Lesser Included Crimes Under Felony Murder Indictments in New York: The Past Speaks to the Present

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LESSER INCLUDED CRIMES UNDER FELONY MURDER INDICTMENTS IN NEW YORK: THE PAST SPEAKS TO THE PRESENT

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The question of charging the degrees of homicide in a felony murder has always been troublesome.1

INTRODUCTION

For purposes of punishment, a generic criminal offense may be divided into several grades or degrees according to various combinations of elements.2 Larceny, for example, is raised in degree if the act involves taking directly from the person,3 or because of the circumstance that the stolen property is worth more than a stated amount.4 Robbery is raised in degree if the circumstances include an accomplice actually present,5 or if the robbery results in physical injury to any nonparticipant in the crime;6 it is raised again to

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1 People v. Lunse, 16 N.E.2d 345, 347 (N.Y. 1938).

2 These elements are analytically divided into two parts: a subjective, mental part (mens rea); and an objective, external part (actus reus). In New York, mens rea is subdivided into four types: intent, knowledge, recklessness, and criminal negligence. N.Y. PENAL LAW § 15.05 (McKinney 1987). The actus reus is expressed as one or more of three variables: the act, the surrounding circumstances, and the result. See id. § 15.10.

An offense may require different forms of mens rea with respect to different elements of the actus reus. For example, fourth degree arson requires intent with respect to the act of starting a fire, but only recklessness with respect to the resulting damage to a building. N.Y. PENAL LAW § 150.05 (McKinney 1988). See generally Paul H. Robinson & Jane A. Grail, Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond, 35 STAN. L. REV. 681, 683 (1983) (Model Penal Code recognizes different mental states for separate elements of an offense).

3 Compare Grand Larceny in the Fourth Degree, N.Y. PENAL LAW § 155.30(5) (McKinney 1988) with Petit Larceny, id. § 155.25.

4 Id. § 155.30(1) ($1000—fourth degree); id. § 155.35 ($3000—third degree); id. § 155.40(1) ($50,000—second degree); id. § 155.42 ($1,000,000—first degree).

5 Id. § 160.10(1).

6 Id. § 160.10(2)(a).
a higher degree if the physical injury is serious.\(^7\)

All of the homicide offenses have two elements in common: causing the death of a human being (an act and a result). What divides the higher offense (murder) from the lower (the degrees of manslaughter) is the mens rea element.\(^8\) However, the type of murder called felony murder is anomalous in that no mental culpability is required with respect to the death caused by the actor;\(^9\) the crime is assigned the highest degree of penal sanction because of a circumstance element—the commission of one of several felonies named in the statute, each of which incorporates its own set of elements, including mens rea. By legal fiction, the felonious intent substitutes for the homicidal intent that would otherwise be required.\(^10\)

If a grand jury returns a felony murder indictment accusing someone of shooting another to death during a robbery, the proof at trial may show that the deceased was a drug dealer and the defendant a user. The people’s evidence may establish a prima facie case. The defense may put in evidence that the shooting arose out of a simple altercation and that the defendant was too befuddled by drugs to form an intent to rob. Depending on how the jury evaluates the totality of the evidence, the defendant may be guilty as charged, not guilty, or guilty of manslaughter in the first or second

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\(^7\) Id. \(\S\) 160.15(1).

\(^8\) See N.Y. Penal Law \(\S\) 125.00-125.25 (McKinney 1987 & Supp. 1992). But see People v. Register, 457 N.E.2d 704, 708 (N.Y. 1983) (holding that culpable mental state of recklessness was the same for depraved indifference murder (N.Y. Penal Law \(\S\) 125.25(2)) and second-degree manslaughter (N.Y. Penal Law \(\S\) 125.15(1))), cert. denied, 466 U.S. 953 (1984).

\(^9\) N.Y. Penal Law \(\S\) 125.25(3) (McKinney 1987); see People v. Lytton, 178 N.E. 290, 292 (N.Y. 1931); People v. Udwin, 172 N.E. 489, 491 (N.Y. 1930).

\(^10\) See People v. Enoch, 13 Wend. 159, 174-75 (N.Y. 1834):

Every felony, by the common law, involved a forfeiture of the lands or goods of the offender upon a conviction of the offense; and nearly all offenses of that grade were punishable with death, with or without benefit of clergy. In such cases, therefore, the malicious and premeditated intent to perpetrate one kind of felony, was, by implication of law, transferred from such offense to the homicide which was actually committed, so as to make the latter offense a killing with malice aforethought, contrary to the real fact of the case as it appeared in evidence.

Id.; accord Lytton, 178 N.E. at 292; People v. Nichols, 129 N.E. 883, 884-85 (N.Y. 1921). Whether a legal fiction is a satisfactory basis upon which to secure convictions for the gravest crime known to the law is a serious question of penal policy upon which this writer has previously expressed a firm opinion. See Bernard E. Gegan, Criminal Homicide in the Revised New York Penal Law, 12 N.Y.L.F. 565, 585-91 (1966); see also People v. Aaron, 299 N.W. 304, 326 (Mich. 1980) (abolishing felonious intent from definition of malice); George P. Fletcher, Reflections on Felony-Murder, 12 Sw. U. L. Rev. 413, 415 (1981) (discussing felony murder doctrine with reckless mens rea).
degree. The defendant, however, was not indicted for those lesser crimes; he was indicted for felony murder. How should the jury be instructed?

Should the prosecution fail altogether if the jury finds that some, but not all, of the elements of the crime charged were established—bearing in mind that constitutional and statutory double jeopardy rules may bar future prosecution of a related but lesser crime based on the same transaction? The defendant also has a stake in the matter. If the jury is confined to two choices only—guilty or not guilty—it is more likely to convict on doubtful proof rather than to free a defendant who seems guilty of some criminal responsibility for a killing. Permitting the jury to consider related crimes of lesser degree prevents a polarized distortion of the fact-finding process and allows verdicts that reflect the appropriate degree of guilt established by the proof. On the other hand, to submit an array of uncharged offenses has the potential of subverting the grand jury’s prerogative of deciding which charges to bring and the defendant’s right to fair notice of what he must be prepared to defend against. Further, to enlarge the jury’s discretion may increase the likelihood of compromise verdicts prejudicial

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12 See Beck, 447 U.S. at 633-34; Keeble, 412 U.S. at 212-13. As stated by Justice Brennan:

Moreover, it is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction—in this context or any other—precisely because he should not be exposed to the substantial risk that the jury’s practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.

Id.; see also People v. Green, 437 N.E.2d 1146, 1149-50 (N.Y. 1982) (lesser included offense aids prosecution); Murch, 189 N.E. at 222 (lesser included charge prevents prosecution's failure).
to the defendant and lawless mercy verdicts prejudicial to the people.

The tension among these conflicting policies is resolved through judicial interpretation of a statutory charge-down rule that has been part of New York law ever since its earliest codification in 1829. The charge-down rule, as recodified without substantial change in section 444 of the 1881 Code of Criminal Procedure, provided: "Upon an indictment for a crime consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment, and guilty of any degree inferior thereto, or of an attempt to commit the crime." 1

Section 444 was supplemented by another statute (section 445) that provided: "In all other cases, the defendant may be found guilty of any crime, the commission of which is necessarily included in that with which he is charged in the indictment." 2

A rich and complex body of case law developed around these statutes, particularly on the "troublesome question" of charging the lower degrees of homicide in felony murder cases. The courts avoided simplistic solutions and, in the main, effectively realized the beneficial effects of the statutes and minimized their abuse.

Unfortunately, the Legislature reverted to a simplistic solution in 1970, when the statutes quoted above were repealed, and the Code of Criminal Procedure was replaced by the present Criminal Procedure Law ("CPL"). 3 The charge-down provisions of the CPL

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2 Upon an indictment for any offence consisting of different degrees, as prescribed in this Chapter, the jury may find the accused not guilty of the offence in the degree charged in the indictment, and may find such accused person guilty of any degree of such offence, inferior to that charged in the indictment, or of an attempt to commit such offence.
3 Id. In prior years, when the death penalty was mandatory for first-degree murder, charge-down served as a surrogate for sentencing discretion. Without charge-down, however, many jurors who shrank from giving a deadly verdict would acquit a guilty defendant if no alternative verdict were available. See People v. Hicks, 38 N.E.2d 482, 484-85 (N.Y. 1941) (discussing jury's reluctance to convict of capital crime), aff'd, 43 N.E.2d 716 (N.Y. 1942).
4 N.Y. Code of Crim. Proc. § 444 (Bender 1907) (repealed 1970). The words of the Code of Criminal Procedure § 444 were substantially restated in former New York Penal Law § 610, as follows: "Upon the trial of an indictment, the prisoner may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime." Id. (omitted from the current New York Law).
5 Id. § 445 (Bender 1907)(repealed 1970).
omit former section 444 and incorporate a derivative of former section 445; however, the combined effect of the two critical sections in the present law effectively eliminates any verdict in felony murder cases except guilty or not guilty.\(^{17}\) It is not known whether the revisers thought through the implications for felony murder when they drafted the new statutory rules, but the result is open to serious criticism. It is the purpose of this Article to reexamine the decisions under the former law in an effort to demonstrate that the draconian simplicity of the present law is bought at too high a price in terms of fairness and accuracy of adjudication in felony murder cases.

The starting point for analysis is a legacy from the common law that is embodied in the state constitution: no person may be put on trial for any felony except upon an indictment found by a grand jury.\(^{18}\) To serve its function as a criminal pleading, the indictment must allege facts sufficient to match the constituent elements of a crime as defined by statute, both actus reus and mens rea.\(^{19}\) This, together with the requirement of proof beyond a reasonable doubt,\(^{20}\) forms the cornerstone of due process in criminal cases. As one early case summarized it: "[A]n accused party cannot be surprised upon [his] trial, for the people cannot prove any fact not alleged, nor can he be convicted of any crime that the facts proved do not establish."\(^{21}\)

Parts I, II, and III of this Article will seek to develop the steps by which these two factors, the indictment and the evidence, came to be applied to the question of charging the lesser degrees of homicide in felony murder cases. Part IV will set forth the changes brought about in 1970 when the CPL superseded the statutes that had existed without substantial change since 1829. Finally, Part V will bring the lessons from the past to bear on the present rule and will suggest a statutory amendment.

I. SETTING THE STAGE: THE NINETEENTH CENTURY CASES

At common law, the mens rea for murder was defined as mal-

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\(^{17}\) See infra text accompanying notes 150-56.

\(^{18}\) See N.Y. Const. art. I, § 6.

\(^{19}\) See N.Y. Crim. Proc. Law § 200.50(7) (McKinney 1982).

\(^{20}\) See id. § 70.20 (McKinney 1992); see also In re Winship, 397 U.S. 358, 364 (1970) (reasonable doubt standard constitutionally compelled by Due Process Clause).

\(^{21}\) People v. McDonald, 1 N.Y.S. 703, 705 (Sup. Ct. Gen. T. 5th Dep't 1888).
ice aforethought; all other unlawful killings were manslaughter.\footnote{See William Blackstone, Commentaries 195, 198-202 (Oxford, Clarendon Press 1769); 3 Edward Coke, Institutes of the Laws of England 47 (6th ed. 1680); Rollin M. Perkins, A Reexamination of Malice Aforethought, 43 Yale L.J. 537, 544 (1934).}

In addition to alleging the factual manner of death, the usual form of indictment at common law accused the defendant of acting “wilfully, feloniously, and with malice aforethought.” Thus, the indictment matched the crime.

When New York did away with common law crime and systematically codified the criminal law in 1829, it also did away with the omnibus mens rea of malice aforethought. Thenceforth, murder was divided into three specific categories: premeditated murder, depraved-mind murder, and felony murder.\footnote{2 N.Y. Rev. Stat. pt. IV, ch. 1, tit. 1, § 5 (1829) (repealed 1970).} As it turned out, this accomplished some significant changes. The new statutory definitions of mens rea omitted some cases that were formerly within the scope of common law malice\footnote{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. Id.} and included others that were formerly excluded.\footnote{See Michael Foster, Crown Law 259 (Oxford 1762). Malice at common law embraced an intent to do great bodily harm as well as an intent to kill. Id.; Edward H. East, Pleas of the Crown 262 (London, A. Strahan 1803); 1 Matthew Hale, The History of the Pleas of the Crown *491 (Savoy 1736). Intent to inflict great bodily harm was included as murder in the Report of the Commissioners Appointed to Revise the Statute Laws of New York 3 (1828), but was omitted by the Legislature when it enacted the Revised Statutes of 1829. See supra note 23. This omission was noted and criticized as early as 1854 in Darry v. People, 10 N.Y. 120, 154 (1854) (Denio, J., concurring).} Whether this was done by design or clumsy drafting has been discussed elsewhere and need not be reprised here.\footnote{Under the statutory scheme in 1829, manslaughter covered only cases where the defendant acted without a “design to effect death”; all killings done with intent to kill were murder. 2 N.Y. Rev. Stat. pt. IV, ch. 1, tit. 2, §§ 6, 10, 12 (1828-1835). This effectively eliminated heat of passion, which the common law had always recognized, as a mitigating element in intentional killings. See Communication and Study Relating to Homicide, [1937] Law Rev. Comm’n Rep. 651 [hereinafter Comm’n Rep.]; Shufflin v. People, 62 N.Y. 229, 236 (1875); People v. Foster, 50 N.Y. 598, 601 (1872); People v. Clark, 7 N.Y. 385, 393 (1852).} Of interest is that the lawyers of that time (waiving com-
parison with lawyers today) were creatures of habit and went along practicing law just as if nothing had changed: district attorneys continued to use their familiar office forms, charging defendants with committing murder "wilfully, feloniously, and with malice aforethought"—perfectly indifferent to the slight change in circumstance that such a crime no longer existed.

Perhaps the judges in those early days did not appreciate the extent to which the new statutory definitions departed from the common law concept of malice. Perhaps they undervalued the function of the indictment as a pleading. In any event, in the leading case of People v. Enoch,\(^27\) the court held that an indictment in common law form, alleging malice aforethought, was sufficient to let in proof of any of the three categories or "theories" of murder defined in the statute.\(^28\)

One byproduct of this decision was that multiple "theories" could be lumped together under a single common law count in the indictment, to which the jurors could return a single verdict. For example, someone indicted under a common law count of murder could be confronted by proof that he shot a policeman who interrupted an attempted burglary. A close question of fact might exist as to whether preparation had ripened into attempt so as to bring the felony murder theory into play. There might also be a close question of fact as to the defendant's intention in pulling the trigger so as to bring premeditated murder into play. Some jurors might be convinced that premeditation existed but not that a felony was in progress; others might be convinced of the progress of the felony but have reasonable doubt as to premeditation. Thus, by mixing and matching their different views of the proof, all twelve jurors could conscientiously join in a single verdict of guilty under the so-called common law count even though there was no unanimity as to any one theory of guilt.\(^29\) This practice still prevails in some states and has recently been upheld as constitutional by the United States Supreme Court.\(^30\)

\(^{27}\) 13 Wend. 159 (N.Y. 1834).

\(^{28}\) Id. at 168-69; accord People v. Conroy, 97 N.Y. 62, 69 (1884); Cox v. People, 80 N.Y. 500, 514 (1880); People v. Porter, 54 N.Y.S.2d 3, 5 (Kings County Ct. 1945).

\(^{29}\) See, e.g., People v. Sullivan, 65 N.E. 989, 999-90 (N.Y. 1903) (upholding murder conviction when evidence sufficient to establish premeditated murder or felony murder).

\(^{30}\) See Schad v. Arizona, 111 S. Ct. 2491, 2504 (plurality), 2506 (Scalia, J., concurring) (1991). Mix-and-match verdicts combining different theories of murder are no longer permitted in New York. See N.Y. CRIM. PROC. LAW § 200.30 (McKinney 1982) (requiring indictment to contain separate counts for each theory); see also infra notes 141-42 and accom-
A. Interpreting the Charge-Down Statutes

By providing that a defendant "may be found guilty of any crime, the commission of which is necessarily included in that with which he is charged in the indictment," section 445 of the Code of Criminal Procedure appears to have intended to remove any doubt that certain crimes could qualify as lesser included offenses, even if they might not be technically an "inferior degree" of the crime charged, as stated in section 444.31 Larceny, for example, is not in form a degree of burglary. Yet, if a defendant were indicted for breaking into a building for the purpose of stealing, it was intended that he might be convicted of larceny if the proof failed to show a breaking.32 All of the elements of the lesser crime of larceny were sufficiently alleged in the indictment, and the unproved allegation of breaking was treated as surplusage. By this line of reasoning, the charge-down rule of section 445 operated in harmony with the traditional requirement that an indictment must allege facts sufficient to support all of the elements of the crime for which the defendant was convicted.

The question that the courts were to confront at an early date was whether section 444 displaced the traditional pleading requirement in cases where a lower degree of a crime had elements foreign to the higher degree charged in the indictment. This problem arose because the Legislature could and did create lower degrees containing special elements not present in the definition of the higher offense. In Dedieu v. People,33 the defendant was indicted for first-degree arson in that he set fire to the dwelling house of another with persons living inside. The proof showed that the defendant did not damage the building but that he burned some of his own goods in order to collect the insurance.34 These facts met the statutory definition of arson in the third degree, and the defendant was convicted of that crime. The Court of Appeals reversed the conviction because the indictment nowhere alleged the burning of goods or an intent to defraud an insurer; it alleged only the willful burning of a building. Even though the crime of which the defendant was convicted was a "degree inferior" to the crime charged, the

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31 See supra notes 14-15 and accompanying text.
32 See, e.g., People v. Jackson, 3 Hill 92, 94 (N.Y. Sup. Ct. 1842).
33 22 N.Y. 178 (1860).
34 Id.
predecessor of section 444 was construed narrowly to conform to the more basic requirement that the factual allegations of the indictment limited the scope of the people’s proof and the defendant’s exposure to criminal liability. The legitimate reach of the statute was explained by the court:

In all these cases the indictment includes a true description of the act done, and all the circumstances defining the minor offence, and it adds to these the further circumstance, which, if proved, would raise the offence to the higher grade. Now, if the latter are not proved, there is yet no variance. As far as the proof goes, it conforms to the allegations. Simply, the whole indictment is not proved; but the principle applies, that it is enough to prove so much of the indictment as shows that the defendant has committed a substantial crime therein specified.\textsuperscript{35}

Nine years after the decision in Dedieu, the court in 1869 had occasion to revisit the issue in connection with a felony murder case, Keefe v. People.\textsuperscript{36} The charge-down statute became relevant in Keefe because from 1862 to 1873 felony murder, except for death caused by first-degree arson, was reduced in grade to second-degree murder and made punishable by a term of imprisonment.\textsuperscript{37} In Keefe, the grand jury charged the defendant with killing a man by “willfully, feloniously, and of his malice aforethought” stabbing him in the abdomen with a knife, causing his death. The court’s opinion does not discuss the proof offered at trial, but the jury acquitted the defendant of first-degree premeditated murder and convicted him of second-degree murder in the commission of a felony (probably robbery). The Court of Appeals sustained the con-

\textsuperscript{35} Id. at 184.
\textsuperscript{36} 40 N.Y. 348 (1869).
\textsuperscript{37} See Act passed April 12, 1862, ch. 197, §§ 6, 7, [1862] N.Y. Laws 368. From the first codification of New York’s criminal laws in 1829, there were no degrees of murder: felony murder, together with premeditated murder and depraved-mind murder, was a capital offense. See Foster v. People, 50 N.Y. 598, 601-02 (1872). Presumably, the reduction of felony murder in 1862 to a lower grade was in reaction to the harshness of capital punishment. This enlightened attitude did not last, however, and in 1873 felony murder was restored to the capital first-degree grade; intentional murder without deliberation and premeditation was substituted in the second-degree grade; intentional murder without deliberation and premeditation was substituted in the second-degree category. See ch. 644, [1873] N.Y. Laws 1014. Through various recodifications, this degree structure remained intact until the present penal law took effect in 1967. See N.Y. PENAL LAW art. 125 (McKinney 1987 & Supp. 1992). A previous attempt to restrict the category of capital murder had failed altogether because its penalty provisions were made unconstitutionally retroactive. See People v. Hartung, 22 N.Y. 95, 97-99 (1860) (discussing Act passed April 14, 1860, ch. 410, [1860] N.Y. Laws 712); COMM’N REP., supra note 25, at 557-60.
viction over defense objection, based on the Dedieu case, that the indictment did not allege facts concerning the commission of any felony independent of the stabbing itself. The court reaffirmed the holding of Dedieu but criticized the narrowness of its reasoning. In Dedieu the act and intent proved (burning goods to defraud an insurer) were radically different from the act and intent charged (burning the dwelling of another). In Keefe, however, the proof of the person killed and the means used were consistent with the allegations of the indictment. The court reasoned that where a crime is divided into degrees depending on various states of mind and surrounding circumstances, the charge-down statute superseded traditional pleading requirements as to those collateral elements. If the indictment were factually sufficient as to the basic overt act elements, and sufficient as to the intent and circumstances constituting the higher degree, the statute put the defendant on notice that he might be convicted of the lower degree, even if the indictment did not allege the intent and circumstances peculiar to the lower degree. As applied to the case at bar, the commission of an independent felony upon the deceased was a circumstance that could be proved even though not specially pleaded.

The attempt in Keefe to broaden the reasoning of Dedieu may have been wholly unnecessary. The opinion in Keefe was based on the assumption that the indictment on its face alleged only first-degree murder and failed to allege facts constituting second-degree felony murder. Only on this assumption was it necessary to give the predecessor of section 444 any wider scope than it had been accorded in the Dedieu case. Based on Enoch, however, an indictment charging killing with malice aforethought was a sufficient allegation to let in proof of felony murder. In Enoch, the charge-

38 Keefe, 40 N.Y. at 354-57.
39 Id. at 356-57. The period during which felony murder was second degree also elicited the first challenge to the fairness of using the common-law form of indictment. In Fitzger- rold v. People, 37 N.Y. 413 (1868), the defendant was indicted for “wilfully, and of malice aforethought” shooting and killing the deceased. He was found guilty as charged and sentenced to hang. The mode of appeal presented the court only with the indictment, the exceptions, and the verdict—none of the evidence. Id. at 415-21. Judge Bacon dissented from the court’s affirmation of the conviction. According to Judge Bacon, the indictment was as consistent with second-degree felony murder as with the first-degree premeditated murder; and, as such, insufficiently informed the defendant of the charge against him. At a minimum, he argued, the death sentence should be reduced to life imprisonment—as being the least penalty consistent with both the form of the indictment and the general guilty verdict. Id. at 421 (Bacon, J., dissenting).
40 See supra note 14 and accompanying text (discussing charge-down statute).
down statute had no relevance since felony murder was not then a lower degree. However, given that a simple allegation of malice aforethought was sufficient to support a conviction for felony murder as a first-degree crime, there is no reason to suppose the same allegation insufficient when felony murder was for a short while reduced to second degree. If so, it was unnecessary in Keefe to expand the statute to justify a conviction of a lower degree based on proof of facts not sufficiently alleged in the indictment for the higher degree.

Whether holding or dictum, the views expressed in Keefe were ignored in People v. Meegan, which affirmed a first-degree burglary conviction based on an indictment charging the defendant, in the language of the burglary statute, with breaking and entering a building with intent "to commit some crime." The defendant argued on appeal that the trial judge erred in failing to submit to the jury the misdemeanor of unlawful entry. By statute, this offense did not require a breaking, but was limited to unlawful entry with intent to commit a felony, a larceny, or malicious mischief. After observing that the evidence did not justify the request to charge, the Court of Appeals, in dictum of its own, noted:

It may be added, also, that no modification of the indictment, by striking out the characteristics of burglary in any or all of its degrees, would have left an adequate description of the misdemeanor. That offense involves an intent to commit a felony or a larceny or malicious mischief accompanying the entry. The only allegation of intent in the indictment is "to commit some crime."  

11 N.E. 48 (N.Y. 1887).

Id. at 48-49.

Id. (citing N.Y. CODE OF CRIM. PROC. §§ 444, 445 (Bender 1907)). The court did not distinguish a charge-down request by the defendant from one by the people, a distinction that first emerged in People v. Stevens, 6 N.E.2d 60, 61 (N.Y. 1936). In accusing the defendant of breaking in with the intent to commit "a crime," the indictment in Meegan was as broad and general as permitted by the burglary statute. In a later case, People v. Miller, 128 N.Y.S. 549 (App. Div. 1st Dep't), aff'd, 96 N.E. 1125 (N.Y. 1911), the burglary indictment was more specific: it alleged breaking with intent to steal the owner's goods. The defendant was convicted of unlawful entry, after the trial court submitted that crime as a lesser offense over the defendant's objection. The appellate division affirmed the conviction in a carefully reasoned (and much-cited) opinion that relied on Dedieu and distinguished Meegan. The court specifically rejected the argument that the statutory elements of the lower crime must always match the elements of the higher crime; it was sufficient that the particular manner of committing the higher crime, as alleged in the indictment (intent to commit larceny) matched the required elements of the lesser crime. Id. at 549-53.
This survey of early developments will close with another murder case decided during the period (1862-1873) when felony murder was reduced in grade to murder in the second degree. In *Foster v. People*, the defendant was indicted for murder in common law form. The evidence established that he killed the deceased by a blow to the head with a heavy tool after a trifling argument on a streetcar. The trial judge charged the jury on first-degree premeditated murder and manslaughter, but refused to charge second-degree felony murder. On the defendant's appeal from a conviction of first-degree murder, the court held that the judge properly withheld felony murder from the jury's consideration because there was no evidence of any felony other than the fatal assault itself. This was the first in a long line of cases holding that felony murder could be found only where the accused was engaged in some felony legally and factually distinct from the fatal assault—otherwise the assault (though felonious) merged into the homicide.

B. Summary

According to sections 444 and 445 of the former Code of Criminal Procedure, the statutory scheme and the degree structure of the various crimes in the Penal Law fixed the outer boundaries of what could be a "degree inferior to" the crime charged or "necessarily included" thereunder. Within these boundaries, the *Dedieu*, 50 N.Y. 598 (1872).

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44 Id. at 599-603.
45 Id. at 599-603.
46 See People v. Luscomb, 55 N.E.2d 469, 473 (N.Y. 1944); People v. Moran, 158 N.E. 35, 36 (N.Y. 1927); People v. Wagner, 156 N.E. 644, 646 (N.Y. 1927); People v. Patini, 101 N.E. 694, 695 (N.Y. 1913) (dictum); People v. Spohr, 100 N.E. 444, 445 (N.Y. 1912); People v. Huter, 77 N.E. 6, 8 (N.Y. 1906); Buel v. People, 78 N.Y. 492, 500 (1879) (dictum). In *Foster*, the defendant wanted to have the jury consider felony murder in an effort to escape conviction for first-degree premeditated murder. After felony murder was restored to the first degree in 1873, the rule of merger served the purpose of maintaining the statutory distinctions between first-degree felony murder, second-degree intentional murder, and the degrees of manslaughter. Without it, any felony assault that resulted in death would become murder in the first degree, thereby swallowing up the lower degrees of homicide, contrary to the manifest purpose of the statutory scheme. See, e.g., *Moran*, 158 N.E. at 36; *Wagner*, 156 N.E. at 646; *Patini*, 101 N.E. at 695; *Spohr*, 100 N.E. at 445; *Huter*, 77 N.E. at 8; see also Albert E. Arent & John W. MacDonald, *The Felony Murder Doctrine and Its Application Under the New York Statutes*, 20 CORNELL L.Q. 288, 298 (1935). The doctrine of merger became necessary because under the former Penal Law § 1044 "any felony" could serve as the predicate for a felony murder charge. See id. at 299. The doctrine is now superfluous since felony assault is not included in the felonies enumerated in the present felony murder statute. See N.Y. PENAL LAW § 125.25(3) (McKinney 1987 & Supp. 1992).
Keefe, and Meegan cases left some uncertainty as to how the factual allegations in the indictment might further limit the submission of lesser crimes. The Foster case was the first of many to pass on how the state of the proof at trial affected the judge's duty to charge down. The following two sections of this Article will trace subsequent developments with respect to the indictment and the evidence—up to the adoption of the present CPL in 1970.

II. Twentieth Century Developments: The Limiting Effect of the Indictment

The tension between the narrow interpretation of the charge-down statute adopted in Dedieu and the broader interpretation adopted in Keefe came to a head in People v. Santoro with the narrow view prevailing. The defendant was indicted for first-degree manslaughter in that "without a design to effect the death" of the victim, defendant caused his death by use of a dangerous weapon, a pistol. The proof showed an altercation between the deceased and the defendant, that the deceased seriously wounded the defendant, that the defendant shot the deceased twice in the chest, and that death came ten days later. Because of evidence that the deceased failed to obey his doctor's orders, the principal issue of fact at the trial was whether the defendant's acts were the proximate cause of death. In addition to charging the jury on the elements of manslaughter, the trial judge submitted each of the three degrees of assault. Defense counsel objected to the submission of assault in the first degree, defined as assault with a deadly weapon with an intent to kill. The jury convicted of assault in the first degree and the defendant appealed.

In a 4-3 decision, the Court of Appeals in Santoro reversed the conviction over the dissenters' argument that the jury instruction was warranted by Keefe. The majority opinion is not a model of clarity and contains the unfortunate dictum that lack of intent to kill is an essential element of manslaughter. The principal ground

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47 See supra note 33.
48 See supra note 36.
49 128 N.E. 234 (N.Y. 1920).
50 Id. at 235.
51 Id.
52 Id. at 239 (Chase, J., dissenting).
53 See id. at 236 (citations omitted). A recurrent problem in drafting statutes that define different degrees of crime consists in stating the effect of mitigating elements that dif-
of decision, however, was a reaffirmation of the Dedieu rule that the charge-down statute, now recodified as section 444, justified submitting a lower degree of crime to the jury only when the indictment for the higher degree set forth averments of fact sufficient to match the elements of the lower degree. Because the indictment did not allege that the defendant intended to kill the victim when he shot him, and indeed, specifically alleged the opposite, it was error to instruct the jury that they might find the defendant guilty of a type of assault that required an intent to kill.

Differentiate a lower degree from a higher. When such a mitigating element is incorporated in the definition of a lesser offense, a court may easily stumble into the error of interpreting it as a positive element necessary for guilt of such lesser offense. The Court of Appeals has usually avoided this pitfall. For example, under the former Penal Law, the definition of felony murder (§ 1044) stated that it was "without a design to effect death"; and second-degree intentional murder (§ 1046) was "without deliberation and premeditation." The court has brushed aside arguments that proof of these pseudo-elements was necessary for guilt of the lesser crime. The statutes have been interpreted as simply eliminating the correlative aggravating elements. See People v. Sullivan, 65 N.E. 989, 990 (N.Y. 1903); Dolan v. People, 64 N.Y. 485, 498 (1876).

In People v. Peetz, 164 N.E.2d 384 (N.Y. 1959), the court fell into the trap of holding "heat of passion" a necessary element to be proved in a manslaughter prosecution. See id. at 387. The Peetz holding has been eliminated by the carefully drawn language of the present Penal Law §§ 125.25(1)(a) and 125.20(2). See N.Y. Penal Law §§ 125.25(1)(a), 125.20(2) (McKinney 1987 & Supp. 1992).

The general problem continues to persist. See, e.g., People v. John P., 470 N.Y.S.2d 299, 299-300 (Sup. Ct. Crim. T. Queens County 1983) (dismissing indictment for criminally negligent homicide because evidence disclosed defendant must have foreseen risk). Conscious foresight of risk is the factor that differentiates the higher offense of reckless manslaughter (N.Y. Penal Law § 125.20(1) McKinney 1987 & Supp. 1992) from the lower offense of criminally negligent homicide (N.Y. Penal Law § 125.10) in which the defendant "fails to perceive" the risk. Evidently, the John P. court believed that foresight of risk exonerated the defendant from criminal negligence. Extraordinary!

See Santoro, 128 N.E. at 236. Section 444 applied to the facts of Santoro even though assault was not technically a "degree inferior" to manslaughter because, by amendment, it provided that "[u]pon a trial for murder or manslaughter, if the act complained of is not proven to be the cause of death, the defendant may be convicted of assault in any degree constituted by said act, and warranted by the evidence." Act of April 23, 1900, ch. 625, [1900] N.Y. Laws 1373-74. The appellate division had previously reached the same result in a different case, but that decision was reversed by the Court of Appeals on a technical ground: the defendant had failed to except to the trial judge's submission of the lesser crime. See People v. Huson, 99 N.Y.S. 1081 (App. Div. 4th Dep't 1906), rev'd, 79 N.E. 835 (N.Y. 1907). In reversing, the Court of Appeals emphasized the deliberate trial strategy of defense counsel. See Huson, 79 N.E. at 835-36.

See Santoro, 128 N.E. at 237.
A. The Application of Dedieu and Santoro to Felony Murder Cases

The survey of nineteenth century cases brought out that under the line of cases beginning with *Enoch*, a murder indictment in common law form, alleging malice aforethought, sufficiently alleged mental culpability to support proof of any of the three statutory theories of murder. However, it was also held that if such an indictment specified one of the three theories of murder, the people’s proof would be limited to that theory to the exclusion of the others. Given that the generic common law count would suffice, and that multiple theories could be mixed together under the generic count—even to the extent of producing a mix-and-match guilty verdict—one might ask why a prosecutor would want to confine an opportunity for conviction to a specific theory by a narrowly drawn indictment? The reason is that, under the generic count, if an appellate court found legal error or insufficiency of proof affecting one of the two theories on which the jury had been instructed, the conviction would be reversed, because it would be impossible to know whether the jurors acted on the theory tainted by error or the one not so tainted. Consequently, in cases where the evidence before the grand jury would justify both a premeditated murder theory and a felony murder theory, it became common to hand up two counts: one in either common law form or premeditated form to cover proof of premeditated murder; and a second count specifically charging felony murder. This second count would not contain an allegation that the accused intended to kill, and might even track the words of the statute and affirmatively allege that the accused did not intend to kill.

If a felony murder case were submitted to the jury under a common law count, there could be no obstacle, as far as the indictment was concerned, to submitting lesser degrees of homicide if the evidence warranted. The allegation of malice aforethought covered the ground. But what about a case in which the sole count submitted to the jury specifically alleged that the accused caused a death during a felony, and contained no allegation of homicidal intent?

56 See supra notes 27-28 and accompanying text.
57 See People v. White, 24 Wend. 520, 536-37 (N.Y. 1840).
58 See People v. Lazar, 2 N.E.2d 32, 32 (N.Y. 1936); People v. Huter, 77 N.E. 6, 7 (N.Y. 1906); People v. Sullivan, 65 N.E. 989, 990 (N.Y. 1903) (dictum).
This issue was addressed for the first time by the Court of Appeals in 1910. In *People v. Schleiman* the defendant was charged in a two-count indictment with murder in common law form and felony murder for shooting a woman to death while burglarizing her house. The district attorney tailored his proof exclusively to the felony murder theory and made no argument concerning premeditation or intent. The jury brought in a verdict of murder in the first degree after the trial judge charged only the felony murder count and refused the defendant's request to submit the lower degrees of homicide. The court's opinion strongly suggests that it was the uncontradicted evidence of felony murder that induced the trial judge to refuse to submit any of the lesser degrees of homicide. Indeed, that is the sole context in which the case came to be viewed many years later, after all the judges who participated had left the bench. A fair reading of the opinion, however, discloses that a distinct reason for sustaining the felony murder conviction, and approving the trial judge's all-or-nothing charge, was the court's view that the specificity of the felony murder count in the indictment rendered all forms of homicidal intent immaterial.

Under such circumstances, the power to convict of a lesser degree of felonious homicide which belongs to the jury in cases where the degree depends upon the intent cannot properly be exercised, because an intent to kill is not a necessary ingredient of the offense in this kind of murder.

Although the court in *Schleiman* carefully distinguished between the common law murder count, which was not submitted to

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*90 N.E. 950 (N.Y. 1910).*

*Id.* at 951-53.

*Schleiman,* 90 N.E. at 952. Schleiman's accomplice, who did not personally do the killing, was tried with Schleiman and also convicted of felony murder and sentenced to death. *Id.* at 951. It does not appear that the accomplice, Giro, requested a charge-down; thus, when his appeal was decided separately, no such issue was addressed by the court. *See* *People v. Giro,* 90 N.E. 432, 434 (N.Y. 1910). It is food for speculation whether the *Schleiman* court was influenced by this circumstance—why should the principal get the benefit of a charge-down and not the accomplice. *See* Samuel Bader, *Lesser Included Crimes,* 21 Brook. L. Rev. 75, 82 (1954). Later cases indicate that Schleiman's accomplice would not have been given a charge-down even if he had asked for one. *Compare* *People v. Seiler,* 158 N.E. 615, 617 (N.Y. 1927) (where evidence could not support other degrees of crime, court “was not required to charge the jury upon degrees of crime”) and *infra* notes 92-95 and accompanying text with *People v. Koerber,* 155 N.E. 79, 82-83 (N.Y. 1926) (court should have charged jury upon degrees of crime) and *infra* notes 99-105 and accompanying text.
the jury, and the felony murder count, which was, the opinion could also be read as disapproving a lesser included offense charge under a felony murder “theory” regardless of how murder was charged in the indictment. This ambiguity also appears in People v. Monat, decided by the same bench one year later. The defendant was convicted of first-degree murder for beating a saloon keeper to death with an iron bar during a robbery. The court’s opinion does not reveal the form of the indictment; only that both the premeditated and felony murder theories were presented to the jury. The trial judge submitted second-degree (intentional) murder as a lesser included offense under the premeditation theory, but did not submit any of the manslaughter crimes. As to the premeditated murder theory, the court noted counsel’s failure to request a manslaughter charge, but also found that the defendant could not have been prejudiced by the omission, since the jury’s verdict of first-degree murder, when given the option to convict of second-degree murder, indicated that they would not have considered lesser alternatives. Citing Schleiman, the Monat court stated simply: “So far as concerns the killing of a human being by one engaged in the commission of a felony, conviction in a lesser degree than murder in the first degree is not justified.”

That the decisive factor limiting the submission of lesser crimes was to be found in the specific factual allegations of the indictment, rather than in the abstract “theory” of felony murder as defined by statute, seems probable when it is remembered that felony murder was not then understood to be a separate crime from the other types of murder, each having lower degrees of its own. Murder in the first degree was viewed as a single crime, not three distinct crimes; the lower degrees were lower degrees of the single crime. True, there were three different ways of proving the necessary mens rea, but that did not fractionate the unity of the crime itself. Otherwise it would have been impermissible to indict in common law form and obtain a single verdict with multiple theories of proof. This conclusion is reinforced by People v. Nich-

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62 93 N.E. 982 (N.Y. 1911).
63 Id. The same point had previously been decided in People v. Granger, 79 N.E. 833, 834 (N.Y. 1907). Subsequent cases have relied on the “harmless error” aspect of Monat. See, e.g., People v. Richette, 303 N.E.2d 857, 858 (N.Y. 1973); People v. Brown, 96 N.E. 367, 369 (N.Y. 1911).
64 Monat, 93 N.E. at 983 (citing People v. Schleiman, 90 N.E. 950, 953 (N.Y. 1910)).
a felony murder case holding that the predicate felony was not a lesser included offense under a murder indictment in common law form. The primacy of the allegations in the indictment over an abstract theory of the statutory crime seems conclusively established by People v. Van Norman. The defendant was convicted of first-degree murder under an indictment, not in common law form, but specially pleading that the defendant caused the death of one person (X) during the commission of a felony: assault in the first degree upon another person (Y) with the intent to kill (Y). The proof showed that the defendant and another suspect (X) were under arrest in a police car. The defendant produced a pistol and fired six shots at one of the policemen (Y), who fired back. Both the policeman and the defendant were wounded, but one of the defendant's shots hit and killed the other suspect (X). The trial judge refused to instruct the jury that they could convict of any lesser crime than that charged in the indictment—felony murder. The jury returned a guilty verdict. Although then, unlike now, a felonious assault could serve as the predicate for felony murder, the felony assault was required to be independent of the assault that caused the victim's death. The Van Norman court examined the Schleiman case and concluded that it was limited to felony murder charges where the intent to kill was immaterial. Noting that the particular felony in the case before it alleged an assault with intent to kill, the Court of Appeals ruled that the jury might possibly take a view of the facts that eliminated the alleged independent felony and simply conclude that the defendant accidentally killed his confederate while shooting at the policeman. If this

68 129 N.E. 883 (N.Y. 1921).
69 Id. at 884. Nichols continues to be the rule under the present Criminal Procedure Law. See, e.g., People v. Berzups, 402 N.E.2d 1155, 1160 (N.Y. 1980) (robbery not a lesser included offense under felony murder); People v. Rios, 454 N.Y.S.2d 301, 301 (App. Div. 1st Dep't 1982) (predicate sodomy count not lesser included offense under felony murder).
70 132 N.E. 147 (N.Y. 1921).
71 Id.

For example, where an assailant temporarily turned aside from the original assault victim, he attacked a rescuer and caused his death. See supra note 46 and accompanying text; see also N.Y. PENAL LAW § 125.25(3) (McKinney 1987 & Supp. 1992) (assault not now predicate for felony murder).
72 See People v. Moran, 158 N.E. 35, 36-37 (N.Y. 1927); People v. Spohr, 100 N.E. 444, 446 (N.Y. 1912). It would therefore seem that on the facts in Van Norman there was no legally sufficient evidence of an independent felony and that only the lower crimes should have been submitted to the jury.
were done with an intent to kill but without premeditation and deliberation, it would be second-degree murder; beyond that, according to the court, there was room to find manslaughter, depending on the presence or absence of an intent to kill. Accordingly, the court reversed the conviction for failure to submit the lower degrees as requested by the defendant. The court noted the anomaly that the burglary murder charge in Schleiman justified the failure to charge the lesser degrees, while the first-degree assault felony murder charge required a charge-down. The distinction flowed from the command of section 444, which could “be deviated from in homicide cases only when the intent to kill is not a necessary element of the offense charged in the indictment and established at the trial.”

The distinction made in Van Norman found application several years later in People v. Hoffman. The defendant was brought to trial for first-degree murder under an indictment specifically charging him with having killed a woman, without an intent to kill, during commission of rape. Although most murder cases decided theretofore involved the court’s refusal to grant a defendant’s request for submission of lower degrees, in Hoffman the defendant was willing to stake everything on a choice between the electric chair and freedom. The judge, however, charged the jury, over defense objection, on premeditated murder, second-degree intentional murder, and felony murder. The jury convicted of second-degree intentional murder. The appellate division reversed, distinguishing cases where the indictment was in common law form, in which a general allegation of malice covered all types of homicidal mens rea. The indictment did not allege any mens rea other than the intent to commit rape. In finding the defendant guilty of second-degree murder, the jury necessarily found that he intended to kill:

Therefore the jury were permitted to find a fact not a necessary element of the crime as charged, a fact denied in the indictment, and to base their verdict thereon. The indictment was entirely sufficient in form, but it did not authorize a conviction of murder in the second degree, as a necessary element of that crime was omitted.

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72 Van Norman, 132 N.E. at 148.
74 Id. at 250. The Hoffman case was a cause celebre in its day, as illustrated in the following passage:
The Court of Appeals affirmed without opinion.\textsuperscript{78}

The decisive blow to the argument that the lower degrees of homicide were intrinsically alien to the statutory felony murder theory came in \textit{People v. Koerber}.\textsuperscript{76} The defendant was indicted for first-degree murder in common law form.\textsuperscript{77} The killing occurred during a robbery, and felony murder was the only theory submitted to the jury, which returned a guilty verdict under an all-or-nothing instruction. The Court of Appeals reversed, finding that, under the evidence, the lower degrees of homicide should have been charged, as requested by the defendant.\textsuperscript{78}

The \textit{Koerber} holding established that if the indictment were broad enough in its allegations to include the mens rea of the lower degrees of homicide, i.e., a common law form, the decision of a prosecutor to tailor proof to the felony murder theory would not deprive a defendant of the right to have the jury consider any lower degrees compatible with the evidence. The line of cases from \textit{Dedieu}\textsuperscript{75} through \textit{Santoro}\textsuperscript{80} that culminated in \textit{Hoffman}\textsuperscript{81} established that no defendant could be exposed to conviction of any lower crime where a narrowly drawn felony murder indictment omitted an allegation of criminal intent necessary for guilt of the

Hoffman was convicted of second-degree murder and sentenced to twenty years to life. Upon learning that he was a suspect, Hoffman tried to manufacture an alibi that would help him avoid both lynching and the death penalty. He was inspired to commit this folly by his fear that he would otherwise be another Leo Frank. The false alibi was exposed at trial and the jury viewed it as evidence of guilt. The conviction was reversed on a technicality—faulty wording in the original indictment. At retrial, a mistrial was declared when Hoffman's defense counsel collapsed from a heart attack. The third trial resulted in a hung jury. In 1929, at the fourth trial, it was shown that the original eyewitness testimony was perjured and that the fatal shots could not have come from Hoffman's gun. Hoffman was acquitted because "[t]he jury had realized how treacherous circumstantial evidence could be."


\textsuperscript{76} \textit{Hoffman}, 157 N.E. at 869.

\textsuperscript{75} 155 N.E. 79 (N.Y. 1926); accord \textit{People v. Draper}, 104 N.Y.S.2d 703, aff'd 101 N.E.2d 763 (1951).

\textsuperscript{77} \textit{Koerber}, 155 N.E. at 80. The \textit{Koerber} opinion does not reveal the actual form of indictment, but in \textit{People v. Stevens}, 6 N.E.2d 60 (N.Y. 1936), the dissenting opinion of Judge Lehman states that Koerber was indicted in common-law form. \textit{Id.} at 65 (Lehman, J., dissenting).

\textsuperscript{78} \textit{Koerber}, 155 N.E. at 80-81.

\textsuperscript{79} See supra notes 33-35 and accompanying text.

\textsuperscript{80} See supra notes 49-55 and accompanying text.

\textsuperscript{81} See supra notes 73-75 and accompanying text.
lower degree. In all three cases the defendant had objected to the charge-down. An important question left unresolved by these cases was whether a prosecutor could force an all-or-nothing jury verdict by bringing an indictment specifically pleading only felony murder, without any allegation of homicidal intent. In other words, was Hoffman a two-way street? Did its holding that the people were limited to the allegations in the indictment also bind the defendant—as Schleiman seemed to indicate?

The issue was confronted in People v. Stevens, decided ten years after Hoffman. Just as in Schleiman, the murder indictment was in two counts: one in common law form and one specifically charging killing during a robbery. Again, as in Schleiman, the trial judge, at the prosecutor's request, sent the case to the jury only on the felony murder count. The judge refused a defense request for a charge-down and gave the jury the stark choice of guilty as charged or acquittal. The jury convicted. The Court of Appeals affirmed over a lengthy dissent by Judge Lehman. The court split solely over whether the evidence qualitatively justified submitting lesser crimes. Judge Lehman, who believed that the evidence was sufficient, made the point that the form of the indictment should not be so controlling as to deprive an accused, in a capital case, of the substantial right to have the jury presented with an appropriate range of choice in terms of degrees of guilt. He re-interpreted Schleiman as a case based on the state of the evidence, not the form of the indictment. Otherwise, he argued, even if the jury had some doubts as to the evidence in relation to the elements of the crime charged, they would be under severe moral pressure to suppress those doubts if the only alternative were to set free a defendant who, by common sense, was guilty of some serious responsibility for the death of a fellow human being. Significantly, the majority agreed with this aspect of Judge Lehman's dissent:

Upon the request of the district attorney the court submitted the case to the jury on a felony murder count only and charged that it must find the defendants guilty of murder in the first de-

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82 See supra notes 59-61 and accompanying text. This assumption also appears to underlie the reasoning of Van Norman, supra notes 68-72 and accompanying text.
83 6 N.E.2d 60 (N.Y. 1936).
84 Id. at 62 (Lehman, J., dissenting).
85 Id.
86 Id. at 66-67 (Lehman, J., dissenting).
gree or acquit them. . . . It is true that where there is evidence from which the jury could find that the defendants are guilty of a lesser crime, the jury must not be left with the alternative of convicting of murder in the first degree or acquittal.87

Technically, this statement of the majority was dictum, since the court found no basis in the evidence to warrant a charge-down. Nevertheless, given the emphasis in the dissenting opinion, it seems almost certain that this was and has remained the settled view of the Court of Appeals. No subsequent case decided under the former Code of Criminal Procedure ever attempted to justify denying a defendant's request for a charge-down in a felony murder case on the basis of the form of the indictment.88 If this position is accepted, it provides an interesting comparison with the Hoffman case. If there were no factual allegation of homicidal mens rea in the indictment, no conviction could be had for any lesser crime requiring such mens rea over the defendant's objection—no matter what the proof showed. But, if the proof justified a charge-down and the defendant requested the trial judge to give one, he waived the deficiency in the indictment, and the charge-down was required.89 This point will be revisited in Part IV, when the rules of the present CPL are discussed. First, however, it is necessary to review the law as it developed with respect to evidentiary matters.

III. Twentieth Century Developments: The Limiting Effect of the Evidence

Notwithstanding the statutory authorization of conviction for "any degree inferior" to the crime charged, it is axiomatic that no one can be convicted of a crime unless there is legally sufficient evidence to establish every necessary element of the actus reus and mens rea. Because felony murder is unique among the homicide crimes in not requiring any mental culpability with respect to the

87 Id. at 61.
88 See, e.g., People v. Oddy, 229 N.Y.S.2d 983 (App. Div. 4th Dep't 1962). In Oddy, two youths were specifically indicted for felony murder in that they fatally beat a guard in furtherance of an attempted escape from jail. Their convictions were reversed on appeal because the trial judge erred in denying their request for a charge-down. See id. at 984-87.
89 See People v. Huson, 79 N.E. 835, 836 (N.Y. 1907). The other side of the waiver coin is that a defendant who requests, or acquiesces in, the submission of a lesser offense containing elements beyond those alleged in the indictment is bound by the result and cannot complain if he is convicted of the lesser crime. See id.
killing, it is possible to have a prima facie case of felony murder but not of any of the other forms of murder or manslaughter.

In the earlier discussion of nineteenth century developments, it was noted that Foster held that felony murder (then a lower degree of murder) should not be submitted to the jury when the evidence did not disclose any predicate felony independent of the killing itself. The same basic principle was applied in reverse after felony murder was restored to its former position as first-degree murder, and intentional murder, without premeditation, was subordinated to second degree. In *People v. Seiler*, the victim of a robbery was shot and killed by one of the robbers. The defendant was proved to have participated in the robbery but neither fired the fatal shot nor aided and abetted the felon who did. His defense was that he was so intoxicated as to be unable to form an intent to rob. Over the defendant's exception, the trial judge refused to submit the lower degrees of homicide and left the jury with the choice between acquittal or conviction of the crime charged. The Court of Appeals approved the trial judge's charge to the jury and affirmed the felony murder conviction.

The court acknowledged that evidence of intoxication raised a question of fact for the jury as to defendant's intent to commit robbery; that issue was resolved against him, however, by the jury verdict. Moreover, evidence tending to exculpate the defendant from responsibility for felony murder did not necessarily constitute evidence to inculpate him for any other type of homicide. Because no proof connected the defendant with the shooting, as distinct from the robbery, the court applied the basic principle that no crime, even a lower degree of the crime charged, should be submitted to the jury without legally sufficient evidence to establish the necessary elements. The only possible theory of guilt supported by the evidence was vicarious responsibility for the act of a co-felon imputed by law to every participant in the felony of robbery.
The requirement of legally sufficient evidence to support submission of a lower degree was an inflexible rule that bound both the people and the accused. In *Seiler*, the trial judge properly refused to submit the lower degrees despite the request of the defendant, who wanted the jury to consider them. In *People v. Martone*, on virtually identical facts, the trial judge did submit the lower degrees over the objection of the defendant, who obviously wanted to gamble on an all-or-nothing verdict. The jury compromised and returned a verdict of manslaughter in the first degree. The conviction was reversed because there was not sufficient evidence to connect the defendant with that crime. The only theory of guilt consistent with the evidence was that the defendant participated in a robbery, in furtherance of which an accomplice caused a death—and of that responsibility the jury's verdict necessarily acquitted him.

By way of contrast, *People v. Koerber* illustrates a case where it was held that, under the evidence, the lower degrees should have been submitted. *Koerber* also involved a felony murder charge based on a killing during a robbery. Here, too, the defendant introduced evidence that he was grossly intoxicated and actual killer would require proof of intentional complicity in the killing itself. See *People v. Monaco*, 197 N.E.2d 532, 535 (N.Y. 1964); *People v. Agron*, 176 N.E.2d 556, 558 (N.Y.), *cert. denied*, 368 U.S. 922 (1961); *People v. Weiss*, 48 N.E.2d 306, 313 (N.Y. 1943). When passing on the legal sufficiency of the evidence to establish accomplice liability for premeditated murder, the court has sometimes been willing to draw broader inferences where a felony murder theory was also in the case. See *People v. Emieleta*, 144 N.E. 487, 488-89 (N.Y. 1924); *People v. Wilson*, 40 N.E. 392, 394 (N.Y. 1895); *cf. supra* notes 91-93 and accompanying text.

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95 See *Seiler*, 158 N.E. at 616. It had previously been held that if a defendant acquiesced in the erroneous submission of a lower degree of homicide lacking evidentiary support, the error was not preserved for appeal. See *People v. Thompson*, 41 N.Y. 1, 4-5 (1869) (conviction of second-degree felony murder upheld when no evidence of independent felony); *cf. Foster v. People*, 50 N.Y. 598, 603 (1872); supra notes 44-46 and accompanying text.

The statement in the text is meant to emphasize that it was not error to reject a defendant's request to submit a lesser crime for which there was no legally sufficient evidence. See *Seiler*, 158 N.E. at 616. It was error, however, to reject a defendant's request to submit a lesser crime the elements of which were not sufficiently alleged in the indictment. See *People v. Stevens*, 6 N.E.2d 60, 61 (N.Y. 1936); *People v. Oddy*, 229 N.Y.S.2d 993, 987, 989-90 (App. Div. 4th Dep't 1962). In summary, insufficiency in the indictment was waivable by a defendant as a matter of right; insufficiency in the evidence was not. This requirement protected the public interest in avoiding lawless mercy verdicts.

96 176 N.E. 544 (N.Y. 1931).
97 *Id.* at 544-45.
98 155 N.E. 79 (N.Y. 1926).
unable to entertain an intent to rob. The key difference between Koerber and the Seiler and Martone cases lay in proof that Koerber himself fired the fatal shot. He requested that the lower degrees of homicide be submitted to the jury. The trial judge refused and gave the jury only the alternative of convicting of felony murder or acquitting. Faced with this choice, the jury understandably convicted of felony murder. The Court of Appeals reversed, holding that, under the evidence, the lower degrees should have been charged. The court recognized that the defendant’s intoxication raised a jury question of whether he intended to rob. In this case, however, the evidence indicated that even without an intent to rob, the defendant might be criminally responsible for some form of homicide:

It is conceivable, for example, that a youth whose mind was befuddled by drink might intend merely to stage a holdup and yet be guilty of some degree of homicide. He might be so frightened by resistance as to shoot in the heat of passion, the emotion of fright, and thus be guilty of manslaughter in the first degree, or conceivably even of murder in the second degree. The jury would have to say under proper instructions as to the degrees of crime.

The jury verdict, of course, logically entailed a finding that the defendant was not so intoxicated as to lack an intent to commit robbery. This, it was argued, rendered harmless any error in failing to charge lower degrees that might apply if such a felonious intent were absent. Nevertheless, the court recognized the circularity of this argument and how the all-or-nothing charge distorted the fact-finding process to the defendant’s prejudice:

When the alternative presented was conviction of murder in the first degree or acquittal, a conscientious jury would scarcely bring itself to a verdict of not guilty in this case. If they had been instructed that other verdicts were permissible, they might or might not have found the defendant guilty of a lesser degree of felonious homicide. We therefore cannot overlook the failure of the court to give proper instructions, as we might if we could reach the conclusion that there was a lack of sufficient evidence to go to the jury that defendant was, in the only relevant sense, too drunk to

99 Id. at 80.
100 See id. at 82.
101 Id.
form the specific intent of committing robbery.\textsuperscript{102}

The concluding sentence of the opinion in Koerber, quoted above, leads to a discussion of a second category of felony murder cases. In the cases discussed thus far, the evidence disclosed some fact, usually intoxication, that might plausibly cast doubt on the defendant's responsibility for the felony.\textsuperscript{103} The inquiry then became whether there was other evidence legally sufficient to render him criminally responsible for the killing on a basis other than felony murder.\textsuperscript{104}

\textsuperscript{102} Id. at 83 (citation omitted).

\textsuperscript{103} Another recurrent issue of this type in felony murder cases arose because, under the former Penal Law, felonious assault could provide the predicate for a felony murder conviction if the felonious assault were independent of the fatal assault—otherwise the assault merged into the homicide, precluding use of the felony murder theory. See supra note 46 and accompanying text. Where the evidence presented a fair question of fact whether there was a separate felonious assault on a third person, distinct from the fatal assault on the victim, it was error to send the case to the jury without a charge-down. See People v. Moran, 158 N.E. 35, 36 (N.Y. 1927); People v. Van Norman, 132 N.E. 147, 148 (N.Y. 1921); see also supra note 71. In Moran, Chief Judge Cardozo stated:

This killing was not done in circumstances excluding every possible hypothesis except one of homicide while engaged in another or independent felony. . . .

. . .

This court has given warning more than once that the conditions justifying submission of the “felony” grade of homicide to the exclusion of all others must be understood to be “exceptional.” Such a submission is proper only where there is “no possible view of the facts which would justify any other verdict except a conviction of the crime charged or an acquittal.” Apparently the warning has need to be repeated. Evidence uncertain in its implications must not be warped or strained to force a jury into the dilemma of choosing between death and freedom. We do not say that this jury, with choice unconstrained, would have chosen otherwise than it did. There was ample evidence to justify a verdict of deliberate and premeditated murder if that issue had been submitted. It never was. The reason it never was is that the jurors must then have been informed of the range and measure of their power. Moran, 158 N.E. at 36-37 (citations omitted).

\textsuperscript{104} See People v. Cummings, 8 N.E.2d 882, 883 (N.Y. 1937). In Cummings, the defendant, an accomplice in a hold-up, was intoxicated and claimed he lacked an intent to commit robbery. He did, however, urge his confederate to shoot the victim. Id. at 882-83. The court reversed his felony murder conviction because the trial judge had refused a charge-down:

During this past year we have had many of these felony murder cases coming to our court wherein the degrees of homicide might just as well have been charged without any injury to the People or the enforcement of law, thus avoiding the very serious question of the correctness of a charge omitting the degrees. We again caution the trial judges to use the short form of charge—murder in the first degree, or not guilty—only when there can be no question whatever of the killing during the commission of the felony. If the evidence shows the defendant to have been intoxicated or his mentality so impaired or weakened as to call in question his ability to have formed an intent, then the degrees of homicide must be charged.
A consideration of the second category of cases presupposes sufficient evidence to fix some other form of criminal responsibility on the defendant. The distinguishing feature of this second category is the absence of a plausible reason to exculpate the defendant from responsibility for felony murder.

In deciding whether a defendant is guilty of the crime charged in the indictment, the jury is instructed on the people's burden of proof beyond a reasonable doubt. This instruction is given in general terms as a rule of law to be followed by the jury. The application of the reasonable doubt rule, however, must be left to the jury without further interference by the court. Thus, in a felony murder case, as in any other case, the jury may refuse to find that the defendant participated in the felony, no matter how clear and uncontradicted the inculpatory evidence may be. This necessarily will result in acquittal of the felony murder charge. What then? It is theoretically possible for the jury to return for further instructions on other possible lesser homicide liability for which there is legally sufficient evidence. But it has never been our practice to allow such piecemeal adjudication; at the conclusion of the evidence, the judge instructs the jury once and for all on the possible

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Id. at 883.

People v. Lunse, 16 N.E.2d 345, 346 (N.Y. 1938), decided one year later, also involved two intoxicated accomplices in a robbery, when a policeman was shot by another one of the robbers after interrupting the robbery. The defendants were convicted of felony murder under an all-or-nothing charge. The court affirmed the convictions under the authority of Seiler, see id. at 347, and distinguished Cummings on the ground that Cummings' direction to the killer to shoot the victim afforded legally sufficient evidence to convict of some form of homicide other than felony murder, see id. at 347-48. The dissent pointed out that both defendants knew that their accomplice carried a gun and that this knowledge justified an inference of complicity in the shooting. Id. at 349 (Loughran, J., dissenting) (citing People v. Sullivan, 65 N.E. 989, 991 (1903)); see People v. Porter, 54 N.Y.S.2d 3, 7-9 (Kings County Ct. 1945); cf. N.Y. PENAL LAW § 125.25(3)(c) (McKinney 1992) (requiring defendant to show "no reasonable ground" for believing other participant armed as element of affirmative defense to felony murder).

105 See N.Y. CRIM. PROC. LAW § 300.10(2) (McKinney 1982); In re Winship, 397 U.S. 358, 361 (1970).

106 That is what is meant when we say that whether the evidence in a particular case meets the reasonable doubt standard is a question of fact for the jury, not a question of law for the court. Not only can the court not direct a guilty verdict, Horning v. District of Columbia, 254 U.S. 135, 136 (1920); People v. Howell, 5 Hun 620, aff'd, 69 N.Y. 607 (1877), no matter how clear the evidence may be, the court cannot instruct the jury that the evidence satisfies the standard, or even that any one element of the crime has been established, see People v. Walker, 91 N.E. 806, 808 (N.Y. 1910); McKenna v. People, 81 N.Y. 360, 362 (1880).
verdicts they may return under the indictment and the evidence.\textsuperscript{107}

Should the judge charge on lesser included crimes for which there is legally sufficient evidence despite the apparently airtight character of the proof of the crime charged—the felony murder? Or would such instructions amount to an invitation for the jury to exercise their fact-finding prerogative in a lawless manner, out of sympathy for the accused, distaste for the victim, or other human but legally irrelevant consideration? Where the proof points just as strongly to guilt of the higher crime as it does to the lesser, especially where the proof is logically indivisible in its relevance to the elements of the two crimes, the cases, with some vacillation, have tended to avoid compromise verdicts in felony murder cases.

The first case to consider this issue was \textit{People v. Schleiman}.\textsuperscript{108} As previously discussed in connection with the limiting effect of the indictment on the submission of lower degrees, the case was submitted to the jury under a count charging the defendant with killing during a burglary.\textsuperscript{109} The people’s proof tended to show that the defendant and a confederate, both armed, burglariously entered a dwelling house at night. While the defendant’s accomplice struggled with one of the occupants, the defendant fired into a room from a hallway, fatally wounding another member of the family. The jury found the defendant guilty pursuant to a charge that confined them to a choice between guilty of felony murder or acquittal. The Court of Appeals approved the trial court’s charge and affirmed the conviction.\textsuperscript{110}

The court’s opinion is ambiguous as to whether the refusal to charge the lower degrees was justified by the form of the indictment or the state of the proof. The indictment aspect of the case was modified by \textit{Stevens}, as discussed previously.\textsuperscript{111} As to the evidentiary aspect, the court remarked at the close of its opinion:

The conditions are exceptional, however, which warrant a refusal to instruct the jury as to their power to convict of a lower degree of the crime charged for which the defendant is upon trial, and great care should be observed, as was done here, not to withhold such instruction unless the case is one like that before us, where there was no possible view of the facts which would justify any

\textsuperscript{107} See N.Y. CRIM. PROC. LAW § 300.10(4) (McKinney 1982).
\textsuperscript{108} 90 N.E. 950 (N.Y. 1910).
\textsuperscript{109} See supra text accompanying notes 59-61.
\textsuperscript{110} \textit{Schleiman}, 90 N.E. at 951-53.
\textsuperscript{111} See supra notes 83-87 and accompanying text.
other verdict except a conviction of the crime charged or an acquittal.\textsuperscript{112}

This comment has obvious application to cases where the only evidence connecting an accused with the killing is his complicity in the underlying felony, and \textit{Schleiman} has been cited by the court in such cases.\textsuperscript{113} But, as applied to the facts in \textit{Schleiman} itself, it must have been intended to have broader application. The defendant fired the fatal shot. There was certainly legally sufficient evidence to support a finding that he had the intent necessary for second-degree murder, or possibly first-degree manslaughter. So, when the court referred to "no possible view of the facts which would justify any other verdict except a conviction of the crime charged or an acquittal,"\textsuperscript{114} it must have meant that the same testimony that inculpated the defendant for the lower degrees of homicide also inculpated him for felony murder; and that it would not be rational to arbitrarily refuse to credit the testimony establishing the latter, yet accept the former.

Subsequent cases bear out this view of \textit{Schleiman}.\textsuperscript{115} Voices of dissent were occasionally raised concerning the requirement that the evidence must disclose a plausible ground for supposing the defendant not guilty of the felony murder as a necessary predicate for a charge-down. This view sometimes blended into the closely related question of what did it take to raise a plausible question of fact regarding a defendant’s guilt of the underlying felony.\textsuperscript{116} Both the majority and minority views were aired in \textit{People v. Stevens}.\textsuperscript{117} Two defendants, Waterbury and Stevens, were indicted for felony murder for killing during a bank robbery. Both were armed, and both fired at an officer of the bank who hesitated in obeying their commands. One of the shots inflicted a minor wound and the other

\begin{thebibliography}{99}
\bibitem{112} \textit{Schleiman}, 90 N.E. at 953.
\bibitem{113} See, e.g., People v. Lunse, 16 N.E.2d 345, 347 (N.Y. 1938); People v. Martone, 176 N.E. 544, 545 (N.Y. 1931); People v. Seiler, 158 N.E. 615, 616 (N.Y. 1927); People v. Chapman, 121 N.E. 381, 386 (N.Y. 1918).
\bibitem{114} \textit{Schleiman}, 90 N.E. at 953 (emphasis added).
\bibitem{117} 6 N.E.2d 60, 61 (N.Y. 1936).
\end{thebibliography}
the fatal wound. The testimony as to who fired the fatal shot was conflicting; but because both defendants acted in concert, the evidence for second-degree murder or for manslaughter, depending on intent, would be legally sufficient for both. Under the felony murder theory, it would be irrelevant which one was directly responsible or with what intent he acted. Both defendants pleaded abandonment of the felony as a defense to the felony murder charge. In addition, Waterbury pleaded insanity, and Stevens pleaded that he was coerced by Waterbury. The trial judge submitted all of these defenses to the jury, presumably under appropriate instructions as to their legal effect. The judge, however, refused both defendants' request to charge the lower degrees of homicide and sent the case to the jury on an all-or-nothing charge. Both defendants were convicted of murder in the first degree.\(^1\)

The Court of Appeals affirmed, in a short opinion by Judge Finch, concurred in by three other judges. If the proof showed that the defendants were guilty of anything at all, the court reasoned, they were guilty of felony murder, and the trial judge properly refused to charge the lesser degrees of homicide. The court further noted that there was a lack of evidence of abandonment and that the jury found against the defendants on the other questions.\(^1\) In a long dissent, concurred in by one other judge, Judge Lehman pointed out that the evidence was sufficient to show individual responsibility of both defendants in the homicidal act.\(^1\) Judge Lehman quoted from his own opinion in Seiler to the effect that a jury may unreasonably acquit of the higher crime, however strong the evidence of guilt may be. "[Y]et a verdict of guilty of some lesser degree is within the power of the jury if based on evidence which establishes at least all the elements of the crime of lesser degree."\(^1\)

As to the defendant Stevens, Judge Lehman criticized the majority opinion for brushing aside his right to a charge-down simply because the jury's verdict implied that his claim of coercion was rejected. He noted that the same might be said in every case in which a charge-down was improperly withheld. The real explanation for the majority's action seems to have been that the majority

\(^{118}\) Id.
\(^{119}\) Id.
\(^{120}\) Id. at 65 (Lehman, J., dissenting).
\(^{121}\) Id. at 64 (Lehman, J., dissenting) (quoting People v. Seiler, 158 N.E. 615, 617 (N.Y. 1927)).
simply was not persuaded that the proof of coercion was plausible. As to the defendant Waterbury, even Judge Lehman conceded that there was probably insufficient proof of abandonment to warrant the submission of that issue to the jury, and that the trial judge erred in his favor in doing so. Even on the assumption that there was no plausible rationale for exculpating Waterbury from felony murder, Judge Lehman insisted that a charge-down was required. Noting the constraint against instructing the jury as a matter of law that felony murder had been established, and the jury’s undoubted power to refuse to find it established, Judge Lehman endorsed the defendant’s right to a charge-down in any case where the evidence would be legally sufficient to spell out the lesser crime.\textsuperscript{122}

It is interesting to note that Chief Judge Crane concurred with the majority as to the defendant Waterbury and with Judge Lehman’s dissent as to the defendant Stevens.\textsuperscript{123} It is submitted that the position taken by the Chief Judge was in perfect harmony with precedent. None of the judges disputed the sufficiency of the evidence to warrant placing Stevens’ claim of coercion before the jury. Assuming that question was properly before the jury, the “reasonable basis in the evidence” test acknowledged in Koerber was met, and Stevens should have been given the benefit of a charge-down. It is no answer to say, as did the majority, that the jury’s verdict resolved that question against him. His right to have the issue placed before the jury is substantially negated and the fairness of the fact-finding process distorted if the only alternative to accepting the defense is complete acquittal of the defendant. As Judge Lehman properly observed, the jury might well find that he was coerced into the robbery, but not the shooting itself.\textsuperscript{124}

As to the defendant Waterbury, however, Judge Lehman parted company with precedent. Both Schleiman and Koerber indicate that the right of charge-down is not automatic or simply conditioned on evidence sufficient to show guilt of the lesser crime. There must be some “reasonable basis” in the evidence for finding the accused innocent of the higher crime as well as guilty of the lesser one. When a defendant claims that the felony had been abandoned at the time of the shooting, the cases have viewed the

\textsuperscript{122} Id. at 65-67 (Lehman, J., dissenting).
\textsuperscript{123} Id.
\textsuperscript{124} Id. at 65 (Lehman, J., dissenting).
issue as a defense extrinsic to the people's case-in-chief. As such, it falls outside the rule prohibiting partial directed verdicts; unless a minimum threshold of evidence appears, the court may rule as a matter of law that the issue is not in the case and need not be submitted to the jury.\(^{126}\) On the other hand, if the threshold is met, not only must the issue of abandonment be submitted, as it affects the felony murder theory, but the appropriate lower degrees of homicide must also be submitted.\(^{126}\) If, as in Waterbury's case, the threshold is not met, the case should be sent to the jury under an all-or-nothing charge.\(^{127}\) This explains Chief Judge Crane's voting with the majority as to the defendant Waterbury,\(^{128}\) while voting with the dissent of Judge Lehman as to the defendant Stevens, who had given threshold evidence of coercion.

Although many of the felony murder cases in which the court passed on the issue of charge-down involved defenses extrinsic to the basic elements of felony murder, it is fair to say that any defendant's right to a charge-down was treated as if it were a matter

\(^{126}\) See People v. La Marca, 144 N.E.2d 420, 427 (N.Y. 1957); People v. Walsh, 186 N.E. 422, 424 (N.Y. 1933) (dictum); People v. Nichols, 129 N.E. 883, 885 (N.Y. 1923); People v. Chapman, 121 N.E. 381, 386 (N.Y. 1918). On the distinction between a "defense" and the elements of the crime charged, see People v. McManus, 496 N.E.2d 202 (N.Y. 1986). On the evidentiary threshold for a defense, see People v. Silver, 310 N.E.2d 520 (N.Y. 1974).

\(^{127}\) What lower degrees of homicide are appropriate depends upon evidence linking the defendant to the homicide on a basis other than felony murder. See supra notes 91-94 (discussing Seiler). For example, in Walsh, a policeman who had responded to a robbery at a speakeasy was shot and killed by a lookout on the street outside the premises, while other officers were subduing the robbers inside. Walsh, 186 N.E. at 423-24. All the defendants were found guilty of felony murder under an all-or-nothing jury charge. Because the evidence was sufficient to raise a doubt whether the robbery had terminated at the time of the shooting, the defendant who shot the policeman was held entitled to a charge-down. The case against the other accomplices, who had nothing directly to do with the shooting, was properly submitted to the jury as felony murder or acquittal. Id. at 424-25; see also People v. Lunse, 16 N.E.2d 345, 347 (N.Y. 1938). Their convictions were also reversed because the trial judge, in his instructions on the law, improperly invaded the jury's fact-finding prerogative as to whether the felony had terminated at the time of the shooting. See Walsh, 185 N.E. at 424; see also People v. Smith, 133 N.E. 574, 575 (N.Y. 1921) (jury entitled to determine if homicide occurred after commission of felony had terminated).

\(^{128}\) See La Marca, 144 N.E.2d at 427; Lunse, 16 N.E.2d at 347.

\(^{129}\) See People v. Stevens, 6 N.E.2d 60, 67 (N.Y. 1938). Neither the majority nor the dissent in Stevens discussed defendant Waterbury's claim of insanity with reference to the charge-down issue. Presumably all of the judges were of the view that charge-down is not required if the defense is one that would, if accepted, necessarily require acquittal of all crimes, e.g., insanity, mistaken identity, alibi. It is interesting that Judge Lehman, in discussing Stevens's claim of coercion, observed that he might have been coerced into the robbery, but not the shooting—thus rendering him not guilty of felony murder but guilty of intentional murder or manslaughter.
of defense: some plausible evidentiary showing that the defendant might not be guilty of felony murder; the jury's arbitrary and absolute power to acquit of the crime charged was not to be encouraged by charging down in every case. In addition, it was necessary to have evidence legally sufficient to establish guilt of a lower degree of homicide. This dual requirement consistently commanded majorities on the Court of Appeals despite inevitable disagreement on the margins of its application—as shown by Stevens.\textsuperscript{129} The cases, however, dealt with the problem piecemeal, and the opinions were often unhelpful or misleading.\textsuperscript{130} The stage was clearly set for a major synthesis.

B. People v. Mussenden: \textit{Precursor to the Criminal Procedure Law}

When the Court of Appeals finally seized the opportunity to harmonize the prior case law and to synthesize the holdings, it did so, not in a major felony murder case, but in a case arising out of a simple street mugging. In \textit{People v. Mussenden},\textsuperscript{131} the defendant was indicted and convicted of attempted robbery after the trial judge refused to submit attempted grand larceny as a lesser included offense. The people's evidence tended to show that the complainant was walking on the sidewalk at night when a car full of men pulled up ahead of him. Three men got out and approached the complainant, while the appellant stayed behind the wheel of

\textsuperscript{129} See Stevens, 6 N.E.2d at 61; \textit{supra} notes 111-128 and accompanying text. Interestingly, shortly after the \textit{Stevens} case, Governor Herbert Lehman (Judge Lehman's brother) sent a message to the New York State Legislature resulting in the enactment of § 1045-a of the former Penal Law. \textit{See Ch. 67, § 2, [1937] N.Y. Laws 121}. This amendment eliminated the mandatory death penalty in felony murder cases and empowered the jury to recommend life imprisonment. \textit{See id.; see also People v. Hicks, 38 N.E.2d 482, 484 (N.Y. 1941) (Lehman, C.J.) (jury decides whether life imprisonment is part of verdict which is incomplete until all jurors have agreed), aff'd, 43 N.E.2d 716 (N.Y. 1942).}

\textsuperscript{130} The opinion in the leading case of \textit{Schleiman} is ambiguous. \textit{See supra} notes 108-14 and accompanying text. Although the holding of \textit{Seiler, supra} notes 91-95 and accompanying text, was that no lower degree should be submitted without legally sufficient evidence of guilt, dictum in Judge Lehman's opinion also anticipated his position in \textit{Stevens}; that to require any legal threshold of exculpatory evidence in regard to felony murder as a prerequisite to charge-down improperly invaded the jury's prerogative. The position he held throughout his judicial career is summed up in \textit{People v. Rytel, 30 N.E.2d 578 (N.Y. 1940), which was not a charge-down case: "The power of a jury in a criminal case to reject, though unreasonably, evidence which is uncontradicted and unimpeached, and to extend mercy to an accused by finding a lesser degree of crime than is established by the evidence, cannot be challenged in an appellate court." Id. at 580 (dictum).}

\textsuperscript{131} 127 N.E.2d 551 (N.Y. 1955).
the car. Complainant testified that, after asking about a house number, two of the men grabbed him from behind while the other went after his wallet in his hip pocket, but failed to remove it before the police arrived. Two of the defendants testified that they innocently asked the complainant about the location of a street address and never touched him. Over defense objection, the judge instructed the jury that they could find all of the defendants guilty of attempted robbery or not guilty. Appellant, the driver of the car, appealed his conviction because of the judge's refusal to submit attempted grand larceny as a lesser included offense.

In a 4-3 decision, the Court of Appeals affirmed the conviction. The court's opinion, written by Judge Fuld, acknowledged early authority requiring submission of lower degrees regardless of the strength of the proof pointing to the higher degree.

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132 Id. at 554-55. The defendants claimed that a language problem prevented complainant from understanding their request and caused the excited state in which police found him. Id.
133 Id. As relevant to the case, attempted robbery would consist of an attempt to take property from the complainant by force or fear. Attempted grand larceny, as a lesser offense, would consist of an attempt to take property from the complainant's person without the use of force or fear, by fraud or stealth like a typical pickpocket. Id.
134 See id. at 556.
135 See id. at 553. When the theory of the crime charged was premeditated murder, it appears to have been the universal practice to also submit second-degree intentional murder and often manslaughter. When the degree of guilt depended on a subjective operation of the mind, it was settled that the resolution of this issue belonged exclusively to the jury, under a full range of instructions. See People v. Schleiman, 90 N.E. 950, 951 (N.Y. 1910) (dictum); People v. Rice, 54 N.E. 48, 50 (N.Y. 1899); People v. Downs, 25 N.E. 988, 989 (N.Y. 1890); Stokes v. People, 53 N.Y. 164, 180 (1873); People v. Young, 88 N.Y.S. 1063, 1064 (App. Div. 1st Dep't 1904); People v. Kelly, 35 Hun. 295, 301 (N.Y. Sup. Ct. Gen. T. 5th Dep't 1885); People v. Rego, 36 Hun. 129, 132 (N.Y. Sup. Ct. Gen. T. 4th Dep't 1885); McNeveins v. People, 61 Barb. 307, 308-09 (N.Y. Sup. Ct. Gen. T. 1872).

In People v. Cohen, 119 N.E. 886 (N.Y. 1918), a defendant who hired gangsters to kill a business rival was tried for premeditated murder. He was convicted under an all-or-nothing charge, in which his counsel acquiesced. In affirming the conviction, the court noted that, "[u]nder such circumstances the only logical [guilty] verdict would be murder in the first degree." Id. at 887-93. Nevertheless, the court went on to say that:

We may assume, without so deciding, that even in a case such as the one before us this is true; that the jury has the physical right to exercise this power in all cases where the indictment charges actual murder, and where intent is an element of the crime; that the court is bound to make such a charge on the request of the defendant's counsel. But it certainly is not true where the defendant has taken such a position as was taken by him here. If he does, he cannot be heard to complain if the charge is omitted. He cannot have the advantage of obtaining the pitty of the jury by statements that unless they acquit they must convict him of murder in the first degree, and at the same time expect the court to adopt an inconsistent attitude.

Id. at 893.
added, however, that the jury’s mercy-dispensing power is “a thing apart from the true duty imposed upon a jury; that it is, rather, an inevitable consequence of the jury system.” Accordingly, “a court should avoid doing anything, such as submitting lower crimes in an inappropriate case, that would constitute an invitation to the jury to forswear its duty and return a compromise or otherwise unwarranted verdict.” In a much-quoted summary, the opinion stated:

The principle has, accordingly, evolved that the submission of a lesser degree or an included crime is justified only where there is some basis in the evidence for finding the accused innocent of the higher crime, and yet guilty of the lower one. The submission in such a case performs a function useful to the defendant and intelligible to the jury. The trial court may not, however, permit the jury to choose between the crime charged and some lesser offense where the evidence essential to support a verdict of guilt of the latter necessarily proves guilt of the greater crime as well. With the record in that state, there is no basis in the evidence for differentiating between the several offenses and no warrant for submitting any but that charged in the indictment.

In applying this test to the appellant’s contention, the Mussenden court found that the evidence would not support an inference that the appellant was an accomplice in an attempt to steal but not by the use of force or fear. Any evidence implicating him in an attempt to steal at all necessarily implicated him in an attempt to steal by force or fear. Consequently, the trial court was correct in refusing to charge attempted grand larceny.

The Mussenden case, it is submitted, accurately synthesized the net effect of the previously decided felony murder cases; indeed, the court’s opinion cited several of them. The major contri-
bution of the case lay in its articulation of a general test for evaluating the effect of the evidence on the propriety of submitting lesser included offenses to the jury. When the present Criminal Procedure Law was enacted in 1970, the revisers acknowledged their indebtedness to Mussenden in drafting the present statutory rule.\textsuperscript{140}

IV. Changes Made by the Present Criminal Procedure Law

The replacement of the former Penal Law by the present Penal Law in 1967, and the former Code of Criminal Procedure by the present Criminal Procedure Law in 1970, has had a dramatic effect on the submission of lesser offenses generally, and particularly where felony murder is the crime charged.

In the first place, the former unity of murder is dissolved. Intentional murder, depraved mind murder, and felony murder are no longer to be regarded as three "theories" incorporated shamrock-like in a single crime, indictable in common law form.\textsuperscript{141} Any single count of an indictment must be confined to a single theory; and if more than one theory is to be charged, the indictment must contain separate counts for each.\textsuperscript{142} A conviction under any count must be based on a unanimous verdict that the evidence establishes the allegations of that count beyond a reasonable doubt. In deliberating on any count, the jury is instructed that lesser included offenses are to be considered in the alternative to the crime charged, and only after unanimous agreement that the defendant is not guilty of the crime charged.\textsuperscript{143}

Because no conviction can be based on a fact not alleged, and because, under the present law, no count charging felony murder may contain a duplicitous allegation of homicidal mens rea, this change standing alone precludes the prosecution from requesting the submission of lesser homicide offenses, all of which do require an allegation of some form of homicidal mens rea. This probably imposes no undue burden on district attorneys since, in guiding the grand jury, they can incorporate additional counts in the indictment covering any lesser crimes that may be indicated by the evidence they intend to introduce.

\textsuperscript{140} See N.Y. CRIM. PROC. LAW § 300.50 (McKinney 1982) (commission staff comments).

\textsuperscript{141} See supra text accompanying notes 23-26.

\textsuperscript{142} N.Y. CRIM. PROC. LAW § 200.30(2) (McKinney 1982).

\textsuperscript{143} See People v. Boettcher, 505 N.E.2d 584, 585-96 (N.Y. 1987).
The defendant, of course, has no influence on the drawing of the indictment. The defendant's rights, however, were sufficiently protected under prior law by *Stevens*, which recognized that, notwithstanding a narrowly drawn felony murder count, a defendant should not be deprived of the opportunity to have the jury consider the alternative of lesser crimes where the evidence would justify submitting them. In effect, this allowed the defendant to waive the absence of a mens rea allegation in the indictment. This very important right appears to have disappeared because of two new sections of the CPL, which bind the people and the defendant alike.

CPL section 300.50 provides for charge-down as follows:

1. In submitting a count of an indictment to the jury, the court in its discretion may, in addition to submitting the greatest offense which it is required to submit, submit in the alternative any lesser included offense if there is a reasonable view of the evidence which would support a finding that the defendant committed such lesser offense but did not commit the greater. If there is no reasonable view of the evidence which would support such a finding, the court may not submit such lesser offense. Any error respecting such submission, however, is waived by the defendant unless he objects thereto before the jury retires to deliberate.
2. If the court is authorized by subdivision one to submit a lesser included offense and is requested by either party to do so, it must do so. In the absence of such a request, the court's failure to submit such offense does not constitute error.
3. The principles prescribed in subdivisions one and two apply equally where the lesser included offense is specifically charged in another count of the indictment.

The key term in the charge-down section is "lesser included offense," which is defined in CPL section 1.20(37) as follows:

When it is impossible to commit a particular crime without concomitantly committing, by the same conduct, another offense of lesser grade or degree, the latter is, with respect to the former, a "lesser included offense." In any case in which it is legally possible to attempt to commit a crime, an attempt to commit such crime constitutes a lesser included offense with respect thereto.

Section 300.50 embodies what has been called a two-prong test

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144. See supra notes 83-88 and accompanying text.
145. N.Y. CRIM. PROC. LAW § 300.50 (McKinney 1982).
146. Id. § 1.20(37) (McKinney 1992).
for submitting lesser offenses. First, the inferior crime must qualify as a “lesser included offense” according to the definition stated in section 1.20(37). Only if that test is met may the trial judge move to the second prong: whether the evidence discloses a reasonable basis for finding the defendant not guilty of the crime charged but guilty of the lesser included offense. The second prong of the test is clearly designed to adopt the standard laid down in Mussenden.

The first prong of the test represents a departure from prior law. The departure consists as much in what is omitted as in what is stated. While the definition of “lesser included offense” is derived from section 445 of the old Code of Criminal Procedure, the present CPL omits former section 444, which authorized submission of any crime which was a “degree inferior to” the crime charged. When felony murder was one of three “theories” embraced in a single crime of murder, it was section 444 that authorized a charge-down. The noncapital homicide crimes required proof of mental culpability with respect to a killing and were thus not “necessarily included” under the felony murder theory; but they were indisputably “inferior degrees” of the unitary crime of murder in the first degree. Accordingly, the only factors constraining the right of charge-down in felony murder cases were the allegations of the indictment and the state of proof—as discussed previously.

Under the present law, no crime inferior to that charged in a given count of an indictment may be submitted to the jury unless it qualifies as a “lesser included offense.” According to CPL section 1.20(37), this means that it must be impossible to commit the greater offense without also committing the lesser. Moreover, in applying the “impossibility” aspect of the test, the Court of Appeals has abandoned the traditional focus on the factual allegations of the indictment and the state of proof—in favor of an abstract analysis of the

147 See People v. Glover, 439 N.E.2d 376, 377 (N.Y. 1982) (per curiam); People v. Green, 437 N.E.2d 1146, 1148 (N.Y. 1982).
148 See supra text accompanying notes 132-40. The manner in which the court applies this aspect of the two-prong test is best explained and illustrated in the opinion of Judge Jones in People v. Scarborough, 402 N.E.2d 1127, 1129-31 (N.Y. 1980); see also People v. Asan, 239 N.E.2d 913, 914 (N.Y. 1968) (reversing conviction of first degree manslaughter because judge refused to submit charge of second degree manslaughter).
149 See supra text accompanying notes 14-15.
150 See supra text accompanying notes 33-35 (discussing Dedieu); see also note 43 (discussing People v. Miller, 128 N.Y.S. 549 (App. Div. 1st Dep’t 1911)). This was followed as
legal elements of the crimes, as defined by statute. If it would be theoretically possible, on some hypothetical state of facts, to commit the higher crime without committing the lesser crime, the latter is not a "lesser included offense"—even if the specific facts alleged in the indictment and established at trial necessarily entail guilt of such lesser crime.\footnote{See Glover, 439 N.E.2d at 377; People v. Green, 437 N.E.2d 1146, 1148 (N.Y. 1982).}

Although the Court of Appeals has not as yet delivered an opinion on how the CPL changes the traditional rule of charging lesser offenses in felony murder cases, the likely result appears evident from the case of People v. Miguel.\footnote{423 N.E.2d 400 (N.Y. 1981); cf. Green, 437 N.E. 2d at 1147.} The defendant was indicted for second-degree robbery (causing physical injury in the course of a robbery) and second-degree assault (causing physical injury in the course of a felony).\footnote{Miguel, 423 N.E.2d at 401.} The people's evidence tended to show that the defendant, with two others, assaulted a man and stole his money. The defendant requested a charge-down to third-degree assault (recklessly or intentionally causing physical injury). The trial court refused, and the defendant was convicted as charged. The Court of Appeals affirmed the conviction, noting that, by statutory definition, neither of the crimes charged required any mental culpability with respect to the element of physical injury. Consequently, the top crimes could be committed by conduct that did not necessarily entail assault in the third degree, which does require intent or recklessness with respect to the resulting physical injury. Because of this purely theoretical possibility, the defense was held to have no right to have the jury instructed as to the lesser degree of assault—regardless of whether the evidence might have indicated a rational basis for acquitting the defendant of the higher crime yet convicting him of the lesser.\footnote{Id. at 401-02.}

The relevance of Miguel to felony murder is clear. Just as in felony assault, where physical injury to the victim is a strict liability element, in felony murder no mental culpability need be proved with respect to the killing: it is theoretically possible to be guilty of felony murder without even criminal negligence in causing the victim's death.

Unless the law is changed, the conclusion seems inescapable that, no matter what the evidence may be in a particular case, the only jury instruction under a felony murder indictment is guilty as charged or not guilty. This confronts the jury with the same stark choice that many older cases found unacceptable. The fact-finding process is distorted in two possible ways. Unjust convictions may be had where the proof of the felony is shaky because the jury will be reluctant to free a defendant who by intuition and common sense is guilty of some responsibility for the death of a human being. Unwarranted acquittals may occur if a jury, having honest doubts as to the felony, lacks any lesser alternative.\footnote{Those two undesirable possibilities are addressed in People v. Seiler, 158 N.E. 615 (N.Y. 1927); see also supra note 12 and accompanying text (discussing arguments in favor of lesser included crimes instruction).}

It is true that since the death penalty no longer obtains in New York, the stakes are not as high as they were when the right of charge-down was considered in the older cases. However, both political and judicial attitudes towards the death penalty are in flux, and it would be foolhardy to brush aside the charge-down issue for that reason. Moreover, the potential sentence of twenty-five years to life for felony murder continues to exert a sufficient moral pressure to make the distorting effect of an all-or-nothing charge in felony murder cases a matter of ongoing concern.

V. Conclusion and Recommendation

The original intent behind the rule providing for charging down to lesser offenses was to prevent the prosecution from failing when some element necessary to the higher offense was not proved. In actual practice, the rule most often operated to benefit the defendant, who was otherwise at risk of being unjustly convicted by a jury under the moral pressure of an all-or-nothing choice. Irrational mercy verdicts and split-the-difference compromise verdicts were discouraged by the evidentiary requirement that the charge-down be given only when the evidence disclosed some reasonable basis for supposing the defendant innocent of the higher crime yet guilty of the lesser. By incorporating this evidentiary test, CPL section 300.50 wisely continues the policy developed in the prior case law.

The present statute, however, in superimposing an abstract definitional criterion of “lesser included offense” drawn from CPL
section 1.20(37), represents a radical break with prior law—to the disadvantage of persons accused of crime. The public interest in efficient law enforcement is sufficiently protected by the evidentiary test stated above: it permits convictions in accordance with the evidence, no more and no less. Any additional limitation on the submission of lesser crimes must be designed primarily to safeguard the rights of the accused. He is not to be unfairly surprised in the preparation of his defense nor exposed to conviction based on factual elements not found by the grand jury. As strongly asserted in the early case of Dedieu v. People, the focus has always been on the allegations in the indictment: the people were bound thereby and could not prove any crime the elements of which were not sufficiently alleged. The defendant, however, could waive a deficiency in the indictment and have the jury consider a lesser crime, provided that the evidentiary test was satisfied.

The present statutes deprive a defendant of this traditional right of waiver by rigidly defining “lesser included offense” in abstract statutory terms and by placing both the prosecution and the defense in the same position with respect to the right of charge-down. It is submitted that this innovation takes a valuable right away from defendants, particularly those accused of felony murder, without any compensating benefit to the public interest. If the proof in a felony murder case shows a reasonable possibility that the defendant may be innocent of that crime, but guilty of manslaughter, and the defendant wishes to have the jury consider the lesser alternative, what public interest justifies confining the jury to an all-or-nothing choice?

If the lessons of the past provide persuasive reasons to restore a defendant’s right of charge-down in felony murder cases, one issue that must be addressed is that of outer limits. Notwithstanding the “necessarily included” language of section 445 of the former Code of Criminal Procedure, the courts in New York never permitted a defendant, through waiver, to demand the submission of crimes other than “degrees inferior to” the crime charged. Now that this parameter has disappeared with the repeal of section 444 of the former Code of Criminal Procedure, what would be the outer limit to the defendant’s right of charge-down? If the proof

156 22 N.Y. 178 (1860); see supra text accompanying notes 33-35.
157 See supra text accompanying note 15.
158 See supra text accompanying note 14.
shows that the defendant used a pistol, should a weapons charge be submitted as an alternative to felony murder? If the defense introduces evidence that the defendant used cocaine, should narcotics possession be submitted? To allow such an extreme watering-down of the charge in the indictment would go beyond the requirement of fairness and would trivialize the charge-down procedure. This is undoubtedly why the predicate felony was never submitted as a lesser offense in felony murder cases.

Efforts to liberalize a defendant's charge-down option through judicial interpretation of a uniform statutory rule have met with mixed receptions. Both the United States and California have charge-down statutes similar to New York's present "necessarily included offense" statute. California, which had previously followed the current New York interpretation, now allows a defendant to demand the submission of any lesser offense "closely related" to the crime charged. The United States Supreme Court, on the other hand, has rejected this approach because of perceived uncertainty in its application.

One aspect of the problem is the difficulty inherent in formulating a uniform charge-down rule applicable to all crimes. This difficulty is compounded when reform is undertaken through judicial interpretation rather than legislative amendment. Because felony murder presents a particularly compelling case for reform, the jury's traditional discretion in appropriate cases could be restored, precisely and without uncertainty, by the following suggested amendment adding a new subdivision (6) to CPL section 300.50:

Upon the defendant's request, all offenses that would qualify as lesser included offenses under a count of an indictment charging intentional murder shall be deemed lesser included offenses under a count of an indictment charging felony murder. Such lesser included offenses shall be submitted to the jury according to the requirements otherwise stated in this section.

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160 It has been suggested that defense counsel may manipulate a liberal charge-down privilege by deliberately introducing evidence of a lesser offense. See Janis L. Ettinger, In Search of a Reasoned Approach to the Lesser Included Offense, 50 BROOK. L. REV. 191, 201 n.63 (1984).
161 See supra notes 566-67 and accompanying text.
162 Fed. R. CRIM. P. 31(g).
163 CAL. PENAL CODE § 1159 (West 1985).
It will be noted that the suggested recognition of lesser included crimes under felony murder is triggered only by the request of the defendant. This would restore the defendant's right of waiver recognized in Stevens, while binding the people to the allegations of the indictment. This, of course, eliminates the "mutuality" written into the present statute. When the United States Supreme Court recently refused to enlarge a defendant's right of charge-down based on waiver, it spoke approvingly of the mutuality implicit in the federal rule. Since this was in the context of interpreting a uniform rule as written, it does not directly argue against altering the rule by legislative action. Nevertheless, a few concluding words on the merits of mutuality are in order.

The concept of mutuality has an undeniable appeal; everyone is instinctively in favor of a level playing field. We should not, however, succumb to tunnel vision; the levelness of the whole playing field should be taken into account, not just the part where a particular play is taking place. In a criminal case, the playing field begins at least with the drawing of the indictment and continues all the way to submission of the case to the jury. As previously noted, it is the district attorney whoquarterbacks the drawing of the indictment. It is he, not the defendant, who in effect decides whether to include additional counts of intentional murder or manslaughter together with a count of felony murder. If such additional counts are included and submitted to the jury, then the issue of lesser included crimes under the felony murder count is defused—the jury will have a full range of choice, compatible with the evidence. However, even if separate counts are included in the indictment, there is no certainty that they will be submitted

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166 See People v. Stevens, 6 N.E.2d 60, 65 (N.Y. 1936) (Lehman, J., dissenting).
167 See Schmuck, 489 U.S. at 717.
169 The jury's present range of choice may indeed extend beyond what would be appropriate if the lower degrees of homicide were lesser included offenses under the felony murder count. Because they are not lesser included offenses, their submission to the jury is not now subject to the statutory requirement that the evidence disclose a reasonable basis for acquitting the defendant of felony murder while at the same time convicting him of manslaughter. With this constraint removed, the CPL now opens the door to compromise verdicts and mercy verdicts unwarranted by the evidence in cases where a multi-count indictment is submitted to the jury. This is a retrograde step that should be addressed by the Legislature. Perhaps no noninclusory concurrent count carrying a lesser penalty should be submitted together with one of higher penalty unless the evidence discloses a reasonable basis for convicting on the former while acquitting on the latter.
to the jury. Here, again, the district attorney has the upper hand. The older cases demonstrate that trial judges are willing to accede to the prosecutor's strategy in deciding which counts to dismiss and which to send to the jury. Under the CPL, a count of intentional murder (with its lesser included offenses) is a noninclusory concurrent count with a felony murder count. Assuming that there is legally sufficient evidence to support both counts, the court must submit at least one of the counts and has discretion whether to submit both. Moreover, the statute expressly freezes out the defendant in providing that the court is not required to submit any particular count if "the people" consent that it not be submitted. Where are the level playing field and the mutuality here?

The lack of any need for proof of mental culpability with respect to a death caused in the commission of a felony makes felony murder a uniquely harsh rule. If that very lack renders a defendant helpless to have the jury consider less serious homicide alternatives, then the original harshness of the felony murder rule carries an extra sting in its tail by compromising the requirement that the crime charged be proved beyond a reasonable doubt: as previously observed, a jury is likely to suppress doubts as to felony murder if the only alternative is to acquit the defendant completely. The playing field is not now level: legislative change needed to enhance both fairness and accuracy in adjudicating felony murder indictments.

See Stevens, 6 N.E.2d at 61; People v. Schleiman, 90 N.E. 950, 951 (N.Y. 1910).

Noninclusory means that one offense is not a "lesser included offense" with respect to another. N.Y. CRIM. PROC. LAW § 300.30(4) (McKinney 1982). A defendant may be convicted and sentenced on both of two noninclusory counts, e.g., a felony murder count and a count for the predicate felony. See People v. Santana, 440 N.Y.S.2d 668, 669-70 (App. Div. 1st Dep't), aff'd, 431 N.E.2d 305 (N.Y. 1981).

Concurrent counts means that any sentence imposed under one count must run concurrently, not consecutively, with the other. N.Y. CRIM. PROC. LAW § 300.30(3) (McKinney 1982). If an intentional murder conviction is based on the same killing as the felony murder conviction, the sentences must run concurrently. N.Y. PENAL LAW § 70.25(2) (McKinney 1987); People ex rel. Maurer v. Jackson, 140 N.E.2d 282, 288 (N.Y. 1957); People v. Brathwaite, 465 N.Y.S.2d 756, 757 (App. Div. 2d Dep't 1983) (concurrent sentences for felony murder and predicate felony).

Id. § 300.40(6)(a).