of the terms "willful, deliberate and premeditated." Willful presumably means intentional,<sup>67</sup> but an intentional killing also may amount to second degree murder. Premeditated suggests either that the intent to kill preceded the act of killing, or that the actor thought about killing before forming the intent to kill.<sup>68</sup> To the extent that premeditation refers to a thought process between the intent to kill and the act of killing, this term applies equally to second degree murder since intent actuates conduct. The other sense of premeditation, a thought process preceding the formation of the intent to kill, however, sounds very much like deliberation. Only deliberation, in the sense that it means a mental process that involves careful thought and weighing of the facts and consequences,<sup>69</sup> connotes a concept that is not necessarily included in the notion of intent. Intentional conduct may be the product of deliberation or it may be quite impulsive.<sup>70</sup>

The New Mexico courts have construed the statutory phrase "willful, deliberate and premeditated killing" to mean a killing with the deliberate intention to take away the life of another.<sup>71</sup> Indeed, the courts have held

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67. "Willfully" is a mens rea term commonly used by legislatures but its meaning has proved slippery. See *United States v. Adamson*, 665 F.2d 649 (5th Cir. 1982) for a discussion of the ambiguous nature of the term and how it has been used to signify different states of mind. See also 1 LaFave & Scott, *supra* note 10, at 299.

68. The term "premeditate" suggests a thought process before something, but court decisions interpreting this term do not clearly spell out whether "premeditate" refers to the time before the intent to kill is formed or to the time between the formation of the intent to kill and the act of killing. Most courts place "premeditate" between the intent to kill and the act of killing. See, e.g., *State v. Jones*, 217 Neb. 435, 350 N.W.2d 11 (1984) (premeditation requires that the intent to kill precede the act which caused death); *Sandoval v. People*, 117 Colo. 588, 192 P.2d 423 (1948) (premeditation requires an interval between the determination to kill and the act causing death); *State v. Donnelly*, 190 Cal. 57, 210 P. 523 (1922) (premeditation does not require an appreciable period of time between the intention to kill and the act of killing). 2 LaFave & Scott, *supra* note 10, at 237 n.6, give the following example of premeditation that places it before the intent to kill is formed: "It has been suggested that for premeditation the killer asks himself the question, 'Shall I kill him?'" For a case suggesting that premeditation must occur before, rather than after, the intent to kill, see, e.g., *Commonwealth v. Drum*, 58 Pa. 9, 16 (1868) (time to enable the mind to form the intent to kill). See also Perkins & Boyce, *supra* note 11, at 133.

69. See 2 LaFave & Scott, *supra* note 10, at 237-38; Perkins & Boyce, *supra* note 11, at 132.

70. See Perkins & Boyce, *supra* note 11, at 133.

71. See, e.g., *State v. Valenzuela*, 90 N.M. 25, 30, 559 P.2d 402, 407 (1976); *State v. Vigil*, 87 N.M. 345, 553 P.2d 578 (1975); *State v. Sanchez*, 27 N.M. 62, 196 P. 175 (1921); *State v. Smith*, 26 N.M. 482, 194 P. 869 (1921); *State v. Aragon*, 85 N.M. 401, 403, 512 P.2d 974, 976 (Ct. App. 1973).

that deliberation is the difference between first and second degree intentional murder.<sup>72</sup> The presence of deliberation with intent raises the murder from second degree to first degree. Thus, an intentional and premeditated killing, but without deliberation, is considered second degree murder.

The New Mexico courts have done little to explicate the difference between a deliberate and impulsive killing notwithstanding the significant difference in punishment between the two types of intentional murders. A review of the New Mexico cases and the Uniform Jury Instructions on intentional homicides suggests that intentional killings will generally support an instruction on murder in the first degree. Although most cases do not articulate the reasons why the evidence supports first degree deliberate murder rather than second degree impulsive murder,<sup>73</sup> a few opinions have found sufficient evidence of deliberate intention where the proof, in addition to an intent to kill, included the following types of evidence: (1) motive for the killing;<sup>74</sup> (2) plan or design for the killing;<sup>75</sup> (3) method of killing;<sup>76</sup> and (4) sufficient time for careful thought and weighing of the considerations for and against the killing.<sup>77</sup> No decision has required some or all of the above types of evidence in order to establish a deliberate murder, but several of the decisions have mentioned evidence of one or more of the above types in affirming a deliberate murder conviction.<sup>78</sup>

No New Mexico case reviewing a deliberate intention first degree murder conviction has ever held that the evidence did not support a deliberate murder but instead supported no more than a nondeliberate or impulsive second degree murder. Proof of an intentional killing in the absence of diminished capacity seems to warrant an instruction on and to support a conviction of deliberate murder in all cases.

#### A. *Definition of Deliberate Intent*

Deliberate intention is defined in the New Mexico Uniform Jury Instructions for Criminal Cases which became effective September 1, 1975.<sup>79</sup> Instruction number 14-201 for willful and deliberate murder defines a deliberate intention as a state of mind

arrived at or determined upon as a result of careful thought and the

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72. See cases cited *supra* note 71.

73. See, e.g., *State v. Beach*, 102 N.M. 642, 699 P.2d 115 (1985); *State v. Blea*, 101 N.M. 323, 681 P.2d 1100 (1984); *State v. Johnson*, 99 N.M. 682, 662 P.2d 1349 (1983); *State v. Hamilton*, 89 N.M. 746, 557 P.2d 1095 (1976).

74. See *infra* note 94 and accompanying text.

75. See *infra* note 94 and accompanying text.

76. See *infra* notes 90-97 and accompanying text.

77. See *infra* notes 88-93 and accompanying text.

78. See cases cited *infra* notes 88-97.

79. N.M. STAT. ANN. U.J.I. Crim. 14-201 (Recomp. 1986).

weighing of the consideration for and against the proposed course of action. A calculated judgment and decision may be arrived at in a short period of time. A mere unconsidered and rash impulse, even though it includes an intent to kill, is not a deliberate intention to kill. To constitute a deliberate killing, the slayer must weigh and consider the question of killing and his reasons for and against such a choice.<sup>80</sup>

The New Mexico Supreme Court approved this definition in *State v. Hamilton*.<sup>81</sup>

New Mexico cases belie the premise that the definition of deliberate intention in New Mexico law is clear enough to demarcate deliberate killings from rash or impulsive intentional killings. A study of those cases reveals that almost all intentional killings will support a charge of murder in the first degree unless the defendant can establish his incapacity to deliberate due to intoxication or mental disease or defect.<sup>82</sup> In the absence of diminished capacity, most of the intentional killings in New Mexico result in first degree murder convictions. Apparently, the New Mexico courts view an intentional killing as a deliberate killing if the defendant was neither intoxicated nor suffering from a mental disease or defect.<sup>83</sup> The rash or impulsive killing does not seem to be distinguished from the deliberate killing in the reported cases.<sup>84</sup>

### B. Evidence of Deliberate Intent

Although the definition of deliberate intent in the Uniform Jury Instructions for Criminal Cases appears to distinguish between deliberate and

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80. *Id.*

81. 89 N.M. 746, 557 P.2d 1095 (1976).

82. See, e.g., *State v. McGhee*, 103 N.M. 100, 703 P.2d 877 (1986); *State v. Beach*, 102 N.M. 642, 699 P.2d 115 (1985); *State v. Blea*, 101 N.M. 323, 681 P.2d 1100 (1984); *State v. Chavez*, 101 N.M. 136, 679 P.2d 804 (1984); *State v. Johnson*, 99 N.M. 682, 662 P.2d 1349 (1983); *State v. Hamilton*, 89 N.M. 746, 557 P.2d 1095 (1976) and *State v. Manus*, 93 N.M. 95, 597 P.2d 280 (1979). Each of these cases represents a variety of affirmed first degree murder convictions based on a willful, deliberate, and premeditated theory of murder. The facts in each case range from bar room brawls to lying in wait.

83. See, e.g., *McGhee*, 103 N.M. 100, 703 P.2d 877; *Beach*, 102 N.M. 642, 699 P.2d 115; *Blea*, 101 N.M. 323, 681 P.2d 1100 (1984); and *Valenzuela*, 90 N.M. 25, 559 P.2d 402.

Uniform Jury Instruction 14-5110 provides a defense to murder in the first degree based upon inability to form a deliberate intention to take away the life of another. N.M. STAT. ANN. U.J.I. Crim. 14-5110 (Recomp. 1986). The instruction permits mental disease or disorder and intoxication as the only means of mitigating an intentional murder from first degree to second degree.

84. If the trial court finds, as a matter of law, that there is evidence supporting sufficient provocation, an instruction on voluntary manslaughter must be given. N.M. STAT. ANN. U.J.I. Crim. 14-221 and 14-222. If a rash or impulsive killing does not meet the objective standard of sufficient provocation there is no provision in either the New Mexico Criminal Code or the Uniform Jury Instructions for using insufficient provocation in determining the difference between first and second degree murder. See generally *Romero*, *supra* note 14, at 752-56.

impulsive or rash killings, the courts have provided little guidance about the evidence sufficient to place an intentional homicide on one side or the other of the "deliberate" line. Without guidance with respect to the types of evidence that will support a deliberate murder, virtually all intentional killings will result in jury instructions on first degree murder and the jury will be left to apply its own conception of what deliberate intention means.<sup>85</sup>

The New Mexico appellate courts need to identify the types of evidence that will support a first degree murder instruction and conviction. Many first degree murder convictions on appeal present a sufficiency of the evidence question.<sup>86</sup> In evaluating the sufficiency of the evidence to support a first degree deliberate intent murder, the New Mexico courts frequently give their opinion without indicating what types of evidence support the verdict and how.<sup>87</sup> The opinions simply identify the evidence that was introduced and then conclude that the evidence was sufficient. Such opinions provide little guidance to the lower courts in deciding whether the evidence warrants an instruction on deliberate intent murder. Furthermore, prosecutors and defense counsel lack direction as to the types of evidence necessary for an instruction on deliberate murder.

### 1. Time as Evidence of Deliberate Intent

The New Mexico Uniform Jury Instruction on deliberate murder eliminates time as a relevant factor in determining whether an intentional killing is deliberate. The instruction states, "A calculated judgment and decision may be arrived at in a short period of time."<sup>88</sup> The Supreme Court of New Mexico has confirmed that an accused may form the requisite intent for first degree murder in a short period of time.<sup>89</sup> Although time should not be a determining factor for deciding whether an intentional homicide is deliberate, time should not be irrelevant to the decision. The thought processes described in the definition of deliberate intention would

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85. Cardozo, *supra* note 64, at 99, wrote that the deliberation and premeditation distinction is much too vague to be continued. Cardozo concluded that the effect of the distinction is merely a privilege offered to the jury to find the lesser degree when the suddenness of the intent, the vehemence of the passion, seems to call irresistibly for the exercise of mercy. I have no objection to giving them this dispensing power, but it should be given to them directly and not in a mystifying cloud of words. The present distinction is so obscure that no jury hearing it for the first time can fairly be expected to assimilate and understand it. *Id.* at 100.

86. See, e.g., *McGhee*, 103 N.M. 100, 703 P.2d 877; *Beach*, 102 N.M. 642, 699 P.2d 115; *Blea*, 101 N.M. 323, 681 P.2d 1100; *Johnson*, 99 N.M. 682, 662 P.2d 1349; *Manus*, 93 N.M. 95, 597 P.2d 280; *Hamilton*, 89 N.M. 746, 557 P.2d 1095.

87. See, e.g., *Blea*, 101 N.M. 323, 681 P.2d 1100; *Johnson*, 99 N.M. 682, 662 P.2d 1349; *Hamilton*, 89 N.M. 746, 557 P.2d 1095.

88. N.M. STAT. ANN. U.J.I. Crim. 14-201 (Recomp. 1986).

89. *Blea*, 101 N.M. 323, 681 P.2d 1100.

seem to require some time. To engage in careful thought and to weigh the considerations for and against the proposed course of action that might result in a killing must involve the passage of time;<sup>90</sup> otherwise, the formation of the intent to kill would be impulsive and rash.

One New Mexico decision suggested that deliberation requires "ample time."<sup>91</sup> In evaluating whether the trial court's instruction on first degree murder was warranted by the evidence, the New Mexico Court of Appeals stated that the evidence tended to indicate that "sufficient time elapsed during which the defendant could have weighed his actions and considered their consequences . . . ."<sup>92</sup> Whereas, the court of appeals appreciated the significance of time as an evidentiary factor in judging whether deliberate intent exists, the Uniform Jury Instruction for deliberate murder appears to minimize the importance of time.<sup>93</sup> By informing the jury that a deliberate intent can be formed in a short time, the instruction fails to recognize the relationship between the thought processes involved in deliberation and the time sufficient to engage them. If deliberation is to be the basis for distinguishing between first and second degree murder when an intentional killing is committed, then the jury instruction should define deliberation so as to include sufficient time for the careful thought and weighing of the considerations for and against the killing.

## 2. Motive, Plan, Design, Method of Killing and Pursuit as Evidence of Deliberate Intent

Only one New Mexico Supreme Court decision has alluded to the types of evidence that are important to the sufficiency of evidence issue. In *State v. Manus*,<sup>94</sup> the court found that evidence of motive and evidence of a plan or design clearly supported the instruction on deliberate murder. Although the court did not say that such evidence is required to establish a deliberate intention, the mention of motive, plan, and design provides at least some guidance for measuring whether an intentional killing falls within the first or second degree category.

No other New Mexico cases have articulated types of evidence that will support a finding of deliberate intent beyond a reasonable doubt. Additional guidance can be found by looking at the evidence described

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90. 2 LaFave & Scott, *supra* note 10, at 237, state that the better view of premeditation and deliberation requires some time. Perkins & Boyce, *supra* note 11, at 131, label as preposterous the elimination of time from the deliberation and premeditation. Accordingly, they state that premeditation takes some appreciable time. *Id.* at 132-33. See also R. MORELAND, *THE LAW OF HOMICIDE* 207 (1952).

91. *State v. Aragon*, 85 N.M. 401, 512 P.2d 974 (Ct. App. 1973).

92. *Id.* at 403, 512 P.2d at 976.

93. N.M. STAT. ANN. U.J.I. Crim 14-201 (Recomp. 1986).

94. 93 N.M. 95, 597 P.2d 280 (1979).



in the decided cases and extrapolating the factors that the courts considered important in proving deliberation. For example, in *State v. Johnson*,<sup>95</sup> the method of killing seemed to be an important factor to the Supreme Court of New Mexico in finding substantial evidence of deliberate intent. In *Johnson*, the defendant administered ether to his wife before he strangled her. Although the court did not indicate how the evidence of strangulation or the evidence of administering ether to the victim proved deliberation, strangulation suggests a method of killing from which one may infer that the accused gave careful thought and weighed the considerations for and against the proposed course of action. In addition, the administration of ether to the victim before the killing suggests evidence of a plan or design to bring about death.

Evidence that the defendant chased the victim before the homicide also seems to be a factor that supports a deliberate intent. In *State v. Blea*,<sup>96</sup> the defendant chased the victim from the club bar and shot him a second time in the alley. In *State v. Hamilton*,<sup>97</sup> the prosecution's evidence showed that the defendant ran after the victim and fired at her and dived through the window after the victim had retreated into the house. In both *Blea* and *Hamilton*, the Supreme Court of New Mexico found sufficient evidence to support a deliberate and premeditated murder conviction. In neither case did the court say how the evidence of chase shows deliberate intent, but such evidence may suggest a firmly held design to kill the victim that overcomes the victim's flight.

According to *Manus*, evidence of motive, plan, and design tends to support a deliberate and premeditated murder. An analysis of the facts in *Blea* and *Hamilton* reveals that the method of killing and pursuit of the victim also tend to be types of evidence that the courts consider important in proving deliberate intent.

### *C. Evidence That Negates Deliberate Intent*

Another way of looking at the types of evidence that distinguish first degree deliberate murder from second degree intentional murder focuses on the evidence that negates deliberation. The definition of deliberate intent in the Uniform Jury Instructions states: "A mere unconsidered and rash impulse, even though it includes an intent to kill, is not a deliberate intention to kill."<sup>98</sup> Neither the murder statute<sup>99</sup> nor the instruction, how-

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95. 99 N.M. 682, 662 P.2d 1349 (1983).

96. 101 N.M. 323, 681 P.2d 1100 (1984).

97. 89 N.M. 746, 557 P.2d 1095 (1976).

98. N.M. STAT. ANN. U.J.I. Crim. 14-201 (Recomp. 1986).

99. N.M. STAT. ANN. § 30-2-1 (Repl. Pamp. 1984) includes no reference to an impulsive or rash killing and has no definition of deliberate intent.

ever, define an impulsive or rash killing. Moreover, none of the reported appellate cases defines a rash or impulsive killing or indicates what type of evidence establishes such a killing. Instead of using impulsive killings to negate a deliberate intent, New Mexico law allows diminished capacity to negate deliberation.

### 1. Diminished Capacity: Intoxication and Mental Disease or Defect

Because first degree murder requires a deliberate intention to take away the life of another, New Mexico cases<sup>100</sup> and the New Mexico Uniform Jury Instructions<sup>101</sup> recognize that a defendant's inability to form a deliberate intention to kill another operates as a defense to first degree deliberate murder. This diminished capacity defense,<sup>102</sup> however, does not apply to second degree intentional murder because second degree murder does not require any additional state of mind beyond the intent to kill.<sup>103</sup> In essence, New Mexico law does not permit a defendant to negate an intent to kill by means of incapacity to form an intent to kill.<sup>104</sup> Only sufficient provocation can serve to reduce an intent-to-kill homicide from murder to manslaughter.<sup>105</sup>

The Uniform Jury Instruction on diminished capacity to form a deliberate intent to kill limits the causes of diminished capacity to intoxication and mental disease or defect.<sup>106</sup> The instruction reads:

Evidence has been presented that the defendant was [intoxicated from

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100. See, e.g., *State v. Privett*, 104 N.M. 79, 717 P.2d 55 (1986); *McGhee*, 103 N.M. 100, 703 P.2d 877; *Beach*, 102 N.M. 642, 699 P.2d 115; *Blea*, 101 N.M. 323, 681 P.2d 1100; *Chambers*, 84 N.M. 309, 502 P.2d 999; *Tapia*, 81 N.M. 274, 466 P.2d 551; *Padilla*, 66 N.M. 289, 347 P.2d 312.

101. N.M. STAT. ANN. U.J.I. Crim. 14-5110 (Recomp. 1986).

102. Diminished capacity to form a deliberate intent has wide support in other jurisdictions. See, e.g., *State v. Christenson*, 129 Ariz. 32, 628 P.2d 580 (1981); *People v. Wolff*, 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964); *Goodman v. State*, 573 P.2d 400 (Wyo. 1977). See also 2 LaFave & Scott, *supra* note 10, at 238; Perkins & Boyce, *supra* note 11, at 131; Fletcher, *supra* note 23, at 255. Diminished capacity refers to an impaired mental condition of the defendant short of insanity. See generally 1 LaFave & Scott, *supra* note 10, at 522-35; Perkins & Boyce, *supra* note 11, at 980-85; Fletcher, *supra* note 23, at 250.

103. The New Mexico Supreme Court has limited the defense of diminished capacity to first degree murder upon the premise that diminished capacity can only be used to negate a specific intent and that first degree deliberate murder is a specific intent crime. Because second degree murder is considered to be a general intent crime, the supreme court has rejected diminished capacity as a defense to second degree murder. See, e.g., *Beach*, 102 N.M. 642, 699 P.2d 115; *Chambers*, 84 N.M. 309, 502 P.2d 999; *Tapia*, 81 N.M. 274, 466 P.2d 551; *Padilla*, 66 N.M. 289, 347 P.2d 312. See also 2 LaFave & Scott, *supra* note 10, at 238; Perkins & Boyce, *supra* note 11, at 984.

104. The New Mexico Uniform Jury Instructions also limit the defense of diminished capacity to deliberate intent murder. See N.M. STAT. ANN. U.J.I. Crim. 14-5110 (Recomp. 1986).

105. N.M. STAT. ANN. § 30-2-1(B) (Repl. Pamp. 1984); N.M. STAT. ANN. U.J.I. Crim. 14-210 and 14-220 (Recomp. 1986). See also *Romero*, *supra* note 14, at 750; 1 LaFave & Scott, *supra* note 10, at 526.

106. N.M. STAT. ANN. U.J.I. Crim. 14-5110 (Recomp. 1986).

use of (alcohol) (drugs)] [suffering from a mental disease or disorder]. You must determine whether or not the defendant was . . . . . , and if so, what effect this had on the defendant's ability to form the deliberate intention to take away the life of another.<sup>107</sup>

The New Mexico cases likewise permit evidence of intoxication and mental disease or disorder to negate a deliberate intent.<sup>108</sup>

## 2. Diminished Capacity: Provocation

Several cases suggest that evidence of provocation can affect a defendant's ability to form a deliberate intention to kill and, therefore, warrants the diminished capacity instruction.<sup>109</sup> These opinions indicate that provoked killings which do not meet the requirements for mitigating murder to voluntary manslaughter may prevent a deliberate intent. In *State v. Fero*,<sup>110</sup> the New Mexico Supreme Court rejected an appeal from a conviction of deliberate murder in the first degree. The court held that the accused was not entitled to an instruction on voluntary manslaughter because the evidence of provocation would not have provoked "an ordinary person of average disposition."<sup>111</sup> The court added, however, that the evidence of the defendant's subjective lack of control entitled him to an instruction on inability to form a deliberate intention to kill.<sup>112</sup> The court in *State v. Valenzuela*<sup>113</sup> also suggested that evidence of provocation that affects a defendant's ability to control his actions may warrant instructions on provocation for voluntary manslaughter and/or diminished capacity.

According to *Fero* and *Valenzuela*, sufficient provocation, as measured by the reasonable person standard, will warrant an instruction on voluntary manslaughter.<sup>114</sup> Insufficient provocation which would not meet the ordinary person standard will warrant an instruction on diminished capacity. Sufficient provocation, therefore, can be a mitigating defense to both first and second degree murder by reducing both murders to voluntary man-

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107. *Id.*

108. For cases involving intoxication see, e.g., *Privett*, 104 N.M. 79, 717 P.2d 55; *Blea*, 101 N.M. 323, 681 P.2d 1100; *Nelson*, 83 N.M. 269, 490 P.2d 1242 (Ct. App.), cert. denied, 83 N.M. 259, 490 P.2d 1232 (1971). For cases involving mental disease or defect see, e.g., *McGhee*, 103 N.M. 100, 703 P.2d 877; *Beach*, 102 N.M. 642, 699 P.2d 115.

109. *State v. Fero*, 105 N.M. 339, 732 P.2d 866 (1987); *State v. Valenzuela*, 90 N.M. 25, 559 P.2d 402 (1976). See also *Perkins & Boyce*, *supra* note 11, at 131 and n.2; 2 LaFave & Scott, *supra* note 10, at 238 and n.17 & 20.

110. 105 N.M. 339, 732 P.2d 866 (1987).

111. *Id.* at 343, 732 P.2d at 870.

112. *Id.* See N.M. STAT. ANN. U.J.I. Crim. 14-5110 (Recomp. 1986).

113. 90 N.M. 25, 559 P.2d 402 (1976).

114. For a discussion of the types of evidence that will establish sufficient provocation in New Mexico, see *Romero*, *supra* note 14.

slaughter.<sup>115</sup> Insufficient provocation, on the other hand, may only reduce first degree murder to second degree murder by negating the deliberate intention required for first degree murder.

## VI. PROPOSED LEGISLATIVE REVISIONS

The willful, deliberate and premeditated formula for distinguishing between first and second degree murder has proved to be ineffective in separating deliberate intent killings from nondeliberate or impulsive killings.<sup>116</sup> Virtually all intentional homicides support a first degree murder instruction and verdict. Without standards for the kind of evidence that is sufficient to sustain a finding of a willful, deliberate and premeditated killing, the application of the deliberation formula requires no more than

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115. The New Mexico Uniform Jury Instructions appear to limit sufficient provocation as a mitigating defense to second degree murder only, but the statutory language supports its use to reduce a first degree murder charge to voluntary manslaughter. N.M. STAT. ANN. U.J.I. Crim. 14-210(3) (Recomp. 1986) provides that sufficient provocation defeats a second degree murder charge. No similar instruction appears in any of the first degree murder instructions. *Id.* 14-201 to 14-203 (Recomp. 1986). Furthermore, none of the commentaries to the first degree murder instructions, *id.*, or to the voluntary manslaughter instructions, *id.* 14-220 and 14-222, suggest that sufficient provocation may be used to reduce first degree murder to voluntary manslaughter.

The murder and manslaughter statutes, read together, support the use of sufficient provocation to reduce murder in the first degree to voluntary manslaughter. The murder statute makes second degree murder a lesser included offense of first degree murder. N.M. STAT. ANN. § 30-2-1 (Repl. Pamph. 1984). Therefore, to the extent that sufficient provocation operates as a defense to second degree murder, the lesser included offense, it will also operate as a defense to first degree murder, the greater offense.

The manslaughter statute, N.M. STAT. ANN. § 30-2-3 (Repl. Pamph. 1984), defines manslaughter as a homicide "without malice." *Id.* Although malice was eliminated from the definition of murder in the 1980 legislative amendments and no longer appears in the current murder statute, N.M. STAT. ANN. § 30-2-1 (Repl. Pamph. 1984), the manslaughter statute was not revised. The reference to malice in the definition of manslaughter suggests that sufficient provocation will negate what amounted to malice before the 1980 amendments. Since murder, either first or second degree, required malice under the pre-1980 murder statute, N.M. STAT. ANN. § 40-2-1 (Repl. Pamph. 1972) (amended 1980), sufficient provocation was a defense to both degrees of murder. The 1980 revisions do not appear to change the defense of sufficient provocation, especially since the voluntary manslaughter statute was unchanged.

The Supreme Court of New Mexico stated in *State v. Fero*, 105 N.M. 339, 732 P.2d 866 (1987), that an instruction on voluntary manslaughter was proper in a case charging first degree murder if there was evidentiary support for sufficient provocation. *Id.* at 343, 732 P.2d at 870. This decision, addressing a first degree murder charge based on the post-1980 revisions, supports the use of sufficient provocation to reduce first degree murder to voluntary manslaughter.

116. New Mexico's problems with the deliberate and premeditated distinction are not unique. See, e.g., Note, *Should Virginia Put The Planning Back Into The Premeditation Required for Murder?*, 40 WASH. & LEE L. REV. 341 (1983); Fletcher, *supra* note 23, at 256 ("courts have not been able to settle upon a consistent interpretation of the test . . ."). Clarkson & Keating, *supra* note 23, at 562 ("It is almost impossible to distinguish between a 'premeditated' and a 'merely intentional' killing"); Knudson, *supra* note 64, at 306-07 ("the maelstrom of homicide law in many other jurisdictions"); R. Moreland, *supra* note 90, at 210-11; Wechsler & Michael, *supra* note 64, at 708-09.

an intent to take away the life of another and makes meaningless the legislative classification of intentional murder into two degrees.<sup>117</sup>

Although the willful, deliberate and premeditated distinction could be infused with standards that clarify the line between first and second degree murder, it should be replaced by a new, principled, and workable formula. Even if the courts should clarify the line between the two degrees of intentional murder, this remedy would only highlight the flaws in the premise underlying the present distinction.

Perhaps the reluctance of the New Mexico courts to reduce intentional killings from deliberate first degree murder to second degree murder reflects the judgment that deliberation does not identify the worst murders. Such a judgment would explain the courts' unwillingness to clarify the deliberation distinction and make it meaningful and workable. In fairness to the courts, the deliberation formula is a product of the legislature, and the legislature should address the problems created by the use of willful, deliberate and premeditated as the basis for distinguishing capital from noncapital murders.

The solution requires the legislature to eliminate the deliberation formula for distinguishing between first and second degree murder. The use of deliberation as a basis for identifying murders deserving of the greatest punishment has been rejected by the Model Penal Code<sup>118</sup> and by many of the recent criminal code revisions.<sup>119</sup> The Commentaries to the Model Penal Code criticized the deliberation test as follows:

. . . this distinction . . . probably rests on the premise that there exists some dependable relation between the duration of reflection and the gravity of the offense. Crudely put, the judgment is that the person who plans ahead is worse than the person who kills on sudden impulse. This generalization does not, however, survive analysis. . . . Prior reflection may reveal the uncertainties of a tortured conscience rather than exceptional depravity. The very fact of a long internal struggle may be evidence that the homicidal impulse was deeply aberrational and far more the product of extraordinary circumstances than a true reflection of the actor's normal character. Thus, for example, one suspects that most mercy killings are the consequence of long and careful deliberation, but they are not espe-

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117. See, e.g., the efforts by the California Supreme Court in *People v. Anderson*, 70 Cal. 2d 15, 447 P.2d 942, 73 Cal. Rptr. 550 (1968), to make the deliberation and premeditation distinction meaningful by the use of evidentiary guidelines.

118. MODEL PENAL CODE § 210.2 (Official Draft 1962).

119. See, e.g., CONN. GEN. STAT. ANN. §§ 53a-54a and 53a-54b (West 1985); DEL. CODE ANN. tit. 11, § 636 (1979 & Supp. 1986); ILL. ANN. STAT. ch. 38, para 91 (Smith-Hurd Supp. 1987); TEX. PENAL CODE ANN. § 19.03 (Vernon 1974 & Supp. 1987); WIS. STAT. ANN. § 940.01 (West 1982). England also refused to adopt the deliberation and premeditation distinction in its revision of its homicide laws. See Royal Commission on Capital Punishment, Report 182-89 (1949-53).

cially appropriate cases for imposition of capital punishment. . . . It also seems clear, moreover, that some purely impulsive murders will present no extenuating circumstance. The suddenness of the killing may simply reveal callousness so complete and depravity so extreme that no hesitation is required.<sup>120</sup>

Even with adequate definitions, the willful, premeditated and deliberate basis for identifying the worst murders seems flawed in two respects. First, such a basis includes murders that do not merit the stigma or punishment reserved for first degree murder.<sup>121</sup> Mercy killings and some family homicides following deep emotional struggles do not seem to present the same depravity exhibited by the contract slayer. Although such killings deserve the criminal sanction, murder in the second degree should provide sufficient condemnation and punishment. Second, the willful, deliberate and premeditated basis excludes very grave murders from the first degree murder category that deserve the maximum punishment.<sup>122</sup> The intentional and impulsive killing of a robbery victim seems to be in a class with the killing for hire, but not with the mercy killing. The willful, deliberate and premeditated formula, therefore, fails because it "takes one of several grounds that are sufficient to treat a homicide as among the most wicked, and takes that one ground to be necessary to the exclusion of all others."<sup>123</sup>

Instead of using deliberate intent to identify the intentional killings that deserve the greater punishment reserved for first degree murder, the legislature should specify the particular circumstances that make some intentional homicides especially grievous. For purposes of identifying those murders for which capital punishment may be appropriate, the legislature should follow the lead of the Model Penal Code<sup>124</sup> and states<sup>125</sup> that have followed it by rejecting the deliberation and premeditation distinction. Instead, the legislature should specifically list the circumstances, in addition to intentional murder, that warrant exposure to the death penalty.<sup>126</sup> This list could include murders for pay, murders by convicts under sentence of imprisonment, and murders committed for the purpose of avoid-

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120. American Law Institute, *MODEL PENAL CODE AND COMMENTARIES* 127 (Part II 1980).

121. Clarkson & Keating, *supra* note 23, at 559-60.

122. Fletcher, *supra* note 23, at 254, states, "Wanton killings are generally regarded as among the most wicked, and the feature that makes a killing wanton is precisely the absence of detached reflection before the deed." See also 3 Stephen, *supra* note 64, at 94.

123. Fletcher, *supra* note 23, at 254.

124. *MODEL PENAL CODE* § 210.2 (Official Draft 1962).

125. See *supra* note 119.

126. Fletcher, *supra* note 23, at 256, stated that, ". . . so far as the classification of murder into degrees was designed to isolate cases in which the death penalty was justified, that goal appears to be better served by listing the aggravating circumstances and mitigating considerations that bear on the gravity of a proven murder."

ing or preventing a lawful arrest or for the purpose of escaping from lawful custody.<sup>127</sup> The list could also include impulsive murders that occur during the commission of rape or robbery.<sup>128</sup> Such a scheme would clearly reflect the legislative judgment about which intentional murders deserve consideration of the death penalty, and it would avoid the vague deliberation standard that gives little guidance to the jury in making the critical judgment about which intentional homicides are subject to capital punishment.

## VII. CONCLUSION

The New Mexico legislature needs to address the problems created by the use of the deliberate and premeditated formula for distinguishing between capital and noncapital murder. The distinction has proved to be meaningless in differentiating from first and second degree intentional murder. More importantly, the premise upon which this distinction is based does not identify the worst homicides for capital murder and includes some murders that do not deserve the first degree label. If the legislature wishes to retain capital murder, it should eliminate the deliberation and premeditation distinction and identify first degree murders by specifically listing the circumstances that warrant subjecting intentional murders to the possibility of the death penalty.

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127. See MODEL PENAL CODE § 210.6(3) (Official Draft 1962) for a suggested list of aggravating factors that identify those intentional homicides that merit the death penalty in the absence of mitigating circumstances.

128. *Id.* at § 210.6(3)(e).