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Critiquing Crump: The Strengths and Weaknesses of Professor Crump's Model Laws of Homicide

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CRITIQUING CRUMP: THE STRENGTHS AND WEAKNESSES OF PROFESSOR CRUMP'S MODEL LAWS OF HOMICIDE

*Arnold H. Loewy**

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The West Virginia Law Review has graciously invited me to respond to Professor David Crump's article: "Murder Pennsylvania Style': Comparing Traditional American Homicide Law to the Statutes of Model Penal Code Jurisdictions."¹ Confident that the reader has already perused Professor Crump's thoughtful analysis, I shall not bore the readership nor encroach on law review pages by a repetition thereof. Instead, I shall direct my analysis to several of Professor Crump's more provocative points, some of which deserve widespread adoption, others of which do not.

I. MALICE AFORETHOUGHT

Professor Crump suggests that the ancient phrase "malice aforethought" is a double misnomer that in contemporary society causes more harm than good.² In short, he is right. Malice aforethought never has been a real element of murder. Instead, it is an esoteric catchall designed to include those states of mind necessary for murder. The problem is, as Professor Crump notes, lawyers may understand that, but juries don't.

What really persuades me of the value of eliminating malice aforethought as a separate element is the mess that the Supreme Court has made of

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¹ David Crump, *"Murder Pennsylvania Style": Comparing Traditional American Homicide Law to the Statutes of Model Penal Code Jurisdictions*, 109 W.VA. L. REV. 257 (2007).

² *Id.* at 300.

the concept in *Mullaney v. Wilbur*,³ *Patterson v. New York*,⁴ and *Martin v. Ohio*.⁵ Under these cases, if the State makes malice aforethought an element of murder, the State must prove beyond a reasonable doubt that the crime was not mitigated to voluntary manslaughter by reason of provocation. On the other hand, where malice aforethought is not officially listed as an element, the State can require the defendant to prove provocation (or extreme emotional disturbance).⁶

In *Martin*, the Court went even further, holding that where the only elements of murder were “purposely causing the death of another with prior calculation or design,”⁷ the State could even shift the burden of proof on self defense. The perversity of these decisions is apparent. Because malice aforethought is an element, the State cannot compel a defendant to prove mitigation of an unquestionably unlawful homicide. But when only causing death with intent to kill is required for murder, the State can even shift the burden on self defense.⁸

These decisions support Professor Crump’s call for eliminating malice aforethought as an element of murder. Indeed, as he tells us, Maine, the State that lost *Mullaney v. Wilbur*, has since modified its homicide law by eliminating the “element” of malice aforethought and reinstating the shifting of the burden of proving provocation to the defendant.⁹

II. THE PREMEDITATION/DELIBERATION FORMULA

Professor Crump is prepared to totally discard the premeditation/deliberation formula. Although I would agree that formula is not flaw free, I believe that it serves a useful purpose. All other things being equal, a preconceived intentional killing in cold blood is more blameworthy than an instantaneous unintentional hot blooded killing.¹⁰ This is not to say that it should necessarily be the only aggravator. Indeed most states that use what Professor Crump

³ *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

⁴ *Patterson v. New York*, 432 U.S. 197 (1977).

⁵ *Martin v. Ohio*, 480 U.S. 228 (1987).

⁶ For a discussion of the wisdom of the extreme emotional disturbance defense vis-à-vis the provocation defense, see *infra* Part III.

⁷ *Martin*, 480 U.S. at 230.

⁸ I should add that I have always found *Martin* to be an extremely troubling decision. While malice aforethought is a fictional element of murder, unlawfulness is real. And, people who kill in self defense do not act unlawfully. Indeed, I would seriously question the constitutionality of any law that required an individual to be killed rather than to kill his unjustified aggressor.

⁹ Crump, *supra* note 1 at 316.

¹⁰ I emphasize the importance of all other things being equal. In a case of extreme emotional disturbance for which there is a reasonable explanation or excuse, an otherwise first degree murder case should be mitigated to voluntary manslaughter. See, e.g., *State v. Forrest*, 362 S.E.2d 252 (N.C. 1987); see also discussion *infra* Part III.

calls the "Pennsylvania formula," also punish a killing perpetrated during certain enumerated felonies as first degree murder.

The premeditation/deliberation formula has been construed quite differently by the states that employ it. Consequently, we are looking at not one rule, but many. Pennsylvania, for example, before it formally abandoned the formula named for it,¹¹ had judicially construed its statute to apply to all intentional killings, thereby reading premeditation and deliberation out of its formula as so much surplusage.¹² Pennsylvania thus distinguishes between intentional killings, classified as first degree murder and unintentional (or more accurately where the State cannot prove intentional) killings, which are second degree.

Other states say there must be appreciable premeditation, but this simply means capable of being appreciated, and this can be a matter of seconds.¹³ Still others look for factors that tend to show premeditation, such as a second or third stab wound after the victim had been disabled by the first.¹⁴ Then there is California, which as Professor Crump correctly notes, made an unbelievable mess of the *Anderson* case.¹⁵

Anderson's progenitor, *People v. Wolff*,¹⁶ had held that in order to make premeditation a meaningful concept, it was necessary that the premeditation be "meaningful and mature."¹⁷ Accepting *Wolff* as correct on that point, it is hard to see how the *Anderson* formula, as exhaustive as opposed to illustrative, helps much. Indeed, the number of stab wounds should have been evidence *for* premeditation, not against it.

Candidly, I view *Anderson* as one of several vintage sixties California decisions where an anti-capital punishment court would do something, anything, to avoid having to impose capital punishment. Thus, if a finding of premeditation or felony murder¹⁸ could be avoided, there was one person (and perhaps many future people) that the State could not execute.

Ultimately, I suppose the question of whether to retain degrees of murder depends on whether one believes there should be one single category of murder with lots of aggravating and mitigating circumstances, or whether there should be discrete categories of murder, some punishable more seriously than others. I am inclined to think that discrete categories tend to cabin judicial dis-

¹¹ Pennsylvania statute currently provides that "[a] criminal homicide constitutes murder of the first degree when it is committed by an intentional killing." 18 PA. CONS. STAT. § 2502(a) (West 2006).

¹² See, e.g., *Commonwealth v. O'Searo*, 352 A.2d 30 (Pa. 1976); *Commonwealth v. Carroll*, 191 A. 610 (Pa. 1937).

¹³ See, e.g., *State v. Britt*, 204 S.E.2d 817 (N.C. 1974).

¹⁴ See *State v. Ollens*, 733 P.2d 984 (Wash. 1987).

¹⁵ *People v. Anderson*, 447 P.2d 942 (Cal. 1968).

¹⁶ *People v. Wolff*, 394 P.2d 959 (Cal. 1964).

¹⁷ *Id.* at 976.

¹⁸ See, e.g., *People v. Sears*, 465 P.2d 847 (Cal. 1970).

cretion in a healthy way. With just one category of murder, I fear that there would be too much sentence variation. Hence, because I believe in categories, and because I believe that generally wilful, deliberate and premeditated murders are worse than others, I would retain the classification.

III. PROVOCATION OR EXTREME EMOTIONAL DISTURBANCE

Despite Professor Crump's general support of the MPC, he prefers the common law provocation formula to the MPC's extreme emotional disturbance.¹⁹ Though hardly applauding the common law approach to manslaughter, he considers it vastly superior to the MPC, which he seems to view as a "Get out of jail free" card to any kook who happens to have strange ideas or a different background. For example, he seems to believe that Sirhan Sirhan, the killer of Senator Robert Kennedy, might have successfully raised the MPC defense because of his childhood background as a mistreated Palestinian, whose cause the Senator did not support.²⁰

Linguistically, it is plausible that the MPC provision, (which defines as manslaughter a killing that would otherwise be murder when it is committed under the influence of "extreme emotional disturbance for which there is a reasonable explanation or excuse," which reasonableness "shall be determined from the viewpoint of a person in the actor's situation as he determines them to be") could be applied in such a way. But I am aware of no such misapplications. Rather, the cases that have applied the test have accepted it as the remarkable combination of subjectivity and objectivity that it is.

For example, in *People v. Casassa*,²¹ a spurned lovesick defendant killed the object of his unrequited love and claimed extreme emotional disturbance. The New York Court of Appeals had no difficulty concluding that there was an objective component to the reasonable explanation or excuse. That is, even looking at it from the perspective of the defendant, the excuse still could not be so idiosyncratic as to not resonate with a reasonable trier of fact. Nor am I aware of any cases in jurisdictions following the MPC in which a far out defense succeeded.

The major advantage of the MPC test is that it focuses more on emotional disturbance and less on categories. Consider a case like *State v. Forrest*,²² cited by Professor Crump as an example of what is wrong with the premeditation/deliberation formula.²³ Forrest killed his terminally ill father, apparently after substantial premeditation, because he promised his father that he would not

¹⁹ Crump, *supra* note 1, generally.

²⁰ *Id.*

²¹ *People v. Casassa*, 404 N.E.2d 1310 (N.Y. 1980).

²² *State v. Forrest*, 362 S.E.2d. 252 (N.C. 1987).

²³ Crump, *supra* note 1 at 279.

allow him to continue to suffer. North Carolina, relying on traditional common law provocation rules, affirmed his first degree murder conviction.²⁴

The MPC is explicitly designed to eschew the rigidity of the common law so that deserving cases of extreme emotional disturbance achieve mitigation, but that defendants for whom there is no *reasonable* explanation or excuse do not. I think that it is a good rule that other states should adopt.

IV. DEPRAVED HEART MURDER

Professor Crump appears to oppose the concept of unintentional murder and categorically opposes the terminology “depraved heart.” I categorically favor retaining some form of unintentional (non-felony) murder and moderately favor retaining the concept of “depraved heart,” if, but only if, it is defined properly. I agree that the California definitions as Professor Crump describes them do not adequately distinguish murder from manslaughter.

The MPC, which for the most part Professor Crump endorses, defines manslaughter as a killing committed “recklessly”²⁵ that is “with a conscious regard of a substantial and unjustifiable risk.”²⁶ It punishes as murder, those killings “committed recklessly under circumstances manifesting extreme indifference to . . . human life.”²⁷

I think the MPC has it right. There are some unintentional killings that manifest such extreme recklessness (depraved heart if you will) that they should be treated as murder. Consider the following hypothetical: Alan and Ben are sitting on the balcony of their apartment, fifty stories above the center of a major City, currently teeming with people. Alan takes five large rocks from their rock garden and makes the following proposal to Ben: “I’ll bet you \$100 that I can throw all five of these rocks to the ground and not hit anybody.” Ben says: “You’re on. No way that you’ll miss the people all five times.” So, Alan throws the rocks. The first four rocks do not hit anybody. The fifth strikes Carla in the head, killing her instantly.

Under the MPC, and most common law jurisdictions, Alan would clearly be guilty of murder. However, under Texas law, as Professor Crump describes it, he would be guilty of only manslaughter.²⁸ Alan would argue correctly that he had no desire to hit anybody, much less cause her death. Indeed,

²⁴ But see Justice Exum’s unusual dissent in which he focused on the absence of malice. One rarely sees the concept of malice taken that seriously. But both Professor Crump and I agree that that term should be removed from our lexicon. Consequently, in our ideal world, absence of malice would not save a future Forrest from being convicted of murder.

²⁵ MODEL PENAL CODE § 210.3(1)(a) (West 2006).

²⁶ This definition of recklessly is not defined in the model penal code section referenced nor the definition section under 210. § 210.3(1)(a).

²⁷ Id. at § 210.2(1)(b).

²⁸ Conceivably a case for murder could be made against Ben, the aider and abettor, because he knew (or at least believed) that Alan would kill somebody.

his bad aim cost him \$100. He would further note that his intent to not hit anybody was successful on his first four tries, so that there is no basis whatsoever to presume that he *intended* to kill or to inflict serious bodily injury.

It seems to me that Alan should be guilty of murder when, as here, the death resulted from an act of extreme depravity. The difficulty is defining the concept in terms that are understandable to jurors. Perhaps with some examples (like the aforementioned hypo or perhaps Professor Crump's hypo of the jilted lover who drives an automobile onto a sidewalk and kills twelve people),²⁹ the jury can understand the difference between the recklessness required for manslaughter and the extreme recklessness required for depraved heart murder.

I actually think that the term "depraved heart" is helpful in this context. While it may have the flourish of analogizing love to a "red red rose,"³⁰ it has a criminological significance that substantially transcends its flourish. It suggests that we are talking about a lot more than ordinary, or even gross, negligence.

Let us examine the *Berry* case,³¹ which has so displeased Professor Crump. From the State's perspective, this is no ordinary recklessness claim. Michael Berry intentionally put the dog, Willy, on a conditioning program to make him the toughest fighting dog possible.³² He had two reasons for doing so, both grossly anti-social. First was to fight him in illegal dog fights in far off South Carolina, and second to guard his illegal marijuana plants.³³ Furthermore, he knew that the fence was not completely enclosed so that if a little child got into his yard through the unenclosed fence, he had no chance against such a vicious dog.³⁴ Although it is close case, I think that the California courts may have been right in letting the case go to the jury as a murder case.

On the other hand, there was also some mitigation. Willy was tethered in his own yard behind a fence that was substantially, though not completely, enclosed.³⁵ Furthermore, Berry had warned the child's mother not to allow her child to come into the yard and get near Willy.³⁶ So, this was not a case where the defendant allowed a pack of (or even one) wild dogs with vicious propensities to roam the neighborhood.³⁷ Given those mitigating factors, it is not sur-

²⁹ Crump, *supra* note 1, at 312.

³⁰ *Id.* at 305 (quoting Robert Burns).

³¹ *People v. Berry*, 2 Cal. Rptr. 2d 416 (Cal. Ct. App. 1991).

³² *Id.* at 418.

³³ Footnotes were added here to reference the appropriate facts of the *Berry* case. The 1989 case can be used to cite footnotes 32 through 37 at page 346 instead of using two different opinions. Footnote 34- The 1991 *Berry* case does not mention South Carolina at all. It is mentioned in the 1989 decision. *Berry v. Superior Court*, 256 Cal. Rptr. 344, 346 (Cal. Ct. App. 1989).

³⁴ *Id.* at 418.

³⁵ *Id.* at 418.

³⁶ *Id.* at 418.

³⁷ *Cf.* *People v. Noel*, 116 P.3d 475 (Cal. 2005) (where a woman who had admitted she couldn't control her large ill-tempered dogs took them for a walk without their muzzles).

prising or disturbing that the jury returned a verdict of the lesser included offense of manslaughter.

The fact that there are some close cases is neither alarming nor unusual. The criminal law is full of cases where five or six factors lead to a result and one is left to wonder whether the absence of any might have changed it.³⁸ The point is that there are depraved heart killings and there are reckless killings. It is the job of a *properly instructed* jury to tell the difference. The law should not reduce all depraved heart killings to manslaughter simply because there are some close cases. Indeed, *Berry* should be viewed as an instance where the system did work. The State had its chances, but the jury, probably correctly, concluded that involuntary manslaughter was the appropriate crime.³⁹

V. FELONY MURDER

Professor Crump supports the felony-murder rule,⁴⁰ and to a limited extent, I concur. Ideally, I would abolish the felony-murder rule as such and substitute an aggravated crime when the underlying felony results in death. For example, if rape were normally subject to a thirty year maximum, it might be appropriate to punish the crime of rape resulting in death with life imprisonment. This is predicated on the theory, which I understand Professor Crump to endorse, that harm (or as he calls it, *actus reus*) should count.⁴¹

Let us suppose the following: Don forcibly rapes Ellen. Ellen attempts to scream. Don puts his hand over Ellen's mouth to prevent her scream. Ellen suffocates. Let us further assume that all of the evidence at the trial is to the effect that Don's hand placement was highly unlikely to cause suffocation, but that on this one freakish instance, it did. If the jury properly applied Crump's theory, it would have to find Don not guilty of felony murder. But given his

³⁸ See, e.g., *State v. Harrington*, 260 A.2d 692 (Vt. 1969) (where a lawyer was convicted of extortion). He had hired a prostitute to seduce his client's husband to have sex with the prostitute at the husband's motel, took pictures of the event, and wrote a letter demanding a favorable divorce settlement along with a veiled threat to turn IRS informant against him. One could legitimately ask: What if he hadn't hired the prostitute? What if he hadn't participated in the picture taking? What if he hadn't threatened to go to the IRS? The truth is we don't know if the absence of any of these factors would have changed the result. Such is the nature of the criminal law.

³⁹ *Berry* is one of those rare cases where looking at it one way may get murder, but looking at it another way may even make manslaughter a difficult case (fence, warning, tethering). In my casebook, ARNOLD H. LOEWY, *CRIMINAL LAW: CASES AND MATERIALS* (2d ed. 2001), I use *Berry* as a problem case. I tell the students that they represent *Berry* who has been charged with murder. The DA offers to them the choice of going to trial for murder or pleading guilty to involuntary manslaughter. I ask them: "[W]hich would you choose? Why?" *Id.* at 100. It usually makes for an interesting class discussion.

⁴⁰ David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J. LAW & PUB. POL'Y 359 (1985).

⁴¹ See Arnold H. Loewy, *Culpability, Dangerousness, and Harm: Balancing the Factors On Which Our Criminal Law Is Predicated*, 66 N.C. L. REV. 283 (1988).

theory that harm should count, it is hard to justify convicting Don as an ordinary rapist.⁴²

In other cases, Professor Crump appears to endorse felony murder as a substitute for the depraved heart murder that he had previously rejected. The “[c]learly dangerous to human life” standard may be little more than “depraved heart” dressed up in less prosaic (and more comprehensible) language. If Professor Crump (and the Texas legislature) really want to do away with depraved heart (extreme recklessness) murders, why bring it in through the back door of felony murder?

So, in jurisdictions retaining depraved heart murder, Crump’s felony-murder rule is either irrelevant or unnecessarily superfluous. If the defendant didn’t commit a dangerous act in concert with his crime (the Don and Ellen rape hypo), felony-murder would be irrelevant. If he did commit a dangerous act, felony murder would be unnecessary. For this reason, the MPC rejects felony murder as a separate category, but creates a presumption of extreme recklessness when a death results from a felony.

I very much disagree with Professor Crump’s endorsement of assault as a predicate felony for felony murder. Assume the following: Frank arrives at his home to find his family slaughtered. George is in the living room laughing about it and commenting: “Hey Frank, I sure enjoyed killing your stupid family!” Enraged, Frank shoots George in the heart, killing him instantly.

Does that sound like classic voluntarily manslaughter which, of course, cannot be a predicate felony to murder? But suppose the prosecutor has other ideas. She says: “Frank, I’m not going to prosecute you for murder or manslaughter. I’m going to prosecute you for felony murder predicated on your felonious assault upon George. And, of course, you can’t introduce evidence of provocation to mitigate the crime to manslaughter because provocation is only relevant for intentional killings; it is not relevant for felony murder.”

That is what cases like *Ireland*⁴³ are about. They are concerned about prosecutorial bootstrapping with the felony murder rule, thereby eliminating a legitimate provocation or diminished capacity defense.⁴⁴ They are not concerned about a defendant who says: “Yes I shot the victim but I only meant to maim him.”⁴⁵ That defendant would be guilty of second degree murder in most jurisdictions anyway. The only time felony murder would be relevant would be

⁴² Perhaps he could just be sentenced at the extreme high end of the rape sentencing continuum because of the aggravating circumstance of her death. I doubt, however, that Ellen’s surviving relatives would be pleased to know that Don was not homicidally responsible for her death. This is why I prefer calling the crime, rape resulting in death, and having a potentially higher sentence than rape simpliciter.

⁴³ *People v. Ireland*, 450 P.2d 580 (Cal. 1969).

⁴⁴ If we think those defenses should be unavailable, we could eliminate them entirely. Of course, if we did, all felonious assaults resulting in death would be murder without the felony rule. Hence, once again the rule would either be irrelevant or unnecessary.

⁴⁵ Crump, *supra* note 1 at 344.

if a defendant could mitigate the murder to manslaughter, but was precluded from doing so because of the felony murder rule. And, that is precisely when the felony-murder rule is least appropriate.

I do agree with Professor Crump, however, that California has made something of a mess of the merger doctrine. Although assault should always merge with the murder, burglary should not. Thus, if Harold breaks into Irene's home for the purpose of assaulting her, he should not have his felony murder conviction upset because the assault was the only reason the entry was burglarious, and therefore burglary like assault merges with the murder. The security of the home (especially from assault) is independent of the attack itself. Thus, I join Professor Crump in his condemnation of the *Wilson* case.⁴⁶

VI. CONCLUSION

David Crump should be commended for his prodigious effort in rethinking the law of homicide. I am particularly impressed by his call for abolishing "malice aforethought" as an independent element of murder. I am less sure of the wisdom of totally abolishing the category of willful deliberate and premeditated murders as among those deserving special harshness.

In regard to voluntary manslaughter, Professor Crump overstates the problems and understates the benefits of the MPC's "Extreme Emotional Disturbance" test. Consequently, he wrongly calls for its rejection. He similarly understates the importance and overstates the problems with depraved heart murder, and would eliminate that too without an adequate substitute.

I partially disagree with Professor Crump's felony murder analysis. If the felony murder rule is to be maintained, I would limit it to the most serious felonies, and not worry about whether *ex ante* the ultimately fatal act appeared dangerous. More fundamentally, I would clearly apply the merger rule to assault to prevent prosecutorial bootstrapping, a problem to which Professor Crump gives insufficient consideration.

In sum, I admire Professor Crump's undertaking. I do not, however, universally admire his conclusions.

⁴⁶ *People v. Wilson*, 462 P.2d 22 (Cal. 1969).

