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Legal Perspectives on the Slaying of Laban

John W. Welch

Abstract: This article marshals ancient legal evidence to show that Nephi's slaying of Laban should be understood as a protected manslaughter rather than a criminal homicide. The biblical law of murder demanded a higher level of premeditation and hostility than Nephi exhibited or modern law requires. It is argued that Exodus 21:13 protected more than accidental slayings or unconscious acts, particularly where God was seen as having delivered the victim into the slayer's hand. Various rationales for Nephi's killing of Laban are explored, including ancient views on surrendering one person for the benefit of a whole community. Other factors within the Book of Mormon as well as in Moses' killing of the Egyptian in Exodus 2 corroborate the conclusion that Nephi did not commit the equivalent of a first-degree murder under the laws of his day.

When Nephi reentered the city of Jerusalem late at night in his final effort to obtain the plates of brass, he must have been completely in the dark about how the plates could ever possibly fall into his possession. The city was asleep; the chance of any further meetings or negotiations with Laban was out of the question; appeals to friends or intercession by Lehi's sympathizers seemed improbable; Nephi himself was the son of a prophet who was a fugitive from justice (at least in the minds of those who thought he should be executed, just as the prophet Urijah ben Shemaiah had been; cf. Jeremiah 26:23). Nephi appears to have entered the city unarmed, having no expectation of any specific way that he might gain access to the locked treasury that held the plates. Nephi must have been as surprised as anyone by the events that unfolded that night.

The story of Nephi's unexpected success in 1 Nephi 4 can be viewed today from many perspectives, and obviously it was included in Nephi's record for several significant reasons. For example, this dramatic account demonstrated the religious importance of the scriptures and the vital role of the law in

God's desires for the Nephite people. If the law was important enough that one man should perish so that an entire nation could have it, the message was clear that the nation should be diligent not to dwindle in unbelief—a lesson that was kept bright in the Nephite memory for many years (1 Nephi 4:13; Omni 1:14; Alma 37:3–10). Moreover, in Nephi's mind the events that night validated the promises that the Lord had given to him personally about keeping the commandments, prospering in the land, and being a ruler and a teacher over his brothers (1 Nephi 2:20; 4:14, 17). Politically, the account undoubtedly came to play an important part among the founding narratives of Nephite culture and society, for it showed how God miraculously put a copy of their fundamental laws into their hands (1 Nephi 5:8–10). The fact that Nephi alone was able to obtain the plates—while his inept and unfaithful brothers were unable to complete the task their father had assigned them—legitimized Nephi's claim to possess the plates and to lead the group. Indeed, for several subsequent centuries the Lamanites accused the Nephites of having robbed them of their rightful possession of these plates (Mosiah 10:16), but the recorded facts about the events of that night went a long way toward showing that Nephi was the rightful owner of the plates, was the legitimate successor to his father Lehi, and was able to succeed with God's help where his brothers not only had failed at the task but had said that it could not be done.¹ Accordingly, for the next six hundred years, one of the most important symbols of authority among the Nephites was possession of the plates of brass (see Mosiah 1:16; 28:20; 3 Nephi 1:2).² The story of Laban, therefore, serves several purposes in the Nephite record: religious, political, historical, and personal.

The story also has significant legal dimensions. By its very nature the episode invites legal analysis and commentary: The story involves the killing of a man, to which the legal consequences of the day normally would have attached. The terminology of the narrative is also legalistic: precise words and technical concepts used by Nephi show that he wrote this story

¹ See Noel B. Reynolds, "The Political Dimension in Nephi's Small Plates," *BYU Studies* 27 (1987): 15–37; and "Book of Mormon, Government and Legal History in the," *Encyclopedia of Mormonism* (New York: Macmillan, 1992), 1:160–62.

² Gordon Thomasson, "The Complex Symbolism and the Symbolic Complex of Kingship in the Book of Mormon," F.A.R.M.S. paper, 1982.

with biblical laws in mind that justifiably cast this episode in a favorable light. Accordingly, Nephi's slaying of Laban can be evaluated profitably through the perspectives of the prevailing legal principles of Nephi's day. Those precepts are found primarily in Exodus 21:12–14, Deuteronomy 19:4–13, and Numbers 35:9–34, discussed below.

The following analysis presents several factors that substantially reduce Nephi's guilt or culpability under the law of Moses as it was probably understood in Nephi's day, around 600 B.C. Nephi may have broken the American law of Joseph Smith's day, but it appears that he committed an excusable homicide under the public law of his own day. This is not to say that Nephi would have been acquitted and declared free to walk the streets of Jerusalem again had he been brought before a Jewish court in Jerusalem and tried for killing Laban, although Nephi could have raised several arguments in his own behalf if such a proceeding had ever taken place.³ As a practical matter, however, Nephi's case probably never would have come before a formal court because the required two witnesses were lacking, making a capital conviction technically impossible (Numbers 35:30; Deuteronomy 19:15). But if an action had been brought against Nephi, early biblical law appears to have recognized two types of killings—excusable and inexcusable—and the slaying of Laban arguably falls quite specifically into the excusable category.

The primary biblical text explaining the enforcement of the general command, "Thou shalt not murder (*rāṣah*)" (Exodus 20:13), is found in Exodus 21:12–14. It reads:

He that smiteth a man, so that he die, shall be surely put to death. And if a man lie not in wait, but God deliver him into his hand, then I will appoint thee a place whither he shall flee. But if a man come presumptuously upon his neighbor, to slay him with guile; thou shalt take him from mine altar, that he may die.

³ The research paper by two law students, Fred Essig and Dan Fuller, "Nephi's Slaying of Laban: A Legal Perspective," F.A.R.M.S. preliminary report, 1981, explores some of the hypothetical procedural and substantive arguments that might have been advanced for or against Nephi at just such a trial.

The normal punishment under biblical law for murder at the time of Nephi was apparently death (Genesis 9:6), although the likelihood of paying ransom or compensation (*kōfer*), especially in cases involving unpremeditated acts or indirect causation, has been vigorously examined by biblical scholars.⁴ By way of comparison, the Hittite laws (c. 1400–1300 B.C.) explicitly provided for slaves or other persons to be given in cases of unpremeditated killings that occurred in a quarrel or unintentionally (“[only] his hand doing wrong”), while they excused entirely aggravated killings that occurred in the heat of passion, thus increasing the possibility that Hebrew law contained mitigating rubrics of its own.⁵

Although the provisions of these ancient laws cannot be stated precisely, Exodus 21:13–14 clearly shows that not all killings were culpable under biblical law. If a killing qualified as excusable under this provision, the law provided that the Lord would appoint “a place whither he [the slayer] shall flee.” This did not mean that the killer automatically went free, only that he was allowed to flee to a city of refuge and remain there for trial (Numbers 35:12). If it was then shown through witnesses that the slayer had come presumptuously upon his victim to kill him with guile or enmity, the slayer was taken from the city of refuge and put to death by one of the victim’s relatives acting as the so-called “avenger of blood” (Deuteronomy 19:12).⁶ If it was found that the slayer had not planned the event in advance, he was still considered to be tainted by blood but he would be granted safe refuge in a city of asylum until the death of the reigning high priest, at which time he could safely return to his former city. Nephi, of course, was prepared to flee—not only from his city of residence, but from the land of Israel entirely; thus, even to the extent that he might have been thought to have

⁴ Bernard S. Jackson, *Essays in Jewish and Comparative Legal History* (Leiden: Brill, 1975), 43–44, discussing also the views of Reuven Yaron and Moshe Greenberg. Greenberg holds that “anyone who killed a human being personally and with intent to harm could not avoid the death penalty” by paying ransom. Moshe Greenberg, “More Reflections on Biblical Criminal Law,” *Scripta Hierosolymitana* 31 (1986): 16.

⁵ Hittite Laws 1–4, 37–38, 174, in James B. Pritchard, *Ancient Near Eastern Texts Relating to the Old Testament* (Princeton: Princeton University Press, 1969), 189–90.

⁶ For a discussion of this concept in the context of the Book of Mormon, see James L. Rasmussen, “Blood Vengeance in the Old Testament and Book of Mormon,” F.A.R.M.S. preliminary report, 1981.

carried a blood taint due to his slaying of Laban, Nephi did not pollute the land, for he did not remain in it.⁷

The crucial question, however, is whether or not the law of Exodus 21:13–14 would have applied to the case of Nephi's killing of Laban. In order to determine the answer, we must carefully examine the two key elements that are mentioned there. The first involves the slayer's state of mind. As will be explained, the slayer must not have been lying in wait, or in other words must not have come presumptuously (having planned the deed out in advance) to kill his victim with guile. The second involves the role of the divine will: God must deliver the victim into the slayer's hand. Whether it was necessary to satisfy both of these elements, or only one, in order to prove that a killing was legally excusable under the law of Moses,⁸ Nephi's slaying of Laban probably satisfies both. After discussing these two elements, I will consider briefly biblical precedents and traditional attitudes in Jewish law which, under certain circumstances, allowed one person to be killed in order to save the lives of a whole city or community. I will then end with evidence from the Book of Mormon and also from Moses' killing of the Egyptian in Exodus 2 to corroborate the conclusion that Nephi's killing of Laban was not tantamount to murder under the law of Moses.

⁷ For discussions of the ancient Israelite concerns about blood guilt and its polluting taint, see Henry McKeating, "The Development of the Law on Homicide in Ancient Israel," *Vetus Testamentum* 25 (1975): 57–65; Jacob Milgrom, "Sancta Contagion and Altar/City Asylum," in J. A. Emerton, ed., *Congress Volume, Vienna 1990* (*Vetus Testamentum Supplement*) (Leiden: Brill, 1981): 278–310. "Shedding an innocent man's blood, even unintentionally, involved bloodguilt, and no manslayer was considered clear of this guilt"; Moshe Greenberg, "The Biblical Concept of Asylum," *Journal of Biblical Literature* 78 (1959): 127. Regarding the doctrine of pollution that emerged in Greece shortly after the time of Lehi, see Robert J. Bonner and Gertrude Smith, *The Administration of Justice from Homer to Aristotle*, 2 vols. (Chicago: University of Chicago, 1930; reprint New York: Greenwood, 1968), 1:53, 194–95, 203–5.

⁸ It has been argued that the satisfaction of either one of these two elements was sufficient for a killing to be considered unintentional, since the *wāw* in verse 13, usually translated as "but," makes better sense grammatically and contextually when translated as "or," especially when compared with a similar construction in verse 16 where the *wāw* can only mean "or." Bernard S. Jackson, *Speakers Lectures*, Oxford University, 1985, unpublished manuscript, VIII.5–8.

1. *Nephi's state of mind.* The basic facts regarding Nephi's state of mind in this case are well known. He entered Jerusalem late one night, probably unarmed, hoping to obtain the plates of brass. He did not know beforehand what he should do. He stumbled onto Laban drunk in the street. He was constrained repeatedly by the spirit of the Lord to kill Laban, and eventually he cut off Laban's head with his own sword. In killing Laban, Nephi sought no revenge, but acted reluctantly, without hatred, and in good faith.

It is evident that the ancient concept of premeditation (if we may use such a term) was different from the concept of premeditation under modern American or British law. The modern concept merely requires awareness and determination, and such determination need not have been formulated any earlier than the instant at which it is given effect. The archaic concept of premeditation, however, required a murder to have been preplanned, thought out, schemed, or implemented through some kind of treachery, ambush, sabotage, or lying in wait. "Lying in wait" is the term employed to describe the wily tactics of a hunter stalking his prey (as in Genesis 10:9; 25:27–28; 27:3, 5, 7, 33); and the word "presumptuously" expresses "insolent defiance of law."⁹ Thus, Bernard Jackson has concluded: "Premeditation [in biblical law] means that the action in question was the result of a preconceived design, not of a desire formed on the spur of the moment. Thus, not every intentional act is premeditated."¹⁰

Several strong clues indicate that Nephi had the ancient definition in mind when he wrote the story of Laban. He trusted implicitly that the Lord in some miraculous unknown way would be "able . . . to destroy Laban," even as he had vanquished the Egyptians at the Red Sea (1 Nephi 4:3). He expressly emphasized the fact that he did not know what he was to do as he entered the city of Jerusalem: "I was led by the Spirit, not knowing beforehand the things which I should do" (1 Nephi

⁹ See Mayer Sulzberger, "The Ancient Hebrew Law of Homicide," *Jewish Quarterly Review* 5 (1914–15): 127–61, 289–344, 559–614, esp. 290–91, citing Deuteronomy 17:12–13; 18:20, 22; Isaiah 13:11.

¹⁰ Jackson, *Essays*, 91; see also 154–55. On the meaning of human intentionality, and its theological connection in Jewish thought with conforming to the divine will, see Howard Eilberg-Schwartz, *The Human Will in Judaism: The Mishnah's Philosophy of Intention* (Atlanta: Scholars Press, 1986); reviewed by Bernard S. Jackson, in *Jewish Quarterly Review* 81 (1990): 179–88.

4:6). This point is crucial, for it shows that Nephi had not planned to find Laban and that he did not know that Laban would be out with the city elders, where Laban would be, or that he would be drunk. The occasion presented itself spontaneously. Nephi was completely surprised to find Laban. His deed was not preplanned and, therefore, not culpable.

A later and more commonly found interpretation of Exodus 21:13–14, however, would limit its application to accidental killings irrespective of the slayer's state of mind. For example, several biblical commentators, without examining or discussing the point, readily assume that these verses only provide "that the *accidental* homicide will have a place appointed for him for flight"¹¹ or that this grant of asylum was "limited to instances of *accidental* homicide only."¹² If such a limited understanding of this text is correct, Nephi's slaying of Laban would not be covered by the concepts of asylum in Exodus 21, for in no way can this killing be described as an accident.

The limited interpretation of negligent or excusable homicide in Exodus 21:13–14 and its related texts, however, is unpersuasive. While it is true that Deuteronomy 19:4–5 gives as an example of an excusable homicide the case where a man and his neighbor are chopping wood and an axe head accidentally flies off its handle and kills the neighbor, this does not mean that the definition of excusable homicide includes only freak accidents. If that were the intent, there would have been no need for each of the three definitive sections to require that the slayer had not "hated" his neighbor in time past (Deuteronomy 19:4), had not come "presumptuously upon his neighbor to slay him with guile" (Exodus 21:14), or had not injured him in "hatred" or with "enmity" (Numbers 35:20, 22). Put another way, as Jackson has concluded: "Unpremeditated but intentional homicide seems to be dealt with in the same way as purely accidental homicide";¹³ in other words, the concept of excusable

¹¹ Greenberg, "Biblical Concept of Asylum," 125 (emphasis added).

¹² Alexander Rofé, "The History of the Cities of Refuge in Biblical Law," *Scripta Hierosolymitana* 31 (1986): 207 (emphasis added). See also Anthony Phillips, "Another Look at Murder," *Journal of Jewish Studies* 28 (1977): 121. As far as I am aware, those who hold this opinion do not discuss the matter in depth. Menachem Elon is ambiguous: "The death penalty is prescribed only for willful murder [citations] as distinguished from unpremeditated manslaughter or accidental killing." *Principles of Jewish Law* (Jerusalem: Keter, 1975), 475.

¹³ Jackson, *Speakers Lectures*, VIII.8.

homicide includes more than purely accidental killings. Ben Zion Eliash concurs: although it is “unclear what the exact relationship is between the manslayer’s [state of mind] toward the victim, or his motive to kill, and the classification of that murder as either intentional or unintentional,” it is clear that “even a death brought about by an intentional blow is not intentional homicide unless that blow was accompanied by enmity.”¹⁴ Accordingly, if Nephi’s intentions were neither maliciously nor hatefully preconceived, he would well come within the definition of a protected slayer under the law of his day.

Evidently for this further reason, Nephi certified in some detail that he had no desire to kill Laban and that he did not do the deed of out malice because of any of Laban’s offenses against him and his family. Nephi reasoned with himself, “I also knew that he had sought to take away mine own life; yea, and he would not hearken unto the commandments of the Lord; and he also had taken away our property” (1 Nephi 4:11), but he recognized that none of these rationalizations would justify the slaying of Laban either at law or before the justice of God. He resisted the distasteful assignment, saying in his heart, “Never at any time have I shed the blood of a man” (1 Nephi 4:10). He did not act out of hatred or enmity, although the meaning of the later term is somewhat unclear.¹⁵

¹⁴ Ben Zion Eliash, “Negligent Homicide in Jewish Criminal Law: Old Wine in a New Bottle,” *National Jewish Law Review* 3 (1988): 65–98; quotation on 70–71. Regarding Eliash’s equating of “enmity” with “the intent to kill,” see the discussion of Rosenbaum, below.

¹⁵ It has been argued that the ancient concept of enmity (*ʿēbāh*) went well beyond personal hatred and was a technical term that requires “a different kind of antipathy than that which arises in the daily course of human events.” Stanley N. Rosenbaum, “Israelite Homicide Law and the Term ‘Enmity’ in Genesis 3:15,” *Journal of Law and Religion* 2 (1984): 149. Rosenbaum suggests that this rare Hebrew term originally referred to a state of belligerency that had been declared by a head of state against an enemy of the people and that such a conflict can “only be resolved by the death of one of them,” *ibid.*, 148–49. With respect to Genesis 3:15, Rosenbaum suggests that God acted like such a king in declaring “enmity” between Satan and the seed of Adam and Eve, for “the real fruit of [Satan’s] deception which took place in Eden was murder,” *ibid.*, 150, and this conflict will not be resolved until either Satan or the king is dead. His theory implies that only God or the king as the divine representative can rightfully declare such a state of enmity, and he infers that the royal power to declare *ʿēbāh* had been perverted by individuals in antiquity and thus “the purpose of the legislation [in Numbers 35:21–22] was to prevent individuals

In addition, Numbers 35:11, 15, and Joshua 20:3, 9, which seem to require that the killing occur “at unawares,” should not be understood to limit the ability of a person in Nephi’s situation to flee to a city of refuge and seek exculpation simply because he had been conscious of his action at the time it took place. The Hebrew word translated “unawares” is *shegāgāh*. Meaning “to sin ignorantly,” this word also occurs in Numbers 15:28 (compare Mosiah 3:11). It derives from the word *shāgag*, meaning to stray, sin, miss the mark, be deceived, or err, but not necessarily unconsciously. Depending on how these words are construed, they may imply that the person acted perhaps negligently but at least unaware of the consequences of his action, or that he miscalculated or misjudged. Others in Jerusalem might have judged Nephi to have acted in error,¹⁶ and ancient legal distinctions may have existed between various kinds of mistakes (i.e., ignorance of the law, mistakes of fact, misjudgments of consequences, etc.), but no one could have doubted that if Nephi sinned he did so unaware of it being a sin and acted in good faith. Gauging by later Jewish law, which may shed a little further light on the subject, “a murder by someone under the mistaken belief that his actions were permissible” was considered grossly negligent, but the slayer was not subject to punishment;¹⁷ at least, it has been argued, he “should be treated less severely than one who kills another in ignorance of the more fundamental command not to kill.”¹⁸

from declaring *ʿēbāh* against one another,” *ibid.*, 151. This observation, if correct, would bear on the slaying of Laban, for it was indeed God—and not Nephi—who declared such a state of enmity against Laban. When Laban was killed by Nephi it was not under any kind of prohibited enmity that he as an individual had arrogated to himself the power to declare.

¹⁶ For an interesting discussion of the ancient legal and literary treatments of tragic errors as opposed to morally insignificant accidents, see David Daube, “Error and Accident in the Bible,” *Revue internationale des droits de l’antiquité* 2 (1949): 189–213. Daube, 209, concludes that no law developed distinguishing between error and accident because “it is exceedingly difficult to mark off from any irrelevant error that sort and degree of error which you want to consider as exonerating a man.”

¹⁷ Eliash, “Negligent Homicide in Jewish Criminal Law,” 88, citing Maimonides, *Mishneh Torah*, *Nezikin* 6:10.

¹⁸ Arnold Enker, “Mistake of Law and Ignorance of Law in Jewish Criminal Law,” 2, summary of paper for the Conference of the Jewish Law

Thus, Nephi's action would probably have come within the additional protection of wrongs committed "unawares," if it were viewed as a wrongdoing to any extent.

The foregoing conclusion, based on an examination of the Hebrew terminology, is confirmed on other grounds by the Greek word that was used in the Septuagint to translate *shegāgāh* in Numbers 15:28. The Greek word is *akousios*, a contracted form of *aealousios*, literally meaning "unwillingly." Its root is *hekousios*, from *hekōn*, denoting action that is "voluntary, willing, acting of free will," within one's control; and thus its opposite, *akousios*, is action that is "against the will, constrained,"¹⁹ "intended but not desired."²⁰ This term was used as a legal term by Antipho, Plato, and Aristotle to refer to "involuntary action," including such actions as "involuntary murder" or jettisoning the cargo of a ship in order to save the vessel and its passengers. Obviously, its meaning was broader than the English word *involuntary*.²¹ Aristotle recognizes that many difficult philosophical questions are raised by "actions done through fear of a worse alternative, or for some noble object," and he concludes that these "mixed" actions approximate voluntary conduct at the time they are committed; but his main interest is not juristic and thus he does not pursue or resolve the issue. Aristotle's discussion, however, shows that the issue was a live one in the ancient world: where an action was truly undesired by the human agent, it certainly could be argued that it was equivalent to involuntary conduct for purposes of assessing legal culpability so long as the circumstances were meritorious.²²

Such concepts coming from the Greek world only a few centuries after the time of Nephi offer a valuable point of comparison in assessing Nephi's state of mind. Nephi says, "And I shrunk and would that I might not slay him" (1 Nephi

Association, Paris, July 1992, full paper forthcoming in the *Jewish Law Annual*.

¹⁹ Henry George Liddell and Robert Scott, *A Greek-English Lexicon* (Oxford: Clarendon, 1968), 27, 53, 514–15, 749–50.

²⁰ W. F. R. Hardie, *Aristotle's Ethical Theory* (Oxford: Clarendon, 1968), 153.

²¹ Antipho, III, 2, 6; see generally, Aristotle, *Ethics* III, 1, 8–9.

²² The entire third book of the *Nicomachean Ethics* wrestles with the problems of classifying an action as voluntary (*hekousia*), involuntary (*akousia*), or mixed (*miktē*). See Hardie, *Aristotle's Ethical Theory*, 152–59.

4:10). This affirms that Nephi's action was strongly against his will and his desire, and hence was involuntary under either the Hebrew or Greek conceptions. Moreover he states that he was "*constrained* by the Spirit that I should kill Laban" (1 Nephi 4:10). "Constrain" was a strong English word in Joseph Smith's day, meaning "to compel or force; to urge with irresistible power, or with a power sufficient to produce the effect" and "to produce in opposition to nature."²³ Being "constrained," Nephi should not be viewed as acting willingly according to his predilections, but obedient to a higher authority to achieve the lesser of two evils. Thus Nephi concludes this section of his account by saying, "And now when I, Nephi, had heard these words, . . . I did obey the voice of the Spirit" (1 Nephi 4:14, 18). Accordingly, Numbers 15:28; 35:11, 15; and Joshua 20:3, 9 would have encompassed Nephi's action legally within the concept of "involuntary" conduct and would not have taken him outside the principles of asylum or of mitigated culpability.

Having found that the definition of excusable homicide was broader than purely accidental killings and was not limited by what modern readers would consider to be acts committed "unawares," we must next ask whether that law in Exodus 21 was broad enough to include even a slaying with a sword. Indeed, the application of Exodus 21 to the slaying of Laban should not have been precluded in Nephi's mind by Numbers 35:16, even though that slaying was by the sword. Numbers 35:16 states: "If he smite him with an instrument of iron, so that he die, he is a murderer." This provision, however, must be read in its surrounding context. The purpose of Numbers 35:16–24, is, in essence, to establish the rule that the burden of proof must be borne by or for the avenger of blood who pursues a killer to a place of refuge,²⁴ and that text sets forth several evidentiary considerations that were to be weighed by the judges in reaching their judgment.²⁵ If it could be proved that the killer

²³ Webster's *American Dictionary of the English Language* (New York: Converse, 1828).

²⁴ Numbers 35 also establishes the right but not the duty of the slayer to seek refuge, although all aspects of the avenger's standing in the ensuing legal proceeding are not specified. Eliash, "Negligent Homicide in Jewish Criminal Law," 68.

²⁵ This view is consistent with the conclusion others have reached that Numbers 35 was written or used in connection with the judicial reforms of Jehoshaphat, c. 900 B.C., to guide judges in handling cases of asylum. "The passage may be attributed to Jehoshaphat's reform"; see Rosenbaum,

was not entitled to the protection of the sanctuary, the congregation was to judge between the slayer and the avenger of blood (Numbers 35:24). Verses 16–18 seem to speak categorically, creating rules of strict liability that were to operate without regard to the slayer's state of mind: They provide that if the killer struck the victim with an instrument of iron, hit the victim by throwing a stone, or struck the victim with a weapon of wood, the killer was to be put to death. But while the use of such dangerous instruments, weapons, or projectiles might raise a strong presumption that the slaying was not accidental but preplanned, verses 20–23 show that the earlier statements were not intended to create an automatic judicial outcome based on that single fact alone. The text continues, "But if he thrust him of hatred, or hurl at him by lying of wait, that he die; or in enmity strike him with his hand, that he die: he that smote him shall surely be put to death" (Numbers 35:20–21). These qualifications show that "hatred" or "lying in wait" must still be proven in addition to the probative—but not necessarily conclusive—evidence supplied by the nature of the weapon used.²⁶ The text concludes that if the killer "thrust him suddenly without enmity, or have cast upon him anything without lying 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 exonerate the slayer and allow him to remain in the city of refuge until the death of the reigning high priest (Numbers 35:22–23). Thus, it is possible, under some circumstances, for a person to be killed with an instrument of iron and for that not to be counted automatically as

"Israelite Homicide Law," 151, citing Albright and Childs. Indeed, Jehoshaphat appointed priests and elders to judge "between blood and blood" in all the walled cities of Judah (2 Chronicles 19:5–11). However, the rules in Numbers 35 direct the congregation in general and not a select body of priests or judges in these evidentiary matters (see Numbers 35:24–25).

²⁶ Elon, *Principles of Jewish Law*, 475, asserts, to the contrary, that either element alone was sufficient: "willfulness or premeditation is established by showing either that a deadly instrument was used (Num. 25:16–18) or that the assailant harbored hatred or enmity toward the victim (Num. 35:20–21)." This reading, however, ignores Numbers 35:22–23, which provides that a sudden thrust without enmity is excusable, even if it is made with a deadly instrument.

a homicide requiring the death penalty or other criminal sanctions.²⁷

Obviously, the ground in antiquity between the two extremes of intentional homicide and negligent manslaughter was wide enough to raise several legal questions that cannot be answered today with certainty. Although we cannot reformulate a precise law of negligent or excusable homicide with any degree of certainty for the biblical period (and it is doubtful that a codified version of the foregoing principles ever existed),²⁸ it is abundantly clear that several elements in Nephi's state of mind were relevant factors in proving that a slaying was excusable and protected by ancient Israelite law. Thus, although "the Bible does not contain any abstract principles through which one could determine exactly what criteria the court should use in determining whether a murder was intentional or unintentional,"²⁹ it is clear that culpable slayings under biblical law had to involve some preplanned, treacherous, or hateful state of mind and that such a requirement was lacking in Nephi's case.

2. *God's deliverance of Laban into Nephi's hand.* In the end, Laban was killed for one and only one reason, namely because the Spirit of the Lord commanded it and constrained Nephi to slay him, for "the Lord hath delivered him into thy hands" (1 Nephi 4:11, 12; see also 1 Nephi 3:29). Looking beyond Nephi's personal state of mind on the matter, the ultimate reason for his action was God's deliverance of Laban into Nephi's hands. As the Spirit stated, it was the Lord who caused Laban's death: "the Lord slayeth the wicked to bring forth his righteous purposes" (1 Nephi 4:13). And, parenthetically, the distinctive biblical punishment for inveterate, unrepentant apostates was execution by the sword (Deuteronomy 13:15).

The killing of Laban was not the only time in ancient Israel when God sanctioned certain slayings to promote the national existence and welfare of the righteous. During the conquest of the Promised Land, Israel was commanded to kill the inhabitants of the region in order to occupy that land and to establish Israel, and accordingly Jewish law recognizes a special legal classification of certain mandatory wars required when God

²⁷ For further reasoning along the same lines, see Eliash, "Negligent Homicide in Jewish Criminal Law," 70-71.

²⁸ *Ibid.*, 69-71.

²⁹ *Ibid.*, 69.

commands.³⁰ The wars of the kings were optional and limited, but the requirements imposed by God in certain circumstances were mandatory.³¹

Some people have wondered why God needed to have Nephi kill Laban instead of telling him simply to put on Laban's clothes and go forth in disguise to get the plates. Leaving the drunken Laban alive, however, would probably have created serious problems in several ways: (1) Laban could have awakened, stumbled home, or could have been helped home by someone else who found him drunk in the streets; if Laban had reentered his house while Nephi was there pretending to be Laban, Nephi would have been extremely vulnerable as a housebreaker at night. (2) Even if Laban spent the night in the streets, the next morning he would have regained his senses and would have been furious. He would have led a search party to pursue and kill Nephi and his brothers and recover the plates of brass. With Laban dead, however, his family and kinsmen would have gone into mourning and would have immediately attended to the funeral and burial. They were less motivated to recover the plates than Laban would have been (especially since they had already inherited Lehi's gold and silver from Laban). (3) Few members of Laban's family were probably much aware of the negotiations and conflicts between Laban and the four sons of Lehi. With Zoram gone, people in Jerusalem could well have assumed that Zoram was the one who had killed Laban, since the city of Jerusalem had every reason to believe that the four sons of Lehi had been scared out of town earlier and had never returned. If Laban had not been killed, however, he would have known Zoram and the circumstances well enough to have suspected what had happened and to have led an effective pursuit against Nephi and his brothers. These reasons explain why it was virtually essential to the completion of Nephi's task that Laban be killed, and with a little imagination several other reasons can probably be suggested.

Be that as it may, Laban was not killed for any short-term practical need of the moment. As Nephi stood marveling over the drunken Laban, he must have been quite astonished. He was

³⁰ For further details, see my "Law and War in the Book of Mormon," in Stephen D. Ricks and William J. Hamblin, eds., *Warfare in the Book of Mormon* (Salt Lake City: Deseret Book and F.A.R.M.S., 1990), 49.

³¹ George Horowitz, *The Spirit of Jewish Law* (New York: Bloch, 1953), 147-48.

drawn immediately to Laban's sword, which he removed from its sheath. The splendor of the workmanship and the sharpness of the steel blade left an indelible impression on the young man's mind. As Nephi stood marveling at this weapon, the Spirit constrained Nephi that he should kill Laban (1 Nephi 4:10). Nephi balked. The Spirit then said to him again, "Behold the Lord hath delivered him into thy hands" (1 Nephi 4:11). Three times Nephi tried to rationalize the commanded deed, but the Spirit said again, "Slay him, for the Lord hath delivered him into thy hands" (1 Nephi 4:12).

The words of the Spirit were apparently a verbatim quote from Exodus 21:13, "And if a man lie not in wait, but God *deliver him into his hand.*" These words or their equivalent, in my opinion, would have been recognized by Nephi as coming from the Code of the Covenant. Growing up in Israel as a young boy, Nephi would certainly have learned this passage from Exodus 21. Deuteronomy 6:6–7 required righteous parents in Israel to teach their children the law of Moses, to talk of these words when they sat at the dinner table, to recite them as they walked down the path, to repeat them before going to bed, and to speak of them upon rising in the morning. One of the most important texts of the law of Moses was Exodus 21–23, essentially an elaboration of the familiar Ten Commandments. Coming early in the first chapter of the Covenant Code was the text cited by the Spirit to Nephi.

The Hebrew verb in Exodus 21:13 translated as "deliver" (*'innāh*) occurs only four times in the Hebrew Bible. Mayer Sulzberger sees in this phrase a "subtle intimation that Divine wisdom" causes events to occur "between persons not hostile to each other, in order to attain ends of justice which the narrow wisdom of human courts would be unable to reach."³² Accordingly, this rare Hebrew expression or its equivalent indicated to Nephi in essence that God had caused Laban and Nephi to meet that night,³³ and that Laban's death was

³² Sulzberger, "The Ancient Hebrew Law of Homicide," 292.

³³ The Hebrew may be translated, "God [*hā-Ēlōhîm*] caused him to meet," Jackson, *Essays*, 91 n. 98; but this expression is otherwise unattested and thus its meaning is not entirely certain. Eliash renders this phrase, "and the Lord caused it to come [*by*] his hand," see "Negligent Homicide in Jewish Criminal Law," 69. Paul Hoskisson has suggested in private correspondence, 2 June 1981, that the Hebrew should be understood to mean that "God has caused the opportunity to come *upon him*," namely the one killed. The Greek Septuagint translators three centuries after Nephi

occasioned by an act of God, but not as that term is understood in its modern sense.³⁴ Especially if the Spirit used this rare word and not one of the more common Hebrew words for “deliver” (for example, *nātan*, “to give over”; or *hiṣṣîl*, “to snatch, rescue”), the connection between the Spirit’s words and Exodus 21 would have been far more obvious in Hebrew than it is even in English.

The implication of the Spirit’s instruction could not have been lost on Nephi: he had not been lying in wait and the Lord had delivered Laban into his hands. Therefore, in order to accomplish the Lord’s purposes, under this unusual and extraordinary circumstance, the killing was on both counts legally justifiable and religiously excusable. It was the kind of killing that would be protected by the mercy of God in a place of refuge within God’s jurisdiction.

3. *Better that one man perish than a whole nation.* The Spirit, finally, gave the following explanation for Laban’s death: “It is better that one man should perish than that a nation should dwindle and perish in unbelief” (1 Nephi 4:13). This point of view concerning the relative rights of the individual or the group also has a long tradition in biblical and Jewish legal history.

The Old Testament lays a narrative groundwork for the legal view that, under rare appropriate circumstances, a single person can be exposed to certain death for the benefit of the whole. David Daube has shown that in early Israel there was little moral constraint protecting the individual in such a case:

Clearly, no such scruples are entertained by the Judeans in Judges [15:9–13] who, fearing what their mighty Philistine neighbours might do to settle

rendered these Hebrew words *alla ho theos paredōken eis tas cheiras autou*, literally “but God delivered [him] into his hands.” Despite the possible translational nuances here, the message should have been clear to Nephi in any case: God had caused him to stumble onto Laban, or had caused this outcome to come upon Laban, or had delivered Laban into his hands.

³⁴ God’s involvement for purposes of Exodus 21:13 should not be confused anachronistically with the modern legal notion of “act of God,” which has come to mean “an act occasioned exclusively by violence of nature without the interference of any human agency.” *Black’s Law Dictionary*, rev. 4th ed. (St. Paul, MN: West, 1968), 43.

accounts with the indomitable Samson, propose to deliver him up in fetters.³⁵

And the case of Sheba, a rebel against King David in 2 Samuel 20, provided a further instance where peace was offered to an entire city in exchange for the life of a single man (2 Samuel 20:21–22).

This point of law, along with its biblical precedents and ethics, was hotly debated between the Pharisees and Sadducees at the time of Christ: The initial position of the Pharisees was “unbendingly negative: no one to be surrendered ever, even though extinction will ensue,”³⁶ while the Sadducees (notably Caiaphas in condemning Jesus) were more liberal (John 11:50; 18:14).³⁷ Eventually the view of the Sadducees prevailed, as evidenced in the Genesis Rabba: “It is better to kill that man [Ullah] so that they may not punish the congregation on his account.”³⁸ In the rabbinic period, Talmudic law went on to puzzle deeply over the meaning and implications of these notions. Used judiciously, these debates confirm the fact that surrendering one person to be killed for the benefit of the entire group was a topic addressed in biblical law.

In the Talmud, unpremeditated homicide was eventually subdivided into five categories: negligent, accidental, nearly avoidable, under duress, or justifiable.³⁹ For purposes of comparison with Nephi’s case, justifiable killings included (1) those that prevented one man from killing another (and by analogy, Nephi’s slaying of Laban prevented him from causing Lehi’s people to perish spiritually) and (2) surrendering a specific named individual to be killed when heathens threaten to kill a whole group unless that one is delivered up.⁴⁰ While the rabbis passionately and compassionately debated the limited circumstances under which the life of a specified individual could be sacrificed for the benefit of the group,⁴¹ and whereas

³⁵ David Daube, *Appeasement or Resistance* (Berkeley: University of California Press, 1987), 79.

³⁶ *Ibid.*

³⁷ See *ibid.*, 86–88.

³⁸ Genesis Rabba 94 on 46.26, cited in *ibid.*, 87.

³⁹ Elon, *Principles of Jewish Law*, 476.

⁴⁰ *Ibid.*, 476.

⁴¹ See TY *Terumot* 8:10, 46b, in *The Talmud of the Land of Israel: A Preliminary Translation and Explanation*, Alan J. Avery-Peck, trans. (Chicago: University of Chicago Press, 1988), 6:418, which reads:

one case from the fourth century A.D. distinguished between an individual and a group ordered to put a man to death (the individual must first offer himself to be killed),⁴² there can be little doubt that the possibility of killing one person for the benefit of the whole was recognized under early Jewish law and that it was consonant with the rationale expressly stated in Laban's case ("better that one man should perish than a nation should dwindle and perish in unbelief," 1 Nephi 4:13).

Indeed, logic was on the side of the rabbis who held that this rule applied especially when the victim had already committed a crime worthy of death, and this raises the further possibility that Laban was justifiably consigned to die because he had committed such a crime. Falsely accusing a person of a capital offense was a capital crime under biblical law (Deuteronomy 19:19), as it had been in the ancient Near East since at least the time of Hammurabi (Code of Hammurabi 1). Since Laban had falsely accused Laman of being a "robber" (a serious capital offense)⁴³ and had sent his soldiers to execute the

It is taught [T. Ter. 7:20]: [As to] a group of men who were walking along and gentiles met them and said, "Give us one of your number that we may kill him, and if not, lo, we will kill all of you"—let them kill all of them, but let them not give over to them a single Israelite. But if they singled one out, such as they singled out Sheba the son of Bichri [2 Sam. 20]—let them give him to them, that they not all be killed. Said R. Simeon b. Laqish, "Now this applies [only] if the man [already] is subject to execution, as was Sheba the son of Bichri." But R. Yohanan says, "[It applies] even if he is not subject to execution, as was Sheba the son of Bichri."

Similarly, it was permitted for a group of women to turn over one who was unclean to be raped in order to protect the cleanness of the others. *Ibid.* While it was allowed to sacrifice the welfare of one for the whole, the rabbis taught that "the law for pious ones" advised against doing so. *Ibid.*, 419. Others held that the person singled out for death had to have "already forfeited his life to God by committing a capital offense against God's laws for which he had not yet been punished," although this opinion was not held unanimously. Haim H. Cohn, *Human Rights in Jewish Law* (New York: KTAV, 1984), 38.

⁴² David Daube, *Collaboration with Tyranny in Rabbinic Law* (London: Oxford, 1965), 26–27.

⁴³ Bernard S. Jackson, *Theft in Early Jewish Law* (Oxford: Clarendon, 1972), 13; against robbers "the laws of war operated," 16. I

sons of Lehi on this pretext (1 Nephi 3:13, 25), Laban effectively stood as a false accuser. Such an accusation, coming from a commanding officer of the city, was more than an idle insult; it carried the force of a legal indictment. Since Nephi and his brothers were powerless to rectify that wrong, God was left to discharge justice against Laban.

Corroborating factors. Three pieces of circumstantial evidence corroborate the view that the prevailing law in Nephi's day counted the slaying of Laban as something less than culpable or capital homicide.⁴⁴

First, it is significant that Nephi's brothers never accused him of breaking the law. Laman and Lemuel had ample reason to accuse Nephi. If he had broken the very law that he so scrupulously claimed to observe, Laman and Lemuel would not have let that pass unnoticed. They accuse him of usurping power, of trying to become a ruler and a teacher over them, of trying to trick them by his cunning arts and "foolish imaginations" (1 Nephi 16:37–38; 17:20), but never do they accuse him of murder. Moreover, their descendants taught their children to hate and murder the Nephites because Nephi "had

thank Paul Hoskisson for recently reminding me of this point which we had discussed several years ago. It is also probable that Laban was among those who had wrongly accused Lehi of being a false prophet, which was also a capital offense (Deuteronomy 13:5; 18:20).

⁴⁴ In this paper, I have been concerned with the laws of the society in which Nephi lived. God gave Nephi and all the ancient prophets and apostles additional private rules that may have guided Nephi's actions or shaped his subsequent retelling of the events in 1 Nephi 4. See D&C 98:23–38. It is unknown, however, whether Nephi received the two laws in D&C 98 before or after the Laban episode; he could have received them at the time he and his followers separated themselves from Laman and his group, for those two rules deal with (1) defensively enduring threefold attacks by enemies on the righteous *and their families* and (2) offensively warning one's enemies three times and offering peace *before going to war against them*. These rules of war fit the events in 2 Nephi 5, but they do not apply precisely to the case of Laban. The statement "if he has sought thy life, and thy life is endangered by him, thine enemy is in thine hands and thou art justified" (D&C 98:31) might appear to have overtones of the Laban episode, but it literally applies only to a case of self-defense, which was not the case with Nephi and Laban since Nephi's life was not threatened at the time he found Laban drunk in the streets of Jerusalem. If Nephi had known this law at the time and had considered it as complete justification, he might well have said so. He sees more in the case than this alone.

taken the ruling of the people out of their hands” and robbed them (Mosiah 10:15–17), but never do they depict Nephi as a murderer. This strongly implies that they accepted Nephi’s explanation of the case as a justifiable killing.

Second, at or shortly after Nephi’s coronation as king, Jacob addressed the young Nephite assembly. He pronounced ten woes upon those who work wickedness (2 Nephi 9:27–38). His ten woes are quite obviously patterned after the Ten Commandments.⁴⁵ One of these woes pertains to murder: “Wo unto the murderer who *deliberately* killeth, for he shall die” (2 Nephi 9:35). The conspicuous insertion of the word “deliberately” is an uncharacteristic qualification. Few of Jacob’s strict woes are accompanied by such a modifier. The thrust of his point is to be sure that only those who deliberately kill are considered guilty and punishable. Under Exodus 21:12–14, that would require deliberation, lying in wait, or other similar planning and hatred. Categorically cursing all people who killed—particularly at the coronation of Nephi—would have been extremely undiplomatic. People immediately would have wondered, “But what about Nephi?” The answer is simple. As has been shown above, Nephi had not killed “deliberately.” Jacob’s curse implies that he understood Exodus 21:13 to require a high degree of advance deliberation.

Third, of course, Nephi was not the only prophet in scripture to shed a man’s blood. Moses killed an Egyptian when Moses saw the Egyptian beating a Hebrew slave; when he looked around and saw that no one was watching, Moses killed the Egyptian and buried him in the sand (Exodus 2:11–12). Fearing that he might get caught, Moses fled to the land of Midian. This background sheds further light on the meaning of intentionality in the law of homicide in Exodus 21. Moses, the lawgiver himself, just like Nephi could have argued that his spontaneous action was not preplanned or premeditated in that sense. This, again, is not to say that Moses had not committed a slaying, but only that it was a protectable slaying. He fled and took refuge in the wilderness of Midian, perhaps thereby creating the very precedent out of which the strange procedure of

⁴⁵ “Jacob’s Ten Commandments,” in John W. Welch, ed., *Reexploring the Book of Mormon* (Salt Lake City: Deseret Book and F.A.R.M.S., 1992): 69–72.

the cities of refuge emerged.⁴⁶ Only rarely, however, has any connection between Moses' flight and the biblical asylum law been suggested. One Jewish source imagined that Moses must have been happy when he received that section of the law from God, because "he that hath tasted of a food knoweth its flavor," and Moses "who had erstwhile been obligated to flee on account of having slain an Egyptian, knew the feelings of the man who is pursued on account of a manslaughter that he had committed unawares."⁴⁷ Accordingly, the concrete cases of Moses and Nephi offer us important practical glimpses into the meaning of unintentional manslaughter in the biblical period.

Nephi's reference to Moses as he and his brothers moved quietly toward Jerusalem that dark night turns out to be more prophetic and more significant than Nephi probably realized at the time. Nephi urged his brothers, "Let us be strong like unto Moses. . . . Let us go up; the Lord is able to deliver us, even as our fathers, and to destroy Laban, even as the Egyptians" (1 Nephi 4:2–3). Although Nephi had the destruction of the Egyptian army in mind (he assumed he would encounter Laban's fifty), in the end it was not an army that Nephi destroyed, but a single man. Nephi became strong like unto Moses, following the archetype who set into motion the exodus of Israel from Egypt. Even so, the slaying of Laban inexorably sealed the destiny of Lehi's party as exiles from the land of Jerusalem until they likewise arrived at their new Promised Land. In retrospect, the parallel between the actions of Moses

⁴⁶ Dating the biblical texts about the cities of refuge and determining to what extent they were actually implemented is debatable. But in any event, they predate Lehi and Nephi. Moshe Greenberg dates the asylum laws before the reforms of Josiah c. 625 B.C.; see "The Biblical Conception of Asylum," 126. Henry McKeating adduces evidence of a custom of sanctuary in the early monarchy and shows that few are convinced that these practices are not at least as old as the seventh century B.C. See "Development of the Law on Homicide in Ancient Israel," 53–54. Whether these laws were promulgated by Moses himself or patterned after him, his flight to Midian could have influenced the development of the concept of refuge.

⁴⁷ Louis Ginzberg, *The Legends of the Jews*, 7 vols. (Philadelphia: Jewish Publication Society of America, 1938), 3:416 and n. 869. See also Rofé, "The History of the Cities of Refuge," 237, suggesting that Moses' flight to Midian, Absalom's escape to Geshur (2 Samuel 13:37; 14:13, 32), and Cain's becoming a wanderer on earth (Genesis 4:12–16) offer clear evidence that self-imposed exile from society was an alternative for the killer under ancient Israelite customary law.

and Nephi was surely strengthened by the fact that both had been involved in the excusable killing of a man.

Concluding observations. Over the years Hugh Nibley has enjoyed telling a story about his Arab students in the early 1950s who were required to take the basic Book of Mormon class at Brigham Young University. Knowing that the Laban episode had been troublesome to the moral sensitivities of many twentieth-century readers, Nibley was puzzled when these students found the story somewhat implausible but precisely for the opposite reason he had expected. Instead of being troubled that Nephi had killed the unconscious Laban, the students found it odd that he had hesitated so long.⁴⁸ While the reaction of these Arab students cannot be taken as evidence of the attitudes of the inhabitants of the city of Jerusalem around 600 B.C., it does reinforce the point that different cultures have unique values and idiosyncratic legal expectations. Accordingly, modern readers should be willing to consider not only the implications and moral bearings of ancient scriptural events upon contemporary society, but also to approach these developments in terms of the ancient dispositions and legal norms that would have operated as guiding principles in the lives of people years ago.

While nineteenth-century vocabulary and concepts are in some ways useful in Book of Mormon exegesis, the Laban episode is a case where the nineteenth-century environment offers little help.⁴⁹ Joseph Smith's nineteenth-century audience

⁴⁸ John W. Welch, "Hugh Nibley and the Book of Mormon," *Ensign* 15 (April 1985): 52.

⁴⁹ It is difficult to determine how the law of homicide was understood in Joseph Smith's community. Under the earliest colonial laws of New York, which were based largely on biblical precedents, a capital homicide was defined as "wilful and premeditated." *Earliest Printed Laws of New York 1665-1693*, John D. Cushing, ed. (New York: Michael Glazier, 1978), 124. Similarly, the Blue Laws of New Haven Colony (1656) spoke of "willfull murder . . . upon premeditated malice, hatred or cruelty, (not in a way of necessary and just defence, nor by meere casualty against his will,) he shall be put to death." *Blue Laws of New Haven Colony 1656*, compiled by an antiquarian (Hartford: Case, Tiffany, 1838). In the nineteenth century, even greater protection to life was given. Life "cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow-creatures, merely upon their own authority." *Blackstone's Commentaries on the Laws of England* (Chicago: Callagan, 1872), 133. Laws, such as the Penal Code of the State of New York (1865), minimized the extent of premeditated awareness that was required: §243: "A design to effect death sufficient to constitute murder, may be formed

was just as scandalized by Nephi's killing of Laban as is a modern audience. Early Book of Mormon critics readily viewed this episode as a clear indication that the Book of Mormon was not inspired by God, a divine being who would never have commanded a true prophet to kill, having already commanded, "Thou shalt not murder." That view, however, assumes only a nineteenth-century viewpoint.

But when analyzed in terms of ancient biblical law, the case is framed within the appropriate set of legal terms and issues. This is not to say that the slaying of Laban presents us as modern readers with an easy case: neither was it an easy case for Nephi. In its ancient legal context, however, the slaying of Laban makes sense, both legally and religiously, as an unpremeditated, undesired, divinely excusable, and justifiable killing—something very different from what people today normally think of as criminal homicide.

instantly before committing the act by which it is carried into execution." Homicide was excusable under these statutes only in certain accidents; in lawfully correcting a child or servant; in doing a lawful act with ordinary caution and without unlawful intent; when resisting an attempted murder; in lawful defense; apprehending a felon, suppressing a riot, or lawfully preserving the peace.