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BERNARD E. GEGAN*

On December 30, 1970, a college student named Michael Blake was driving his pickup truck on East River Road, a rural two-lane highway outside Rochester, New York. It was the kind of clear, cold night that often follows a snowfall, and the wind blew occasional dustings from the snowbank along the shoulders of the plowed road. It was about 10 p.m. and Blake was headed towards a friend's house; he knew the road and since there was no ice, he drove perhaps 10 miles above the 40 m.p.h. speed limit. After passing Bailey Road, he noticed a car approaching in the opposite lane blinking its headlights on and off. We do not know if Blake realized the urgency of the signals but there is no reason to doubt his account of what happened next: after the oncoming car had passed, his headlights picked up a man sitting in the middle of his lane, hands raised in the air. The man's shirt was pulled up to his chest and his pants were down around his ankles. Blake froze. He did not brake or turn. He just drove on the remaining 100 or 200 feet and ran down the strange looking man.

Surprisingly, the man was not killed instantly by the impact. Although his injuries were massive, he lived long enough to be the victim of one more accident. When the ambulance which was taking him to Strong Memorial Hospital went through a red light, it was hit by a car. The man was transferred to another ambulance and finally pronounced dead on arrival at the hospital. The injuries from the first impact were so great that no one seriously questioned whether it, rather than the second accident, was the cause of death.

Perhaps Michael Blake was not as careful as he should have been, but it was the kind of accident that might have happened to anyone. Although a homicide charge arose out of the incident, it was not directed at Blake. No, the criminal act had been committed earlier.

George Stafford's last day began quite auspiciously. He collected

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money from a lawyer — two hundred-dollar bills to be exact. But Stafford had two failings: he liked to drink and he liked to show his money. After doing both at a bar in Rochester, he asked if anyone would drive him to Canandaigua. One volunteer could not get his car started, so Stafford accepted a ride from Barry Kibbe and Roy Krall. Following more bar-hopping with Kibbe and Krall, during which he became so drunk he was refused service, Stafford once again got into the car with his two hosts. After more driving, the two men slapped Stafford in the face and robbed him of his money. They removed his boots and pulled down his pants in search of more cash. Stafford's eyeglasses were also removed and were later found on the dashboard of the car. When they had finished relieving Stafford of the two hundred-dollar bills, Kibbe and Krall put him out of the car on the shoulder of East River Road about one quarter mile from a gas station. Krall was the only one to testify to the events during the robbery itself. He said that Stafford fell down when he got out of the car but that Kibbe helped him up. Kibbe also put Stafford's boots and jacket on the ground beside him and told him to go to the gas station so he would not freeze. The boots were found in the snow the next day.

It was shortly after 9:30 or 9:40 p.m. when Kibbe and Krall drove off leaving George Stafford standing in the snowbank by the side of the road. Stafford was not seen again by anyone until 10 p.m., when he was briefly illuminated by Michael Blake's headlights — sitting in the middle of the road drunkenly waving his hands in the air. Although there was no traffic coming from either direction, Blake could not react fast enough to avoid running the helpless man down. And because he could not, Barry Kibbe and Roy Krall became murderers.1

Kibbe and Krall were indicted, tried, and convicted under New York Penal Law section 125.25(2), which declares that a person is guilty of murder in the second degree when:

Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person . . . .2

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1 To the extent the facts set forth above expand upon those reported by the court, they may be found in the briefs submitted by the parties to the Court of Appeals. See Brief for Defendant-Appellant Krall at 8-20, Brief for Defendant-Appellant Kibbe at 5-12, Brief for Respondent at 2-14, People v. Kibbe, 35 N.Y.2d 407, 321 N.E.2d 773, 362 N.Y.S.2d 848 (1974). Although the opinion of the Court states that the decedent was let out "nearly one half of a mile away" from the gas station, id. at 411, 321 N.E.2d at 775, 362 N.Y.S.2d at 850, the briefs indicate that the police witness who testified that the distance was one-half mile later corrected his testimony, Brief for Defendant-Appellant Krall at 16, and the district attorney's brief concedes the distance to be one-quarter mile. Brief for Respondent at 4.

2 N.Y. PENAL LAW § 125.25(2) (McKinney Supp. 1974).
In affirming the judgment in *People v. Kibbe*, the opinions of both the Appellate Division\(^3\) and the Court of Appeals\(^4\) were concerned primarily with the question of causation: did the defendants' act of placing the deceased by the side of the road, given all the circumstances, legally cause his death notwithstanding the subsequent intervening act of Blake in running him down? Neither court considered the other necessary elements of depraved mind murder subject to serious argument.

This writer does not believe that the significance of this case rests on the issue of causation taken alone. Rather, it lies in what is submitted to be a substantial expansion of the coverage of section 125.25(2) of the Penal Law. The remoteness of the fatal result of the defendants' act is important in this context of statutory interpretation and will be discussed further on.

THE CAUSATION ISSUE IN *Kibbe*

As to causation itself, the case falls into an established category in which a defendant's wrongful act leaves his victim exposed to a condition of peril into which a new agency enters to bring about the final result. On occasion, the subsequent cause arises from an act of the victim himself. In one case, for example, the defendant fired shots at a boat carrying three boys. One of the boys jumped out, capsizing the boat, as a result of which he and one other were drowned.\(^5\) Sometimes, as in the *Kibbe* case, the intervening cause is the act of a third person,\(^6\) or even nonhuman agencies.\(^7\) In all such cases the inquiry is whether the subsequent intervening cause was reasonably foreseeable; or more pre-

\(^3\) 41 App. Div. 2d 228, 342 N.Y.S.2d 386 (4th Dep't 1973).
\(^5\) Letner v. State, 156 Tenn. 68, 299 S.W. 1049 (1927) (manslaughter). See also Saunders v. Commonwealth, 244 Ky. 77, 50 S.W.2d 37 (1932) (manslaughter where deceased leaped from moving car to avoid assault). If the victim's response to defendant's conduct is abnormal and improbable it will be held a superseding cause. State v. Preslar, 48 N.C. 421 (1856) (assault victim died of exposure when she lay down to sleep in the cold, not wishing to enter her father's house until morning). Compare People v. Goodman, 182 Misc. 565, 44 N.Y.S.2d 715 (Sup. Ct. Sullivan County 1949) with Hendrickson v. Commonwealth, 85 Ky. 281 (1887).
\(^7\) People v. Rockwell, 39 Mich. 503 (1878) (assault victim kicked by a horse). If Stafford had fallen into a drunken slumber and frozen to death in the "near zero" temperature the case would have presented this pattern. One writer would exclude conditions existing at the time and place of the original actor's conduct from the category of intervening causes. McLaughlin, *Proximate Cause*, 59 Harv. L. Rev. 149, 167 (1925). While this interpretation seems unduly narrow, no practical difference will arise. The subsequent effect (freezing to death) of existing forces (zero temperature) would be so clearly natural and probable that responsibility is easily found.
cisely whether, in retrospect, it was a natural and probable event as opposed to an unusual coincidence.\textsuperscript{8}

The application of this test may vary with the intent with which an accused originally acted. If he intended to kill, it would require a most unusual intervening cause to insulate him from responsibility for the resulting death. It has been said with only slight overstatement that an intended result is never remote.\textsuperscript{9} If the defendant is merely negligent or reckless, the foreseeability of the intervening cause ought to be made more apparent.\textsuperscript{10} Where the defendant need have no mental culpability with respect to a victim's death, as in felony murder, the test becomes very strict, and several cases totally reject the possibility of attributing responsibility to the felon for fatalities arising from the foreseeable resistance of the victim or the police.\textsuperscript{11}

Judged by this test, it was not unforeseeable that driven by the cold and drunk as he was Stafford might meet with a traffic accident in

\textsuperscript{8} See R. PERKINS, CRIMINAL LAW 726 (1969); W. LA FAVE & A. SCOTT, CRIMINAL LAW 257 (1972). The Model Penal Code would ask whether the intervening cause was so unusual as to "have a just bearing on the actor's liability or on the gravity of his offense." MODEL PENAL CODE § 203 (1962 draft).

\textsuperscript{9} Terry, Proximate Consequences in the Law of Torts, 28 HARV. L. REV. 10, 17 (1914); Edgerton, Legal Cause, 72 U. PA. L. REV. 345 (1924). The leading case is Regina v. Michael, 169 Eng. Rep. 48 (Cr. Cas. Res. 1840) in which the accused was convicted of murdering an infant by poison which she gave to the infant's nurse in the guise of medicine. The nurse put the "medicine" aside and four days later a five-year old innocently gave it to the infant, causing death. See also 1 HALE, PLEAS OF THE CROWN 431 [hereinafter cited as HALE]. Still, cases may be imagined in which even an intended consequence could not be deemed caused by the actor. If, in the Michael case, immediately after the infant received a fatal dose of laudanum, the nurse dropped the infant or fell down the stairs with it, producing death by trauma, the defendant could not be held for murder.

\textsuperscript{10} One might logically, it would seem, be harder on those who intend bad results, more readily holding them criminally liable for results which differ from what they intended, than on those (morally less at fault) whose conduct amounts only to reckless or negligent creation of risk and bad results.

\textsuperscript{11} Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958), as expanded by Commonwealth ex rel. Smith v. Meyers, 438 Pa. 218, 261 A.2d 550 (1970), holding that felony murder will not lie where the fatal shot is fired by the victim, a policeman, or anyone other than one of the felons in furtherance of the felony; accord, People v. Washington, 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965); People v. Austin, 370 Mich. 12, 120 N.W.2d 766 (1963); State v. Schwensen, 237 Ore. 506, 392 P.2d 328 (1964). For the argument that deprived mind murder might lie if the felons' menacing conduct stimulated the victim to shoot, see Taylor v. Superior Court, 3 Cal. 5d 578, 477 P.2d 191, 91 Cal. Rptr. 275 (1970).
attempting to reach the shelter of the gas station on the other side of
the road, one quarter mile away. In contrast, if Stafford had been in-
stantly killed in the subsequent accident between his ambulance and
another car, it would probably have been held a superseding cause, thus
exculpating the defendants.

The Kibbe fact pattern of death caused by a subsequent inter-
vening agency is distinguishable from two similar but critically distinct
types of cases. The first is where the defendant’s act takes effect upon an
unknown preexisting condition, producing an unanticipated result. Al-
though criminal responsibility for the result may be limited because of
insufficient mens rea, no issue of causation is raised because of the un-
foreseeable nature of the consequence. The defendant’s act is the last
direct efficient cause producing death, and it cannot be said that he did
not legally cause it. In this sense he takes his victim as he finds him.12
The second distinguishable situation is where a subsequent agency inter-
venes to add its force to the continuing effect of the defendant’s orig-
inal act but does not extinguish that effect. The new causal agency
merely joins with that of the defendant and both acting together pro-
duce the final result—as where the defendant inflicts an injury and
another assailant acting independently inflicts another injury and the
victim dies as a result of the combined effect of both wounds. As long
as the continuing physical effects of the defendant’s act contribute sub-
stantially to the fatal result it is of no consequence whether the later
injury was foreseeable.13

These two distinguishable fact patterns are contrasted with that of
Kibbe because the case principally relied upon by the Court of Appeals
in its causation analysis is more nearly representative of them than of

12 Cox v. People, 80 N.Y. 500 (1880); Ex parte Heigho, 18 Idaho 566, 110 P. 1029
(1910); Regina v. Murton, 176 Eng. Rep. 221 (nisi prius 1862); accord, State v. Frazier,
339 Mo. 966, 98 S.W.2d 707 (1936) (manslaughter where hemophiliac bled to death from
cut caused by blow to jaw with fist).

13 This point is well stated in the case of Smith, 43 Crim. App. 121 (Courts-Martial
App. 1959), in which the court, in affirming a conviction notwithstanding abnormal med-
ical complications, stated:

It seems to the court that if at the time of death the original wound is still an
operating cause and a substantial cause, then the death can properly be said to be
the result of the wound, albeit that some other cause of death is also operating.
Only if it can be said that the original wounding is merely the setting in which
another cause operates can it be said that the death does not result from the
wound. Putting it in another way, only if the second cause is so overwhelming
as to make the original wound merely part of the history can it be said that the
death does not flow from the wound.

Id. at 131. Accord, Henderson v. State, 11 Ala. App. 37, 65 So. 721 (1914); People v. Lewis,
124 Cal. 551, 559, 57 P. 470, 473 (1899); Payne v. Commonwealth, 255 Ky. 539, 75 S.W.2d
14 (1934); State v. Lusten, 178 S.C. 199, 207, 182 S.E. 427, 430 (1935); Beale, The Proximate
Consequences of an Act, 33 HARV. L. REV. 633 (1920).
the Kibbe situation. In People v. Kane, the defendant was convicted of the premeditated murder of a pregnant woman. He inflicted two serious gunshot wounds upon her which produced a miscarriage; the miscarriage produced septic peritonitis and the woman died. In one aspect, the case presents the preexisting cause pattern. To the extent that the septicaemia was attributable to the wound acting upon the pregnancy to produce a miscarriage, it was not necessary for the defendant to have known of his victim's condition. In another aspect, it presents the pattern of cooperating causes. The defendant had argued on appeal that the blood poisoning was caused by improper packing of the uterus with gauze following the miscarriage. Although the trial judge did not directly come to grips with this contention in his charge, the Court of Appeals brushed it aside with the observation that it was purely speculative and not based on medical testimony. The most the Court would concede was that the medical treatment might not have been "all that it should have been...." The jury verdict was seen as necessarily based on a finding "that no matter what was done at the hospital, the pistol-shot wounds which he inflicted operated to cause her death." Again, the Court stated in conclusion that the evidence warranted a finding "that the wounds inflicted by the defendant operated as causes of death even though the medical treatment may also have had some causative influence...."

The Kane Court's only reference to the independent intervening cause situation can be seen in the following hypothetical case it posed:

It is only where the death is solely attributable to the secondary agency, and not at all induced by the primary one, that its intervention constitutes a defense. Thus, if the internes at St. Catherine's Hospital had carelessly killed Anna Klein by the negligent administration of a deadly poison, the defendant would not have been liable for her death, though he would still have remained responsible for the assault....

Even here the Court did not fully analyze its own example. In the hypothetical, the defendant would be entitled to acquittal of homicide, not just because death was solely attributable to the subsequent cause, but because the administration of a deadly poison would be an unusual, unforeseeable intervening cause. Other cases, discussed by the Court
with approval, illustrate the correct principle of the foreseeable intervening cause as applied to death under the surgeon's knife, in one case, and a surgical drainage tube which entered the spinal cord, causing death, in another.

**History of Depraed Mind Murder in New York**

**Early Interpretations Under Revised Statutes of 1829**

The predecessor of the present New York depraved indifference murder provision dates back to the Revised Statutes of 1829, which contained the following murder section:

§ 5. Such killing, unless it be manslaughter or excusable or justifiable homicide, as herein after provided, shall be murder in the following cases:

1. When perpetrated from a premeditated design to effect the death of the person killed, or of any human being;

2. When perpetrated by any act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual;

3. When perpetrated without any design to effect death by a person engaged in the commission of any felony.

The earliest reported interpretations of subdivision 2 occurred several years after the enactment of the statute. In *People v. Recto*, the court reversed the murder conviction of a brothel keeper who had delivered an unwelcome patron from further temptation by a blow on the head with a wooden stick. In discussing the appellant's exceptions to the trial court's charge to the jury, two of the three judges stated that the depraved mind murder subdivision could apply to a violent attack upon an individual, even though an intent to kill was lacking.

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wealth, 55 Va. 582, 14 Grat. 592 (1857); Jordan, 40 Crim. App. 152 (1956) (conviction reversed where stab victim died from known allergy to drug and pulmonary edema from abnormal quantities of intravenous fluid).


23 19 Wend. 569 (N.Y. Sup. Ct. 1838).

24 As Judge Bronson stated in his opinion:

What rule of law then did the counsel ask the court to lay down for the guidance of the jury? It was in effect neither more nor less than this: If you believe the prisoner was unlawfully beating the deceased without any intent to kill, then he should not be convicted of the crime of murder. If the court had yielded to the request, and given this instruction to the jury, it would, I think, have erred beyond all question. It would, in effect, have been telling the jury, that in case of a direct assault upon the person killed, however deliberately it may have been, and without regard to the weapon employed or the violence of the attack, the crime
However, a new trial was granted on the unrelated ground of improper exclusion of character evidence.

In *People v. White*, the accused was convicted of murder under an indictment in common-law form with a specification of premeditated design to kill. The defendant was proved to have stabbed the deceased and another during an affray and the trial court charged the jury on premeditated and depraved mind murder. The Supreme Court of Judicature affirmed the murder conviction without discussing the meaning of the statute. It merely observed that an allegation of premeditation in the indictment did not preclude proof of “implied malice,” evidently referring to the depraved mind theory. On further appeal to the Court for the Correction of Errors, the conviction was reversed, primarily on the ground that the allegation of premeditated design to kill limited the People’s proof to that theory and did not justify submitting the case to the jury on the theory of depraved mind murder. Only the opinion of Senator Wager suggested the idea that subdivision 2 was inapplicable to a case of direct assault, a suggestion contradicted by two other opinions.

Judge John W. Edmonds, one of the outstanding judges of the early nineteenth century, included several cases involving depraved mind murder in the reports of his cases. In *People v. Campbell*, a hod carrier was indicted for murder for killing a cartman with a single blow to the head with his hod. Judge Edmonds instructed the jury under both the intent to kill and depraved mind subsections. As to the latter, he charged:

> And then, as to the other alternative, the jury must find not only that the act was imminently dangerous to others—as striking a man with a hod on the back of his head unquestionably was—but they must also find in the prisoner a depraved mind, regardless of human life. And on that point, evidence of a previous life as a peaceable, quiet man, was of great importance.

> For where there was no intention to effect the death of any one, the offense could not be murder, unless there was a union of the elements of an act imminently dangerous, evincing a depraved mind, regardless of human life; such as firing a gun into a crowd, or turning loose among them a wild and savage animal, etc.

*Id.* at 606-07 (Bronson, J., dissenting).


The jury convicted the defendant of manslaughter rather than murder.

Judge Edmonds’ view that the inquiry of depravity could extend beyond the circumstances immediately attending the homicide to include the defendant’s past habits appeared in another case he tried in 1851. The Judge, ever a candid and outspoken man of his time, began his report of the case with a description of the defendant: “She was an Irishwoman, and addicted to the use of liquor.” After an argument with another woman in the hall of their tenement, the defendant carried a pot of boiling soup from her room and threw first the soup and then the pot towards her antagonist and several other women and children. The pot was apparently a very heavy object because one of its feet broke the skull of a woman and penetrated her brain, killing her.

Over counsel’s objection the Judge admitted evidence of the defendant’s declarations made after her arrest to prove “an habitual depravity of mind regardless of human life” from which “the jury might legitimately infer such a mood of mind as characterizing the act complained of.” The verdict was for manslaughter in the second degree. The only one of Judge Edmonds’ cases which produced a conviction for depraved mind murder was that of Thomas Hayes, who “was a laboring man, and occasionally indulged in the use of ardent spirits.” He was convicted of murder for having axed his wife to death while drunk.

Judge Edmonds’ broad inquiry into depravity, while never expressly repudiated, has not been followed in subsequent cases. Nor has his position concerning the requisite mens rea been accepted. His decision on this point was occasioned by a practice that had become a national scandal by mid-nineteenth century; in the early exuberance over the speed made possible by the steam engine, numerous accidents were caused by the practice of steamboat racing. One of the most notorious arose during a race on the Hudson from Albany.

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29 Id.
30 Id. at 259.
32 Id.
33 Western steamboats showed an appalling accident record. A voyage on the Mississippi, it was often said, was far more dangerous than a passage across the ocean. There were no official figures before 1852, but we can estimate that of all steamboats built before mid-century, about thirty percent were lost in accidents.

D. Boorstin, THE AMERICANS: THE NATIONAL EXPERIENCE 190-01 (1965). The New York Revised Statutes of 1829 made express provision for steamboat cases. Part IV, ch. 1, tit. 2, art. 1, § 16 made it manslaughter in the third degree if steamboat passengers were killed by a boiler explosion. This subsection was not before the court in the “Henry Clay” case since the fire was not caused by a boiler explosion.
to New York between the passenger steamer "Henry Clay" and the "Armenia." Because of reckless efforts to make an excessive head of steam, the "Henry Clay" took fire near Yonkers, causing nearly 100 fatalities. The captain, pilot, engineer, and others were arrested and charged with depraved mind murder. Judge Edmonds held that they must be admitted to bail because the acts charged could not constitute murder.34 While reserving judgment on the necessity of a general deadly intent, he held that at least an intent to injure must be shown.

A similar view must have been held by Judge Walworth in the trial of Thomas Fuller for murder by shooting into the public highway. The court charged the jury that they might convict of murder if Fuller "shot him intentionally" but not if they found that the gun was fired without knowledge that the victim was there:35

For the act of firing into the street in the manner described, was gross carelessness, and was calculated to endanger the lives of persons passing along the street. That killing a human being by such carelessness, would constitute the crime of manslaughter.36

A verdict of manslaughter was returned.

Darry v. People: Danger to Many as an Essential Element

The nisi prius cases discussed above were not reported until many years after the decision in what was to become the leading New York case on depraved mind murder, Darry v. People.37 The defendant was proved to have killed his wife by beating and kicking her over a period of several days. The jury convicted him of murder and the appeal was concerned solely with his counsel's exception to that part of the judge's charge which allowed the jury to convict if they found

that the prisoner designedly inflicted the injuries, that they were inflicted without provocation, and not in the heat of passion, but were perpetrated by such acts as were imminently dangerous to the life of the deceased, and evincing, on the part of the prisoner, a depraved mind, regardless of human life, although without any premeditated design to effect the death of the deceased.38


A newspaper account of the disaster indicates that there were neither life boats nor fire-fighting apparatus aboard. It further appears that motives of gain commingled with joie de vivre in animating the race. The boats were from rival lines and the first to arrive at each landing secured the custom of the waiting travellers while the other stood idly by only to discharge passengers. N.Y. Times, July 28, 1852, at 2, col. 4.

35 People v. Fuller, 2 Parker Crim. R. 16, 18 (N.Y. Oyer & Terminer 1823).

36 Id. at 18.

37 10 N.Y. 120 (1854).

38 Id. at 121.
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The Court, with three separate majority opinions and two judges dissenting, rejected the position of the *Rector* and *White* cases, and reversed the conviction. Although the three concurring opinions differed in emphasis and argument, they all asserted the proposition that a murder indictment supported by proof of a direct attack upon a single victim must be established within the language of subdivision 1, premeditated design to kill. Only cases in which the defendant's conduct indiscriminately endangers the lives of many fall within subdivision 2. This conclusion was based on the Court's interpretation of the legislative intent and the common law background of implied malice.

The opinion of Judge Selden, in particular, sought to correlate the common law with the legislative intent by reference to East's *Pleas of the Crown*, which had been cited in the Commissioners' notes to the statute. East's definition of express malice is "where the deliberate purpose of the perpetrator was to deprive another of life, or to do him some great bodily harm."39 This category, Judge Selden went on

is again divided by East into three subdivisions, in the next section, as follows

1. From a particular malice to the person killed:

2. From a particular malice to one, which falls by mistake or accident on another:

3. From a general malice or deprived inclination to mischief, fall where it may.40

Although the first two subcategories were said to have been combined to become subdivision 1 of section 5, Judge Selden does not convincingly explain why the New York statute is limited to intent to take life while East includes as express malice an intent to do serious injury. It may be that the serious injury branch of express malice was removed to the proposed final subsection 4, which described "a premeditated design to do some great bodily injury, although without a design to effect death."41 This subsection was omitted by the legislature when it enacted the proposed statute.

The Judge concluded that it was East's third subcategory which was incorporated into section 5, subdivision 2. However, since East's classification contemplates general express malice, all cases would be required to possess at least an intent to do serious bodily harm.42

39 *Id.* at 142, citing 1 *East, Pleas of the Crown* 262 (1803) [hereinafter cited as *East*].

40 10 N.Y. at 142.


42 This view was finally reached by Judge Edmonds. Notwithstanding a different position in an earlier case, *People v. Campbell*, 1 *Edm. Sel. Cas.* 507 (N.Y. Oyer & Terminer
Since this would be too narrow a scope for the provision, Judge Selden was forced to bend East’s class of general express malice to include implied malice, i.e., wanton recklessness without any intent to kill or injure. The judge illustrated his point with the example of a man who

may fire into a crowd, with the view of destroying life, and he may do so, for the mere purpose of producing alarm, although at the imminent hazard, as he knows, of killing some one. Again, he may open the drawbridge of a railroad, with intent to destroy the lives of the passengers, or he may do it, for the sole purpose of effecting the destruction of the property of the railroad company. The subdivision in question was intended to provide for all these and similar cases indiscriminately, putting them on the same footing, without regard to the particular intent.\textsuperscript{43}

Although the Judge sought to assimilate the structure of the murder section into the classifications of a single writer, East, clearly he was not successful in doing so. In the first place, East’s classification of express malice included both an intent to kill and an intent to do serious injury; the first subdivision of the homicide section is narrower — an intent to kill will alone suffice; the second subdivision is broader — an intent to kill generally, an intent to injure generally, and a wanton indifference to either will suffice.

In evaluating the decision in Darry, the first question is the historical one: was danger to a multitude of persons a distinguishing feature of the common law class of cases from which the depraved mind murder provision was derived? It is true that many (but not all) of the cases advanced by the early writers in illustration of “a mind grievously depraved”\textsuperscript{44} and a bad heart “regardless of social duty and deliberately bent on mischief”\textsuperscript{45} involved acts dangerous to more than one person. Typical examples included willfully riding an unruly horse into a crowd,\textsuperscript{46} or throwing heavy timber from a roof

1846), the judge charged a subsequent jury that they could not convict of murder unless they found an intent to kill. “There is only one homicide known to our law which becomes murder in the absence of an intention to effect death, and that is when the act is perpetrated by one engaged in the committing of a felony.” People v. Austin, 1 Parker Crim. R. 154, 166 (N.Y. Oyer & Terminer 1847). In the “Henry Clay” case he retreated to the position that depraved mind murder required at least a design to do bodily injury. People ex rel. McMahon v. Sheriff of Westchester County, 1 Parker Crim. R. 659, 2 Edm. Sel. Cas. 324 (N.Y. Sup. Ct. 1852).

\textsuperscript{43} 10 N.Y. at 146.

\textsuperscript{44} M. Foster, Crown Law 138 (1762) [hereinafter cited as Foster].

\textsuperscript{45} 5 W. Blackstone, Commentaries 198 (Tucker ed. 1803) [hereinafter cited as Blackstone].

\textsuperscript{46} 1 Hale, supra note 9, at 476 (1800 ed.). See also 1 Hawkins, Pleas of the Crown 104 (8th ed. 1824).
onto a crowded street. However, when it is recalled how the common law judges conceived of "malice" these examples are seen to be merely illustrative and not definitive.

At common law, malice did not mean intent. Intent is a narrow term denoting a purposive means-end relation. Intent only requires that the actor seek a particular result. It does not deal with why he sought it or whether he was justified or provoked; nor does it deal with whether the actor ought to be held accountable for the result even though he did not intend it. The broader principle of *mens rea* sought to judge moral blameworthiness and the notion of malice exhibits this quality. Malice judges the actor's character, not just his intent. Even in the simplest cases, where the facts bespoke an intent to injure, the inquiry into malice extended beyond intent.

Foster, in his classic treatise, speaks of a case decided in 1757 in which an inhabitant of a house slew an officer who had come to serve process. Foster suggests that the officer may have acted unlawfully in breaking into the house and discusses the defendant's right of resistance:

> But admitting that a trespass in the house with an intent to make an unjustifiable arrest on the Owner, could be considered as some provocation to a Stander by: yet surely the knocking a Man's brains out, or cleaving him down with an Ax on so slight a Provocation, savoreth rather of Brutal rage, or, to speak more properly, of Diabolical Mischief, than of Human Frailty. And it ought always to be remembered, that in all cases of Homicide on Sudden Provocation, the Law indulgeth to Human Frailty, and to that alone.

> And where the circumstances of Deliberation and Cruelty concur, as they do in this Case, the Fact is undoubtedly Murder; as flowing from a wicked heart, a Mind grievously depraved, and acting from motives highly Criminal, which is the genuine notion of Malice in our Law.

In this case there was an attempt by the defendant to palliate his guilt; so Foster was at pains to show that his act went beyond what is allowed to "human frailty" and was attributable to a wicked heart and depraved mind — the "genuine notion" of common law malice. It is noteworthy that the case involved an assault directed at a single victim. Most cases of attacks on a single victim, particularly with deadly weapons, were thought so obviously of malice that little dis-

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48 *Foster, supra* note 44.
discussion was necessary. They were simply presumed so unless the accused could establish otherwise.

Quite naturally, the early judges and writers would expressly reaffirm their understanding of malice as a wicked heart and depraved mind in those cases in which doubt might otherwise be raised. One such case would be that discussed by Foster, where the accused unsatisfactorily attempted to excuse his act. Another class of cases calling for explanation would be those in which the Crown's evidence tended to show a lack of specific intent to injure any particular person. If such an act were fraught with grave hazard to human life it, too, would


50 In every Charge of Murder, the Fact of Killing being first proved, all the Circumstances of Accident, Necessity, or Infirmary are to be satisfactorily proved by the Prisoner, unless they arise out of the evidence produced against Him: for the law presumeth the Fact to have been founded in Malice, until the Contrary appeareth. And very right it is that the Law should so presume. The Defendant in this Instance standeth upon just the same foot that every other Defendant doth: the Matters tending to Justify, Excuse, or Alleviate, must appear in Evidence before He can avail himself of them.

Foster, supra note 44, at 255; accord, 5 BLACKSTONE, supra note 45, at 201.

Modern discussion of this point has centered around whether it is a presumption in the procedural sense of locating the burden of coming forward with evidence, a shifting of the burden of proof, or a statement of permissible inferences of fact. Analysis of this controversy is aided by recognizing that malice at common law consisted of two distinct elements, one positive and one negative. Positively, the actor must have had, in Professor Perkins' apt summary, "a man-endangering state of mind." Perkins, A Re-Examination of Malice Aforethought, 43 YALE L.J. 537, 566 (1934). Negatively, he must have acted without justification or adequate provocation. The prosecution's case on the positive element of malice was aided by the deadly weapon doctrine and the presumption that every sane man must intend the natural and probable consequences of his acts. Whatever may have been the case in days past, see Commonwealth v. York, 50 Mass. (9 Met.) 93 (1845); 9 J. WIGMORE, EVIDENCE §§ 2491, 2511a (3d ed. 1940), it is now clear that the required mental state must be proved by the prosecution beyond a reasonable doubt. The use of deadly weapons or other lethal conduct merely affords the basis of a permissive inference of fact concerning intent — an inference that may be helped along by a judicial nudge. See People v. Cooke, 292 N.Y. 185, 54 N.E.2d 357 (1944). See also Oberer, The Deadly Weapon Doctrine — Common Law Origin, 75 HARV. L. REV. 1565 (1962).

As to the negative component, i.e., the absence of justification or mitigation, the situation is more complex. In New York, it is long settled that justification is to be disproved by the prosecution when raised by the defendant. Stokes v. People, 53 N.Y. 164 (1875). Yet, the burden of raising the issue rests with the accused. N.Y. PENAL LAW § 25.00(2) (McKinney 1997). What is required of a defendant to "raise" a defensive issue such as justification or insanity was considered recently by the Court of Appeals in People v. Silver, 33 N.Y.2d 475, 310 N.E.2d 520, 354 N.Y.S.2d 915 (1974). As opposed to the "defense" of justification, the "affirmative defense" of provocation must not only be raised by the defendant but he must also bear the burden of persuading the jury by a preponderance of the evidence that he acted under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse. N.Y. PENAL LAW § 125.25(1)(a) (McKinney 1997). In this context, therefore, the presumption of malice is very much part of the law today. This writer has previously discussed the difficulty inherent in instructing a jury on the "defense" of justification and the "affirmative defense" of mitigation when both must be charged in the same case. Gegan, Criminal Homicide in the Revised Penal Law, 12 N.Y.L.F. 566, 577 (1966) [hereinafter cited as Gegan].
be held symptomatic of an abandoned and malignant heart. As the great historian of English criminal law, Stephen, said: "As far as wickedness goes it is difficult to suggest any distinction worth taking between an intention to inflict bodily injury, and reckless indifference whether it is inflicted or not."51 It is only to be expected that such cases would often involve danger to many. Unlike the simple case of murder by "lying in wait," recklessness by its nature is undirected conduct. The acts of a wanton brute will more often endanger many than the acts of the poisoner or assassin; hence the typical examples so often cited. While typical, of course, danger to many was in no way essential to this view of malice. Years later, the New York Law Revision Commission Study of 1937 summarized the matter thus:

The authorities seem to intermingle with their illustrations instances in which the fatal act was directed against a particular individual as well as against a multitude. One gets the feeling that probably the kind of individual assaults these writers had in mind were instances in which the slayer entertained no special ill-will towards his victim.52

Notwithstanding the generic usage of terms such as "depraved mind" to describe the overall "genuine notion" of malice, it is true that cases involving wantonly reckless conduct not aimed at a particular victim formed a factually distinct class of malice. The early writers entered into a discussion of these cases separately because, unlike "the grosser instances of wilful murder," they were, according to Foster, "the cases upon which doubts have arisen."53 Accordingly, judicial explanations were often given in affirmation of a special application of the implied malice doctrine thought especially in need of justification, i.e., cases where the evidence positively showed lack of malice toward any individual. In cases of implied malice "[i]t is no excuse that the party was bent on mischief generally."54 Similarly, "malice . . . is not confined to a particular animosity to the person injured, but extends to an evil design in general . . . ."55 Implied malice "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 partic-
ular person may not be intended to be injured.” The family resemblance to the New York provision is unmistakable.

Some years ago this writer criticized the Darry holding in the following terms:

[T]he absence of a particular design on the deceased, once something of a difficulty to be overcome and an extension to be justified, was seized on in Darry as an aggravating affirmative element without which the homicide could not be murder.

This criticism overlooked the peculiar design of the early New York Revisers, which was to construct mutually exclusive categories of murder and manslaughter, rather than the cumulative pattern exhibited in the present Penal Law. Thus, the point was not well taken because the cases of particular design on the deceased were covered by the proposed intent-to-kill and intent-to-do-grievous-injury subsections. Having so provided, the Revisers designed the depraved mind subsection, this writer is now convinced, to cover exclusively cases of malicious conduct which had no specific purpose to harm anyone, but which, “Against or Beside the Original Intention of the Party,” manifestly endangered human life.

While conduct of this type might usually threaten the lives of many persons, a case of wanton endangerment of a single person would not be outside the scope of this interpretation of the provision. The subsection would exclude all cases of attacks directed at a victim or victims. These cases would be covered by the other provisions of the murder section and the various manslaughter categories dealing with lesser batteries.

Unfortunately, the legislature in 1829 did not enact the intent-to-do-grievous-injury murder subsection. It was omitted without explanation. As Judge Denio noted with regret, it “would precisely have met” the facts before him in Darry. A few such cases were swept within subdivision 2 when Judges Selden and Denio held it applicable to East’s class of express general malice: an intent to kill or seriously injure “people,” although not any particular individual. This left out only cases of an intent to seriously injure a particular person. Judges Selden and Denio let these cases go unprovided for because they could not satisfactorily be brought within subsection 2 without

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57 Gegan, supra note 50, at 583.
58 Foster, supra note 44, at 261.
59 Darry v. People, 10 N.Y. 120, 154 (Denio, J., concurring).
60 See text accompanying notes 39-43 supra.
hopeless confusion with other provisions, especially manslaughter. Judge Parker apparently thought deaths arising from a felonious assault would be murder under subdivision 3—the felony-murder provision. This supposition was not destined to be borne out. Only "independent" felonies, and not the fatal assault itself, afforded a basis for felony murder. This doctrine of "merger" was created for the same kind of reason that motivated Judges Selden and Denio: to prevent the various manslaughter sections from being swallowed up and premeditated murder rendered superfluous. As to death resulting from a battery not felonious, Judge Parker agreed with his brothers on the need to preserve the integrity of the statutory scheme:

If the judge was right in his charge in this case, there is no security against a conviction for murder, in every case where a person intends merely to beat with his fists, and accidentally causes death, and in every other case of manslaughter, caused by personal violence, because the accused could hardly deny, that the act was imminently dangerous, when it proved so, by causing death; and every beating with the fist evinces a certain depravity of mind, because there is a design to do wrong to the extent, at least, of committing a misdemeanor, and to some extent, there may be considered a regardlessness of human life in such case, because such a beating might cause death. If such a construction is admissible, the absurdity is presented, of putting the offence of killing without design, by a person engaged in the commission of a misdemeanor, on the same level with a killing without design, by a person engaged in the commission of a felony, and punishing both with death . . . .

Judge Parker stated:
If this case was properly submitted to the jury, as falling under the second subdivision of murder, so might a case be thus submitted, where death was caused without design, by a person engaged in a felonious assault upon the person killed, which is one of the cases provided for in the third subdivision. But the construction I have put on the second subdivision confines each subdivision to a distinct class of cases, and renders it entirely inapplicable to any other.

10 N.Y. at 160-61. And again, "if the party intends an assault and battery, and death ensues, without design, he is guilty of manslaughter; if he intends a mayhem or other felony to the person, and death ensues, without design, it is murder." Id. at 161.


10 N.Y. at 158-59.
The net effect of the Court's construction of subdivision 2 is not wholly free of anomaly from a moral point of view. Why is it murder when death results from an act done with the intent to seriously injure a group of persons but not a single victim? Is human life worthy of such protection only in the aggregate? And again, because of the legislative omission, if an actor specifically intends great bodily harm his act of killing is not murder under the statute; but if his deadly act is in wanton disregard of the safety of that same victim, the homicide is murder. As Hale put the latter case: "A drives his cart carelessly, and it runs over a child in the street; if A had seen the child, and yet drives on upon him, it is murder . . . ." Perhaps the possibility of such an invidious comparison induced the Darry court to downplay the possibility of a case such as Hale's illustration of reckless danger to a single person. The opinions, especially that of Judge Selden, emphasized cases of danger to many, thereby removing this last mentioned anomaly. It is this danger-to-many doctrine which the case has been credited with establishing. Still, a careful reading of the three opinions persuades this writer that at least Judges Denio and Parker were not denying the applicability of the provision to a case of reckless conduct which happened to endanger only a single victim. They denied its application only to cases of fatal batteries intentionally inflicted on a single victim.

It is only just to add that any lack of moral proportionality resulting from the Darry decision is more properly laid at the door of the legislature than of the courts, which made the best they could out of a series of statutory provisions from which the category of intent-to-do-grievous-injury had been omitted. The legislature and not the Revisers bore the responsibility for this omission. Still, even as recommended by the Commission the homicide sections of the Revised Statutes were not well designed.

In their commendable Benthamite quest for rationality and clarity, the Revisers broke with such common law concepts as "malice."

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65 1 HALE, supra note 9, at 476 (italics supplied).
66 Judge Denio stated the issue in Darry to be whether subdivision 2 "fairly extends to cases where the intention and the act refer only to the person killed; where the evil intention, whether more or less wicked, has for its object the party who ultimately becomes the victim." 10 N.Y. at 155. He concluded:
Upon the most careful and anxious examination of the provision, I am entirely satisfied, that it cannot, without violence to the intention of the legislature, as evinced by the language, be applied to the case of homicide resulting from a direct assault by one person upon another.
Id. at 156-57.
Judge Parker reasoned that depravity of mind and disregard of human life are expressions "not applicable, and cannot be made so, to a mere case of the commission of a battery with the fists, without a design to effect death, but from which death ensues." Id. at 158.
In doing so, they lost touch with some of the moral realities represented in the old doctrine. For example, they made intent to kill a fixed dividing line between murder and manslaughter; no case of such intent could be less than murder. This eliminated all concession to "human frailty" whereby the common law had long mitigated intentional killings done in a heat of passion upon great provocation. Heat of passion was indeed incorporated in the manslaughter provisions, but only, as with all the manslaughter sections, where there was no intent to kill. This blunder was compounded by the legislature's failure to enact the intent-to-do-grievous-injury murder subsection.


68 The killing of a human being, without a design to effect death, in a heat of passion, but in a cruel and unusual manner, unless it be committed under such circumstances as to constitute excusable or justifiable homicide, shall be deemed manslaughter in the second degree.

1937 Law Revision Comm'n, supra note 52, at 850, quoting N.Y. Rev. Stat. pt. IV, ch. 1, tit. 2, art. 1, § 10 (1829). The law further states:

The killing of another, in the heat of passion, without a design to effect death, by a dangerous weapon, in any case except such wherein the killing of another is herein declared to be justifiable or excusable, shall be deemed manslaughter in the third degree.


69 This is called a blunder even though it is possible that the 1828 Revisers thought that the common law rule of mitigation would carry over into the statute on the assumption that the existence of "heat of passion" would negate the "premeditated design to effect death" required for murder under § 5(1). See the opinion of Judge Sobel in People v. D'Andrea, 26 Misc. 2d 95, 207 N.Y.S.2d 215 (Kings County Ct. 1960). This hope, if it existed, was based on confusion. Heat of passion at common law negated "malice," not intent to kill. As Chief Justice Shaw said in Commonwealth v. Webster, 59 Mass. 295, 304 (1850):

Manslaughter is the unlawful killing of another without malice; and may be either voluntary, as when the act is committed with a real design and purpose to kill, but through the violence of sudden passion, occasioned by some great provocation, which tenderness for the frailty of human nature the law considers sufficient to palliate the criminality of the offence . . . .

The premeditated design to kill, required by the New York statute, was held possible to form in a very brief period of time, quite consistent with the existence of sudden passion. People v. Majone, 91 N.Y. 211 (1883); People v. Conroy, 97 N.Y. 62 (1884); People v. Rodwald, 177 N.Y. 408, 70 N.E. 1 (1904).

Judge Edmonds suggested that the problem was an oversight in the definition of manslaughter. If that crime had been defined as committed in a heat of passion, "without a [premeditated] design to effect death" then manslaughter would have included, as at common law, intentional homicides in which passion clouded cool deliberation. Judge Edmonds stated:

I know from conversations with two of the revisers (Messrs. Duer and Butler) that it was far from the intention of the revision to make capital punishments more frequent, but on the contrary, the design was to diminish them. That was expected to be attained by the abolition of implied malice, and would have been attained, but for the inadvertent omission of the word premeditated in the definition of manslaughter.

Edmonds, The Law of Murder, 7 Albany L.J. 247, 248 (1873). The cool suggestion that unknown numbers of men were executed for murder because of the inadvertent omission of a single word from a statute is astonishing. If it is so, it is a stain on the legal history of the state.
This produced the result that heat of passion was not only eliminated as a mitigating element in an intentional killing but introduced as an aggravating element in an unintentional one. This led in 1959 to the paradoxical holding that an indictment for manslaughter would not lie unless the prosecution proved that the defendant acted in a heat of passion.  

DEPRAVED MIND MURDER IN NEW YORK TODAY

The New Penal Law

The murder provisions of the Revised Statutes of 1829 remained substantially the same until the adoption of a new Penal Law in 1967. The language of the depraved mind murder subsection was then changed from "an act imminently dangerous to others," to "conduct which creates a grave risk of death to another person." A few years later, in *People v. Poplis*, the Court of Appeals, on facts quite similar to those in *Darry*, held that the new provision applied to an attack directed at a single person. The Court stated: "The actual decision in *Darry* turned on a limitation in the language of that statute which, seeming to require a threat of danger to more than one person, was subsequently corrected by amendment."

As previously discussed, the decision in *Darry*, an elaborately briefed and twice argued case, turned on deeper considerations than the use of a plural noun. In addition to interpreting the statute in light of history, the Court was alert to the need for harmonizing all of the homicide provisions. As Judge Selden stated:

But there is an additional reason for putting this construction upon the subdivision in question. If it can be so construed as to include the case at bar, and others of a similar description, we are left wholly without any line of distinction between murder and manslaughter, except the loose and uncertain opinion of a jury, as to whether the act which produced death did or did not evince a "depraved mind, regardless of human life." There is scarcely a case of manslaughter which, upon the construction, may not be

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70 *People v. Peetz*, 7 N.Y.2d 147, 164 N.E.2d 384, 196 N.Y.S.2d 83 (1959). It may be that in *Peetz*, the Court was concerned that the injuries may have been inflicted by misadventure, not by deliberate battery. The Court's holding was nevertheless accepted as settling the necessity for proving heat of passion as an affirmative element of the crime charged. *People v. D'Andrea*, 26 Misc. 2d 95, 207 N.Y.S.2d 215 (Kings County Ct. 1960).


72 N.Y. Penal Law § 125.25(2) (McKinney 1967).


74 Id. at 89, 281 N.E.2d at 168, 330 N.Y.S.2d at 367.
brought within the definition of murder, and punished as such, provided a jury can be found to say, that the act which produced death evinced a "depraved mind, regardless of human life;" because the other clause, to wit, "imminently dangerous to others," if it can apply to this, would apply to every case of homicide, as the result would always prove the imminently dangerous nature of the act; and because, upon this construction, cases of homicide, committed unintentionally, in the heat of passion, would not be excluded, as such a case might very well evince a depraved mind, regardless of human life, in the opinion of a jury. This construction then would throw us upon that sea of uncertainty, which it was the special object of the revisers, in framing, and of the legislature, in adopting, the section in question, to avoid.\footnote{Darry v. People, 10 N.Y. 120, 147-48 (1854).}

The Darry case was thus a composite product of historical continuity, statutory interpretation, and moral proportionality. It might be said of the Darry court as Foster said of English decisions on another occasion, "The judges have wisely holden a strict hand over this statute."\footnote{Foster, supra note 44, at 301.}

Considerations such as these were not discussed by the Poplis Court when it overruled the Darry case in a single sentence; nor did it advert to the comment of the 1964 Revision Commission that the new depraved mind murder subsection was "substantially a restatement" of the old.\footnote{TEMPORARY STATE COMM’N ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, PROPOSED N.Y. PENAL LAW § 339 (1964).} Thus did the law embark on that "sea of uncertainty" from which the old judges steered clear.

Indeed, the uncertainties are greater now than at the time of Darry and much greater than at common law. In the present Penal Law there are three different degrees of unintentional homicide: depraved recklessness (murder),\footnote{N.Y. PENAL LAW § 125.25(2) (McKinney 1967).} recklessness (manslaughter in the second degree),\footnote{Id. § 125.15(1).} and criminally negligent homicide.\footnote{Id. § 125.10.} In addition, the present Penal Law for the first time includes as manslaughter in the first degree a killing done with an intent to cause serious physical injury.\footnote{N.Y. PENAL LAW § 125.20(1) (McKinney 1967).} All of these offenses would have been murder at common law except for negligence of sufficient inadvertence and remoteness of risk as to constitute manslaughter.

\footnote{75 Darry v. People, 10 N.Y. 120, 147-48 (1854).}
\footnote{76 Foster, supra note 44, at 301.}
\footnote{77 TEMPORARY STATE COMM’N ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, PROPOSED N.Y. PENAL LAW § 339 (1964).}
\footnote{78 N.Y. PENAL LAW § 125.25(2) (McKinney 1967).}
\footnote{79 Id. § 125.15(1).}
\footnote{80 Id. § 125.10. Of course negligent homicide, which comes within the coverage of § 125.10, must, in turn, be distinguished from merely civil negligence, a division said to be "as shadowy as that dividing murder from manslaughter." Michael & Wechsler, A Rationale of the Law of Homicide I, 37 Colum. L. Rev. 701, 721 (1937). For a recent interpretation evidencing great awareness of the problem, see People v. Haney, 50 N.Y.2d 328, 284 N.E.2d 564, 333 N.Y.S.2d 403 (1972).}
\footnote{81 N.Y. PENAL LAW § 125.20(1) (McKinney 1967).}
Comparison with Intent-to-Injure Manslaughter

Special attention is due the case of intent to do grievous injury. As earlier stated, this was treated at common law on a parity with intent to kill and wanton recklessness: all were murder. This provision remained absent from New York criminal law from 1829 until it was incorporated in the present Penal Law in 1967 as manslaughter in the first degree.82

Two questions arise as to this offense. First, does its presence now serve any useful purpose, i.e., does it add anything that would not be covered by the other provisions? Clearly, if the depraved mind murder subsection continued to be subject to the Darry requirement of multiple endangerment, some provision covering felonious assaults without intent to kill might be thought desirable in addition to reckless manslaughter. This would be especially clear if reckless manslaughter were limited to cases in which no physical injury was specifically intended. But neither of these suppositions is true. Depraved mind murder is now applicable to life-endangering acts affecting a single victim; and neither depraved mind murder nor reckless manslaughter is limited to cases lacking a specific intent to harm the victim.83 It would seem that every case of intent to inflict grievous injury of necessity involves reckless indifference to life, or perhaps depraved indifference. For this reason the Model Penal Code, which incorporates a three-tier grading (criminally negligent homicide, reckless manslaughter, and extreme-indifference-to-life murder) omits intent to cause grievous bodily harm as a separate category. The notes state:

The proposed definition of murder accords no express significance to an intent to cause grievous bodily harm, though such a purpose establishes malice aforethought at common law and thus suffices for murder or, where murder is divided into two degrees, for murder in the second degree under the usual formulation. We think, however, that such cases are more satisfactorily judged by the standards of recklessness and extreme recklessness as to causing death. In making that determination the fact that the actor's purpose was to injure is, of course, a relevant consideration, as

82 Id.
also are the nature and the gravity of the injury intended or foreseen.\textsuperscript{84}

The second question is: if homicide based on an intent to inflict serious injury is to be retained as a separate offense, what place should it occupy in the grading scheme? It is widely categorized as murder under modern statutes and, of course, was considered express malice at common law. Stephen, for example, groups it together with intent to kill in his well known classification of malice.\textsuperscript{85} In comparison, depraved mind murder, which was historically considered implied malice, was retained as murder in the 1967 Penal Law while intent to inflict serious injury entered the law as manslaughter only.

Most practitioners at the criminal bar value the admonition implicit in the old saying “manslaughter is not half-proved murder.” A long thoughtful look is due at the comparative elements of depraved recklessness murder and intent-to-cause-serious-injury manslaughter in light of a more obvious truism that murder is not half-proved manslaughter. For example, in the well known Illinois case of \textit{Mayes v. People},\textsuperscript{86} the defendant threw a heavy beer mug at his wife who was carrying an oil lamp. The mug struck the lamp and the wife died from the resulting burns. This was held to be depraved mind murder whether he intended the mug to hit his wife, other persons in the room, or whether, lacking any specific intent at all, he acted from angry disregard of all consequences. In New York, if the jury entertained a reasonable doubt whether the husband had the specific intent to inflict serious injury on his wife they must acquit of first degree manslaughter. It is little short of absurd that they could then turn around and convict of murder. The failure of proof of intent should

\textsuperscript{84} MODEL PENAL CODE § 201.2, Comment 3 (Tent. Draft No. 9, 1959). Judge Denio would not have agreed. After noting that the omitted intent-to-do-grievous-bodily-injury murder provisions “would precisely have met the case,” Judge Denio in the \textit{Darfy} case went on:

\texttt{I do not rely very much upon its having been reported and rejected by the legislature. It may have been, because they did not intend to punish such a case, as murder, and it may have been, because it was considered as embraced in the prior provisions. It is, however, a circumstance of some moment, as it would rather be presumed, that where a case of frequent occurrence was well described in the projected law, the provision would have been adopted, instead of leaving it to be dealt with by a construction upon other provisions less accurately adapted to the case. This consideration is strengthened by the circumstance, that a homicide committed in the attempt to do a great bodily injury, short of death, without, or on insufficient provocation, formed a distinct head of the law of murder by the common law.}

10 N.Y. at 154.

\textsuperscript{85} 3 \textit{STEPHEN}, supra note 51, at 80.

\textsuperscript{86} 106 Ill. 506 (1885).
have the consequence of directing the jury's deliberations to a lower grade of homicide, not a higher one: yet that is the existing statutory structure, as interpreted by the courts.

An ever greater anomaly is presented by the Kibbe case. At least in the Mayes case the defendant inflicted direct violence upon his wife. In Kibbe the defendants merely left the victim in a position in which it was likely he would be exposed to future harm. What Kibbe and Krall did cannot be condoned. When they robbed Stafford and left him by the side of the road, drunk as he was, they were negligent, even reckless of his life. The conclusion is proper that when he was killed by a truck they "caused" his death and should be punished for it. But each reader will have to apply his own moral sense to decide whether they were worse than an actor who shoots, stabs, or beats another to death. Such an individual could not be convicted of murder or first degree manslaughter unless he had an actual intent to kill or seriously injure, and even his use of a deadly weapon would not give rise to a legal presumption of such intent.87

Comparison with Reckless Manslaughter

If the comparison of depraved mind murder with intent-to-injure manslaughter leads to an anomaly, the comparison with reckless manslaughter produces only confusion. The question is: what is the difference between killing someone with reckless disregard of the consequences and killing someone with reckless disregard and under circumstances evincing a depraved indifference to human life? The common law furnishes no guidance since either would have been murder, if the risk were sufficiently obvious.88


88 Indeed, at common law the only debatable point was whether actual consciousness of the risk was required. The leading proponent of the objective view was Holmes, who wrote:

It is enough that such circumstances were actually known as would have led a man of common understanding to infer from them the rest of the group making up the present state of things. For instance, if a workman on a house-top at mid-day knows that the space below him is a street in a great city, he knows facts from which a man of common understanding would infer that there were people passing below. He is therefore bound to draw that inference, or, in other words, is chargeable with knowledge of that fact also, whether he draws the inference or not. If then, he throws down a heavy beam into the street, he does an act which a person of ordinary prudence would foresee is likely to cause death or grievous bodily harm, and he is dealt with as if he foresaw it, whether he does so in fact or not. If a death is caused by the act, he is guilty of murder.

O. HOLMES, THE COMMON LAW 55-56 (1881). A contrary position was held by Stephen: Malice aforesaid means any one or more of the following states of mind. . . .

(b) Knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person
As to mens rea, in New York it was early established that the mental state required for murder was conscious running of risk. As Judge Selden said in Darry, the act must be “perpetrated with a full consciousness of the probable consequences.” But this factor, of course, does not aid in distinguishing manslaughter from murder today because even manslaughter requires that the actor “is aware of and consciously disregards a substantial and unjustifiable risk that such result [death] will occur.” So we come back to the question, wherein lies the difference between the two offenses? Three variables suggest themselves to this writer:

1. The degree of risk of killing someone;
2. Some psychic condition beyond awareness of risk that might constitute “depraved indifference to human life;”
3. Some objective feature of the act or circumstances, beyond the fatal risk created, that might constitute “circumstances evincing a depraved indifference.”

Degree of Risk

Manslaughter in the second degree is defined in section 125.15(1) of the Penal Law as causing the death of another person “recklessly.” The term “recklessly” is elsewhere defined in relevant part as an act done “when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur.” The depraved mind murder subdivision requires that the actor recklessly create a “grave risk of death to another person.” Thus, insofar as the degree of risk distinguishes manslaughter from murder the distinction lies in the distance between “substantial and unjustifiable” and “grave.”

There is considerable difference in penalty between manslaughter in the second degree (one year minimum to a maximum of fifteen years) and murder in the second degree (fifteen years minimum to a maximum of life). Is the difference between substantial risk and

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actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.

J. Stephen, Digest of the Criminal Law art. 223 (1877).

80 Darry v. People, 10 N.Y. 120, 147 (1854).
81 N.Y. Penal Law § 15.05(3) (McKinney 1967).
82 Id.
83 Id. § 125.25(2) (McKinney Supp. 1974).
84 Id. § 125.15(3) (McKinney 1967). A class C felony carries a minimum sentence of one year and a maximum of fifteen years. Id. § 70.00(2),(3) (McKinney Supp. 1974).
85 Id. § 125.25 (McKinney Supp. 1974). A class A-I felony carries a minimum sentence of fifteen years and a maximum of life imprisonment. Id. § 70.00(2),(3) (McKinney Supp. 1974).
grave risk a satisfactory foundation upon which to base such a drastic
difference in criminal liability? It puts a great demand on the trial
judge to instruct the jury adequately on this point. In the Kibbe case,
for example, after giving the statutory definition of recklessness, the
trial judge defined "grave" as "serious, the opposite of trivial or in-
consequential." Adequate? It is true, as Holmes said:

I have heard it suggested that the difference is one of degree. I am
the last man in the world to quarrel with a distinction simply
because it is one of degree. Most distinctions, in my opinion,
are of that sort, and are none the worse for it.

The difficulty is that the process of adjudication cannot directly assess
the ascending degrees of homicidal risk under a progressively ascend-
ing scale of punishment. Instead, it must at some point divide them
into widely separated homicide categories. In this, the only clear
difference between grave and substantial is about fifteen years.

It is submitted that greater clarity could be achieved if a distinc-
tion were drawn between acts that create a "risk" of death and acts
that are virtually certain to cause death. It might be objected, how-
ever, that if the act is so fraught with hazard as to make death almost
inevitable, then the man who commits it, assuming he is aware of
the consequences, acts intentionally; if so, why complicate matters by
a discussion of depraved mind murder? Yet there is a problem here,
due to the peculiar definition of "intentionally" in the Penal Law, a
subject of later discussion. Thus, in addition to better separating
reckless manslaughter from depraved mind murder, the suggested ap-
proach would usefully supplement a lacuna in the coverage of inten-
tional murder.

Before discussing the actor's state of mind, there is one additional
requirement concerning the nature of the risk an actor must create
to come within the coverage of depraved mind murder. The present
section is derived from section 1044(2) of the former Penal Law and,
according to the 1964 Commission Staff Notes, was intended as "sub-
stantially a restatement" of the old section. That provision read, and

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95 Brief for Defendant-Appellant Krall at 36, People v. Kibbe, 35 N.Y.2d 407, 321
97 See text accompanying notes 112-17 infra.
(now N.Y. PENAL LAW § 125.25(2) (McKinney 1967).
99 TEMPORARY STATE COMM'N ON REVISION OF THE PENAL LAW AND CRIMINAL CODE,
indeed had read since 1829, "an act imminently dangerous to others." Imminently means immediately or close at hand; it excludes the idea of remoteness or dependence on subsequent contingencies. With particular reference to the Kibbe case, the defendants' act in leaving George Stafford by the side of the road is not easily characterized as creating an imminent risk of the accident that subsequently happened to him. In pure causation terms the outcome was, in retrospect, not improbable; at least not sufficiently so as to constitute a superseding cause. Yet the rule that a foreseeable intervening act does not supersede a prior cause is distinct from a statutory requirement that an act must create an imminent risk of death in order to subject the actor to conviction for murder despite a lack of intent to kill. A given set of facts may satisfy one requirement but not the other.

All of the New York depraved mind murder convictions, both before and after the Darry case, were cases in which the defendant's wanton acts directly produced the fatal injury, without significant lapse of time or the intervention of any independent causes. The Kibbe case is the first instance of expanded coverage in this temporal and causal sense. Unfortunately, the Court did not discuss the issue or explain the departure. It is not suggested that a requirement of "imminent" risk can be judged by a purely mechanical test, such as


101 See, e.g., People v. Cruz, 10 N.Y.2d 410, 176 N.E.2d 916, 219 N.Y.S.2d 410 (1961) (mem.), facts reported in United States ex rel. Cruz v. LaVallee, 448 F.2d 671, 673 (2d Cir. 1971), cert. denied, 406 U.S. 958 (1972) (shooting into group of people); People v. Jernatowski, 238 N.Y. 188, 144 N.E. 497 (1924) (shots fired into a house where there were several people); People v. Gallo, 149 N.Y. 106, 43 N.E. 529 (1896) (shots fired into group of people leaving saloon); People v. Trezza, 125 N.Y. 740, 26 N.E. 933, aff'd 60 Hun 399, 15 N.Y.S. 515 (2d Dep't 1891) (shots fired in room in house where group of people were present); People v. Skeehan, 49 Barb. 217 (N.Y. Sup. Ct. 1867) (jumping at victim with a knife); People v. Hayes, 1 Edm. Sel. Cas. 582 (N.Y. Oyer & Terminer 1848) (striking victim with an axe, pre-Darry).

In People v. Voelker, 220 App. Div. 528, 221 N.Y.S. 760 (4th Dep't 1927); People v. Darragh, 141 App. Div. 408, 126 N.Y.S. 522 (1st Dep't 1910), aff'd without opinion, 203 N.Y. 527, 96 N.E. 1124 (1911); People v. Doyle, 2 Edm. Sel. Cas. 258 (N.Y. Oyer & Terminer 1851); and People v. Campbell, 1 Edm. Sel. Cas. 307 (N.Y. Oyer & Terminer 1846), the defendants were indicted for murder but convicted of manslaughter. In Darragh, the defendant had killed a child by recklessly driving his car and was convicted of manslaughter in the first degree. In Voelker, the defendant had sold poisonous alcohol he had represented to be drinkable to an individual who then sold the alcohol to the deceased as gin. The defendant was convicted of manslaughter in the second degree. In Doyle, a pre-Darry case, the defendant after having thrown a pot at a group of three women and two children and killing one of the women was indicted for murder. She was found guilty of manslaughter in the second degree. Finally in Campbell, also a pre-Darry case, the defendant was indicted for murder after having struck the deceased with his hod. Defendant was convicted of manslaughter.
the absence of an intervening cause. If, for example, acting without a specific intent to kill, an actor were to shove another from a subway platform onto the track while the station shook with the rumble of an oncoming train, he could be said to have recklessly created an imminent risk of death. The required unities of time, place, and cause would be present.

The Actor's State of Mind

A person may be quite conscious of creating a risk of injury and death yet believe that it will not happen. He is too skillful or clever or lucky to have anything like that happen! When he proves to be wrong, it is manslaughter. This actor is possibly distinguishable from one who is under no illusions, who believes someone will be killed, but just does not care. The latter state of mind is what Judge Selden contemplated when he said that the act of murder evinces that "indifference to human life, which is fully equivalent to a direct design to destroy it." Indeed, some of the older murder cases discuss premeditated design to kill almost interchangeably with depraved indifference to human life. The above described state of mind is more

102 Darry v. People, 10 N.Y. 129, 148 (1854).
103 In the famous cases of People v. Clark, 7 N.Y. 385 (1852) and People v. Sullivan, 7 N.Y. 396 (1852), which for many years established the rule that an instantaneously formed intent to kill satisfied the statutory requirement of "premeditated design to effect death," Judge Edmonds charged the jury in Oyer and Terminer that they might consider whether the prisoner acted "in a manner so violent as to endanger life, and calculated to show a depraved heart regardless of human life, which, in some instances converts a homicide into murder, even when there is no intent to kill." People v. Clark 2 Edm. Sel. Cas. 273 (N.Y. Oyer & Terminer 1851).

In an earlier case Judge Edmonds charged:
The "premeditated design" contemplated in this definition is not merely malice confined to a particular ill-will to the deceased, but is intended to denote an action flowing from a wicked and corrupt motive, a thing done with an evil intention, attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief, and therefore a premeditated design is implied from any deliberate, cruel act against another, however sudden.


In affirming a premeditated murder conviction, the Court in People v. Conroy, 97 N.Y. 62 (1884) answered the appellant's point of lack of motive with the comment that "the corrupt disregard of the person and life of another is precisely the dole or malice, the depraved and wicked purpose which the law requires and is content with." Id. at 77. Similarly, in affirming the premeditated murder conviction of a man who had killed a woman by a hammer blow on the head, the Court observed that the defendant's actions "shoved cruel disposition and a reckless disregard of human life." People v. Kelly, 113 N.Y. 647, 651 (1889). See also People v. Hammill, 2 Parker Crim. R. 223 (1855).

Nor has felony murder escaped assimilation into the depraved mind concept. In one of the leading cases, Judge Haight discussed the defendant's liability for felony murder:
A person who attempts or engages in the commission of a felony, is not only chargeable with express malice [semblé], but also with being perversely wicked, evincing a depraved mind and a disregard of human life, and if, while so en-
It is the state of mind which became the subject of an English Law Commission Report in 1965. The issue in England arose out of *Director of Public Prosecutions v. Smith,* in which a policeman was killed by a man driving a car containing stolen goods. The policeman stopped the car and the driver suddenly accelerated. In order to prevent an escape, the policeman clung to the side of the car while the driver turned and swerved in an effort to shake him off. The driver finally succeeded in dislodging the policeman, who fell to his death in the path of an oncoming car. Although it was not argued that the defendant intended to kill, he was charged with murder based on an intent to do grievous bodily harm. The issue on appeal was whether it was necessary that the driver actually intended that serious injury result from his acts. The House of Lords finally held that the jury was not required to make a finding concerning the accused’s subjective intentions. It was enough that they find that the likelihood of serious injury was sufficiently plain that a reasonable man would have seen it. This, of course, repudiated Stephen’s view that conscious awareness was critical and adopted Holmes’ objective test.

The objective theory of culpability has been severely criticized by the English bar. Even before the *Smith* case, Lord Devlin wrote against the implied malice principle. In arguing that one who lacks the actual intent should not be held for murder based on the objectively probable consequence of his act, Devlin said: “The question is not whether he should be exempt from the consequences, but whether his degree of guilt should be equated with that of a man who deliberately intends the consequences.” The *Smith* case itself was severely criticized and was subsequently overturned by the Criminal Justice Act of 1967, which repudiated a conclusive presumption that the actor intended the natural and probable consequences of his acts.

The Act of 1967 grew out of the recommendations of the English
Law Commission, which, when it considered the Smith case, reasoned that, apart from a purpose to kill,

the essential question on a charge of murder should be whether, at the time when he took the action in fact resulting in death, he was willing by that action to kill in accomplishing some purpose other than killing. A man may hope that he will not kill, or he may be indifferent whether he kills or not, but if he is willing to kill, and does in fact kill, we think he should be guilty of murder.\textsuperscript{110}

Insofar as a distinction between reckless manslaughter and depraved indifference murder may turn on differences in subjective mental state, the Commission's formulation of "willingness to kill" provides tenable ground upon which to stand. Even so, it is pretty thin ice. Yet, as previously described, it is possible to distinguish between the man who is aware of the risk but does not face up to the likelihood of its actual occurrence, and the man who knows better but is willing to let it happen.

The formulation advanced by the English Law Commission, "willingly," is only slightly different from a term found in the New York Penal Law: "knowingly."\textsuperscript{111} Is it possible to relate depraved indifference to human life to knowingly taking life? As suggested earlier in the discussion of the degree of risk, are we not now trespassing on the basic murder subsection, section 125.25(1), intent to kill? This requires a reference to the special definition of "intentionally" in the Penal Law: "A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct."\textsuperscript{112} Therefore, in the case of intentional murder, it must be the actor's "conscious objective" to cause death. This must be read alongside the definition of "knowingly" which, as proposed by the New York Commission in 1964, covered cases in which the actor "is aware that it is practically certain that his conduct will cause such result,"\textsuperscript{113} i.e., death.

How would this distinction affect a case of a mother who abandons her week old infant in a deserted area? She does not particularly wish the death of the child, but in her desire to be relieved of its care

\textsuperscript{110}English Law Comm'n, supra note 105, at § 17.
\textsuperscript{111}The following three paragraphs in the text are taken substantially intact from Gegan, supra note 50, at 568-69, 584.
\textsuperscript{112}N.Y. Penal Law § 15.05 (McKinney 1967).
\textsuperscript{113}Temporary State Comm. on Revision of the Penal Law and Criminal Code, Proposed N.Y. Penal Law § 45.00(5) (1964).
she is aware of and indifferent to its certain fate. Consider a case where the actor burns or explodes a vehicle or structure for some purpose of his own with knowledge that there is a person inside. Would these cases be murder? They would not if we apply the statutory definition of "intentionally." Yet they would be murder at common law, under all statutes known to this writer, and under the Model Penal Code, which includes killings "committed purposely or knowingly." This question, doubtless more theoretical than practical, is further complicated because the definition of "knowingly" was altered between proposal and final enactment. As enacted, "knowingly" is only defined with reference to conduct and circumstances; it is not made applicable to consequences at all. One can only speculate as to the reason for this omission and its effect. The Revisers' notes to the enacted law are silent on the point, although other changes made between proposal and enactment are explained. Is it because the distinction between the conscious desire of a result and foresight of a certain result was thought too subtle to be worth preserving? If so, is a knowing killing to be absorbed into the intentional killing or is there a gap in the spectrum of mental states?

One resolution would be to assimilate cases in which the actor knows that his conduct is substantially certain to cause death into the depraved mind murder provision. In the traditional depraved mind case of multiple endangerment, perhaps some lower probability than substantial certainty would be appropriate. The distinction from ordinary recklessness would lie first, in the cumulatively greater risk when the lives of several are endangered; and second, in the consequent graver culpability if the murder provision were limited to conduct wholly lacking in justification, i.e., conduct which would be without value even if no risk to life were occasioned thereby. The case of risk to the life of a single victim presents greater difficulty because of its similarity to other homicide sections of lesser gravity. Such a case should be subject to the penalty for depraved mind murder only when the degree of risk approaches certainty; that is, at the point where reckless homicide becomes knowing homicide. At that point a knowing killing differs so little from a truly purposive one that parity of treatment is called for. This would conform to the Model Penal Code

114 The vehicle would have to be used for nonbusiness purposes and the structure could not be a building or used for overnight lodging. Otherwise the case would fall into felony murder under the arson provisions of N.Y. Penal Law, § 150.00 et seq. (McKinney 1967).
which groups knowing with purposive killings and would fill a gap otherwise existing in the New York murder section. An illustration may be taken from Stephen's History of Criminal Law. A man, passing along the road, sees a boy sitting on a bridge over a deep river and pushes him into it. Suppose the man had no "conscious objective" of causing the boy's death but merely wanted to see his struggles in the river below with idle curiosity whether he might swim to shore. These facts added to Stephen's illustration, although they take the case out of the literal language of intentional murder under section 125.25(1), only confirm Stephen's judgment that such a crime shows as much cruelty, as much indifference to the lives of others, and a disposition at least as dangerous to society as planned murder. It certainly fits the statutory description of a depraved indifference to human life in connection with reckless, or more properly, knowing killing.

Obviously, this discussion of the nuances of the actor's mind — how forcibly the likelihood of a fatal result was borne in upon him and his willingness to let come what may — is very much related to the degree of risk itself. The more dangerous the act was, the more likely the actor was willing to kill in performing it. So the observations made here inevitably merge into the discussion under the previous consideration of the degree of risk. Of the two viewpoints, however, the more important is the determination of the state of mind. Since there would be no homicide case unless the risky act resulted in someone's death, the risk was, in retrospect, absolute. The main reason for looking at it from the actor's point of view at the time he acted is to judge his mental culpability. Whether his actions were such as to make the death of another inevitable or highly likely or more or less probable is significant only insofar as they enable us to judge whether he "knowingly" or "willingly" or "recklessly" took another's life.

116 Stephen, supra note 51, at 94.
117 In formulating its recommendation concerning "willingness to kill," the 1965 English Law Commission illustrated the proposal with examples as follows:
(a) So long as a distinction between murder and manslaughter is to be maintained, there must be a defensible criterion for distinguishing between them. In our view the essential element in murder should be willingness to kill, thereby evincing a total lack of respect for human life. A man who drives a car at an excessive speed down a crowded street, thereby killing a pedestrian, may know that by his reckless folly he runs the risk of killing that pedestrian, but, although he is aware of the risk, he may not be willing to kill him. He may be guilty of manslaughter because he has run an extreme risk; he is not guilty of murder if he was not willing to kill. On the other hand, it is desirable to bring within the definition of a murderer a man who (to take an example cited during the Commission's consultations) plants a powerful time-bomb in an aeroplane in order to blow it up in flight with the aim of recovering the proceeds of insurance on the cargo. Although he has a purpose other than killing (namely, the recovery of the insurance money) it is clear from the circumstances that at the time when he planted the bomb, he was willing to kill those in the aeroplane.
One final observation concerning the actor's state of mind is in order. It relates not to his intent or foresight of risk as those terms are narrowly conceived in the Penal Law, but rather to the totality of his impulses and motives as revelatory of his character, and is in this sense akin to the common law understanding of "malice" as previously illustrated from Foster's *Crown Law.* Notwithstanding the presence of an otherwise homicidal intent, the common law early recognized the difference between the "abandoned and malignant heart" of malice and the impulses of "human frailty." Consequently, a killing done in a transport of passion upon sufficient provocation was mitigated from murder to manslaughter. The sufficiency of the provocation was always referred to the standard of the average man. Would the provocation have affected him as it did the killer? While it has been pointed out that the test is inaccurate in that reasonable men do not kill, "the point is that the more strongly they would be moved to kill by circumstances of the sort which provoked the actor to the homicidal act, and the more difficulty they would experience in resisting the impulse to which he yielded, the less does his succumbing serve to differentiate his character from theirs."

In a similar vein the mitigation provision of the New York Penal Law speaks of "extreme emotional disturbance for which there was a reasonable explanation or excuse." These factors, of course, do not exculpate the actor; they reduce the grade of his offense from murder to manslaughter. It is in this sense that the absolutely unmitigated quality of depraved mind murder is to be seen. The ordinary man can understand and perhaps sympathize with one who kills in anger or fear; he can even understand the action of one who deliberately kills for revenge or pay. These acts are done for reasons which all men have experienced and understand. What the mind recoils from is the wholly gratuitous act of a man who shoots into a crowded train or "resolves to kill the next man he meets." The unmotivated wickedness of such an offender is beyond ordinary experience and constitutes the para-

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118 See notes 48-50 supra and accompanying text.
120 N.Y. Penal Law § 125.25(a) (McKinney 1967).
121 5 Blackstone, supra note 45, at 200.
digmatic case of the "depraved mind murderer." The total absence of mitigation or even understandable motivation is one strand in the historical fabric. Others, of an affirmatively aggravating character may be considered separately.

Objective Quality of the Act or Surrounding Circumstances

The possibility of distinguishing depraved murder on the basis herein discussed does not rest primarily on New York cases or legislative history. Nevertheless, the statutory language at least raises the possibility that a word freighted with such connotations as "depravity" might invite consideration of elements collateral to the basic proposition of known risk, more or less, of death.

For example, the use of "cruel and unusual means," an expression found in the former Penal Law manslaughter sections, could be considered relevant to an evaluation of depravity. Writing in 1952,

122 The moral delinquency of such an offender was well described by Stephen:
Is there anything to choose morally between the man who violently stabs another in the chest with the definite intention of killing him, and the man who stabs another in the chest with no definite intention at all as to his victim's life or death, but with a feeling of indifference whether he lives or dies? It seems to me that there is nothing to choose between the two men, and that cases may be put in which reckless indifference to the fate of the person intentionally subjected to deadly injury is, if possible, morally worse than an actual intent to kill.

3 Stephen, supra note 51, at 92. It is interesting that gratuitous malice, which to Stephen, heightens moral guilt, might in an extreme case so bespeak a disordered mind that, instead of aggravating the actor's responsibility, it would tend to eliminate it under the insanity doctrine, or mitigate it under the "extreme emotional disturbance" provision.

Although the modern version of heat of passion engendered by sufficient provocation, N.Y. Penal Law § 125.25(1)(a) (McKinney 1967) is predicated on intentional murder alone, it is apparent from what has been discussed in the text that acts done in passion under the influence of great provocation could not be characterized as proceeding from a depraved indifference to human life. The trial court's charge to the jury in the Darry case so stated. See text accompanying note 88, supra. Accord, People v. Johnson, 1 Parker Crim. R. 291 (N.Y. Sup. Ct. 1851).


124 In Halloway's Case, 79 Eng. Rep. 715 (K.B. 1628), a park keeper was convicted of murder when he caught a boy stealing wood and tied him to a horse's tail, causing him to be dragged some distance, breaking bones and causing death. Of this case Hale says: "1. The correction was excessive, and 2, it was an act of deliberate cruelty." 1 Hale supra note 9, at 454. So also says Foster: "This was held to be murder. For it was a deliberate Act and savored of Cruelty." Foster, supra note 44, at 292.

The common origin of the depraved mind category and the intent-to-do-great-bodily-harm category is visible in several early cases in addition to Halloway. See Grey's Case, 84 Eng. Rep. 1084 (K.B. 1666) (master killed apprentice by blow on the head with iron bar); Rex v. Keite, 91 Eng. Rep. 989 (K.B. 1697) (master killed servant with sword). In Keite, Holt, C.J., observed that the killing might have been but manslaughter but "the cruelty of the cut will make a malice implied." Id. at 992-93. The master-servant cases are especially interesting because, since "moderate" correction was lawful, the courts were compelled to refine their thinking as to degrees of culpability. See Oberer, The Deadly Weapon Doctrine — Common Law Origin, 75 Harv. L. Rev. 1565 (1962).

Also instructive on the psychology of malice at common law are cases effecting the transition from chance medley upon sudden encounter (manslaughter only at early
one author noted that 18 states continued the concept of malice aforethought in their statutes, and of these, 8 reserved murder in the first degree for "all murder which is perpetrated by means of poison, lying in wait, torture, or by any other kind of wilful, deliberate and premeditated killing." This phraseology derives from the historic Pennsylvania statute of 1794.

Similarly, Massachusetts raises second degree murder to first degree if committed "with extreme atrocity or cruelty." In making such a determination the Massachusetts Supreme Court has included "the consciousness and degree of suffering of the victim, the disproportion between the means actually needed to inflict death and those employed, the instrumentalities employed and the extent of the physical injury."

Particulars such as these are seldom found in modern criminal codes; yet they express an attitude that is difficult wholly to disregard. Consequently, such considerations are likely to surface in prosecutions under a statute containing such a term as "depraved." For example, the difference between cool cruelty and passionate impulse was seen as the critical factor in one pre-Darry case in which the court reversed the depraved mind murder conviction of a man who terminated a fight by braining his opponent with a large stone. In distinguishing the facts from a true murder case, Judge Barculo said: "If the prisoner had found Kane sleeping by the stone wall and had taken the stone in mere wantonness and let it fall upon him without designing to kill, he..."
would probably have been convicted of murder under the second sub-

division."\textsuperscript{129}

Even more illustrative is \textit{People v. Poplis},\textsuperscript{130} the case which over-
ruled the \textit{Darry} limitation of danger to many. In \textit{Poplis}, a husband
brutally beat his wife's three-year-old infant repeatedly for five days,
causing its death. In affirming a depraved mind murder conviction, the
Court of Appeals stated that the case involved "something more serious
than mere recklessness alone which has had an incidental tragic re-

result."\textsuperscript{131} The Court must have had in mind the prolonged cruelty,
the helplessness of the victim, and the betrayal of duty on the part of
one who should have been the infant's natural guardian and protector.

Perhaps the Court was too sanguine when it described depraved
mind murder as "rather well understood at common law to involve
something more serious"\textsuperscript{132} than reckless manslaughter. Still, one
can understand why the \textit{Poplis} Court reached the result it did. A
stronger set of facts could hardly be imagined to support the ap-
lication of the depraved mind murder provision to a case of vio-
lence directed at a single victim.\textsuperscript{133} It was a hard case. The statute has
now been applied to the \textit{Kibbe} case. A class of depraved mind cases
supposedly "rather well understood" has been greatly expanded with
little discussion and no dissent. Perhaps an intoxicated man with a
blood alcohol content of 0.25 percent can be compared to a helpless
infant, but there the comparison ends. In \textit{Kibbe} the defendants' act
was not prolonged cruelty; it was the act of a moment. It was not
ferocious or brutal; it was not violent at all. The risk of death was
not immediate; it was remote and contingent. Most of all, the defen-
dants were not willing to kill Stafford; they intended him to seek the
shelter of the gas station one quarter of a mile away. All in all, was
this more than what the Court in \textit{Poplis} called "mere recklessness
alone which has had an incidental tragic result"?\textsuperscript{134}

\textsuperscript{129} \textit{People v. Johnson}, 1 Parker Crim. R. 291, 298 (N.Y. Sup. Ct. 1851).
\textsuperscript{131} Id. at 88, 281 N.E.2d at 168, 330 N.Y.S.2d at 366. Accord, \textit{People v. Caprio}, 47
\textsuperscript{132} 2d

\textsuperscript{133} The result of \textit{Poplis} is to raise to the level of murder the typical case of first
degree manslaughter under the old Penal Law, in which without a design to kill an
actor caused death "in a cruel and unusual manner." \textit{See People v. Lee}, 300 N.Y. 422,
91 N.E.2d 870 (1950) (prolonged bloody beating of a woman); \textit{People v. DeGarmo}, 73
App. Div. 46, 76 N.Y.S. 477 (4th Dep't 1902), rev'd on other grounds, 179 N.Y. 130, 71
N.E. 796 (1904) (kicking and beating five-year old with poker); \textit{People v. Hammill}, 2
Parker Crim. R. 223 (N.Y. Oyer & Terminer 1855) (kicking to death). Both the \textit{Hammill}
and \textit{Lee} cases held that intoxication was no defense.
\textsuperscript{134} 30 N.Y.2d at 88, 281 N.E.2d at 168, 330 N.Y.S.2d at 366.
Comparison with Felony Murder

To the extent that the Kibbe defendants' whole "despicable" course of conduct was material in determining that they acted with a depraved indifference to human life, the comparison to felony murder suggests itself. Of course, since the defendants were neither indicted nor tried for felony murder the Court could not rest its affirmance of their conviction on that ground, as such. However, since recklessness is defined in the Penal Law as taking "substantial and unjustifiable" risks, the purposes of the defendants in exposing Stafford to peril remain relevant. Nothing could be less justifiable than the commission of a felony: it is conduct which is without redeeming value wholly apart from any additional danger to life it may occasion.

It is interesting to compare this perspective of the Kibbe case to the treatment of felony murder in the Model Penal Code. Because of the fictive character of the homicidal mens rea in felony murder, the doctrine has been under attack for years. In England, where felony murder was born, it has been abolished. The Model Penal Code eliminates it as a separate category of murder but incorporates it as a presumption within the subsection that makes a homicide murder, when:

(b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.

The comments to the section state that the presumption is rebuttable.

If the presumption of extreme recklessness is rebutted, the homicide may still be adjudged reckless, in which event it constitutes manslaughter, as do all reckless homicides, whether the actor's conduct is otherwise felonious or not. . . . Beyond this, we submit

135 People v. Smith, 232 N.Y. 239, 244, 133 N.E. 574, 575 (1921). In other cases when the Court has passed on the sufficiency of proof of an accomplice's shared purpose to kill under a count of premeditated murder, it has accepted slighter evidence and broader inferences when felony murder was in the background, though not formally before the Court, People v. Wilson, 145 N.Y. 628 (1895); People v. Emileta, 238 N.Y. 158, 144 N.E. 487 (1924), than it has when the only possible theory of guilt was intentional murder, People v. Weiss, 230 N.Y. 160, 161 N.E.2d 506 (1956); People v. Agron, 10 N.Y.2d 130, 176 N.E.2d 556, 218 N.Y.S.2d 625 (1961); People v. Monaco, 14 N.Y.2d 43, 197 N.E.2d 532, 248 N.Y.S.2d 41 (1964).
136 N.Y. PENAL LAW § 15.05(3) (McKinney 1967) (emphasis added).
137 English Homicide Act of 1957, 5 & 6 Eliz. 2, c. 11, § 1.
that the felony-murder doctrine, as a basis for establishing the
criminality of homicide, should be abandoned.139

When the Temporary Commission for the Revision of the Penal
Law submitted its recommendation to the legislature in 1964, it took
a partial step in the direction of the Model Penal Code. Whereas
felony murder formerly could rest on any act committed in further-
ance of any felony,140 the Revisers proposed two limitations: first, the
predicate felonies were narrowed to an enumerated list of those com-
monly thought dangerous to life; second, the fatal act itself was lim-
ited to an act "inherently dangerous to human life."141 The legislature
did not adopt the second limitation. As enacted, the New York felony
murder provision requires only that the death of a person, not a par-
participant in the crime, be caused by one of the felons in the course of,
and in furtherance of, one of the enumerated felonies.142

Could the defendants in Kibbe have been convicted of felony
murder under the present New York statute or have been brought
within the presumptive depravity provision of the Model Penal Code? When they put Stafford out of the car the robbery had been completed.
This alone would have precluded liability under the former Penal
Law.143 The present statute, however, following the Model Penal
Code, extends to acts in furtherance of or in "immediate flight" from
the felony.144 While there was no flight in the sense of hot pursuit, a
jury could have found that the robbers let Stafford out a quarter
mile from the gas station to give themselves time to escape. Since they
intended that Stafford reach shelter, there was no other likely reason
not to have left him at the station. It is at least arguable, therefore,
that the defendants' own acts were performed in furtherance of im-
mediate flight. Is it significant that their acts did not cause death
until some time later, upon the intervention of Michael Blake's truck?
One New York felony murder case suggests not.

The bizarre facts of People v. Keshner145 arose out of an attempt
by four men to burn a loft building to collect insurance. After the
premises had been saturated with gasoline, the police arrested the

139 MODEL PENAL CODE § 201.2, Comment at 33 (Tent. Draft No. 9, 1959).
140 People v. Wood, 8 N.Y.2d 48, 167 N.E.2d 736, 201 N.Y.S.2d 328 (1960); People
v. Lytton, 257 N.Y. 310, 178 N.E. 290 (1931); Fitzgerald v. People, 37 N.Y. 413 (1868).
141 TEMPORARY STATE COMM. ON REVISION OF THE PENAL LAW AND CRIMINAL CODE,
PROPOSED N.Y. PENAL LAW § 130.25 (1964).
142 N.Y. PENAL LAW § 125.25(3) (McKinney 1967).
143 People v. Ryan, 263 N.Y. 298, 189 N.E. 255 (1934); People v. Collins, 234 N.Y.
355, 137 N.E. 753 (1922); People v. Marwig, 227 N.Y. 382, 125 N.E. 535 (1919).
144 N.Y. PENAL LAW § 125.25(3) (McKinney 1967). See also MODEL PENAL CODE
§ 210.2(1)(b) (1962 draft).
conspirators. While the defendant Keshner remained in custody in a police car outside the building, a policeman and two of the conspirators entered the loft. By unknown means the gasoline ignited, causing a fire in which the three men died. Over the dissent of Judge Lewis, the Court of Appeals affirmed Keshner’s felony murder conviction based upon a jury finding that the intervening occurrence of the fire must have been foreseeable.

The validity of the Keshner case, however, was placed in grave doubt by the subsequent decision in People v. Wood. In that case the defendant engaged in a violent argument in a tavern in Nassau County. He wounded one man and fired shots at a police officer who had arrived at the scene. As the defendant attempted to drive away with some companions, the tavern owner seized a rifle and came to the assistance of the policeman. Both fired at the car and the proprietor killed one of the occupants of the car and a bystander. The defendant was indicted for felony murder in the deaths of the two men. The Court of Appeals affirmed an order dismissing the indictment. Although it discussed with apparent approval the well known Redline case, the Court rested its decision not on general causation principles but on the particular language of the former New York felony murder statute, which applied to a killing not excusable or justifiable, committed by a person engaged in the commission of, or in an attempt to commit, a felony. The Court stated:

The statute defines as murder in the first degree only those homicides which are neither excusable nor justifiable. The lethal acts of Gibson [the tavern owner] were at least excusable and could not, therefore, support a felony murder charge. It is apparent, therefore, that the “person” referred to in subdivision 2 of section 1044 of the Penal Law is that person defined in section 2 of the same law, i.e., a principal in the underlying felony. The Court’s discussion of “person” in the last quoted sentence is somewhat opaque. It appears to be comparing the use of the word “person” in two different places in the homicide statute and concluding that the same person is meant in both places. A reading of former Penal Law section 1044 will show that, other than a refer-

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148 § N.Y.2d at 54, 167 N.E.2d at 740, 201 N.Y.S.2d at 334.
149 Ch. 676, § 183, [1881] N.Y. Laws vol. 1, 913, as amended, ch. 384, § 1, [1882] N.Y. Laws vol. 1, 540, as amended, ch. 548, § 1, [1897] N.Y. Laws vol. 1, 649 (repealed 1967): The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed:
ence to "the person killed," which obviously the Court was not discussing, there is only a single use of the word. The effect of the holding, however, is plain. The immediate cause of death must be the act of one of the felons; if the immediate cause is the noncriminal act of a third person, the resulting homicide cannot be felony murder.

The murder section of the revised Penal Law does not contain the precise words relied on by the Court in Wood. The absence of justification or excuse are no longer an ingredient of the definition of the crime; they are treated separately under defenses. Moreover, the statute no longer reads "the killing . . . when committed . . . by a person engaged in the commission of . . ." a felony.\textsuperscript{150} It now applies when the felon (or an accomplice) "causes the death of a person other than one of the participants."\textsuperscript{151} Thus, the issue of causation, which the Wood Court said it was not deciding, is squarely presented by the present statute. Notwithstanding the changes in statutory phraseology, and the narrow reasoning of Wood, it is submitted that a public prosecutor would have difficulty in persuading the Court of Appeals to depart from the actual holding of that case. Too many courts have agreed that a strict causation requirement is a salutary counterbalance to the constructive \textit{mens rea} of felony murder to make a departure from Wood likely.\textsuperscript{152} Under a different indictment the Kibbe case could have been a test for this issue; it is perhaps a tribute to the district attorney's judgment that it was not.

\textit{L'Envoi: Plus Ça Change, Plus C'Est la Même Chose}

In 1828 when the Commissioners submitted their recommendations for the penal part of the Revised Statutes they declared their purposes: "One leading principle has influenced the Revisers; it is, to regard the moral depravity of the offences carefully separating those which unequivocally denote deliberate villainy, from those which may be the result of momentary indiscretion or ignorance."\textsuperscript{153} With particular reference to homicide they thought it "indispensable" to "de-
The depraved mind murder provision is traceable in a direct line of succession through the former penal law back to the common-law doctrine of malice aforethought, and in particular, implied malice. The means used, the brutality of the act, the lack of provocation, and other circumstances were all significant at common law in judging malice. It was a total qualitative appraisal of the actor's character in taking life, not merely of his "intent" in the modern sense of perception and conscious rationation. Professor Oberer has well summarized the difference between the common-law and modern statutes: "In common law murder the only function of intent is to demonstrate malice; statutory murder frequently makes intent, as there defined, an express element of the crime." These two perspectives of culpability differ widely in psychological, penological, and perhaps moral, premises. The writer is not persuaded that the insights gained since James and Freud wholly favor the superiority of the modern statutory approach to appraising the actor's subjective psychic condition in a crime of violence. Be that as it may, one purpose of this

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154 Id. at 10.

Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow-creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.


158 See text accompanying notes 47-49 supra.
159 Oberer, The Deadly Weapon Doctrine—Common Law Origin, 75 HARV. L. REV. 1565, 1573 (1962). The differences have had practical effect in California where the courts have interpreted their statutes as superimposing an independent requirement of "malice" over particular mental states, such as an unprovoked, deliberate and premeditated intent to kill. People v. Conley, 64 Cal. 2d 510, 411 P.2d 911, 40 Cal. Rptr. 815 (1966); People v. Gorshen, 51 Cal. 2d 716, 336 P.2d 492 (1959). The California cases introduce a doctrine similar to the English law of "diminished responsibility." English Homicide Act of 1957, 5 & 6 Eliz. 2, c. 11, § 2, in which mental disorder short of legal insanity may diminish an actor's responsibility from what would otherwise be murder to manslaughter. Compare the extreme disturbance provision of N.Y. PENAL LAW § 125.25 (1)(a) (McKinney 1967), discussed in Gegan, supra note 50, at 570-75.
Article is to question whether companion homicide provisions simultaneously embracing such widely variant premises do not create hopeless incongruity.

The ambivalence of the New York statutes is traceable back to the Revised Statutes of 1829. In commenting on the murder provisions, the Revisers said: "The great principle on which the section rests, is this, that to constitute murder, there should be an express design to take life, or such circumstances as to induce a very strong presumption of such a design, or such facts occurring in a transaction, as would ordinarily lead to the result of taking life."100 Yet, in commenting on the manslaughter subsection which dealt with a killing done in a cruel and unusual manner but without a design to effect death, the Revisers noted: "This case presents greater difficulty perhaps than any other. The weapon used, or the manner of killing may indicate a barbarous and ferocious mind, but yet not that design to kill, which should mark every case of murder."101 It is difficult to believe this was written by the same hands that wrote the murder commentary.

After a century and a half, through three major revisions and numerous amendments, the makers of the New York Penal Law have labored to put the uncertainties of the common law behind them and produce a rational and proportioned grading of homicide categories. Throughout this time, except for the brief period 1860-62,102 the depraved mind murder subsection has been retained notwithstanding its anachronistic character. The potential mischief was effectively contained for more than a century by the Darry rule which limited its application to acts which threatened a number of people. Within that confined sphere it was almost a dead letter, invoked in a small handful of cases. Because of a slight change of wording in the new Penal Law of 1967, from the plural "others" to the singular "another person," the old common law of implied malice, so long dormant but intact, has emerged from the chrysalis of the Darry case. It is now alive and well and growing apace, as the Kibbe case demonstrates. Indeed, if its appetite is not checked it bids fair to swallow up a few other categories of murder and manslaughter. Why prove specific intent when "depraved recklessness" will do the business? Cases without number have interpreted the requirement of intent to kill, and its predecessor, premed-

100 Report of the Comm'rs Appointed to Revise the Statute Laws of N.Y. 3 (1828).
101 Id. at 13.
102 See 1937 Law Revision Comm'n, supra note 52, at 617.
uated and deliberate design. Now, under the *Poplis* and *Kibbe* interpretations of depraved mind murder, how would our approach differ from that of the early common-law judges who decided the cases of the park keeper who dragged a boy tied to a horse or the master who “corrected” his apprentice with an iron bar over the head? Has the labor of years put us in a better position than that described by the Revisers in 1828:

It has been supposed that there was nothing so much wanted in the criminal law, as a settled line of distinction between murder and manslaughter, which are now so nearly connected, and run into each other so much, that courts and juries often mistake, and a lamentable uncertainty prevails, which operates as well to screen the guilty as to expose the innocent. The first step to such a distinction is the definition of murder...

Beyond overlapping other sections of the homicide article, beyond inconsistency and disproportion with the notions of culpability implicit in companion sections, the *Kibbe* case has heightened an inherent ambiguity in depraved recklessness itself. What is it and what makes it different from the other homicide offenses? This Article has attempted to canvass the possibilities but, pending further action from the legislature or the courts, possibilities they must remain. As of now, the existence of a category of murder which must in hard cases be unintelligible to lay jurors, probably to lawyers, and possibly now and then even to judges, is a problem crying aloud for clarification. Unless clarification is forthcoming we would be better off without it.

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163 As of 1937, the New York Law Revision study of intentional murder cases occupied some 75 pages. 1937 *Law Revision Comm’n*, supra note 52, at 533-612. 164 The references are to *Halloway’s Case*, 19 Eng. Rep. 715 (K.B. 1628) and *Grey’s Case*, 84 Eng. Rep. 1084 (K.B. 1666). They may be compared with the early pre-Darry New York cases, beginning with People v. Rector, 19 Wend. 569 (N.Y. Sup. Ct. 1833), and People v. White, 22 Wend, 167 (N.Y. Sup. Ct. 1839), rev’d, 24 Wend. 520 (N.Y. Ct. Corr. Err. 1840), whose value as precedents under depraved mind murder has presumably been restored by the *Poplis* holding that the provision applies to direct assaults on individuals. 165 Report of the Comm’ns Appointed to Revise the Statute Laws of N.Y. 3 (1828). 166 One of the classic American texts observes: Some of the phrases, found in our books treating of this subject of murder, are so technical and even meaningless as greatly to embarrass the student. Of this sort are the terms “malice,” “depraved heart,” “mind fully bent on evil,” and other similar ones. They are often employed by judges and text-writers seemingly without its occurring to them that, in truth, they convey no such exact idea as is essential in legal disquisition, and sometimes no idea whatever. 2 *Bishop, Criminal Law* § 735 (1882); accord, People v. Phillips, 64 Cal. 2d 574, 414 P.2d 353, 51 Cal. Rptr. 225 (1966).