THE ART OF MALICE

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Casual observers of the criminal justice system seldom have more than a superficial appreciation of the importance of what transpires there. Mostly, the cases do not involve matters of national importance or persons of high rank or note. They portray the sad unfolding of the pageant of human tragedy that most of polite culture wishes to ignore. The system itself appears to operate like the emergency room of society, binding up its wounds, trying not to inflict too many of its own, but otherwise staying invisible and irrelevant to those not directly affected by a given case. To the casual observer, errors in the system are readily ignored.

The true importance of the criminal justice system, however, cannot be overstated. Nowhere are the stakes higher than here. Nowhere do we permit the government created by our consent to exercise more ominous power over us in the name of the collective good. The criminal law is the frontier where personal freedom and societal control meet. If these laws are not drawn and administered justly, justice in any other part of the landscape is an illusion. It is here we need the best of our reason. It is here that we need champions who seek to right its wrongs so that we all may face the judgment of history with hope. Our law of torts or contracts may provide future generations with a window into the nature of our society, but if those generations seek to ask if we were truly just they will examine the administration of our criminal law.

One of the serious wrongs in our system is found in the way we instruct juries in a criminal homicide case about the crucial, but mysterious, concept of malice. Malice demarcates murder from all other types of homicide and is the concept upon which many homicide verdicts turn. Malice has the mysterious air of any trinity,

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a single entity with three distinct natures.[1] It exists, the judge will tell the jury, when the killer coldly premeditates his act, executing, so to speak, a plan of execution. But it also arises in two scenarios in which death is not intended. Where the defendant perpetrates a serious but nonlethal felony like robbery or consciously disregards a serious risk he is creating by some reckless act, and death results, there is malice. This trinity is not, however, a "supernatural mystery" humans are not meant to understand.[2] The jury is meant to understand it and apply it justly. But jury members are seriously misled in this effort when the judge tells them the following:

> If you believe that the defendant intentionally used a deadly weapon on a vital part of . . . [the victim's] body, you may regard that as an item of circumstantial evidence from which you may, if you choose, infer that the defendant acted with malice.[3]

Empirically, there are many things wrong with this instruction. First, it does not define the state of knowledge the jury has to reach before convicting the defendant, either in terms of elements to be proven or the level of certainty of the proof.[4] Neither does it give

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1. *See* MODEL PENAL CODE §§ 210.1-.2 (1962); PENNSYLVANIA SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2501A (Pa. Bar Inst. 2005).

2. The Catholic Catechism in use during the 1960s so referenced the Holy Trinity. A CATECHISM OF CHRISTIAN DOCTRINE: REVISED EDITION OF THE BALTIMORE CATECHISM NO. 2, at 6 (St. Anthony Guild Press, 1961) (1853).

3. PENNSYLVANIA SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2501C(4) (Pa Bar Inst. 2005). This is the current form in use in Pennsylvania, the state I will use as a common reference point. *See id.* This same instruction would be given with regard to the issue of specific intent to kill, allowing the jury to distinguish among the grades of murder on that basis. *See id.* § 15.2502A(5). The use of this instruction in other jurisdictions is noted *infra* note 8.

4. In his dissent in *Brown v. Payton*, Justice Souter called it "elementary law" in all U.S. jurisdictions that "the judge bears the ultimate responsibility for instructing a lay jury in the law." 544 U.S. 133, 160 (2005) (Souter, J., dissenting). As early as 1895, the Supreme Court described the court's instructions as a major hemisphere of the trial decision process:

> We must hold firmly to the doctrine that in the courts of the United States it is the duty of juries in criminal cases to take the law from the court, and apply that law to the facts as they find them to be from the evidence. Upon the courts rests the responsibility of declaring the law; upon the jury, the responsibility of applying the law so declared to the facts as they, upon their conscience, believe them to be.

Sparf v. United States, 156 U.S. 51, 102 (1895). The Pennsylvania courts certainly agreed. *See* Ferrer v. Trs. of the Univ. of Pa., 825 A.2d 591, 612-13 (Pa. 2002) ("The purpose of the court's charge is to provide guidance to the jury on the relevant legal issues arising from the claims before the jury."); Commonwealth v. Bricker, 581 A.2d 147, 154 (Pa. 1990) ("The duty of instructing the jury as to the law which is to be applied during their deliberations cannot be delegated to or usurped by a litigant involved in the trial of the case. . . . [As] the judge carries the sole responsibility for instructing the jury.").

practical information about basic court procedures.[5] It merely suggests that jurors need judicial permission to infer something, a suggestion so absurd that its true purpose remains hidden.

Second, the logical relation between deadly weapons and malice is tenuous at best. Indeed, where a weapon is *not used* to kill, malice is more likely to be present. If Jones died of a gun shot, and Smith of manual strangulation, where might malice more readily be inferred? Kowalski's shooting death could be accidental, but how likely is it that he nonmaliciously died from a pillow applied to his face? Yet, the defendant tried for Smith's strangulation or Kowalski's smothering would not hear this instruction, but Jones's shooter would, regardless of the circumstances under which he pulled the trigger. Skepticism about this inference seems particularly appropriate.[6]

Third, where the defendant admits causing the death but claims accident, self-defense, or provocation, the instruction is fatally simplistic in suggesting that one undisputed fact—that the defendant shot the victim—permits the jury to whisk away those complex matters in one tidy act of inference. In the "whodunit" murder, it confuses the issue of the identity of the killer by suggesting that the defendant *had* used the weapon, leaving his intent the only issue. It adds nothing in either case and is pernicious in both.

Despite these empirical objections, the instruction persists. Already having determined that the instruction is not a *mandatory presumption* that improperly shifts the burden of proof,[7] courts have passively accepted it as a fixture in many jurisdictions without further, critical analysis.[8] Such analysis, however, reveals that it is a

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5. *See, e.g.*, PENNSYLVANIA SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 2.01 (Pa Bar Inst. 2005).

6. All skeptical thought must pay homage to David Hume. Hume argued that all cause and effect reasoning was based upon experience, and that reason alone could not show a constant connection between the two that was anything near infallible. DAVID HUME, A TREATISE OF HUMAN NATURE 61, 63-65. (David Fate Norton & Mary J. Norton eds., 2000). Our impressions of experienced causes and effects become ideas that are imbued with belief that then give the causal link more force than it should have and render it, unfortunately, beyond further critical inquiry. *Id.* at 67-68.

7. Yates v. Evatt, 500 U.S. 391, 400-01 (1991).

8. Having tried homicide cases in Pennsylvania, I am intimately familiar with the courts' acceptance of the instruction in that jurisdiction as both a jury instruction and an appellate standard of review for questions of the sufficiency of the evidence. *See, e.g.*, Commonwealth v. Cruz, 919 A.2d 279, 281 (Pa. Super. Ct. 2007) (defendant used a handgun to shoot his victim in the back, killing him); Commonwealth v. Mitchell, 902 A.2d 430, 445 (Pa. 2006); Commonwealth v. Sanchez, 907 A.2d 477, 486 (Pa. 2006); Commonwealth v. Jones, 912 A.2d 268, 279-80 (Pa. 2006).

The validity of the permissive inference in one form or another has also been recognized in at least the following jurisdictions:

Fifth Circuit: COMM. ON PATTERN JURY INSTRUCTIONS, DIST. JUDGES ASS'N, FIFTH CIR., PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) §§ 2.55-.56 (2001).

false echo of the true essence of malice, a debasement of history disguised as the dangerous illusion we call "permissive inference." For malice is not a mystery the jury needs fatal simplicities to understand. Malice is the artwork of the people, a concept subject to continual enactment and redefinition by the most powerful force operating in a democratic society, and the rational consensus of the governed. That same force has created a process for its implementation in each case that trusts in the reasoned judgment of a jury, instructed by a court but unimpeded by judicial overreaching in the demarcation of murder from manslaughter and manslaughter from justified killing. This inference perverts the substance and betrays the process of malice in ways that call profoundly for its elimination.

The case for elimination can only be made by understanding that malice, and the jury trial process that implements it, are our society's best current answer to the basic cultural question of how to deal with the situation in which one person causes the death of another. It is a

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Sixth Circuit: United States v. Garcia-Meza, 403 F.3d 364 (6th Cir. 2005).

Ninth Circuit: United States v. Houser, 130 F.3d 867 (9th Cir. 1997); United States v. Wilson, 221 F. App'x 551 (9th Cir. 2007).

Tenth Circuit: CRIMINAL PATTERN JURY INSTRUCTIONS COMMITTEE (10TH CIRCUIT) §§ 2.52-.53 (2005).

Virgin Islands: Ledesma v. Virgin Islands, No. 2003/012, 2004 U.S. Dist. LEXIS 20876 (D.V.I. Oct. 6, 2004).

Alabama: Jones v. State, 753 So. 2d 1174 (Ala. Crim. App. 1999).

Arizona: Schad v. Schriro, 454 F. Supp. 2d 897 (D. Ariz. 2007).

California: People v. Smith, 124 P.3d 730 (Cal. 2005).

District of Columbia: Belton v. United States, 382 F.2d 150, 154-55 (D.C. Cir. 1967); 1-4 CRIMINAL JURY INSTRUCTIONS FOR DC FORM INSTRUCTION 4.17.

Idaho: State v. Jaco, 949 P.2d 1077 (Idaho Ct. App. 1997).

Indiana: Brown v. State, 691 N.E.2d 438 (Ind. 1998).

Iowa: State v. Shanahan, 712 N.W.2d 121 (Iowa 2006).

Massachusetts: Commonwealth v. Perez, 825 N.E.2d 1040 (Mass. 2005).

Michigan: People v. Fletcher, 679 N.W.2d 127 (Mich. Ct. App. 2004).

Mississippi: McCain v. State, No. 2005-KA-01892-COA, 2007 Miss. App. LEXIS 295 (Ct. App. May 1, 2007).

Nebraska: State v. Frazier, No. A-00-301, 2001 Neb. App. LEXIS 81 (Ct. App. Apr. 17, 2001).

New Jersey: State v. Martini, 619 A.2d 1208 (N.J. 1993).

North Carolina: State v. West, 638 S.E.2d 508 (N.C. Ct. App. 2006).

Ohio: Montgomery v. Bagley, 482 F. Supp. 2d 919 (N.D. Ohio 2007).

South Carolina: State v. Reese, 633 S.E.2d 898 (S.C. 2006).

Tennessee: Lane v. Carlton, 149 F. App'x 374 (6th Cir. 2005).

Vermont: State v. Oakes, 276 A.2d 18 (Vt. 1971).

Virginia: Winston v. Commonwealth, 604 S.E.2d 21 (Va. 2004).

West Virginia: State *ex rel.* Corbin v. Haines, 624 S.E.2d 752 (W. Va. 2005).

Wyoming: Butcher v. State, 123 P.3d 543 (Wyo. 2005).

question of substance and process, and its answer defines us most profoundly. This Article poses that question first in a state of nature mode,[9] and then sketches the historical evolution of its answer in the Anglo-American tradition.[10] Next, it considers the democratic forces that power that evolution, brilliantly described by John Rawls.[11] Throughout, we see that the instruction is not faithful to this compelling history or its crucial undercurrents. Other solutions for its mischief or continued benign neglect of its errors must be rejected in favor of its total elimination from the law.[12]

In its place, we would leave a tribute to the law a free people have created and the gathering of those people who apply it in the noble role as juror. We would also correct a wrong in a part of the law where wrongs must never be overlooked. History will not be kind to us for being mere causal observers to injustices that occur here.

I. STATING THE PROBLEM IN NATURE: OG AND THE DEATH OF ROK

Ever since humans first walked erect, occupied the same geography, and thus became potentially dangerous to each other, we have faced the problem of what to do if Og causes the death of Rok.[13] In the days before society, the answer would largely depend on how many of Rok's friends were otherwise disposed to exercise an instinct for revenge. But society complicates the matter by demanding that the question take on broader implications requiring the process of rulemaking.

What rule will govern this situation largely depends on who writes it. If we believed, for example, that a divine power had given us a rule that causing a death is an unmitigated, unforgivable, and unpardonable sin that merits as much retribution as possible, then the rule would be retributive with gusto as soon as the "causer" was identified.

Then again, if we are in a tradition that has undergone the Enlightenment, we will not view the rules of society as coming from some heavenly source whispering in the ears of a select few who assure us that they hear such commands clearly. Rather, we rely on reason for rules and process and, since reason is not the province of the elite, negotiation among all reasoning members of society is the

9. *See infra* Part I.

10. *See infra* Part II.

11. *See infra* Part III.

12. *See infra* Part IV.

13. Any resemblance between these fictional characters and fellow members of my or any other law school faculty is purely coincidental.

preferred course.[14] We take responsibility for drafting rules, and we consent to their imposition.[15]

The very act of taking that responsibility shapes those rules profoundly. When we negotiate the rule about "causing death," we know that we are writing a rule that someday may apply to us. We could be Rok, the one who ends up dead at the hand of Og, and, in that spirit, we are motivated to write a rule that by its severity might prevent Og from acting, or at least vanquish him for extinguishing from the earth that which we value most highly—our own life.

But we also could be Og. We could innocently cause a stone to fall from the scaffold upon which we are working, killing a stranger named Rok on the street below; or we could kill Rok as he lunges at us with a knife, or find him coupling with our beloved and kill him in a sudden, jealous rage. Without deprecating the value of Rok's life in absolute terms, as Og we demand consideration of circumstances before anything approaching our vanquishment is authorized. Minimally, reasoned self-interest demands contemplation of a range of societal responses in the final rule we write.

The rule will not, however, merely reflect the personal interests of the Og and Rok in each case, as it is neither written by, nor

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14. John Adams put it succinctly and categorically: "It is *Consent alone,* that makes any human Laws binding." THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 143 (C. Bradley Thompson ed., 2000). This conception of consent of the governed was even more profound for Americans than for their British counterparts. Our Constitution was to be a *written* charter of power that entrusted power directly from the people to their government without reliance on custom and precedent. *See* John De Witt, *Essay III* (November 5, 1787), *in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 311, 312 (Ralph Ketcham ed., 1986).

15. *The Federalist* begins with this challenge:

> It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.

THE FEDERALIST NO. 1, at 27 (Clinton Rossiter ed., Signet Classic 1999) (1788). Indeed, Hamilton would remark in *Federalist No. 22* that one of the deficiencies of the government under the Articles of Confederation was that it was based on the unsteady, delegated authority of the states alone, and not on the people directly. *Id.* at 148. There is a necessity, he wrote:

> [O]f laying the foundations of our national government deeper than in the mere sanction of delegated authority. The fabric of the American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority.

Id. Antifederalists agreed on the importance of the consent of the governed, but disagreed that the proposed form of government would actually maintain such consent for long. *See Letters from the Federal Farmer, in* THE ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY 261-301 (Michael Kammen ed., 1986).

exclusively for, the parties themselves. The rule defines contractual relations between my society and me. I want something out of any rule that empowers my society to exercise authority *over* me when it claims I have done wrong and requires me to agree that the societal response will be sufficient *for* me if I were a wronged party. I do not expect a perfect world where no one will ever again cause the death of another. But I do want lives I care about to be protected from the kinds of wanton, dangerous acts that no society can permit if its members are to be free equally from the oppression of government and the terrorization of their neighbors.[16]

In defining those acts and the range of societal responses, we seek a rule we can live with regardless of whether we become Og or Rok, or live on their street. Whatever factors we use, be it the degree of control Og exercised over the act (premeditated or inadvertent), the social utility of the act itself (was Og defending himself from unlawful aggression or aggressively pursuing ignoble ends?), or what weapon he used, all must serve the end of a livable rule.

Once the substance of the rule is reached, we need a process to implement it. A bad process, indeed, may denude the rule of its efficacy by frustrating consideration of all pertinent factors. Process is also a fail-safe way to harness government, a creature we created from need, but fear has an appetite for tyranny.[17] Applying the rule to Rok's death may authorize government to exercise ultimate power and take Og's life. Can we trust this creature to apply and implement the rule, or does reasoned self-interest caution that the final power to fix the price Og owes to society lies elsewhere?[18]

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16. In *The Common Law,* Justice Holmes observed:

> For it is to be remembered that the object of the law is to prevent human life being endangered or taken; and that, although it so far considers blameworthiness in punishing as not to hold a man responsible for consequences which no one, or only some exceptional specialist, could have foreseen, still the reason for this limitation is simply to make a rule which is not too hard for the average member of the community. As the purpose is to compel men to abstain from dangerous conduct, and not merely to restrain them from evil inclinations, the law requires them at their peril to know the teachings of common experience, just as it requires them to know the law. Subject to these explanations, it may be said that the test of murder is the degree of danger to life attending the act under the known circumstances of the case.

OLIVER WENDELL HOLMES, JR., THE COMMON LAW 56-57 (1881).

17. *See generally* Bruce Antkowiak, *Contemplating Brazilian Federalism: Reflections on the Promise of Liberty*, 43 DUQ. L. REV. 599, 605-611 (2005) (describing the history of the rise of federalism in the United States).

18. In extolling the virtues of the English system of giving the citizen "two branches of popular power," namely, voting for members in the House of Commons and sitting on juries, John Adams proclaimed them as "essential and fundamental to the great end of it, the preservation of the subject's liberty, to preserve the balance and

History shows our long struggle with ourselves to find a just societal response to the Og/Rok scenario and a fair process to implement it. In this ongoing struggle, we formed certain core elements into an integrated whole, a gestalt, the art form of malice.

The art form of malice was poetry. A poem, Robert Frost tells us, "begins as a lump in the throat" and happens when an emotion has found its thought "and the thought [has found] words."[19] The "lump in the throat" that spawned malice was a counterbalance of perceptions that while strict liability murder was impractically austere, even when one did not specifically intend to kill another, one's actions might still be so dangerous that calling them murder was not too strong a term. Words were needed to capture this thought and the emotions that underlie it.

The words formed an epic poem so intricate that it could not be known from one fact alone, but not so inscrutable that only our best minds could discern it. We are its scriveners and we have entrusted the process of finding it to ourselves in the body of a jury. It is, we hope, the best of our reason. We have, to paraphrase Henry Ward Beecher's proverb regarding all artists, dipped our brush into our own soul and painted our own nature into this picture.[19]

II. A SHORT HISTORY OF ANGLO-AMERICAN MURDER

A. Simplicity Evolved

Murder today is not the simple legal matter the deadly weapon inference makes it seem. The Model Penal Code requires inquiry about whether the death was caused purposefully or knowingly, recklessly under circumstances manifesting extreme indifference to human life, or negligently.[20] Pennsylvania, like many other states, adopts this general formulation, but retains specific reference to malice as the key definitional term.[21] Principles of justification and

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mixture of the government, and to prevent its running into an oligarchy or aristocracy." WRITINGS OF JOHN ADAMS, *supra* note 14, at 55. He called these powers the "heart and lungs" without which the body would die and government become arbitrary. *Id.* They are the "fortifications against wanton, cruel power" and in them "consist wholly the liberty and security of the people." *Id.*; *see also* Bruce A. Antkowiak, *The Ascent of an Ancient Palladium: The Resurgent Importance of Trial by Jury and the Coming Revolution in Pennsylvania Sentencing*, 13 WIDENER L.J. 11, 22-34 (2003).

19. "Every artist dips his brush in his own soul and paints his own nature into his pictures." HENRY WARD BEECHER, PROVERBS FROM PLYMOUTH PULPIT 229 (1887).

20. MODEL PENAL CODE §§ 210.1-.2 (1962).

21. The *Pennsylvania Suggested Standard Criminal Jury Instructions* on homicide begin as follows:

> 1. The defendant is charged with taking the life of [name of victim] by criminal homicide. There are [six] [*number*] possible verdicts that you

might reach in this case—not guilty or guilty of one of the following crimes: [murder of the first degree] [murder of the second degree] [murder of the third degree] [voluntary manslaughter] [involuntary manslaughter].

[The remainder of this instruction should be tailored to the individual case and reference made *only* to those degrees of homicide or defenses actually before the jury.]

2. Before defining each of these crimes, I will tell you about malice, which is an element of murder but not of manslaughter. A person who kills must act with malice to be guilty of any degree of murder. The word "malice," as I am using it, has a special legal meaning. It does not mean simply hatred, spite, or ill-will. Malice is a shorthand way of referring to any of three different mental states that the law regards as being bad enough to make a killing murder. The type of malice differs for each degree of murder.
3. Thus, for murder of the *first degree*, a killing is with malice if the perpetrator acts with: first, an intent to kill, or as I will explain later in my definition of first-degree murder, the killing is willful, deliberate, and premeditated.
4. For murder of the *second degree*, or "felony murder" as second-degree murder is commonly called, a killing is with malice if the perpetrator engages in one of certain enumerated felonies and a killing occurs, since the law, through the felony murder rule, allows the finder of fact to infer that the killing was malicious from the fact that the actor was engaged in a felony of such a dangerous nature to human life that the perpetrator, as held to the standard of a reasonable man, knew or should have known that death might result from the felony.
5. [First Alternative:] For murder of the *third degree*, a killing is with malice if the perpetrator's actions show his or her wanton and willful disregard of an unjustified and extremely high risk that his or her conduct would result in death or serious bodily injury to another. In this form of malice, the Commonwealth need not prove that the perpetrator specifically intended to kill another. The Commonwealth must prove, however, that he or she took action while consciously, that is, knowingly, disregarding the most serious risk he or she was creating, and that, by his or her disregard of that risk, he or she demonstrated his or her extreme indifference to the value of human life.

5. [Second Alternative:] For murder of the *third degree*, a killing is with malice if the perpetrator acts with [a wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty indicating an unjustified disregard for the probability of death or great bodily harm and an extreme indifference to the value of human life] [a conscious disregard of an unjustified and extremely high risk that his or her actions might cause death or serious bodily harm].

[6. On the other hand, a killing is without malice if the perpetrator acts under circumstances that reduce the killing to *voluntary manslaughter*. I will tell you what those circumstances are when I define voluntary manslaughter.]

[7. A killing is [likewise] without malice if the perpetrator acts with lawful justification or excuse. Lawful justification or excuse not only negates malice but also is a complete defense to any charge of criminal homicide. I shall say more about this when I charge you on the defense of [self-defense] [*type of defense*].]

excuse[22] complete the complex pattern of aspects we now deem pertinent to a finding of murder. This complexity is an evolved state. Over the period of Anglo-American legal history, however, the urge to make murder simpler often overwhelmed us.[23]

While Noah may have had other reading material in the Arc, the Model Penal Code was not in his library. When he finally got to dry land, he needed a short course on the law of homicide. He learned a rule that admitted of few subtleties: "Whoso sheddeth man's blood, by man shall his blood be shed; for in the image of God made he man."[24] A jury instruction based on this passage would be preciously simple: if Og caused the death of Rok, Og is guilty of murder.

Moses, evidently, had registered for the advanced course on homicide. When he recorded the governing principles, subtleties had crept into the equation. The thirty-fifth chapter of the *Book of Numbers* recites a laundry list of ways in which a person can smite another with some object—an instrument of iron, a stone, a weapon of wood—and become a murderer.[25] However, one should not make the mistake of reading *Numbers* as a biblical justification for the malice/deadly weapon inference by omitting the rest of that passage,

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PENNSYLVANIA SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2501A (Pa Bar Inst. 2005).

22. *See* MODEL PENAL CODE §§ 3.01, 210.3.

23. What follows is certainly not an attempt at an exhaustive history of murder. It is simply to view our current endpoint and cast an eye back to moments along the way that illustrate the ebb and flow about the degree of complexity murder should exhibit.

24. *Genesis* 9:6 (King James).

25. *Numbers* 35:9-19 (King James) (emphasis ommitted) reads as follows:

> [9] And the LORD spake unto Moses, saying, [10] Speak unto the children of Israel, and say unto them, When ye be come over the Jordan into the land of Canaan; [11] Then ye shall appoint you cities to be cities of refuge for you, that the slayer may flee there, who killeth any person unintentionally. [12] And they shall be unto you cities for refuge from the avenger, that the manslayer die not, until he stand before the congregation in judgment. [13] And of these cities which ye shall give, six cities shall ye have for refuge. [14] Ye shall give three cities on this side of the Jordan, and three cities shall ye give in the land of Canaan, which shall be cities of refuge. [15] These six cities shall be a refuge, both for the children of Israel, and for the stranger, and for the sojourner among them, that every one who killeth any person unintentionally may flee there. [16] And if he smite him with an instrument of iron, so that he die, he is a murderer: the murderer shall surely be put to death. [17] And if he smite him with throwing a stone, wherewith he may die, and he die, he is a murderer: the murderer shall surely be put to death. [18] Or if he smite him with a hand weapon of wood, wherewith he may die, and he die, he is a murderer: the murderer shall surely be put to death. [19] The avenger of blood himself shall slay the murderer; when he meeteth him, he shall slay him.

which shows the spirit of the attack is far more vital than the weapon of choice.[26]

> But if he thrust him from hatred, or hurl at him by laying of wait, that he die; Or *in enmity* smite him *with his hand*, that he die: he that smote him shall surely be put to death; for he is a murderer: the revenger of blood shall slay the murderer, when he meeteth him.[27]

Indeed, the revenger of blood was to be frustrated by the congregation if enmity in the taking of the life is absent, regardless of weaponry:

> But if he thrust him suddenly without enmity, or have cast upon him anything without laying of wait; Or with any stone, wherewith a man may die, seeing him not, and cast it upon him, that he die, and was not his enemy, neither sought his harm: Then the congregation shall judge between the slayer and the revenger of blood according to these judgments; And the congregation shall deliver the slayer out of the hand of the revenger of blood, and the congregation shall restore him to the city of his refuge, to which he was fled; and he shall abide in it unto the death of the high priest, who was anointed with the holy oil.[28]

Post-Ark enmity might not equate with the eventual epic poem of malice, but something beyond an absolute, strict liability understanding of murder was now realized.[29]

As the ancient world gave way to the medieval, the law of murder was formed to a considerable degree "in Scandinavia, Germany and Anglo-Saxon England" by the system of "blood feud and vengeance."[30] Without highly developed governmental structures, the family became a primary means of dealing with the

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26. This error appears in Professor Greenleaf's treatise. SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 18, at 113 n.1 (John Henry Wigmore ed., 16th ed. 1899). Professor Greenleaf mistakenly found that "[t]he doctrine of presumptive evidence was familiar to the Mosaic Code, even to the letter of the principle stated in the text," so if a man uses a "hand-weapon" and his victim perishes, he is a murderer. *Id.*

27. *Numbers* 35:20-21 (King James) (emphasis added).

28. *Id.* 35:22-25 (emphasis omitted).

29. Excellent discussions of the application of the ancient laws of the Israelites and other cultures regarding murder may be found in ISRAEL DRAPKIN, CRIME AND PUNISHMENT IN THE ANCIENT WORLD (1989), and HERBERT A. JOHNSON, HISTORY OF CRIMINAL JUSTICE 24-26 (1988), as well as the observations concerning these laws in WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND OF PUBLIC WRONGS 206, 209-10, 216-17 (Robert Malcolm Kerr adap., Charles M. Haar ed., Beacon Press 1962).

30. JOHNSON, *supra* note 29, at 46.

Og/Rok problem.[31] But vengeance was not absolute or always bloody. Physical reprisals gave way to a system of payments of property,[32] and the feud process itself took into account some of the circumstances of the initial slaying in determining whether all out reprisal was warranted. Professor Johnson writes:

> Despite its barbarity, vengeance progressed upon fixed rules which tended to limit its scope and ferocity . . . . Clans and kindred groups were careful to restrain the violence of their members because misbehavior that resulted in injury or death beyond the clan triggered revenge and brought disrepute upon the slayer's group. *A rough sort of public opinion* operated to discourage the exaction of revenge when the victim's behavior might have justified the homicide.[33]

Professor Rosenthal commented that the "rules" of blood feuds made it so that "[s]ome deaths could not be avenged either because the slayer had acted [honorably], e.g. fighting to protect his leader, or the slain one [acted dishonorably], e.g. while attempting an ambush or assassination."[34] Again, in an era not regarded for its rule of reason, some sort of societal consensus was afoot to make exceptions and gradations about homicides, at least in terms of matters of justification and excuse. Vengeance and feuds, lusty as they might be, had to be reasonable.

When the common law emerged from the primordial soup of the ancient codes and practices that preceded it,[35] it once again conceived of homicide as a very simple creature. Homicide, unless done at the direction of the King, was murder, and murder was punishable by death.[36] It was virtually a strict liability offense, *Genesis* redux.[37]

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31. Joel T. Rosenthal, *Marriage and the Blood Feud in 'Heroic' Europe*, 17 BRIT. J. SOC. 133, 134 (1966).

32. Referred to variously as "wergild" and "dooms." *See* JOHNSON, *supra* note 29, at 46-47.

33. *Id.* at 46 (emphasis added).

34. Rosenthal, *supra* note 31, at 135.

35. The rich and complex origins of the common law have been traced in various works. MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND, DIVIDED INTO TWELVE CHAPTERS, WRITTEN BY A LEARNED HAND 3 (1713); GEORGE CRABB, A HISTORY OF ENGLISH LAW; OR AN ATTEMPT TO TRACE THE RISE, PROGRESS, AND SUCCESSIVE CHANGES, OF THE COMMON LAW; FROM THE EARLIEST PERIOD TO THE PRESENT TIME 1 (1st Am. ed. 1831); M. Stuart Madden, *The Vital Common Law: Its Role in a Statutory Age*, 18 U. ARK. LITTLE ROCK L.J. 555, 572 (1996); Frederick Schauer, *Is the Common Law Law?*, 77 CAL. L. REV. 455 (1989) (reviewing MELVIN A. EISENBERG, THE NATURE OF THE COMMON LAW (1988)).

36. Edward P. Buford, *The Presumption of Malice in the Law of Murder*, 8 VA. L. REG. (NEW SERIES) 178, 185 (1922); Rollin M. Perkins, *A Re-Examination of Malice Aforethought*, 43 YALE L.J. 537, 541 (1934); Walter E. Oberer, Comment, *The Deadly Weapon Doctrine—Common Law Origin*, 75 HARV. L. REV. 1565, 1566 (1962).

Of course, liability so strictly applied with irreversible consequences is likely to lose its theoretical charm once it begins to be applied in practice. Not surprisingly, various means arose to soften the harsh effects of such absolute rules. The King was called upon to issue pardons, judges resorted to hyper-technical interpretations of law to divert the perceived unjust result, and the "benefit of clergy" was eventually extended to those who could read, whether of clerical rank or not.[38]

These modifications, however, all shared the feature of arbitrariness and had the potential to excuse inexcusable killings as long as the killer was sufficiently politically allied to receive such a dispensation. Parliament responded by limiting both pardon and "benefit of clergy" by making them inapplicable where the murder exhibited the phenomenon of "malice prepensed," later rendered "malice aforethought."[39] Coke viewed this as "a calculated intention to kill in the formation of which the accused had opportunity for deliberating on the likely consequences of his action."[40] This became the dividing line between manslaughter, which was "clergyable," and murder, which was not.[41]

The dividing line was further drawn by the doctrine of "chance medley."[42] At times, English society exhibited a volatile mixture of alcohol in ready supply, weapons carried commonly in public, and personal honor easily offended.[43] A number of deaths in a "sudden affray" and the "heat of blood" were inevitable.[44] As the victor and the vanquished in these deadly brawls were equally the aggressor, self-defense was not available, but, as the killing was hardly with the sort of planning consonant with the idea of "malice prepensed," the same legal condemnation could not be affixed.[45] Hence, the law embraced the lesser charge of manslaughter when "chance medley" was found.[46]

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37. M. Sornarajah, *Reckless Murder in Commonwealth Law*, 24 INT'L & COMP. L.Q. 846, 846 (1975).

38. *See* Perkins, *supra* note 36, at 540, 542; Oberer, *supra* note 36, at 1566.

39. Oberer, supra note 36, at 1566-67. Sornarajah, *supra* note 37, at 847; Perkins, *supra* note 36, at 543.

40. Bernard J. Brown, *The Demise of Chance Medley and the Recognition of Provocation as a Defence to Murder in English Law*, 7 AM. J. LEGAL HIST. 310, 312-13 (1963) (describing Coke's view of malice aforethought).

41. *See* Oberer, *supra* note 36, at 1566; Perkins, *supra* note 36, at 543.

42. *See* Oberer, *supra* note 36, at 1567; *see also* BLACKSTONE, *supra* note 29, at 207.

43. *See* Brown, *supra* note 40, at 312.

44. *Id.* at 310-12; BLACKSTONE, *supra* note 29, at 207.

45. *See* Brown, *supra* note 40, at 310-12.

46. *See id.* at 313; Oberer, *supra* note 36, at 1566-67.

Note that "chance medley" was a finding made without specific reference to whether a deadly weapon was used to vent the "heat of blood" that accompanied the killing.[47] The line to "malice prepensed" was crossed by evidence that the defendant deliberated upon the death, not the manner in which he caused it.[48]

But chance medley allowed a jury to exercise a form of pardon by sparing the brawler from the death penalty that followed a murder conviction.[49] The English courts and Parliament eventually became annoyed at the extent of the jury's largesse in this regard.[50] This was particularly so when James I became king and a number of his fellow Scots began strolling about London, adding cultural antagonism to the volatile atmosphere, and producing "frequent quarrels involving stabbings with short daggers."[51] Parliament responded in 1604 by passing the Statute of Stabbing, making it a capital crime outside the benefit of clergy to:

> [S]tab or thrust any Person or Persons that hath not then any Weapon drawn, or that hath not then first stricken the Party which shall so stab or thrust, so as the Person or Persons so stabbed or thrust shall thereof die within . . . six Months then next following, although it cannot be proved that the same was done of Malice aforethought.[52]

Considered by some to be an emergency measure,[53] the Statute of Stabbings had the primary aim of making manslaughter dependent not upon the *suddenness* of the occurrence of the affray, but on the sufficiency of the *provocation* that brought about the killing.[54] The Statute of Stabbings was seen to embody a common law principle that suddenness did not equate with provocation, a principle to be affirmed against "the inconveniences of juries" who thought it was.[55] On the surface, the Statute of Stabbings was a stark retrenchment from a complex articulation of malice and, by focusing on the means of death alone in some respects, a return to strict liability principles of the past. But, while it lasted on the books for 150 years or so,[56] something happened to the statute almost immediately after its passage that reflects a profound truth about our disposition as

47. Oberer, *supra* note 36, at 1567.

48. *See id.* at 1567-68.

49. Brown, *supra* note 40, at 311.

50. *See id.* at 313-15.

51. LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, at 630 (1948).

52. *Id.*; *see also* Brown, *supra* note 40, at 314.

53. RADZINOWICZ, *supra* note 51, at 20 n.59.

54. Oberer, *supra* note 36, at 1567-68.

55. *Id.* at 1568.

56. *See* Brown, *supra* note 40, at 313 n.16; RADZINOWICZ, *supra* note 51, at 695.

rulemakers. After all, reasoned self-interested negotiation is relentless.

The Statute of Stabbings was rendered "a striking example of a highly penal law the operation of which was effectively restricted by the courts almost immediately after it had been passed by the Legislature."[57] Professor Radzinowicz has brilliantly traced the course of interpretation the English courts gave this statute and the multiple exceptions and qualifications they placed upon it, which effectively restored the common law principles of provocation and excuse the statute ostensibly sought to eliminate.[58]

Blackstone himself had a profound insight about the interpretation of this statute.[59] Since it was a statute "of a temporary nature," he said, it "ought to have expired with the mischief that it meant to remedy."[60] However, its ultimate repeal was a *fait accompli* as "the benignity of the law construed the statute so [favorably] in behalf of the subject, and so strictly when against him, that the [offense] of stabbing stood under the statute almost upon the same footing as it did at the common law."[61] The root of this benignity was, very importantly, an exercise of reason that should be recalled when any union of the ideas of malice and deadly weapons is attempted. Blackstone writes:

> For in point of solid and substantial justice, it *cannot be said* that *the mode of killing*, whether by stabbing, strangling, or shooting, *can either extenuate or enhance the guilt*; unless where, as in the case of poisoning, it carries with it an internal evidence of cool and deliberate malice.[62]

Standing alone, the weapon of death is just too equivocal and inanimate to allow us to make the complex judgment of malice that murder requires. The judges who systematically dismantled the Statute of Stabbing did so because they—like the juries whose "inconveniences"[63] in finding manslaughter where the Crown wanted murder spurred the passage of the statute in the first place—understood the enlightened, rational insight that malice is a gestalt

57. RADZINOWICZ, *supra* note 51, at 695.

58. Some of these were: throwing a hammer or sword was outside the act; an attack by multiple parties allowed a stabbing response against any of them, regardless of whether each was armed; a broad interpretation was given to when the victim had a weapon drawn; and many more. RADZINOWICZ, *supra* note 51, at 695-97; *see also* BLACKSTONE, *supra* note 29, at 215-16 n.d.

59. *See* BLACKSTONE, *supra* note 29, at 215-16 n.d.

60. *Id.* at 216 n.d.

61. *Id.*

62. *Id.* (emphasis added).

63. Oberer, *supra* note 36, at 1568.

that the use of a deadly weapon alone cannot explain if the law is to be just.

The evolutionary path of the Anglo-American view of homicide was hardly a straight line.[64] But a consensus to take into account the varied factors we now persistently embrace emerged. Simplistic strict-liability homicide never thrived for long, and the epic poem of malice, what Blackstone called "the grand criterion" distinguishing murder from other sorts of killing,[65] was the dominant and recurring theme. For society to declare a death to be a murder, science could help us find the cause of death—but it was in the high art of malice that society based its final judgment.

B. The Crafting of Malice

The word "malice" was conscripted into the law and was surrounded with a distinct "aura of mystery."[66] Lord Holt would call it "a design formed of doing mischief to another,"[67] and murder, Blackstone would say, arises "from the wickedness of the heart" that is malice.[68] An English court in 1727 said that while in "common acception malice is took to be a settled anger (which requires some length of time) in one person against another, and a desire of revenge," in the legal sense, "it imports a wickedness, which includes a circumstance attending an act, that cuts off all excuse."[69] Wickedness here was not just morally aberrant, but embraced broader societal considerations of dangerousness.

For while malice could manifest itself as an act willful and deliberate against one particular other,[70] Blackstone observed that it "is not so properly spite or malevolence to the deceased in particular, as any evil design in general" making it "the dictate of a wicked, depraved, and malignant heart."[71] Where a workman deliberately flings a stone or timber into the street of a populous town killing passersby, the act is murder where "he knows of their passing, and

64. Professor McManus has, for example, examined at length the phenomenon of the New England Puritans' treatment of homicide that, based on their view of scripture, diverged from English law in making no distinction between murder and manslaughter in the case of an intentional killing. EDGAR J. MCMANUS, LAW AND LIBERTY IN EARLY NEW ENGLAND 21-22, 25-26 (1993).

65. BLACKSTONE, *supra* note 29, at 221.

66. Sornarajah, *supra* note 37, at 848.

67. *Id.*

68. BLACKSTONE, *supra* note 29, at 213.

69. The King v. Oneby (1727) 94 Eng. Rep. 12 (K.B.).

70. BLACKSTONE, *supra* note 29, at 216.

71. *Id.* at 221.

gives no warning at all, for then it is malice against all mankind."[72] The language had a moralistic patina, but evinced a strong sense that malicious acts were, at their core, ones of extremely negative social utility.

The trinity of malice was forming. Blackstone adapted Coke in saying that murder was an act occurring when a sane adult unlawfully kills another person with malice aforethought expressed or implied.[73] An unlawful killing was a deliberate act done "without warrant or excuse" and largely involved considerations of causation.[74] Express malice and implied malice were not two different species, just different manifestations of the same phenomenon, best understood if we disabused ourselves of the notion that the killer's subjective mental state was the only matter at issue.[75]

Blackstone's venerable definition of express malice is, on the one hand, all about mental state:

> Express malice is when one, with a sedate deliberate mind and formed design, doth kill another: which formed design is evidenced by external circumstances discovering the inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm.[76]

But shortly thereafter, he remarks that "if even upon a sudden provocation one beats another in a cruel and unusual manner, so that he dies, *though he did not intend his death*, yet he is guilty of murder *by express malice*; that is, by an express evil design, the genuine sense of *malitia*."[77] And, like Coke, he identifies at least four situations in which malice will be implied in which either no "external circumstances" hint at the malignant heart or in which no intent to kill is present at all:

> The willful poisoning of another even though "no particular enmity can be proved;"
>
> A sudden killing without any provocation, "for no person, unless of an abandoned heart, would be guilty of such an act, upon a slight or no apparent cause;"

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72. *Id.* at 215. This is a fine illustration of the malice component in what the Model Penal Code calls "extreme indifference" murder, what some jurisdictions call second degree murder and what Pennsylvania courts list as third degree murder. *See* MODEL PENAL CODE § 210.2(1)(b) (1962); PENNSYLVANIA SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502C (Pa Bar Inst. 2005). It is also referenced in the widely cited case of *Commonwealth v. York*, 50 Mass. 93, 102 (1845), where the court observed that the degree of "carelessness, cruelty or malignity" allows for the finding of malice.

73. BLACKSTONE, *supra* note 29, at 218.

74. *Id.*

75. Perkins, *supra* note 36, at 547.

76. BLACKSTONE, *supra* note 29, at 221-22.

77. *Id.* at 222 (emphasis added).

> The killing of a policeman who is "in the execution of his duty;" and,
>
> Where "one intends to do another felony, and undesignedly kills a man, this is also murder."[78]

While "intent is latent in the mind, and can seldom be known otherwise than by the act which is done,"[79] the second type of express malice and much of the implied malice scenarios show that we are not defining malice as merely a state of mind to be inferred from a particular state of facts.[80] While "deliberate" conduct is required across the board for murder, the deliberate intention to kill the victim clearly is not.

A malicious killing is a blend of act and mind but, more broadly, it is the demarcation of violent, deliberate conduct so dangerous, unjustified, and inexcusable that when death results no less than the label of murder must be affixed to it to vindicate all proper societal concerns. We are always free to choose a focal point other than dangerousness as the hallmark of this demarcation or alter the rendering of malice that guides it, but until we do we must read malice as the integrated whole that it is. None of its elements, like the words of any epic poem, may be excised or improperly emphasized without fundamentally altering its internal harmony.

With the poetry of malice, murder became a profoundly multilayered offense. In expressing its elements, however, the common law did so in a way that assigned the burden of proof of them in ways different than the current Supreme Court would countenance. Nonetheless, all the elements of the definition of murder were there:

> [W]e may take it for a general rule that all homicide is malicious, and of course amounts to murder, unless where *justified* by the command or permission of the law; *excused* on the account of accident or self-preservation; or *alleviated* into manslaughter, by being either the involuntary consequence of some act, not strictly lawful, or (if voluntary) occasioned by some sudden and sufficiently violent provocation. And all these circumstances of justification, excuse, or alleviation, it is incumbent upon the prisoner to make out, to the satisfaction of the court and jury: the latter of whom are to decide whether the circumstances alleged are proved to have actually existed; the

78. *Id.* at 223; *see also* JOHN HENRY THOMAS & JOHN FARQUHAR FRASER, THE REPORTS OF SIR EDWARD COKE, KNT. IN THIRTEEN PARTS (2002); Sornarajah, *supra* note 37, at 848. An extended category of implied malice circumstances was announced by the court in *The King v. Oneby* (1727) 94 Eng. Rep. 12 (K.B.).

79. Trial of John Woodburne & Arnold Coke (1722). 8 George 1, 54, 67 (A.D.).

80. Professor Perkins discusses brilliantly the "fiction" of believing we may impute a state of mind in this regard. Perkins, *supra* note 36, at 547.

> former, how far they extend to take away or mitigate the guilt. For all homicide is presumed to be malicious, until the contrary appears upon evidence.[81]

While the language presuming malice might seem to be a vestige of the old days of strict liability,[82] the presumption of murder when Og caused the death of Rok was hardly a fast track to the gallows.[83] The causing of death alone, even with a deadly weapon,[84] had to be examined in light of all the qualifications, exceptions, and mollifications the law then recognized as part of the definition of murder that had evolved. Malice, the most vital term of that definition, was a gestalt that only a wide camera lens could capture. Would the use of a deadly weapon really make that judgment easy for a jury?

C. The Incidental Role of Deadly Weapons

The Statute of Stabbing was an anomaly, as the common law did not need to refer to deadly weapons to define malice.[85] The deliberate use of a deadly weapon may evidence deadly intent, but it neither intensifies the presumption of malice nor negates the importance of assessing all possible issues of justification, excuse, or alleviation.[86] Reference to the use of such weapons may, in fact, have primarily served to inform a collateral issue regarding the extent of corporal discipline society was willing to tolerate.[87]

As between parent and child, master and apprentice, or officer and criminal, "the act of correction" within the bounds of moderation was lawful.[88] But, "immoderate correction [was] unlawful" and could become excessive "either in the manner, the instrument, or the quantity of punishment."[89] Where "death accidentally ensue[d]" the end result could be manslaughter or murder.[90] For example, when a blacksmith corrected his apprentice "by a blow to the head with an iron bar" that caused death, the court found that the use of a deadly weapon might support a finding of malice prepensed, since objects that may kill a human "are not instruments of correction."[91]

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81. BLACKSTONE, *supra* note 29, at 224.

82. *See* Sornarajah, *supra* note 37, at 846 (explaining that at common law, homicide was a strict liability offense).

83. *See* Oberer, *supra* note 36, at 1568-69.

84. *See id.* at 1574-75.

85. *See generally id.* at 1566-76.

86. *See id.* at 1573-76; *see also* Perkins, *supra* note 36, at 549.

87. *See* Oberer, *supra* note 36, at 1570.

88. BLACKSTONE, *supra* note 29, at 205; *see also* Oberer, *supra* note 36, at 1569-71.

89. BLACKSTONE, *supra* note 29, at 206.

90. *Id.*

91. Oberer, *supra* note 36, at 1569.

But, of course, it was not *just* the iron bar that made the blacksmith's act murder. The definition of a "deadly weapon" even today hardly reads like a manufacturer's catalog describing the engineering of the thing itself. Rather, modern law speaks of a weapon's "use" and the intention with which it is used, emphasizing that deadliness can only be traced to the sentiment used to achieve a malicious end.[92] To know if the apprentice died by malice, the jury

92. The Pennsylvania definition of a "deadly weapon" is:

> Any firearm, whether loaded or unloaded, or any device designed as a weapon and capable of producing death or serious bodily injury, or any other device or instrumentality which, in the manner in which it is used or intended to be used, is calculated or likely to produce death or serious bodily injury.

18 PA. CONS. STAT. ANN. § 2301 (West 2006). The focus is not on the instrument itself, but on the manner in which it is used; specifically, whether it is employed in a way that evidences the actor's intent to cause death or serious bodily injury. For example, the Superior Court of Pennsylvania held that a tire iron, when thrown by a defendant toward his victim, constituted a deadly weapon. Commonwealth v. Scullin, 607 A.2d 750, 752 (Pa. Super. Ct. 1992). The court observed:

> Although deadly weapons are commonly items which one would traditionally think of as dangerous (*e.g.*, guns, knives, etc.), there are instances when items which normally are not considered to be weapons can take on deadly status. The definition of deadly weapon does not demand that the person in control of the object intended to injure or kill the victim. Instead, it gives objects deadly weapon status on the basis of their use under the circumstances.

Id. at 753 (citations omitted).

In *Commonwealth v. McKeithan*, the court highlighted the importance of the phrase "in the manner in which it is used or intended to be used." 504 A.2d 294, 301 (Pa. Super. Ct. 1986) (quoting 18 PA. CONS. STAT. ANN. § 2301). The circumstances surrounding a crime must make evident the requisite intent to use the weapon in a deadly manner during the crime. *Id.* at 301.

In *Commonwealth v. Thomas*, the court found that a vehicle was a deadly weapon when driven in the reckless way the defendant operated it since "a deadly weapon need not be, of course, an inherently lethal instrument or device." 656 A.2d 514, 518-19 (Pa. Super. Ct. 1995) (quoting Commonwealth v. McCullum, 602 A.2d 313, 323 (Pa. 1992)).

Other cases examining the relationship between seemingly innocuous objects and their elevation to deadly weapon status through use or intent include: Commonwealth v. Scott, 752 A.2d 871, 874 (Pa. 2000) (finding five-pound dumbbell consitutes murder weapon); Commonwealth v. Brown, 587 A.2d 6 (Pa. Super. Ct. 1991) (affirming that dry-wall saw was a deadly weapon when used to stab victim ten times); Commonwealth v. Cornish, 589 A.2d 718, 719-20 (Pa. Super. Ct. 1991) (holding that fireplace poker was a deadly weapon when used by defendant to beat his victim); Commonwealth v. Raybuck, 915 A.2d 125, 126 (Pa. Super. 2006) (finding that commercial mouse poison was a deadly weapon when used to poison food for human consumption).

had to consider "the whole evidence" not just the bar that surely would have been Exhibit A at trial.[93]

Courts applying these common law principles understood this. The 1868 Pennsylvania Supreme Court decision in *Commonwealth v. Drum* is a paradigmatic example.[94]

While the motive for their affray was not the relative merits of James I, the brawl between William Drum and Daniel Mohigan was much in the nature of the seventeenth-century chance-medley affair, where one man's facility with a knife was the ultimate and decisive factor. The trial arising out of the brawl focused on why Drum armed himself with a knife—anticipation of an assault on Mohigan versus a "hunting excursion"—and who started and continued the fight in which the knife became the instrument of death.[95] The case was no whodunit, and the issues before the jury ranged over premeditation, malice, manslaughter, provocation, and self-defense.[96]

The court charged the jury on the basic elements of murder in language echoing Coke and Blackstone.[97] As to malice, the court

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93. *See* Commonwealth v. Dougherty, 1 Brown 8, 22-23 (Pa. Ct. Common Pleas 1807).

94. 58 Pa. 9 (1868). A wedding reception in 1795 also provided the venue for the Supreme Court of Pennsylvania to discuss certain of these principles. *Respublica v. Mulatto Bob*, 4 U.S. (4 Dall.) 145, 145-46 (Pa. 1795). A brawl broke out among a number of the guests, but had calmed down when the defendant grabbed a club and then an axe from a handy woodpile *Id.* at 146. The defendant then struck the axe into the ground, swearing that he would "split down any fellows that were saucy." *Id.* at 145. He next attributed sauciness to one "David," striking him twice in the head with the axe and killing him. *Id.* at 146.

In determining that this was premeditated, first-degree murder, the court readily found the intention "collected from [the defendant's] words and actions." *Id.* This was an easy conclusion, since the defendant "actually killed the deceased in the way which he had menaced." *Id.*

But the court added this parenthetical: "But, let it be supposed, that a man, without uttering a word, should strike another on the head with an axe, it must, on every principle by which we can judge of human actions, be deemed a premeditated violence." *Id.* This is presumed malice in a situation in which no other attendant facts would dilute the conclusion of an intentional killing. Absent insanity, if there were truly no other circumstances in a case but the fact that a defendant calmly armed himself with an axe and parted the skull of a "saucy" adversary, the act would support a first-degree finding in the same way it would if the death blow was by fist or strangulation. The court did look at the attendant circumstances before it, dismissed the prior fight as insufficient provocation, pondered the words of the defendant before the fatal blows, and reached an integrated decision that did not turn on the mere use of an axe alone. *Id.* at 146-47.

95. *See Drum*, 58 Pa. at 19.

96. *See id.* at 17-19.

97. "At the common law murder is described to be, when a person of sound memory and discretion unlawfully kills any reasonable creature in being and under the peace of the Commonwealth, with malice aforethought, expressed or implied." *Id.* at 15.

issued what became a classic formulation of malice in Pennsylvania law to this day[98]:

> The distinguishing criterion of murder is malice aforethought. But it is not malice in its ordinary understanding alone, a particular ill-will, a spite or a grudge. Malice is a legal term, implying much more. It comprehends not only a particular ill-will, but every case where there is wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty, although a particular person may not be intended to be injured. Murder, therefore, at common law embraces cases where no intent to kill existed, but where the state or frame of mind termed malice, in its legal sense, prevailed.[99]

Pennsylvania's legislature had, by this time, broken down murder into first degree (premeditated killing and felony murder), and second degree (all other types of murder—that is, homicide with malice).[100] By the nature of the killing, the jury could presume the crime was murder in the second degree[101] since "all homicide is presumed to be malicious, that is, murder of some degree, until the contrary appears in evidence," but the Commonwealth bore the burden of proving first degree.[102]

Premeditation required further explanation and, in the context of this case, the use of the knife was to be contemplated. The court instructed on intent in order to demonstrate how integrated the consideration of the knife had to be. See if you can find the inference in the thicket of qualifications that surround it:

> The proof of the intention to kill, and of the disposition of mind constituting murder in the first degree, under the Act of Assembly, lies on the Commonwealth. But this proof need not be express or positive. It may be inferred from the circumstances. If, from all the facts attending the killing, the jury can fully, reasonably, and satisfactorily infer the existence of the intention to kill, and the malice of heart with which it was done, they will be warranted in so doing. He who uses upon the body of another, at some vital part, with a manifest intention to use it upon him, a deadly weapon, as an axe, a gun, a knife or a pistol, *must, in the absence of qualifying facts,* be presumed to know that his blow is likely to kill; and, knowing

98. *See* Commonwealth v. Santos, 876 A.2d 360, 363 (Pa. 2005); Commonwealth v. Ludwig, 874 A.2d 623, 631-32 (Pa. 2005).

99. *Drum*, 58 Pa. at 15.

100. *Id.* at 15-16.

101. *Id.* at 17-18; *see also* Commonwealth v. Reed, 83 A. 601, 603 (Pa. 1912); Commonwealth v. Mika, 33 A. 65, 65-66 (Pa. 1895); Johnson v. Commonwealth, 24 Pa. 386, 389 (1855).

102. *Drum*, 58 Pa. at 18.

> this, must be presumed to intend the death which is the probable and ordinary consequence of such an act. He who so uses a deadly weapon *without a sufficient cause of provocation*, must be presumed to do it wickedly, or from a bad heart. Therefore, he who takes the life of another with a deadly weapon, *and with a manifest design thus to use it upon him, with sufficient time to deliberate, and fully to form the conscious purpose of killing, and without any sufficient reason or cause of extenuation*, is guilty of murder in the first degree.
>
> All murder not of the first degree, is necessarily of the second degree, and includes all unlawful killing under circumstances of depravity of heart, and a disposition of mind regardless of social duty; but where no intention to kill exists or can be reasonably and fully inferred. Therefore, in all cases of murder, if no intention to kill can be inferred or collected from the circumstances, the verdict must be murder in the second degree.[103]

The knife was also relevant in the final stage of the deliberation, assessing whether Drum proved circumstances reducing the crime to manslaughter or establishing self-defense outright.[104] In making this final judgment, however, the jury was not instructed in the simplistic way it would be today:

> When death ensues from the use of a deadly weapon, in a quarrel or affray, the jury must scan closely the conduct of both parties, their former relations and behavior, and the current of events; the character of the weapon, the manner of its use, and circumstances attending it; and by a careful survey of the evidence, must endeavor to arrive at the true motive and cause which prompted the fatal blow. Has there been a former difficulty? What feeling did it produce, and what design did it beget? Was the weapon prepared, and was the blow given coolly and without rage, or was it a sudden and impetuous impulse, causing the act to be committed rashly and without reflection? Were the parties engaged in mutual combat when the blow was given, or was it given when the prisoner was not fighting? Did he use the weapon when he might have avoided it, or was the attack commenced by the deceased, and continued by him until the fatal wound was given? Was the prisoner hemmed in and without means of escape? Was he in danger of life or great bodily harm, and did he give the blow with the knife under the influence of excitement and fear of loss of life, or the infliction of great injury to his person?

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103. *Id.* at 16-17 (emphasis added).

104. *Id.* at 18 ("He must show all the circumstances of alleviation or excuse upon which he relies to reduce his offence from murder to a milder kind of homicide, unless, indeed, where the facts already in evidence show it."); *see also* Commonwealth v. Winebrenner, 265 A.2d 108, 114 (Pa. 1970); *Reed*, 83 A. at 603; *Mika*, 33 A. at 65.

> Again, the nature of the weapon, and the place and character of the wound, are important to be considered. Was it a deadly instrument, a knife, a dagger, or dirk knife? The deadliness of the weapon tends to indicate the intention with which it is used. The place where the thrust is made also throws light on the intention. If used upon the arms or legs it may indicate only an intention to cut and wound; if used upon a vital part of the body it may indicate an intention to kill. All these are most pertinent inquiries to be made in this case, in order to apply the results drawn from the evidence to the case as presented by each side.[105]

This was no dissertation on the process of inference. The court was defining malice and specific intent by trying to illustrate (in excruciating detail) all the circumstances surrounding the incidental feature of the deadly weapon that truly explain the complex terms at issue. *Drum* realized what the United States Supreme Court had meant in two reversals of murder convictions in the 1890s: even *arming oneself* with a deadly weapon in anticipation of trouble did not automatically negate defenses to murder like self-defense or provocation.[106] Malice could not be equated with merely having the weapon or using it since "particular circumstances" necessarily "qualify the character the offence, and it is thoroughly settled that it is for the jury to determine what effect shall be given to circumstances having that tendency whenever made to appear in the evidence."[107]

If reference to the weapon was to be made at all, attaching massive amounts of mind-numbing qualifications was a necessary evil, since otherwise an incomplete definition of the terms would be given.[108] This continued through the 1970s with the concept of intentional use of a weapon drenched in qualifications to make it

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105. *Drum*, 58 Pa. at 18.

106. Wallace v. United States, 162 U.S. 466, 473-75 (1896); Thompson v. United States, 155 U.S. 271, 283 (1894).

107. *Wallace*, 162 U.S. at 475.

108. The qualifying language was also reflected in Massachusetts. *See* Commonwealth v. York, 50 Mass. 93, 103 (1845) ("A sane man, a voluntary agent, acting upon motives, must be presumed to contemplate and intend the necessary, natural and probable consequences of his own acts. If, therefore, one voluntarily or wilfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion from the act is, that he intended so to destroy such person's life. So, if the direct tendency of the wilful act is to do another some great bodily harm, and death in fact follows, as a natural and probable consequence of the act, it is presumed that he intended such consequence, and he must stand legally responsible for it. So, where a dangerous and deadly weapon is used, with violence, upon the person of another, as this has a direct tendency to destroy life, or do some great bodily harm to the person assailed, the intention to take life, or do him some great bodily harm, is a necessary conclusion from the act.").

clear that only when the use was "without legal excuse or legal justification" could first-degree murder be found.[109]

The *Drum* charge was wrong in that, as the Pennsylvania Supreme Court recognized in 1978, the murder statute required the Commonwealth to prove the unlawfulness of the killing and malice, thus making the practice of assigning the burden of proof to negate those to the defense unconstitutional.[110] But the old, confusing charge did at least try to identify for the jury all the proper elements of murder and present them in an integrated way. If, indeed, a jury found that a sane person killed deliberately, without justification from the doctrine of self-defense, and without mitigation from sufficient provocation, he *would be* guilty of murder. The same equation, of course, would apply whether a weapon was used or not. Reference to the weapon in the old instruction complicated matters to a dangerous extreme. Reference to it in the unqualified current permissive instruction is even worse.

Indeed, qualifying language was so vital that in 1864 the Kentucky Court of Appeals in *Smith v. Commonwealth* reversed a conviction in part because insufficient qualifying language accompanied an instruction at the time it was given:

> The court instructed the jury that "if homicide be committed by a deadly weapon in the previous possess of the slayer, the law implies malice in the perpetrator." As given, without qualification as to how or for what purpose the weapon happened in the perpetrator's possession, or whether, having it for a lawful purpose, he used it in self-defense, or under sudden and provoked heat of passion, this instruction was certainly wrong and misleading.[111]

The error here, however, goes even deeper, as the same court realized in 1878 when it reversed a death penalty verdict in *Farris v. Commonwealth*.[112] Farris did not deny shooting the victim, but raised self-defense and heat-of-passion defenses.[113] The trial court told the jury that malice was "implied" from the deliberate use of a deadly weapon on the victim.[114] The Kentucky Court of Appeals, however, found this instruction overly simplistic and thereby erroneous.[115] State law permitted carrying a weapon and using it in self-defense; using it under conditions of sufficient provocation could also negate

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109. *Winebrenner*, 265 A.2d at 112; *see* Commonwealth v. Dougherty, 7 Smith, Laws of Pa. 695 (1807); *Mika*, 33 A. at 65; *Reed*, 83 A. at 603.

110. Commonwealth v. Hilbert, 382 A.2d 724, 727 n.3, 730-31 (Pa. 1978).

111. Smith v. Commonwealth, 62 Ky. (1 Duv.) 224, 227 (1864).

112. 77 Ky. (14 Bush) 362 (1878).

113. *See id.* at 366-70.

114. *Id.* at 368.

115. *Id.* at 368-69.

malice and thereby mitigate murder to a lesser charge.[116] Substantively, the implication failed as a matter of deductive reasoning.

Adorning the instruction with myriad qualifications was not a proper option either, as such extensive qualifications were a sure way to chart a course to jury confusion. In commenting on the *Smith* ruling, the *Farris* court observed:

> It might well be said that this amounted to holding, inferentially and argumentatively, that the instruction would be good if given with the qualifications indicated. But two things are to be considered in this connection: First, the point that the law implies malice does not appear to have received the attention of the court; the objections pointed out being sufficient to destroy the instruction, the court was content to stop them. Secondly, the improbability of being able to draft an instruction containing all the suggested qualifications and exceptions mentioned that might not mislead the jury to the prejudice of the accused.[117]

Jury instructions, after all, "should be so drafted that they may be taken and applied in their literal sense, for the jurors, unlearned in the law, are not required to be able to do more than to make a literal application to the particular case of the law given them."[118] Attempting to fashion an instruction that put the deadly weapon into a proper context, where issues of its deliberate use and concepts of self-defense and provocation would immediately surround it, would convert it into a novella likely to leave the jurors in a stupor. Indeed, "the chances are that its necessary prolixity would be more apt to mislead and confuse the jury and defeat the ends of justice than if no instruction were given on the point."[119]

But the court went further, holding that even making the instruction a permissive inference would not cure the problem: "This conflict could have been avoided by telling the jury that they might infer malice from the circumstances of the killing, *but such an instruction would be objectionable because of the undue prominence that would be given to the fact of killing with a deadly weapon.*"[120]

No one would doubt that the murder weapon is admissible as evidence. But giving a jury instruction relating it directly to malice is

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116. *Id.* at 374-75.

117. *Id.* at 374.

118. *Id.*

119. *Id.* at 375.

120. *Id.* at 370. (emphasis added). The Georgia Supreme Court has disdained the use of a deadly weapon inference instruction even with qualifying language. Harris v. State, 543 S.E.2d 716, 717 (Ga. 2001). But a liberal harmless-error rule for such instructions is in place. *See, e.g.*, Brown v. State, 575 S.E.2d 505, 507 (Ga. 2003).

to give it "undue prominence" of the first order.[121] Malice is not death by deadly weapon. Suggesting to a jury that malice may be inferred from the intentional use of a deadly weapon alone falsely reflects its true history, and errs by confusing and corrupting the process that we hope will bring us justice. Like the elephant in the John Saxe poem that six blind men argue to describe because one thinks it is "like a wall" and the others a spear, a snake, a tree, a fan, or a rope because they each touch only a part of it, malice can only be known incompletely, and thereby falsely, by incidentals like deadly weapons.[122]

The older courts realized this and either smothered the deadly weapon with qualifications or, like *Farris,* disdained its use as an inference entirely. Perhaps they shared Blackstone's view that it "*cannot be said* that *the mode of killing,* whether by stabbing, strangling or shooting, *can either extenuate or enhance the guilt,*"[123] or found its relevance to finding malice only so modestly probative that it should be evidence, but nothing more.[124] Perhaps they realized that a weapon, standing alone, has no capacity to fulfill any of the natures of the trinity of malice, and that the context of its use is far more vital to issues of consequence than the length of its blade or its caliber.

But they realized more. The "undue prominence" also carried an ominous procedural side effect since it was *the judge* saying that an inferential link possibly existed here. The state's argument of this inference would come only with such force as any advocate's words might carry, not with the imprimatur of judicial integrity that threatened an invasion of the jury process.[125] Malice, after all, "is no more within the province of the court to determine than the fact of death, or the character of the weapon used to inflict it."[126] Respecting the sovereignty of the jury within its domain is as vital a reason to

121. *Farris*, 77 Ky. (14 Bush) at 370.

122. John Godfrey Saxe, *The Blind Men and the Elephant, in* POETRY OF AMERICA 150, 150-52 (W.J. Linton ed., George Bell & Sons 1878).

123. BLACKSTONE, *supra* note 29, at 215-16 n.d (emphasis added).

124. *Farris*, 77 Ky. (14 Bush) at 374-75.

125. Note also that in *Quercia v. United States* the Court did not excuse the trial judge's remark that the defendant's act of rubbing his hands while testifying signified that he was lying, even though the judge made it clear to the jury that the remark was his opinion only, and not binding on them. 289 U.S. 466, 471-72 (1932). Since the court's curious insights about body language were made "with all the persuasiveness of judicial utterance . . . [it] was of a sort most likely to remain firmly lodged in the memory of the jury and to excite a prejudice which would preclude a fair and dispassionate consideration of the evidence." *Id.* at 472.

126. *Farris*, 77 Ky. (14 Bush) at 371.

avoid such "instructions" as is the confusing nature of the instruction itself.[127]

The substance of the historical concept of malice is, thus, not the only concept this inference betrays. Shortcuts to the substance of malice invariably short circuit the jury process as well. However lightly or heavily the judge's foot falls there, it is wrong. History, again, makes the point forcefully.

D. The Central Role of Jury

Finding the hallowed place of the jury in the history of the Anglo-American system of government is not difficult. As long as "this palladium remains sacred and inviolate," Blackstone intoned, the "liberties of England" would abide.[128] Joseph Story traced its origin to the earliest times of this tradition, labeling it the "great bulwark" of liberty.[129] It found articulation in the Declaration of Independence, the state constitutions written before 1787, the body of the Federal Constitution, and three of the first eight amendments, a claim virtually no other right could make.[130]

The jury trial is much more than an individual right of a criminal defendant.[131] It also has a place of unique and supreme importance as a structural feature of the republic that, like federalism and separation of powers, is designed to operate as an objective check, internally and externally, on the tyrannical tendencies of government.[132]

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127. *See id.*

128. BLACKSTONE, supra note 29, at 410.

129. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 923, at 656 (Ronald D. Rotunda & John E. Nowak eds., 1987) (1833).

130. *See id.;* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States,* 61 U. CHI. L. REV. 867, 875 (1994); Akhil Reed Amar, *The Bill of Rights as a Constitution,* 100 YALE L.J. 1131, 1183 (1991).

131. I have argued this extensively in a previous work. *See* Antkowiak, *supra* note 18, at 22-37.

132. As I wrote previously:

> The jury trial right was, however, more than just an external hedge. In a very real way, it was an extension of the structural theory of government. Even more profoundly than federalism and separation of powers, it was meant to be an integral part of the blueprint of the collective machine, a part not controlled by the branches of government, but left in the hands of the mortal creators of the machine itself: the reasoned voice of the people.

Id. at 30; *see also* Amar, *supra* note 130, at 1187-89 (analogizing the importance of juries in a republic to that of legislators).

Political theorists have seen the structural importance of juries for some time. In John Rawls's terms, the jury legitimizes a system that facilitates the proper goals of punishment while limiting the risk of outcomes that are undesirable—namely, the punishment of the innocent. John Rawls, *Two Concepts of Rules, in* JOHN RAWLS: COLLECTED PAPERS 26-28 (Samuel Freeman ed., 1999). Individual outcomes can be

No matter how highly regarded the judiciary or a given judge might be, they are the government and are not to be invested with unqualified trust when the issue is whether a citizen should be condemned for a crime.[133] Justice Scalia called the jury trial right "no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."[134] Professor Amar labels the populist and local institution of the jury as the "dominant strategy to keep agents of the central government under control."[135]

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unjust, but certain kinds of institutions minimize that risk by preventing the exercise of arbitrary power. *Id.* at 26-28, 42.

The jury is an institution of Phillip Petitt's famous concept of antipower. *See* Philip Pettit, *Freedom as Antipower,* 106 ETHICS 576 (1996). A passage from a previous article of mine is appropriate here:

> This need for structural protection of liberty finds further articulation in the philosophical writings of Phillip Pettit and his concept of antipower. For Pettit, the traditional notion of freedom, one he argues the Framers embraced, held that true freedom exists in a system that subjects no person to the arbitrary power of another, regardless of whether arbitrary conduct actually occurs. Describing "freedom as antipower," he explains that "I am free to the degree that no human being has the power to interfere with me; to the extent that no one else is my master, even if I lack the will or the wisdom required for achieving self-mastery. The account is negative in leaving my own achievements out of the picture and focusing on eliminating a danger from others." The actual act of interference is not nearly as critical as the elimination of an arbitrary power that allows a dominating entity to act without fear of opposition or consequence. Such power denies to the one subjugated either the capacity to assert himself in response, or to petition a neutral body to assert his position and punish such arbitrary transgressions. The best way to achieve antipower, Petitt argues, is to "consider the introduction of protective, regulatory, and empowering institutions. I do not say that every institution will necessarily increase antipower, of course; some may have indirect, counter production effects, and empirical work will be required to determine which mix of institutions does best. I say only that protective, regulatory, and empowering institutions represent the sorts of options that we ought to be considering if we are interested in the promotion of antipower in a society."

Bruce A. Antkowiak, *Saving Probable Cause,* 40 SUFFOLK U. L. REV. 569, 580-81 (2007) (citations omitted) (quoting Pettit, *supra,* at 578, 590).

133. *See* Antkowiak, *supra* note 18, at 30-34.

134. Blakely v. Washington, 542 U.S. 296, 306 (2004); *see also* Bruce A. Antkowiak, *Judicial Nullification,* 38 CREIGHTON L. REV. 545, 601-605 (2005) (addressing Justice Scalia's comments in *Blakely*).

135. Amar, *supra* note 130, at 1183. The view that juries of citizens, not specially selected professionals, should sit in judgment on criminal matters is a long-standing one. I have previously observed that "[b]oth Professors Sheppard and Clark, respectively quoting G.K. Chesterton and Plato, agree that the ultimate decision on guilt or innocence should remain not with a professional class of individuals but with

He quotes Tocqueville as observing that "the institution of the jury . . . places the real direction of society in the hands of the governed, . . . not in that of the government."[136]

Those who would usurp the jury's power, by creating presumptions and inferences that seek less to explain the law than to influence the outcome of its process, are not disturbing the mere fringes of the system; they meddle with its core. Professor Nesson rebuked statutory presumptions by admonishing legislators to "respect the jury's peculiar ability to function as a sort of institutional 'black box' into which a complex of relevant facts is placed and out of which comes an authoritative answer on the issue of guilt or innocence to which the general public will defer."[137]

That "black box" is as vital a legacy of our negotiation over the terms of a just society as the epic poem of malice. That legacy is no accident. The forces that brought it about demand our respect and the recognition that they continue in operation today. Poetry is being written, the legacy lives, and democracy corrects.

III. THE POWER OF DEMOCRATIC CONSENSUS: WHO INSTRUCTS WHOM?

While our tradition flirted with strict liability murder, we have never walked down the aisle with it for long.[138] We have, in vexatious times, let fear cloud reason and indulged measures of simplistic severity like the Statute of Stabbing.[139] In doing so, as Montesquieu observed, we risked doing lasting harm by responding to a perceived problem with laws so unreasoned that they could leave our minds either "corrupted" by our refusal to obey them or "habituated to despotism" by submitting to them, something he called "an incurable evil."[140] But where democratic institutions are in place, the evil is not incurable. Great minds may have thought to enshrine the jury trial process and found the words for the epic poem of malice, but the emotion that spawned both is decidedly populist in origin.

We have reasserted the gestalt of malice and the process of the jury trial not because we are philosophers, but because we are citizens who must live with the rules we write. We do it through a process of rational correction, which taps into forces primal in nature

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the collection of ordinary citizens empowered to oversee the state's effort to incarcerate or execute a defendant." Antkowiak, *supra* note 132, at 570.

136. Amar, *supra* note 130, at 1185 (quoting 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 293 (1945)); *see also* Antkowiak, *supra* note 18, at 33.

137. Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1216 (1979).

138. *See supra* notes 36-39 and accompanying text.

139. *See supra* note 53 and accompanying text.

140. Baron de Montesquieu, *The Severity of Criminal Laws, in* THE PORTABLE ENLIGHTENMENT READER, 515, 516 (Isaac Kramnick ed., 1995).

and compelling in aspect. Courts are creatures of that process, but are hardly its driving force. Indeed, while we speak so much of judges instructing juries, the fundamental machinery of our republic works in quite the opposite direction.

To be sure, judges do strike balances in interpreting constitutional precepts and legislative acts. But, as Justice Harlan wrote, while this balancing is a rational process, it is not one "where judges have felt free to roam where unguided speculation might take them."[141] They must read a balance struck by the country as a whole:

> [H]aving regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.[142]

John Rawls would agree. The Constitution "is not what the [Supreme] Court says it is" but is "what the people acting constitutionally through the other branches eventually allow the Court to say it is."[143] By amendment or "by a wide and continuing political majority" the people instruct the Court.[144] That instruction comes through processes he describes as the "original position," reflective equilibrium, and the phenomenon of public justification.[145] Malice in Anglo-American law and our belief in the jury are the product of these forces, giving them the most powerful foundation in the political universe: the reasoned consensus of the governed.

Rawls proscribes and describes a process of reasoning conducive to the best advancement of this republic.[146] In arguing that Rawls's approach may be of great importance to reviving the probable cause standard, I have condensed his concept of the "original position" in this way:

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141. Poe v. Ullman, 367 US 497, 542 (1961) (Harlan, J., dissenting). I have discussed this matter at length in a previous article. *See* Antkowiak, *supra* note 132, at 601-06. An excellent piece on the entire subject is Professor Ledewitz's article. Bruce Ledewitz, *Justice Harlan's Law and Democracy,* 20 J.L. & POL. 373 (2004).

142. *Poe,* 367 U.S. at 542 (Harlan, J., dissenting); *see also* Antkowiak, *supra* note 132, at 602; Ledewitz, *supra* note 141, at 392-95.

143. Antkowiak, *supra* note 132, at 605 (quoting JOHN RAWLS, POLITICAL LIBERALISM 237 (1993)).

144. *Id.*

145. *See generally* Rawls, *supra* note 132.

146. A full treatment may be found in Antkowiak, *supra* note 132. *See also* Bruce A. Antkowiak, *An Essay: Courts, Judicial Review and the Pursuit of Virtue,* 45 DUQ. L. REV. 467 (2007); Samuel Gorovitz, John Rawls: *A Theory of Justice, in* CONTEMPORARY POLITICAL PHILOSOPHERS (Anthony de Crespigny & Kenneth Minogue eds., 1975); THE CAMBRIDGE COMPANION TO RAWLS (Samuel Freedman ed., 2003).

> A well-ordered society, Rawls writes, is one in which everyone accepts the same political conception of justice that everyone else accepts. The society then employs, as its main political and social institutions, structures that serve those principles of justice. Implemented in a "fair system of cooperation," these principles of justice are not derived from an "authority distinct from the persons cooperating" or from "natural law." Rather, they proceed from an agreement among its members, as "free and equal citizens," who negotiate them rationally and with an eye to what they regard as their "reciprocal advantage." This societal agreement arises in the first instance in the Rawls' process of "original position."
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> Rawls assumes that persons acting on self-interest and employing reason come together for the purpose of negotiating rules that will govern them after a veil of ignorance lifts and their society forms. They negotiate these governing rules without knowing who they will be once that veil of ignorance rises, but knowing that the principles and rules they negotiate will bind them in future circumstances regardless of what position they find themselves in when their society forms. . . .
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> . . . When a member of society negotiates principles of justice without knowing where on the social ladder he will stand when society materializes, he calculates his judgments to ensure he could tolerate life in that society regardless of his ultimate social position. The negotiator will write the rules dispassionately, before exigencies cloud his judgment; rationally, using his best faculties; with self interest in mind; and blindly, such that he can live in the world his rules will govern.[147]

But they will not write them amorally. Stripped of the knowledge of their "class position, assets, and abilities,"[148] the negotiators will operate under limits that will force them to look broadly to rules that transcend whatever visceral instincts they would indulge if they knew they were at liberty to act from a position of assured power.[149] This becomes, thus, a "moral" process faithful to the Golden Rule and the highest plane of moral reasoning in terms of Kant's categorical imperative.[150] While they will recognize with

147. Antkowiak, *supra* note 132, at 596-97 (citing JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 8-9, 14-15 (Erin Kelly ed., 2001)); John Rawls, *Justice as Fairness*, 67 PHIL. REV. 164, 172 (1958) (quoting RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT, *supra*, at 15-16).

148. CAMBRIDGE COMPANION TO RAWLS, *supra* note 146, at 369.

149. *Id.*

150. *Id.* at 356-62. Professor Samuel Gorovitz has likened Rawls' approach to Kant's categorical imperative. Samuel Gorovitz, *supra* note 146, at 272, 283-84. I have also previously observed:

Justice Holmes that "[t]he first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong," they will disdain visceral passions that do not "cover the whole ground" and require individual considerations to be subordinated "to that of the public well-being."[151]

Of course, the process of consensus or "thought experiment" does not end when the veil is lifted.[152] Through reflective equilibrium, a process whereby we account for the principles of justice others espouse and forge a core justice concept "affirmed in everyone's considered judgments,"[153] consensus will be sought on the "constitutional essentials" that govern the structure of government and the basic privileges and rights of citizenship.[154] This, in turn, leads to "public justification"—political and social cooperation "on terms all can endorse as just."[155] Finally, the well-ordered society will embrace "public reason," a conception of justice "we endorse, not for the different reasons we may each discover, and not simply for reasons we happen to share, but instead for reasons that count

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Rawls' approach has been compared with, or at least spoken of in the same context as, a political application of the biblical Golden Rule. *See* David Barnhizer, *Truth or Consequences in Legal Scholarship?*, 33 HOFSTRA L. REV. 1203, 1229 (2005); George M. Cohen, *When Law and Economics Met Professional Responsibility*, 67 FORDHAM L. REV. 273, 282 n.50 (1998); Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1016 n.106 (2001).

Antkowiak, *supra* note 132, at 597 n.130.

It is also an approach that resonates of John Locke. In his *Second Treatise*, Locke writes that reason, which is the law of nature, teaches that "no one ought to harm another in his life, health, liberty or possessions." JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT 396 (Prometheus Books 1986) (1690). Charity toward all is, apparently, good political science. Even earlier than Locke, Richard Hooker extolled reason as a matter of divine origin, but one so universal that it would bind all men as rational beings, regardless of whether they ascribed to sacred scripture. While complete knowledge required scripture and reason, reason could provide a common basis for governance and a justification for all positive law. *See* Daniel F. Eppley, *Richard Hooker (1554-1600), in* THE REFORMATION THEOLOGIANS 253, 258 (Carter Lindberg ed., 2002); DEBORA KULLER SHUGER, HABITS OF THOUGHT IN THE ENGLISH RENAISSANCE: RELIGION, POLITICS, AND THE DOMINANT CULTURE 27-28 (1997); W.D.J. CARGILL THOMPSON, THE PHILOSOPHER OF THE "POLITIC SOCIETY" 26-27 (W. Speed Hill ed., 1972).

151. HOLMES, supra note 16, at 41, 47.

152. Antkowiak, *supra* note 132, at 599.

153. *Id.* at 600 (quoting RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT, *supra* note 147, at 31).

154. *Id.* (quoting RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT, *supra* note 147, at 27).

155. *Id.* (quoting RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT, *supra* note 147, at 28).

for us because we can affirm them together.[156] This spirit of reciprocity is the foundation of a democratic society."[157]

We seek a well-ordered society by trying to make our rules the product of our best reasoning and by using structures designed to effectuate those mutually affirmed principles.[158] As we are human, we do not always succeed. We sometimes forget that good rules anticipate, but are not produced by, the passions of the moment. But no epic poem we ever wrote is etched in stone tablets. We can continue to use the process of rational consensus and, when we do it well, "we cannot do better than that."[159]

We have sought to do that by reasoning, through time, a workable rule about whether to label someone like Og a murderer.[160] We do not want to live in a dangerous world where people are free to act in ways virtually certain to bring about another's death. People who intend to cause a death or deliberately engage in conduct so inherently dangerous that a death is expected are candidates for such a label. But we want a world that is fair as well as safe. Og may not have intended to kill, but did so from a need any of us would have felt—to defend against an unjustified attack or from provocations external to his control, which displaced his reason in ways that could afflict any of us, and account for, though not wholly justify, a deadly venting.[161] We keep returning to these considerations not from a theological mandate, but because they are consonant with our nature.

That weapons have never been a distinct element in this calculus is telling for our purposes. The means of causing death is incidental to the central, societal considerations of dangerousness at the heart of the rule. Even making weapons part of an illustration of malice is a bad metaphor, since malice identifies archetypes of conduct we condemn as most socially injurious regardless of how they are perpetrated. Shamrocks may be a metaphor for some trinities, but deadly weapons are not effective for the trinity of malice.

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156. *Id.* at 600-01 (quoting Charles Larmore, *Public Reason, in* THE CAMBRIDGE COMPANION TO RAWLS 386 (Samuel Freeman ed., 2003)).

157. *Id.*

158. RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT, *supra* note 147, at 31.

159. *Id.*

160. A time period arguably longer than we have embraced other conceptions, such as probable cause. *See* Antkowiak, *supra* note 132, at 587-88; Jack Weber, *The Birth of Probable Cause*, 11 ANGLO-AM. L. REV. 155, 166 (1982).

161. The court in *Commonwealth v. Dougherty* once observed that "passion . . . tears up reason by the roots." PETER A. BROWNE, REPORTS OF CASES ADJUDGED IN THE COURT OF COMMON PLEAS, OF THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA 19-20 (1871).

The malice/deadly weapon instruction betrays our historical efforts. By using it, courts force a "union of ideas"[162] of these two phenomena where none necessarily exists and where, by that forced conjugation, they distort the core meaning they are trying to convey. However, the error of the courts is not pathological; it is more likely the product of benign neglect. After all, the process of democratic correction takes time. But this error is a betrayal, and the correction process should begin. Options abound. One good one emerges.

IV. POSSIBLE SOLUTIONS

A. Change the Consensus?

Professor Bruce Ledewitz once suggested a change in our view of murder that would eliminate this permissive inference.[163] Surprisingly, however, that change would reject the epic poem of malice the democratic process has produced in favor of the elevation of Ludwig Wittgenstein's theory on the evanescence of intent.[164] With that elevation would come the return of mandatory presumptions about intent to better align homicide law with Wittgensteinian doctrine. While summarizing a friend is a perilous task, let me set out what I understand to be his principle points:

- "[T]he common law and the MPC share a certain understanding of human conduct: people know what they are doing."[165] "The mental state structure is thus a holdover from a more expressly theological time"; however, what we are still "seeking to punish in criminal law is sin."[166]
- Wittgenstein shows, however, that our conception of intent is illusory. Its existence, to the degree it can be said to exist

162. When experience leads us to believe there is, David Hume argues, a "union among ideas," we fixate that union around one of three principles: resemblance (this looks like that); contiguous to (this appears with that), or connected with (cause and effect). HUME, *supra* note 6, at 64-65. This inference suggests the second principle at a minimum, and could readily be heard by the jury to involve the third. In truth, it fits none of the principles well.

163. *See* Bruce Ledewitz, *Mr. Carroll's Mental State or What is Meant by Intent*, 38 AM. CRIM. L. REV. 71, 73, 107 (2001). Professor Nesson also suggested eliminating elements "not suited to jury determination," but, in the end, his best advice is to trust juries. Nesson, *supra* note 137, at 1216.

164. I say "surprisingly" because Professor Ledewitz, who is my friend and colleague, is a staunch advocate of the legitimacy and force of democratic principles. *See* Ledewitz, *supra* note 141; BRUCE LEDEWITZ, AMERICAN RELIGIOUS DEMOCRACY: COMING TO TERMS WITH THE END OF SECULAR POLITICS (2007).

165. Ledewitz, *Mr. Carroll's Mental State, supra* note 163, at 81.

166. *Id.* at 82.

in describable terms, dematerializes rapidly, making it ill-suited to a finding in the criminal law.[167]

- The Supreme Court's constitutional analysis about mandatory presumptions "is itself premised on just the sort of confusion over intention"[168] that Wittgenstein exposes.[169] Indeed, what "is needed in order for criminal law to deal more coherently with mental states is greater acceptance of such inferences or presumptions," including the deadly weapon one, since they "would obviate the need for inquiry into mental states."[170]
- Leaving intent in the law is dangerous: it allows juries to exercise "rough mercy" or, worse, make arbitrary judgments on "race, sexual preference, and class."[171]

I must disagree. The decision we ask the jury to make about malice is neither theological nor psychiatric; it is democratic. We do not read to them from scripture nor ask them to make a stand-alone finding of intent by pulling out the therapist's couch and a time machine to scientifically determine the mental conversation in the head of the defendant when he dropped the stone or pulled the trigger. The verdict is not a test of the jury's psychiatric acuity or their state of grace. The defendant has caused a death. Malice asks for a solemn, societal judgment about whether he was responsible for that death by bringing about a situation so unnecessarily dangerous to human life that empowering government to exercise its most ominous authority is the only rational societal response.

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167. Professor Ledewitz writes:

> In light of the evanescence of intention, its use in criminal law seems unwarranted in general and certainly unwarranted as the critical test of liability and punishment. When a defendant sets fire to a house in order to harm someone in any way—including just scaring the victim—it should not be a matter of needed investigation whether the defendant had a stray hope or thought that no one would be physically hurt. The defendant might have had such a thought or might not. The defendant might have had a thought that burning a house is really dangerous or might not. The defendant might have hoped that maybe the person in the house would die or not die, or might not. Or all these thoughts might have been present at different times. And many other emotions might have been present as well. To force a name to this jumble, whether intent to kill or intent to accomplish something else, should not be the law's task. Insofar as intention matters, the meaning and role of intention should be different.

Id. at 97.

168. *Id.* at 100.

169. *See id.* at 98-102.

170. *Id.* at 102.

171. *Id.* at 109.

Intent to kill is not the point of demarcation—dangerousness is. Intent to kill does not even figure into two-thirds of the situations in which malice is present: felony murder and the "conscious disregard" killing.[172] The intent to engage in a robbery or to fire a gun into an occupied building is enough. The resulting act creates such a dangerous situation that deaths from it are products of malice.

Dangerousness remains the key in the third type of malice as well, the premeditated killing. It requires intent to kill, but such intent is also present in killings in self-defense, the heat of passion, and under the unreasonable belief that deadly force is required.[173] These three subsets of intended killings are nonmalicious; however, because the situations in which they arise are not as systematically dangerous as where someone capable of calm reflection kills anyway.[174] Acts of legitimate self-defense stop dangerous conduct by the deceased; they are restorative of, not dangerous to, the social order. Killings in the heat of passion or under unreasonable belief are not condoned, since self-restraint and good judgment in deadly affairs is a reasonable societal expectation; but these are reactive killings in situations featuring sudden and not readily replicated circumstances that discount their dangerousness in absolute terms.

The premeditated killing, however, is an act that seeks to cause another's death undiscounted by social utility or situational context. It is dangerousness in a pure state. The motive for it, while probative of intent, is immaterial in this calculus. The contract killer and the one who willfully but mercifully ends the life of a dying loved one may be at opposite poles morally, but both acted with malice.

By striking down mandatory presumptions or the equally intrusive permissive inferences, we are not engaged in a "fruitless search for intent as a separate event or entity that characterizes criminal law generally."[175] It is, rather, an effort to recognize that democratic peoples have designated themselves, not the elite of the courts, to make that solemn judgment as the authors of the rule and the ones whose consent to its imposition justifies it. As Jeffrey Abramson has written:

> After all, there would be little point to a jury system if we expected jurors always to decide cases exactly as judges would decide them. The whole point is to subject law to a democratic

172. *See* MODEL PENAL CODE § 210.2 (1962).

173. Section 210.3 of the Model Penal Code calls manslaughter a killing committed "under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse." *Id.* § 210.3; *see also* PENNSYLVANIA SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2503A (Pa. Bar Inst. 2005).

174. PENNSYLVANIA SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502A (Pa. Bar Inst. 2005).

175. Ledewitz, *supra* note 163, at 103.

> interpretation, to achieve a justice that resonates with the values and common sense of the people in whose name the law was written.... To resent the intrusion of such popular conceptions of justice into the judicial process now strikes me as a resentment against democracy. In a democracy, the legitimacy of the law depends on acceptance by the people. And the jury today remains our best tool for ensuring that the law is being applied in a way that wins the people's consent.[176]

The consensus on malice reaches substance and process in equal measure, inextricably intertwined. Intent, to be sure, is part of the epic poem of malice, and new insights about its nature are valuable. But such insights can deceive us into thinking that they alone are the keys to understanding it or, worse, justifying its elimination. Like the blind men in Saxe's poem in search of a complete understanding of the elephant, having a more refined view of the tail may simply lead us to believe that the elephant is a snake too dangerous to let live, instead of a magnificent beast to be celebrated.

B. Keep It In a Safe Harbor and Pretend It Does No Harm?

1. The Illusion of the Permissive Inference

Returning to the age of mandatory presumptions will not work to preserve the best of malice and honor the jury system that protects it. But is eliminating this permissive inference overkill? The United States Supreme Court evidently believes so. Once the Court "cured" the problem that mandatory presumptions improperly shifted the burden of proof, the "undue prominence" criticisms *Farris* offered about such inferences were tragically overlooked. In fact, the Court went to a polar-opposite standard that liberally accepted permissive inferences without critically examining their true nature or impact. Today, permissive inferences are a safe harbor seldom found to create a reasonable likelihood of a wrongful conviction,[177] even while equally improper mandatory and rebuttal presumption instructions have been struck down.[178]

Years ago, Professor Charles Nesson identified critical problems in the legislative practice of enacting permissive inferences.[179] Such inferences were enacted to assuage legislative fears that prosecutors might have a difficult time proving the elements of offenses with the

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176. JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 6 (1994).

177. *See* Estelle v. McGuire, 502 U.S. 62, 78-79 (1991) (O'Connor, J., concurring in part, dissenting in part).

178. *See, e.g.*, Carella v. California, 491 U.S. 263, 266-67 (1989); Yates v. Evatt, 500 U.S. 391, 411 (1991); Francis v. Franklin, 471 U.S. 307, 326-27 (1985).

179. *See* Nesson, *supra* note 137 at 1188-89.

facts available.[180] The inherent danger, however, is that they "modify the procedural framework for adjudicating criminal cases in ways which erode constitutional underpinnings."[181] Permissive inferences have that potential because they purport to offer viable shortcuts to the finding of complex elements, when using them really requires the juror to disregard aspects of those elements in the name of expediency:

> The key problem with permissive inferences is that they isolate and abstract a single circumstance from the complex of circumstances presented in any given case, and, on proof of that isolated fact, authorize an inference of some other fact beyond reasonable doubt. Conviction is authorized by the permissive inference in all cases in which the predicate fact appears, even though the correlation between the predicate fact and the element to be inferred is less than perfect. Permissive inferences thus permit juries to avoid assessing the myriad facts which make specific cases unique. Analysis, as Supreme Court opinions demonstrate, is drawn to likelihoods. The thesis pursued here is that any structure which reduces criminal cases to a simplified assessment of what might be called the "chances of guilt" is fundamentally at odds with the concept of reasonable doubt, and hence to be discouraged as a mode of determining the ultimate question of guilt or innocence.[182]

The Supreme Court never sensed this problem. In *County Court v. Allen*, the Court extolled inferences and presumptions as a "staple of [the] adversary system of factfinding," assessing their legitimacy on the strength of the connection between the *basic* fact and the *elemental* fact inferred, and the degree to which the inference curtails the fact-finder in performing its function.[183] Since permissive inferences do not intrude into the fact-finder's world at all, the Court wrongly supposed, they are proper if the strength of the connection meets this virtually nonexistent test: unless no rational trier of fact could make the inference permitted, the inference may be permitted.[184] According to *Yates*, the trial court may charge on the inference so long as it "would not be irrational."[185] While the element inferred must be proven beyond a reasonable doubt, the inference of it need only meet the "more likely than not" level.[186]

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180. *See id.* at 1187.
181. *Id.* at 1191.
182. *Id.* at 1192 (internal citations omitted).
183. 442 U.S. 140, 156 (1979).
184. *See id.* at 157, 167.
185. Yates v. Evatt, 500 U.S. 391, 402 n.7 (1991).
186. *Allen*, 442 U.S. at 165.

The due process standard for permissive inferences is set so low that even without a running start, the average snail could leap over it with ease. As long as the suggested inference does not make the judge appear to be a babbling idiot, it is arguably proper. The standard is as low as that for relevance of proffered evidence under the Federal Rules of Evidence, that is, does it have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[187] However, proffered evidence, even while relevant, must still be assessed for potential prejudice under the Federal Rules, but the potential prejudice of such an inference is only assessed in passing beyond this bare threshold.[188]

Jury instructions are critical, the *Allen* dissent argued, as "[l]egitmate guidance of a jury's deliberations is an indispensable part of our criminal justice system."[189] While the majority in *Ulster* made a fine jury argument for the instruction it permitted,[190] it did not appreciate that instructions are not arguments, but teachings about law that should be more than "more likely than not" correct explanations of critical legal principles. While reversals of permissive inference cases do occur,[191] the broader issue is, why should we keep

187. FED. R. EVID. 401.

188. Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

189. *Allen*, 442 U.S. at 169 (Powell, J., dissenting).

190. The court in *Allen* argued for the instruction, stating:

> Even if it was reasonable to conclude that she had placed the guns in her purse before the car was stopped by police, the facts strongly suggest that Jane Doe was not the only person able to exercise dominion over them. The two guns were too large to be concealed in her handbag. The bag was consequently open, and part of one of the guns was in plain view, within easy access of the driver of the car and even, perhaps, of the other two respondents who were riding in the rear seat.
>
> Moreover, it is highly improbable that the loaded guns belonged to Jane Doe or that she was solely responsible for their being in her purse. As a 16-year-old girl in the company of three adult men she was the least likely of the four to be carrying one, let alone two, heavy handguns. It is far more probable that she relied on the pocketknife found in her brassiere for any necessary self-protection. Under these circumstances, it was not unreasonable for her counsel to argue and for the jury to infer that when the car was halted for speeding, the other passengers in the car anticipated the risk of a search and attempted to conceal their weapons in a pocketbook in the front seat. The inference is surely more likely than the notion that these weapons were the sole property of the 16-year-old girl.

Id. at 163-64 (majority opinion) (internal footnotes omitted).

191. *See, e.g.*, Hanna v. Riveland, 87 F.3d 1034 (9th Cir. 1996) (affirming grant of writ of habeas corpus because of an improper instruction that allowed the jury to infer

an instruction if the best we can say about it is that it does no real harm?

An interesting application of this standard in the lower courts is found in *United States v. Warren*.[192] *Warren* approved the malice/deadly weapon inference instruction before it, applying a test of whether the inference could be rationally drawn under the proven facts.[193] Concerns that the instruction intruded into the role of the jury by making it seem the judge had predetermined the outcome were eased by numerous other instructions dissipating that suggestion.[194] Similarly, strong facts dissipated fears that the instruction might be unduly suggestive on the intent element,[195] and others dissipated concern that the jury, hearing this instruction, might overlook other exculpatory evidence.[196]

Clearly, a whole lot of dissipating was needed, raising the question whether this permissive inference actually added some positive value or whether there was some profound justification for including it in the first place. It is, after all, part of an *instruction* to a jury, a teaching to help them perform their vital constitutional role. If it has to be surrounded by reams of instructions to dissipate its potential prejudice and if its benefit is speculative at best, why give it at all?

The Court in *Warren* realized this:

> Our fact-intensive review makes us question the effectiveness of permissive inference instructions. They are most effective when least appropriate: where the evidence supporting the inference is sparse and the inference is most crucial to the government's case. Where extensive background facts support the inference and reduce the likelihood that the verdict will be tainted, the instruction is far less likely to play a significant role in the jury's deliberations. Perhaps we are emphasizing the opposite ends of a spectrum; there may be a middle ground where a

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reckless driving from excessive speed alone); Commonwealth v. Kelly, 724 A.2d 909 (Pa. 1999) (reversing conviction where the trial court's instruction to the jury created an impermissible mandatory presumption concerning the element of intent).

192. 25 F.3d 890 (9th Cir. 1994).

193. *Id.* at 898; *see also* Daniel v. West Virginia, No. 97-6808, 1999 U.S. App. LEXIS 22095, at *12-14 (4th Cir. Sept. 14, 1999); Pursell v. Horn, 187 F. Supp. 2d 260, 368 (W.D. Pa. 2002); Commonwealth v. Hall, 830 A.2d 537, 544 (Pa. 2003).

194. *Warren*, 25 F.3d at 899; *see also* United States v. Houser, 130 F.3d 867, 870 (9th Cir. 1997); Commonwealth v. Jones, 912 A.2d 268, 280 (Pa. 2006); Commonwealth v. Carson, 913 A.2d 220, 260 (Pa. 2006).

195. *Warren*, 25 F.3d at 899; *see also Carson*, 913 A.2d at 260; *Hall*, 830 A.2d at 544; *Jones*, 912 A.2d at 280-81.

196. *Warren*, 25 F.3d at 899; *see also Houser*, 130 F.3d at 870; *Pursell*, 187 F. Supp. 2d at 368; *Hall*, 830 A.2d at 550; McNabb v. Alabama, 887 So. 2d 929, 977-78 (Ala. Crim. App. 2001).

> permissive inference instruction assists the jury without being overly intrusive or misleading. Still, closing argument affords the government and defense counsel ample opportunity to argue which inferences may be drawn from the evidence. By inviting the district court to join in this process, the government risks introducing error, without gaining much tangible benefit.[197]

The concurring opinion was even more direct:

> While I agree that it was not reversible error to give the permissive inference instruction on malice in this case, I must say that inference instructions in general are a bad idea. There is normally no need for the court to pick out one of several inferences that may be drawn from circumstantial evidence in order for that possible inference to be considered by the jury. Inferences can be argued without benefit of an instruction; indeed, inferences are more appropriately argued by counsel than accentuated by the court. Further, because they are a detour from the law which applies to the case, inference instructions tend to take the focus away from the elements that must be proved. In this way they do a disservice to the goal of clear, concise and comprehensible statements of the law for laypersons on the jury. Balanced inference instructions are also difficult to craft. And, as this case demonstrates, inference instructions create a minefield on appeal. For all these reasons, as a practical matter it seems to me both unnecessary and unwise for inference instructions to be requested, or given.[198]

But lessening appellate minefields is not the best reason to eliminate the malice/deadly weapon inference. This inference is what it has always been when a court used "malice" and "deadly weapon" in the same sentence: an attempt to define malice. The safe harbor of "permissive inference" that purports to justify it is a dangerous illusion unworthy of the law. It is an illusion because no one "permits" inferences; it is dangerous because it simultaneously debases the substance and process of malice.

2. Exposing the Dangerous Illusion

Do jurors need the court's permission to infer something? The answer is, of course not. Telling jurors they "may" infer is akin to telling them they have leave of court to breathe. Jean Piaget describes the stage of human development in which inference happens, permitted or not:

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197. *Warren*, 25 F.3d at 899-900. This point echoed *Farris*. *See* Farris v. Commonwealth, 77 Ky. (14 Bush) 362, 375-76 (1878).

198. *Warren*, 25 F.3d at 900 (Rymer, J., concurring).

> The child of twelve to fifteen of course does not establish the relevant laws of logic, nor will he write down the formula for the number of all possible combinations of the colored counters. But it is remarkable that at the level at which he becomes capable of combining elements by an exhaustive and systematic method he is also capable of combining ideas or hypotheses in affirmative or negative statements, and thus of utilizing propositional operations hitherto unknown to him: implication (if-then), disjunction (either-or, or both), exclusion (either-or) or incompatibility (either-or, or neither-neither), reciprocal implication, etc.[199]

Inference is part of the inevitable process of affective and cognitive growth, forming a component of intelligence Piaget describes as "the form of equilibrium towards which all structures arising out of perception, habit and elementary sensori-motor mechanisms tend."[200] Humans must deal with concepts and objects that are not immediately subject to their current perception; jurors need to reason out past events as the alleged crime is never played out for them in real time.[201] They can do this because the evolution of our "mental activity from perception and habit to symbolic behaviour and memory, and to the higher operations of reasoning and formal thought"[202] allows them to do so.

Thus, if we keep using jurors over the age of fifteen, we must recognize that instructions we claim to be solely for the purpose of telling them "how" to reason are disingenuous. The process of inference will happen if a juror is disposed to relate two facts in inferential fashion. Telling them they "may" infer something does not *permit* the process but simply *encourages* the outcome the judge is suggesting.

Courts acknowledge the inevitability of inference in other contexts. Jurors must be told not to infer that a defendant who does not testify has something to hide.[203] The court properly assumes this

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199. JEAN PIAGET & BÄRBEL INHELDER, THE PSYCHOLOGY OF THE CHILD 135-36 (Helen Weaver trans., 1969).

200. JEAN PIAGET, THE PSYCHOLOGY OF INTELLIGENCE 6 (Malcolm Piercy & D.E. Berlyne trans., 3d ed. 1959).

201. Social scientists who study juror inference process make the highly obvious assumption that they are, in fact, occurring whether the court permits them or not. *See* David A. Schum & Anne W. Martin, *Formal and Empirical Research on Cascaded Inference in Jurisprudence, in* INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING 136, 136-38 (Reid Hastie ed., 1993).

202. PIAGET, *supra* note 200, at 9.

203. Pennsylvania's instruction on this is typical:

> The charge is an accusation, not proof that the defendant is guilty. A defendant is presumed innocent unless and until proven to be guilty beyond a doubt that would cause a reasonable and sensible person to hesitate in a matter of great importance to him or her. The defendant does not have the

inference is taking place and must, constitutionally, discourage its end product. Likewise, "permitting" the inference of malice based on a woefully incomplete shortcut is "approving" the finding in subtle but undeniable terms. Hoping jurors will not be influenced by this promised approval is a foolish indulgence.

Jurors may not have studied Jean Piaget, but they know that being told they "may infer" something is not a short course in cognition. They also know, because the judge tells them plainly, that they are *not* free to disregard the law the judge gives them if they wish.[204] When the authority figure in the room, in the context of explaining the law that must be applied to find a disputed element like malice, suggests that a jury "may" infer it from one fact, is this anything but a hint or, worse, an authoritative push?

Even if the judge speaks without verbal emphasis or the winking of an eye, it is the person of the judge, after all, who is saying it. It is not just testimony from a witness or argument by an advocate. Courts and scholars have understood for years that the honored place of the judge in the eyes of the jury renders whatever a judge says likely to be suggestive of an outcome in a way that merits caution and vigilance.

The trial judge is, after all, the "governor of the trial,"[205] whose "influence . . . on the jury 'is necessarily and properly of great weight . . . his lightest word or intimation is received with deference, and may prove controlling.'"[206] While judges are permitted to sum up the evidence for the jury, they have always been admonished by their appellate brethren that "[d]eductions and theories not warranted by the evidence should be studiously avoided [as they] can hardly fail to mislead the jury and work injustice."[207]

> burden of proof and need not present any evidence to prove that [he] [she] is not guilty. Furthermore, a defendant has an absolute right founded upon the United States and Pennsylvania Constitutions not to testify. If he or she elects not to testify, you cannot hold that fact against him or her nor infer that the defendant is guilty because [he] [she] chose not to testify.

PEENSYLVANIA SUGGESTED STANDARD CRIMINAL JURY INSTRUCIONS § 2.01(2) (Pa. Bar Inst., revised 2005).

204. Jurors in Pennsylvania hear this:

> It is my responsibility to decide all questions of law. You must follow my rulings and instructions on matters of law whether or not you agree with them. I am likely to give other instructions during the trial in addition to these preliminary instructions and my final charge. You should consider all of my instructions as a connected series. Taken together, they constitute the law that you must follow.

Id. § 2.01(4).

205. Quercia v. United States, 289 U.S. 466, 469 (1932).

206. *Id.* at 470 (quoting Starr v. United States, 153 U.S. 614, 626 (1894)).

207. *Starr*, 153 U.S. at 626 (citation omitted).

Moreover, appellate courts have warned that trial judges must not advance a party's position, either by seeming to become an advocate or a witness for the side they favor.[208] Justice is produced by a process in which actors play but one role at a time. When the referee in the adversary process seems to have chosen sides, the outcomes of that process can no longer be accorded meaning and dignity. In short, "argumentative matter . . . should not be thrown into the scales by the judicial officer who holds them."[209]

But even when they are not seeking to do so, judges influence juries in myriad ways, sometimes just by confusing them. While jurors see the judge as the "embodiment of impartial justice"[210] and attach great significance to what the judge conveys to them verbally and nonverbally,[211] their cognitive understanding of the words used are not always equaled by the significance they attach to them. Various scholars report that the court's goal of accurately conveying the law in a comprehensible way devoid of subtle messages that might subvert the jury function[212] is not being met with regularity.[213] Importantly for our purposes, permissive inference instructions do

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208. *See Quercia*, 289 U.S. at 470; *Starr*, 153 U.S. at 624-26; Logue v. Dore, 103 F.3d 1040, 1045 (1st Cir. 1997) ("[T]here are lines which a trial judge should not cross . . . the judge's participation must be balanced; he cannot become an advocate or otherwise use his judicial powers to advantage or disadvantage a party unfairly."); Ferrer v. Trs. of the Univ. of Pa., 825 A.2d 591, 612-13 (Pa. 2002) ("The instructions to the jury are not intended to supplement the arguments of the opposing parties."). Indeed, studies have shown many judges do not sum up or comment on the evidence, for fear of exerting undue influence. John P. Cronan, *Is Any of This Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 AM. CRIM. L. REV. 1187, 1253 (2002) (citing May, *infra* note 220, at 872).

209. *Starr*, 153 U.S. at 628.

210. Edward J. Imwinkelried & Lloyd R. Schwed, *Guidelines for Drafting Understandable Jury Instructions: An Introduction to the Use of Psycholinguistics*, *in* 4 READINGS IN TRIAL ADVOCACY AND THE SOCIAL SCIENCES 61, 62 (Robert M. Krivoshey ed., 1994).

211. *See* Peter David Blanck et al., *The Measure of the Judge: An Empirically-Based Framework for Exploring Trial Judges' Behavior*, 75 IOWA L. REV. 653 (1990); Peter David Blanck, *What Empirical Research Tells Us: Studying Judges' and Juries' Behavior*, 40 AM. U. L. REV. 775 (1991); Peter David Blanck et al., Note, *The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials*, 38 STAN. L. REV. 89 (1985).

212. *See* Lawrence M. Solan, *Convicting the Innocent Beyond a Reasonable Doubt: Some Lessons About Jury Instructions from the* Sheppard *Case*, 49 CLEV. ST. L. REV. 465, 468 (2001).

213. *See* Nancy Pennington & Reid Hastie, *The Story for Juror Decision Making*, *in* INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING 192, 200 (Reid Hastie ed., 1993); Solan, *supra* note 212, at 468; Cronan, *supra* note 208, at 1202-03; Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, 6 PSYCH. PUB. POL. & LAW 788 (2000); Imwinkelried & Schwed, *supra* note 210, at 62.

not adequately convey that the jury is free to disregard them,[214] with one study concluding that the "subtle distinctions between the different presumption instructions are lost on jurors."[215] This confusion can only be compounded by trying to save such instructions by wrapping them in reams of qualifications as they were in *Drum*.[216]

What is not lost on jurors, however, is their sense of duty. Regardless of whether most jurors think that the "original position" is a term in a yoga class, they get "it,"—"it" being the true mission they must fulfill. Studies indicate that juries may not spend hours parsing out the intricacies of the instructions—principally because they are confusing even to jurors with prior knowledge of the law[217]—but they aspire to a verdict that reflects "the severity of the crime as they perceive it,"[218] grounding their decision in experience and "personal beliefs and values about what is right, wrong, and fair."[219] What they could use is proper guidance, not dangerous illusions.

At a minimum, they should not be misguided. Eliminating this inference from the law will at least accomplish that. While the epic poem of malice may be intellectually challenging for a judge to explain[220] and its intent aspect hard to prove at times,[221] the jury is not stupid. It is made up of the people whose consensus made malice in the first place. Malice has too noble a lineage to be given in a watered-down version with shortcuts that convolute it into a modern day version of the Statute of Stabbing.[222]

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214. *See* Joel D. Lieberman and Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOL. PUB. POL'Y. & L. 589, 599 (1997).

215. *Id.* The Court of Appeals of Kentucky recognized this problem in *Farris v. Commonwealth*, 77 Ky. (14 Bush) 362, 368 (Ky. Ct. App. 1878). *See supra* notes 112-120 and accompanying text.

216. *See supra* note 94 and accompanying text. It should also be recalled that the *Farris* court cautioned against such qualifications as adding "prolixity" likely to further confuse a jury. 77 Ky. (14 Bush) at 374-75.

217. Pennington & Hastie, *supra* note 213, at 200.

218. Phoebe L. Ellsworth, *Some Steps Between Attitudes and Verdicts, in* INSIDE THE JUROR, *supra* note 213, at 42, 47-48.

219. Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y. & L. 622, 699 (2001).

220. *See* Cronan, *supra* note 208, at 1188-89, 1202-03, 1214-15, 1258; Christopher N. May, *"What Do We Do Now?": Helping Juries Apply the Instructions*, 28 LOY. L.A. L. REV. 869 (1995). *See generally* Ellsworth & Reifman, *supra* note 213; Devine et al., *supra* note 219.

221. SIR JAMES FITZJAMES STEPHEN, 2 A HISTORY OF THE CRIMINAL LAW OF ENGLAND 110 (1883); Note, *Presumption of Deliberation and Presumption-The Doctrine of Hunter Hill's Case*, 33 VA. L. REV. 531 (1947); Coffee v. State, 11 Tenn. (3 Yer.) 283, 285-86 (Tenn. 1832).

222. While there may be elements that legislators could safely subsume as part of certain criminal statutes, malice is one of those best left in the care of the jury. *See generally* Nesson, *supra* note 137, at 1216.

But is there more the judge can do besides not give this instruction? Yes. Once a solemn appreciation of what actually happens after the jury instruction ends and the process of producing a verdict begins, there is much more a judge can do.

C. *Respect and Help the Jury*

A verdict is a judgment of conscience, an exercise of civic and political virtue. While jurors should never feel cast as an ecclesiastical body, they are about the task of exercising such virtue at its highest level. Courts have recognized this for centuries. John Marshall charged the jury in the case of Aaron Burr that they should find a verdict as their "own consciences may direct."[223] In 2007, the United States Supreme Court reminded that "before a jury can undertake the grave task of imposing a death sentence, it must be allowed to consider a defendant's moral culpability" in light of a wide range of mitigating evidence to which they are to "respond . . . in a reasoned, *moral manner* . . . [weighing] such evidence in its calculus of deciding whether a defendant is truly deserving of death."[224] What happens inside Professor Nesson's black box is, for the republic and the juror, a supreme test of conscience and an accurate measure of our capacity for virtue.[225]

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223. Alschuler & Deiss, *supra* note 130, at 907 n.214, 915.

224. Brewer v. Quarterman, 127 S. Ct. 1706, 1714 (2007) (emphasis added); *see also* Abdul-Kabir v. Quarterman, 127 S. Ct. 1654, 1674 (2007).

225. In a prior work, I have argued that judges retain the right to take into account their residual doubts about the guilt of a defendant in sentencing him. *See generally* Antkowiak, *supra* note 132. Moral issues pervade the continuum between prosecution, conviction, and sentencing, and lay heavy upon those primarily responsible for passing the case to the next phase. The jury faces a significant moral crisis:

> There is a deep moral sense to a jury's verdict. Professor Sheppard has bemoaned the effort to adjust the standard of proof beyond a reasonable doubt to limit a jury's discretionary judgment on the necessity of a conviction not only because that adjustment undermines the presumption of innocence but also because of its ethical reverberations:
>
> > [T]he juror has been given a task that demands only one power, the discretion to reach an independent judgment. A limitation on the forms of judgment the juror may apply to the evidence presented in the trial is a limit on discretion, on the powers necessary to perform that task. Looking at the sum of the moral notions that might apply in the state's obligations to the juror, there is no question that the limit of juror independence is an immoral burden placed by state officials on the citizen-juror.
>
> Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 78 NOTRE DAME L. REV. 1165, 1241-42 (2003).
>
> Besides placing an individual juror in such a moral quandary, an attempt to limit a juror's discretion renders the jury "a scapegoat for the law." *Id.* at 1242.

To aid in this quintessential moment of citizenship, the judge must be gatekeeper, teacher, and inspiration. As gatekeeper, the judge must accept that juries will not always "get it right," as no institution made up of imperfect beings may ever indulge an arrogant pretense to perfection. The judge must realize that perhaps to have a jury "that resists the tyranny of the state, we must risk our freedom on the jury that practices its own petty tyranny."[226] But the judge must also be aware that my friend Professor Ledewitz is right that any given jury can be the conduit for bigotry born of the mob, and recall Justice Story's admonition that "the true object of the jury was to 'guard against a spirit of oppression and tyranny on the part of [the] rulers and against a spirit of violence and vindictiveness on the part of the people.'"[227] Using voir dire to ferret out the bigots, scoundrels, and those who could never appreciate the solemnity of their office as jurors is a critical task the judge must perform.

> The juror immunizes the police, judge, and lawyers from mistakes prior to trial. Judges will not correct mistakes made by police or the lawyers or other judges unless the jury would likely have reached another decision if the mistake had not occurred. And, jurors immunize mistakes made after the trial. Judges need not much concern themselves that the condemned defendant is innocent, as that was the job for a jury. An actual error, the wrongful conviction of the innocent, is the fault of the jury.

Id.

. . . .

Professor Clark has also written extensively on the moral dimensions of the jury verdict in a criminal case. He argues that the entire jury process is one performing a compelling moral and social function:

> The critical variable for purposes of this argument is the extent to which the procedures governing the criminal jury trial tend to engender in jurors a sense of personal responsibility for the fate of the accused. The meaning I attempt to ascribe to that variable is courage, or rather a particular quality of forthrightness and integrity for which courage is as good a label as any. I suggest that we might admire those individuals and communities who are willing to stand behind what they do. We might want to count ourselves among those who confront, rather than evade responsibility for, the difficult things which we as a society find it necessary to do. In particular, we might consider it cowardly and base to construct a system through which we could hold others responsible for their actions—for that is what we do through the criminal justice system without any of us ever having to take responsibility for those assignments of responsibility.

Sherman J. Clark, *The Courage of Our Conviction*, 97 MICH. L. REV. 2381, 2382-83 (1989).

Antkowiak, *supra* note 134, at 567-68.

226. ABRAMSON, *supra* note 176, at 5.

227. Antkowiak, *supra* note 17, at 34 (citation omitted).

As a teacher, the judge need not fear that the instruction must be crafted like an inscription upon a blank slate. Those being instructed are citizens, heirs to and part of an ongoing consensus about rules that justly set off certain acts as meriting the awful label of "murder." The teaching about malice is not an effort to apply "a defective and unreal psychology"[228] that merely invites the jury to engage in the "exercise of mercy."[229] Properly done, it is an effort to remind them of the collected wisdom about what murder is in this society, a wisdom that lies within their rational instincts already, waiting to be confirmed. Without shortcuts or bad metaphors, the epic poem of malice can be made as accessible to jurors as any other concept critical to their republic. To fear that they cannot understand it is to indulge an arrogance of a different, elitist variety—anathema to a system that sees those jurors as the source of power the elite seek to wield.

Nevertheless, the judge must do more than watch the gate or teach this most critical class. Justice Story placed his great hope that juries would prevent the tyranny of rulers and the rule of the mob in a "firm and impartial verdict of a jury, sworn to do right, and guided solely by legal evidence, and a sense of duty."[230] The judge must inspire that sense of duty and passion to do right by exhorting the jury in the knowledge that the judgments, which will be the legacy of the trial, is theirs and theirs alone. They alone may imbue it with the best of conscience and the highest form of civic and political virtue, or they alone will fail.

Juries are not just fact-finders whose "verdict" is a long narrative of what and whom they believed, leaving to the judge the ultimate conclusion of whether the defendant is guilty of murder. While spoken in one or two words, their verdict is a new page in a great volume of thought, reason, and judgment in a long tradition of self-governance by rational people. That verdict does not only *do* justice, it *is* justice. It is the application of the principles of the original position, the categorical imperative, and the Golden Rule. It is the best we mere mortals can do. It is a noble effort. Inspiring the jury to embrace it in this spirit is far more important a task for instruction writers than tweaking the language of a deadly weapons inference that must be consigned to the scrapheap of legal history.

Something is and was very wrong in the giving of this instruction. By trusting ourselves as jurors and humbling ourselves

228. BENJAMIN N. CARDOZO, LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 100 (1931).

229. *See id.*

230. Joseph Story, Commentaries on the Constitution, Article 3, Section 2, Clause 3 § 1774, *available at* http://press-pubs.uchicago.edu/founders/print_documents/a3_2_3s18.html.

to the rational tide of history, we too can revel in the passion to do right.