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HOMICIDE UNDER THE PROPOSED NEW YORK PENAL LAW

ROBERT M. BYRN

In a sense, the scales are heavily weighted against the draftsman: if he has made himself plain, there is likely to be no litigation and so none to praise him, whereas if he has fallen into confusion of obscurity, the reports will probably record the results of the fierce and critical intellects of both Bar and Bench being brought to bear on his work. Yet the debt owed to him by the legal profession is incalculable.

At the outset, it is only fitting that we acknowledge the incalculable debt owed to the State of New York Temporary Commission on Revision of the Penal Law and Criminal Code for its awesome accomplishment in formulating a new and comprehensive penal law. Sir Edward Coke is quoted as having said of certain statutes that “they were so like labyrinths with such intricate windings and turnings, as little or no fruit proceeded of them.” Perhaps our existing criminal laws cannot be so harshly indicted, but it is certainly true that at times they have borne bitter fruit and at other times the fruit has been lost amid a tangle of impenetrable and thorny branches. Yet by scholarly excision, relocation, restatement, and innovation, the Temporary Commission has, in three years, produced a modern and scientifically integrated code out of the maze of over twelve hundred sections in the existing penal law.

Justice Stephen once stated of Acts of Parliament that although they may be easy to understand, people continually try to misunderstand, and... therefore it is not enough to attain to a degree of precision which a person reading in good faith can understand; but it is necessary to attain if possible to

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a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it.  

Just as Stephen called for precision in legislation, his American contemporary, Holmes, called for rationality in the law:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Keeping in mind Stephen’s and Holmes’ lofty standards of precision and rationality, and cast, perhaps, in the role of an ungrateful debtor of the Temporary Commission, I should now like to turn to an appraisal of some of the Commission’s proposals making generous use of such of the lawyer’s “quiddities” and “quillets” as I am able to muster.

I. GENERAL COMMENTS

The Proposed New York Penal Law is divided into three “Parts”, comprising “General Provisions,” “Specific Offenses,” and “Administrative and Civil Provisions.” Part Two, “Specific Offenses,” is arranged by categories of related offenses, in place of the haphazard alphabetical system presently in use. Each category bears a “Title,” and the separate but related offenses within each title are given individual “Article” numbers, the articles being further subdivided into “Sections” by a decimal system. For instance, the offense of murder is defined at Section 130.25 of Article 130 (Homicide) in Title H (Offenses Against the Person Involving Physical Injury, Sexual Conduct, Restraint and Intimidation).

The proposed homicide article may be outlined as follows: section 130.00 defines homicide; section 130.05 gives the meaning of certain terms which are principally related to abortional offenses; section 130.10 defines criminally negligent homicide; section 130.15 divides manslaughter in the second degree into homicides arising out of (1) recklessness, (2) an unlawful abortion upon a woman believed to be pregnant, or (3) the intentional causing or aiding of a suicide; section 130.20 separates manslaughter in the first degree into homicides caused by acts (1) intended to do serious bodily injury, (2) intended to kill, but committed under the influence of extreme emotional distress, or (3) intended to procure a miscarriage of a female pregnant with an unborn child; section 130.25 classifies murder as killings which: (1) are intentional

6. “There’s another! Why may not that be the skull of a lawyer? Where be his quiddities now, his quillets, his cases, his tenures, and his tricks?” Hamlet, Act V, scene 1.
(2) are the result of a depraved indifference to human life; or (3) occur under specified circumstances during the commission of certain felonies; sections 130.30 and 130.35 are concerned with the punishment for murder, while sections 130.40 through 130.60 define the offenses of abortion, killing an unborn child, self-abortion, filicide of an unborn child, and issuing abortional articles.

The abortional and suicidal offenses, as well as the nature of and the procedures for the punishment of murder, are without the scope of this paper. My intention, rather, is to outline briefly the traditional common-law categories of culpable homicides, and then to pursue each of these crimes through existing New York statutes and into the proposed penal law, with accompanying comments and suggestions.7

II. Homicide at Common Law

At common law, there were only two grades of unlawful killing, murder and manslaughter,8 which were distinguished from each other by the presence or absence of malice aforethought.9 Within the crime of murder, malice aforethought was “express” when the unlawful killing was accompanied by an intent to kill or do grievous bodily harm and was “implied” in cases of a homicide which occurred (1) under circumstances indicating a depraved indifference to human life, (2) during the commission of, or attempt to commit a felony, or (3) while forcibly opposing an officer who was making a lawful arrest, or performing certain other official duties.10

While the crime of murder had definite boundaries, manslaughter was an omnibus catchall for such unjustifiable and inexcusable homicides as did not fall within the definition of murder.11 However, certain rather general categories were discernable. Voluntary manslaughter involved a provoked killing in the heat of passion with an accompanying intent to kill or do grievous bodily harm, while involuntary manslaughter signified

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7. "The drama latent in almost every sentence of the penal statutes dealing with homicide, appeals to the interest of the layman as well as of the lawyer, and some of the most fascinating and discursive questions in the entire field of criminal law have their source in these statutes." Corcoran, Felony Murder in New York, 6 Fordham L. Rev. 43 (1937).
9. Homicide Report 19; Moreland 60; Stephen, A Digest of the Criminal Law 182 (6th ed. 1904) [hereinafter cited as Stephen].
11. Homicide Report 188; Moreland 61; Perkins 41.
an unintentional killing during the performance of an unlawful act not amounting to a felony, or during the performance of a lawful act in a negligent manner.12

III. HOMICIDE IN NEW YORK: AT PRESENT AND AS PROPOSED

Homicide is presently defined as "the killing of one human being by the act, procurement or omission of another."13 The definition, on its face, is all-inclusive and, hence, homicide in se is not a crime.14 In the proposed statute, however, homicide is defined as "the killing of a person or of an unborn child by the act, procurement or omission of another person under circumstances constituting murder, manslaughter, criminally negligent homicide, killing an unborn child or filicide of an unborn child as defined in this article."15 As a result, homicide becomes a generic label for all unlawful killings.

A. Homicide Resulting From an Act Intended to Kill

An intentional killing, which is neither excusable nor justifiable, is murder in the first degree or murder in the second degree under existing New York statutes, depending upon the presence, or absence, of deliberation and premeditation.16 The intentional but unpremeditated killing finds its common law counterpart in voluntary manslaughter which was defined as follows:

12. See generally Moreland 64-195; Perkins 41-61. There have been convictions of involuntary manslaughter based upon a negligent omission to act when a legal duty to act existed, see Moreland 171-82, but these have been relatively rare. "In the common law, there has been a persistent refusal to recognize liability in omission, either in tort or criminal law." Binavince, The Ethical Foundation of Criminal Liability, 33 Fordham L. Rev. 1, 11 (1964). Misdemeanors involving an omission to act have attained some significance in the law of misdemeanor manslaughter in New York. See pp. 200-03 infra. There have also been convictions of voluntary manslaughter arising out of circumstances other than provocation and heat of passion. See Moreland 87-98. However these cases are unimportant to our discussion of the law of homicide.


15. Proposed Pen. Law § 130.00.

16. "The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed: 1. From a deliberate and premeditated design to effect the death of the person killed, or of another . . . ."

N.Y. Pen. Law § 1044. "Such killing of a human being is murder in the second degree, when committed with a design to effect the death of the person killed, or of another, but without deliberation and premeditation." N.Y. Pen. Law § 1046.
homicide, which would otherwise be murder, is not murder, but manslaughter, if
the act by which death is caused is done in the heat of passion, caused by provoca-
tion . . . unless the provocation was sought or voluntarily provoked by the offender
as an excuse for killing or doing bodily harm.17

At common law the varieties of conduct which might be said to con-
stitute adequate provocation were rigidly catalogued.18 Moreover, the
heat of passion had to be sudden i.e., the killing must have occurred be-
fore a reasonable "cooling time" had elapsed.19 Clearly then, the common
law employed strictly objective standards with respect to both the
adequacy of the provocation and the duration of the heat of passion.

In defining murder in the second degree, the New York Legislature
eschewed the affirmatively couched requirements of reasonable provoca-
tion and heat of passion in favor of the exclusionary test of the lack of
premeditation and deliberation. Seemingly implicit in this variation of the
elements of the crime was the substitution of the subjective cognitive
operations of the defendant for the external norms of the common law.
However, no such clear dichotomy developed. It is true that in one line
of cases the courts took an entirely subjective approach. The nature of
the provocation and the length of the cooling time were both subordinated
to the totality of facts which demonstrated the actor's actual failure to
deliberate and premeditate. On the other hand, another series of decisions
emphasized the time elapsing between the provocation and the homicide
(perhaps only a few seconds) as, for all practical purposes, the deter-
minative evidence of premeditation and deliberation—apparently a re-
turn to the objective standards of the common law.20 The evolution of
the two lines of authority did much to obscure the originally intended
distinction between first and second degree murder21 with the result that

17. Stephen 185.
18. "The following acts may . . . amount to provocation:—(a.) An assault and battery
of such a nature as to inflict actual bodily harm, or great insult, is a provocation to the
person assaulted. (b.) If two persons quarrel, and fight upon equal terms, and upon
the spot, whether with deadly weapons or otherwise, each gives provocation to the other, which-
ever is right in the quarrel, and whichever strikes the first blow. (c.) An unlawful imprison-
ment is a provocation to the person imprisoned . . . . (d.) The sight of the act of adultery
committed with his wife is provocation to the husband of the adulterer on the part both
of the adulterer and of the adulteress. (e.) The sight of the act of sodomy committed upon
a man's son is provocation to the father on the part of the person committing the offence.
(f.) Neither words, nor gestures, nor injuries to property, nor breaches of contract, amount
to provocation . . . . (g.) The employment of lawful force against the person of another is
not a provocation to the person against whom it is employed." Id. at 186-87.
20. The cases on both sides are reviewed in Homicide Report 52-53.
21. The New York Law Revision Commission found that the law of murder had been
the defendant was often abandoned to the unbridled and unpredictable sympathies and apathies of judge and jury. 22

Confronted with these problems, the Temporary Commission has proposed the following statutes:

A person is guilty of murder when:

1. With intent to kill another person, he causes the death of such person or of a third person, except when:
   (a) He engages in such conduct under the influence of extreme emotional disturbance so as to render him guilty of manslaughter in the first degree as defined in subdivision two of section 130.20 . . . . 23

A person is guilty of manslaughter in the first degree when: . . .

2. With intent to kill another person, he causes the death of such person or of a third person under circumstances which would constitute murder as defined in subdivision one of section 130.25 except that the homicidal act is committed under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as the actor believes them to be . . . . 24

The proposed formulation, which is an adaptation of an equivalent provision 25 in the Model Penal Code, 26 is purportedly an attempt to balance rendered "vague and indefinite" and that "bare intent to kill" had been "confounded with deliberation." Id. at 83.

22. "In effect, therefore, the fate of each defendant in a first degree murder prosecution hangs upon the caprice of the jury whom chance may have selected for him." Id. at 84. "What we have is merely a privilege offered to the jury to find the lesser degree when the suddenness of the intent, the vehemence of the passion, seem to call irresistibly for the exercise of mercy. I have no objection to giving them this dispensing power, but it should be given to them directly and not in a mystifying cloud of words. The present distinction is so obscure that no jury hearing it for the first time can fairly be expected to assimilate and understand it." Cardozo, Law and Literature 100 (1931).


23. Proposed Pen. Law § 130.25 (Murder).
26. Proposed Pen. Law § 130.20, Commission Staff Notes. The Temporary Commission has stated that "the recently published American Law Institute's Model Penal Code, of which Commissioner Wechsler was the chief reporter, has been an invaluable source of stimulation and guidance throughout the course of the Commission's work. The revisions, in recent years, of the penal codes of Illinois, Minnesota and Wisconsin have also been important aids." Proposed Pen. Law, Commission Foreword at v-vi.

Section 210.3 of the Model Penal Code reads: "(1) Criminal homicide constitutes manslaughter when: . . . (b) A homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable ex-
the relevant subjective and objective factors deemed appropriate for jury consideration. 27

The apparent intrusion of even minimal external norms of reasonableness will disappoint the proponents of trial by psychiatry. 28 But a second reading of section 130.20 reveals that the proffered test of reasonableness is not really meaningful. We are told that reasonableness "shall be determined from the viewpoint of a person in the actor's situation...." 29 What is the actor's "situation?" Does it comprehend none or some or all of the peculiarly subjective forces operating on the actor? Are we to consider, for instance, that the actor has "the hot blood of Southern Europe coursing through his veins," 30 and then judge him by the standard of the reasonably hot-blooded Southern European? Not only does the proposed revision not answer these questions, but its ambiguity was deliberately contrived to allow "room for interpretation." 31 All that has happened is that one "mystifying cloud of words" 32 has been substituted for another. Every harsh word that the Law Revision Commission had to say in 1937 about the extant law of premeditation and deliberation 33 may well be said again today about the proposed law of extreme emotional disturbance. Moreover, we may add a further charge to the indictment when we consider the section in relation to the proposed defense of "mental disease or defect." 34

planation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be." Since section 130.20(2) of the proposed penal law originated in section 210.3 of the Model Penal Code, comments upon the latter are relevant to our discussion of the former.

28. See Note, Manslaughter and the Adequacy of Provocation: The Reasonableness of the Reasonable Man, 106 U. Pa. L. Rev. 1021 (1958). "After many years of hiding behind the reasonable man, it is time that the law recognized the fact that the crucial issue in every homicide case is the state of the mind of the slayer and that it is the psychiatrist and not the reasonable man who will help the courts determine what that is." Id. at 1040.
29. Proposed Penal Law § 130.20(2).
31. "There will be room, of course, for interpretation of the breadth of meaning carried by the word 'situation', precisely the room needed in our view. There will be room for argument as to the reasonableness of the explanations or excuses offered; we think again that argument is needed in these terms. The question in the end will be whether the actor's loss of self-control can be understood in terms that arouse sympathy enough to call for mitigation in the sentence. That seems to us the issue to be faced." Model Penal Code § 201.3, comment 5 (Tent. Draft No. 9, 1959).
32. Cardozo, op. cit. supra note 22, at 100.
33. See notes 21 & 22 supra.
34. Proposed Penal Law § 60.05.
Irresistible impulse, alone, has never constituted a defense of insanity in New York. But irresistible impulse, in an expanded form, finds its way into the proposed penal law, via the Model Penal Code, in the following terms:

1. A person is not criminally responsible for conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity:
   (a) To know or to appreciate the wrongfulness of his conduct; or
   (b) To conform his conduct to the requirements of law.

2. As used in this section, the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

What is first to be noted is the statement of irresistible impulse in terms of the actor's lack of substantial capacity to conform. Unlike the traditional irresistible impulse test, the revision does not require a complete inability to resist. If, therefore, the inability to conform in section 60.05 can be identified with the influence of extreme emotional disturbance in section 130.20, the two will be distinguished only by the degree of impairment of volitional capacity, i.e., substantial versus insubstantial.

On its face the mental disease or defect section imports a lack of self-control, a lack of substantial capacity to resist. The supporting comments for the manslaughter section in the Model Penal Code also refer to the "actor's loss of self-control." Hence, each section contemplates the same psychological phenomenon, the absence to a greater or lesser degree of

35. See, e.g., People v. Schmidt, 216 N.Y. 324, 110 N.E. 945 (1915); N.Y. Pen. Law § 34: "A morbid propensity to commit prohibited acts, existing in the mind of a person who is not shown to have been incapable of knowing the wrongfulness of such acts, forms no defense to a prosecution therefor."


37. Proposed Pen. Law § 60.05. (Emphasis added.)


39. Lack of premeditation has, at times, been analogized to an impulse that is irresistible. See, e.g., People v. Barberi, 149 N.Y. 256, 267, 43 N.E. 635, 638 (1896); People v. Conroy, 97 N.Y. 62, 75 (1884). In People v. Zackowitz, 254 N.Y. 192, 172 N.E. 466 (1930), Judge Cardozo stated: "At the trial the vital question was the defendant's state of mind at the moment of the homicide. Did he shoot with a deliberate and premeditated design to kill? Was he so inflamed by drink or by anger or by both combined that, though he knew the nature of his act, he was the prey to sudden impulse, the fury of the fleeting moment?" Id. at 194-95, 172 N.E. at 467.

40. See note 31 supra. It should be noted that neither section requires that the loss of self-control be the result of spontaneous impulse. See Model Penal Code § 4.01, comment 3 (Tent. Draft No. 4, 1955), § 201.6, comment 3 (Tent. Draft No. 9, 1959).
self-control. Indeed, the identity of the phenomenon is a necessary corollary to the theory of irresistible impulse.

We must begin with the presumption that "the mind is not functionally compartmentalized but, in keeping with the now universally accepted psychological theory of integration, the will, the intellect and the emotions are interdependent." Next let us recall that the proponents of the irresistible impulse test readily admit that the actor knows the nature and wrongfulness of his act, but they urge that he may lack capacity to refrain from doing what he knows to be wrong. Since the intellect remains functioning, the trouble must stem from another of the integral parts of the personality. The emotions being part of the personality, it follows that severe emotional distress may disrupt the whole interdependent mental apparatus, including the ability to exercise self-control. Therefore, the person who kills another under the influence of extreme emotional disturbance does so, at least in part, because his capacity to conform to law has been diminished. In short, if one accepts the irresistible impulse theory, one must also accept that the manslaughter and mental disease or defect sections are on the common ground of diminished capacity to conform, differing from each other only in the degree of diminution.

The argument may be made, however, that the sections are intended to be distinguished, not by the nature of the psychological phenomenon, but by its causes; that is to say, the manslaughter section assumes that the actor is normal and that his loss of self-control must be his own fault, while the mental disease or defect section presupposes that the actor is already suffering from a mental abnormality, and that his consequent lack of self-control is not culpable. In fact, the reporter of the Model Penal Code has advanced just such an argument in support of the exclusion of recidivists from among the mentally diseased and the mentally defective. He asserts that incapacity to conform must be distinguished from mere

43. "The very fact of long internal struggle may be evidence that the actor's homicidal impulse was deeply aberrational, far more the product of extraordinary circumstances than a true reflection of the actor's normal character ...." Model Penal Code § 201.6, comment 3 (Tent. Draft No. 9, 1959). It is perhaps significant that the proposed New York manslaughter section speaks only of emotional disturbance while its counterpart in the Model Penal Code mentions mental or emotional disturbance. Does the excision of mental disturbance indicate that the Temporary Commission considered it a redundancy?
indisposition and that "such a distinction is inevitable in the application of a standard addressed to impairment of volition." 44

First of all, it seems quite doubtful that such a distinction can scientifically be made. As one eminent jurist has put it, "If there is an iota of scientific evidence to sustain the distinction, surely it is not revealed." 45 Thus, when courts have attempted to distinguish between heat of passion and insane impulse, the results have been unenlightening to the point of confusion. 46 What it comes down to then is this: if the irresistible impulse theory is to have any application at all, then, despite disclaimers to the contrary, 47 we must reason circularly from the impelled behavior to mental disease to a lack of substantial ability to conform because of the mental disease. 48 "Sanity is then conceived as the ability to resist (antisocial) impulses." 49 As a result, any theory leading to the exclusion of certain irresistibly impelled behavior on account of its cause is untenable.

There is a second, and perhaps even more significant, reason to ignore the cause of the absence of ability to conform, and look only to the psychological phenomenon itself. Every crime is composed of two elements, the mens rea, the culpable state of mind, and the actus reus, the actual "deed of crime," the presence of both being essential before particular conduct may be labelled criminal. 50 If the mental state required for a particular crime is lacking, the crime has not been committed. 51 The mental element which concerns us here is the intent to kill. But one acting under an irresistible impulse is not acting volitionally and, hence, his act is not intentional, 52 and this is so regardless of the cause of his lack

44. Model Penal Code § 4.01, comment 3 (Tent. Draft No. 4, 1955). One commentator has argued that the purported exclusion of psychopaths is actually illusory. Kuh, A Prosecutor Considers the Model Penal Code, 63 Colum. L. Rev. 608, 626 (1963).
48. Wootton, Social Science and Social Pathology 233 (1959); see State v. Lucas, 30 N.J. 37, 70-71, 152 A.2d 50, 67-68 (1959). Professor Allen may be saying the same thing when he interprets the Model Penal Code test to include "those whose mental condition renders them incapable of appreciating the criminality of their conduct or of conforming their behavior to the law's commands." Allen, The Rule of the American Law Institute's Model Penal Code, 45 Marq. L. Rev. 494, 500 (1962). Note that emphasis is placed on symptomatic "mental condition," not on collaterally diagnosed "mental disease or defect."
50. Perkins, A Rationale of Mens Rea, 52 Harv. L. Rev. 905, 908 (1939). The offense malum prohibitum is not an exception because it is not a "crime." See Model Penal Code § 1.05, comment 3 (Tent. Draft No. 2, 1954); Perkins 701-02.
52. Id. at 979; Keedy, Irresistible Impulse as a Defense in the Criminal Law, 100 U. Pa.
of substantial capacity to resist. Because he cannot entertain the requisite intent to kill, mens rea is lacking and there has been no crime.

No supportable distinction can be made between the incapacitated and the indisposed. The irresistible impulse test requires, rather, that we ignore the cause of the impulse and exculpate the actor solely on the basis of the phenomenon itself. Accordingly, the manslaughter and mental disease or defect sections are distinguishable only by the extent to which the volitional capacity has been diminished. Since the latter section contemplates the absence of substantial capacity to conform, the former must assume the presence of such capacity.

In order to distinguish murder from manslaughter, must we now surrender to further psychiatric delvings into the mind in order to determine whether the actor had a complete or only a substantial capacity to choose? I hope not. I think we do no particular injustice when we treat as a murderer the killer who, with a substantial capacity to choose, elects to kill. On the other hand, to attempt to differentiate between the substantial and the complete would require us, in all fairness, to refine our distinctions to include the little-more-than-substantial and the almost-complete. Punishment for the little-more-than-substantial would necessarily be less severe than for the almost-complete and so on. Psychiatry is still a long way from achieving such mathematical certainty, and to require "psychiatrists ... to give degrees and percentages of responsibility ... would be a travesty."

In summary, section 130.20(2) is objectionable because it is vague and ambiguous. In addition, the irresistible impulse defense, as formulated and proposed, seems to cover all the situations wherein it is desirable and possible to take notice of a diminished capacity to conform to law.

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L. Rev. 956, 986-87 (1952). To put it another way, the accused must have been competent to make a moral decision. Hall, Psychiatry and Criminal Responsibility, 65 Yale L.J. 761, 770 (1956). Presumably, if he lacks volitional capacity to a substantial extent, he lacks the competence to make a moral decision.

53. Over sixty years ago, an Iowa court held that an irresistible impulse to steal was a defense to a prosecution for larceny, even though the impulse was inspired by avarice or greed. The court found that the trial court had erred in instructing the jury to distinguish between an impulse caused by greed and one caused by insanity. State v. McCullough, 114 Iowa 532, 87 N.W. 503 (1901).


55. Guttmacher, op. cit. supra note 41, at 176.

56. I do not mean that I espouse, without reservation, the Temporary Commission's version of the irresistible impulse defense. However, the enactment of the present version, or one closely akin to it, seems inevitable. The Temporary Commission has reported that fruitful discussions have occurred between the State District Attorneys' Association and the Commission concerning controversial aspects of the proposed defense and that these dis-
Sections 130.20(2) and 130.25(1)(a) should be eliminated from the proposed penal law.

B. Homicide Resulting From an Act Intended To Do Serious Bodily Harm

An inexcusable and unjustifiable killing directly resulting from a cold-blooded assault with intent to do serious bodily harm is not murder in any degree under existing New York murder statutes. As a matter of fact, such a homicide, *qua* homicide, may not be unlawful at all. It is clear that an unintentional killing, committed during the heat of passion, is manslaughter. If such killing is perpetrated by means of a dangerous weapon or in a cruel and unusual manner, it is manslaughter in the first degree. Absent both these factors, it is manslaughter in the second degree. On the other hand, it seems equally clear that heat of passion is an affirmative element of the crime.

It is this gap in the existing statutes which is intended to be filled by proposed section 130.20(1):

57. It is not intentional murder, N.Y. Pen. Law §§ 1044(1), 1046, because intent to kill is lacking; it is not felony murder, N.Y. Pen. Law § 1044(2), because the assault merges into the homicide. People v. Hüter, 184 N.Y. 237, 77 N.E. 6 (1906); and it is not depraved mind murder, N.Y. Pen. Law § 1044(2), because the assault has been directed against a particular person. See pp. 185-86, 197 infra.

58. N.Y. Pen. Law § 1050(2).

59. N.Y. Pen. Law § 1052(2).

60. People v. D'Andrea, 26 Misc. 2d 95, 102, 207 N.Y.S.2d 215, 223-24 (Kings County Ct. 1960); see cases collected in Homicide Report 204.

61. Second Report 39-40. The argument might well be made that the crime might well be made that the crime which covers an unlawful homicide committed "by an act, procurement or culpable negligence of any person, which, according to the provisions of this article, does not constitute the crime of murder in the first or second degree, nor manslaughter in the first degree." But then we are confronted with the problem of explaining the existence of § 1052(2), which would be rendered entirely superfluous by including such homicides in § 1052(3). The argument might continue that People v. Angelo, 246 N.Y. 451, 159 N.E. 394 (1927), stands for the proposition that there can be no gaps in our homicide statutes and, therefore, a cold-blooded assault resulting in death must fit into some category of murder or manslaughter. However, it must be remembered that the court of appeals in Angelo was excluding reprehensible conduct (ordinary negligence) from penal sanction. Quite a different approach is to be expected when the court is confronted with the necessity of filling a gap by creating a crime when the statutes seem to provide for none.
A person is guilty of manslaughter in the first degree when:
1. With intent to cause serious physical injury to another person, he causes the death of such person or of a third person . . . .62

This section, which seems straightforward enough, replaces present sections 1050(2) and 1050(3) and adequately fills the outstanding gap by omitting any reference to heat of passion. It is gratifying to note that no provision is made for mitigation on account of the influence of extreme emotional disturbance. It would seem, however, that the absence of such a provision creates somewhat of an inconsistency between proposed sections 130.20(1) and 130.20(2) which can easily be corrected by omitting the latter section.

C. Depraved Mind Homicide

The common law classified as murder a homicide resulting from conduct which carried with it an extreme risk of causing death, and the doing of which was said to evince a depraved heart, regardless of human life.63 "The examples of such cases usually given as illustrations in the [classic common law] texts were: shooting a gun into a crowd, driving a horse into a crowd and rolling a rock or heavy object off a roof, causing it to fall into a well traveled thoroughfare."64

The depraved mind concept was absorbed into the New York Penal Law as a species of first degree murder:

The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed: . . .
2. By an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any individual . . . .65

In the leading case of Darry v. People,66 it was settled that the phrases, "dangerous to others" and "regardless of human life" were intended to

62. Physical injury "means pain of a substantial nature, or any illness or impairment of physical condition." Proposed Pen. Law § 10.00(3). Serious physical injury "means physical injury which creates a substantial risk of death, or which causes serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ." Proposed Pen. Law § 10.00(4).
63. Moreland 31. Terminology used to describe the mens rea attendant upon such conduct has included such epithets as "a wicked heart," "a mind grievously depraved," "dangerous as a wild beast." Homicide Report 103.
64. Id. at 103. (Citations omitted.)
65. N.Y. Pen. Law § 1044(2). Section 1044(4) provides that a homicide, which results from willful interference with railroad property, is murder in the first degree. It would seem that such conduct evinces a depraved indifference to human life and should fall within the scope of section 1044(2). For a brief discussion and rationale of railroad homicide, see Homicide Report 187.
66. 10 N.Y. 120 (1854).
indicate conduct endangering others than the victim, and not specifically
directed at the victim; thus, neither violence aimed at a particular indi-
vidual nor violence endangering only one person falls within the scope
depraved mind murder. On the other hand, conduct, which has been
said to fall within the scope of the statute, has ranged from indiscriminate
shooting to the sale of wood alcohol with knowledge that it was poison-
os and that the purchaser intended to resell it as gin.

1. "Wantonness" as the Key

In its 1937 survey of the law of homicide in New York, the Law Re-
vision Commission found a diversity of opinion among the early author-
ities as to the precise nature of the mens rea and actus reus of depravity.

Nevertheless, Professor Moreland has concluded that the gravamen of
the crime is a species of negligence, though more aggravated than that
required for both the tortious failure to exercise reasonable care and
the recklessness needed for the crime of manslaughter. Professors
Wechsler and Michael seem to be in accord when they identify the crime
as one of "extremely gross recklessness." Of course, we must have a
more precise definition than this, and Professor Moreland has proposed
that we describe the actor's aggravated negligence as "conduct wantonly
disregardful of the lives and safety of others," while Professor Perkins
suggests the phrase "wanton and wilful disregard of unreasonable human
risk."
Despite the similarity in their terminologies, Moreland and Perkins mean two different things by the word “wanton.” Perkins believes that it “goes beyond negligence in any degree,” while Moreland sees it as a “still higher degree of negligence.” The mutual choice of the word wanton is salutary, but Professor Moreland’s continued classification of the conduct as a species of negligence is not. Wantonness has a meaning of its own in the law, representing something quite distinct from both gross negligence (recklessness) and specific intent, although it seems closer, in degree of moral culpability, to intent. Professor Perkins defines it as follows:

Wanton misconduct “is something different from negligence however gross—different not merely in degree but in kind, and evincing a different state of mind,” so callously heedless of harmful consequences known to be likely to follow that “even though there be no actual intent, there is at least a willingness to inflict injury, a conscious indifference to the perpetration of the wrong.” While an intent to do an unlawful act in wanton disregard of the foreseen likelihood of harm may differ little in the scale of moral blameworthiness from actual intent to cause such harm it is not the same state of mind and should not be confused therewith, although it may be permissible to characterize it as “equivalent in spirit to actual intent.”

Viewing the depraved mind as sui generis solves several problems. First of all, it should provide sufficient answer to those who object to the delineation of yet another degree of negligence where no such delineation is feasible. Secondly, the characterization of wantonness as “equivalent in spirit to actual intent” goes a long way toward justifying the identity of punishment for intentional and depraved mind murder. Finally, we must have a way of verbalizing the somewhat difficult and subtle distinction between a depraved mind and a merely reckless mind, and wantonness provides the means of articulation.

75. Perkins 61; see Perkins, Alignment of Sanction with Culpable Conduct, 49 Iowa L. Rev. 325, 362-63 (1964).
77. Perkins 691. (Citations omitted.)
78. “Shadowy enough and uncertain is the dividing line between ordinary and gross negligence. Should a further distinction be necessitated by the addition of another overtone scarcely audible even to trained ears—the creation of very gross negligence?” Homicide Report 131.
79. Professor Moreland, for instance, urges that depraved mind murder should be classified as murder in the second degree, Moreland 309. Since he views the crime as a species of aggravated negligence, he logically concludes that it should be subject to lesser punishment than intentional murder. Id. at 312.
80. “The distinction between the negligence necessary for this crime [depraved mind murder] and culpable negligence is often difficult to perceive. Wherein lies the difference between an act which evinces a disregard of its consequences and indifference to the rights of
2. The Proposed Statute

Depraved mind murder enters the proposed penal law in the following form:

A person is guilty of murder when: . . .
2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct involving a grave risk of human fatality and thereby causes the death of another person . . . .

"Recklessly" is defined as follows:

A person acts recklessly when he consciously disregards a substantial and unjustifiable risk (a) that the result described by a statute defining an offense will occur, or (b) that a circumstance described by a statute defining an offense exists, and when the disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

A merely reckless act which causes death constitutes the crime of manslaughter in the second degree.

Both the text of the proposed depraved mind murder statute and the commission staff comments indicate that recklessness is the gravamen of the offense. In this respect, the formulation seems to coincide with the Moreland view that the crime is a species of negligence, and to be at odds with the Perkins view that it is sui generis. However, it is probable that just the opposite was intended. To begin with, the proposed penal law provides the same punishment for both intentional murder and depraved mind murder. It would seem, therefore, that the mens rea of depravity should, as Professor Perkins puts it, "differ little in the scale of moral blameworthiness from actual intent," and, in fact, should be "equivalent in spirit to actual intent." Therefore, the reasonable man others and one that ‘evinces a depraved mind, regardless of human life’? 6 Fordham L. Rev. 309, 310 (1937).

81. Proposed Pen. Law § 130.25(2).
82. Proposed Pen. Law § 45.00(6).
84. Proposed Pen. Law § 130.25(2), Commission Staff Notes, refer to the crime as "the highest crime of reckless homicide."
85. Perkins 691.
86. Ibid. Model Penal Code § 210.2 (Off. Draft 1962), defines murder, in part, as follows: "(1) Except as provided in Section 210.3(1)(b), criminal homicide constitutes murder when: (a) it is committed purposely or knowingly; or (b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life.” The reporter’s comments to the section emphasize the equivalence in spirit of “purposely or knowingly” and “extreme indifference”: “Paragraph (1)(b) reflects the judgment that there is a kind of reckless homicide that cannot fairly be distinguished for this purpose from homicides committed purposely or knowingly. . . . Since risk . . . is a matter of degree and the motives for risk creation may be infinite in variation, some formula is needed to identify the case where
should not be a part of the definition of depravity any more than he is a part of the definition of intent.\textsuperscript{87}

There is yet another reason for discarding the assumption that the intended gist of the offense is negligence. If the standard were an objective one, then relevant evidence of depravity would, typically, be limited to external manifestations of unreasonableness (the gravity of the risk and the nature of defendant’s conduct), and to the subjective consciousness of risk (solely because it is part of the definition of “recklessly”). But the proposed section would admit of all such proof even in the absence of the phrase, “under circumstances evincing a depraved indifference to human life.” In fact, the phrase would become inexplicable since the word, “circumstances,” if it were to have any meaning at all, would necessarily refer to irrelevant evidence. The better interpretation is that a subjective standard was intended. I propose that we define this standard as “a willingness that death should occur.” It seems to me that such a state of mind is truly equivalent in spirit to actual intent. This is not to say that reasonableness will not enter into the jury’s deliberations.

[W]e cannot directly apprehend the states of others’ minds and must rely on observable data to know them, and . . . in the interpretation of such data, the degree of risk supports an inference as to intention, recklessness or negligence. . . . [But we must not confuse] a mental state with the proof of its existence . . . [or imply] that the risk suggested by the immediate behavior and situation is the only, or decisive, way of establishing the relevant mental state.\textsuperscript{88}

Discarding an objective standard in favor of a subjective one opens a wider scope of inquiry at a depraved-mind-murder trial, and lends meaning to the phrase, “under circumstances evincing a depraved indifference to human life.” The motive of the actor—something which would be ignored entirely if we were to apply a standard of reasonableness to conscious risk-taking—becomes highly significant. For instance, a lawyer, who drives his car through a school zone at high speed during recess because he is late for a calendar call, may be conscious of the risk of a fatal accident, but has probably convinced himself that he can avoid it. On the other hand, an escaping felon might very well prefer a fatal accident to being caught. The lawyer is reckless but the felon is

\textsuperscript{87}A person acts intentionally with respect to a result or to conduct described by a statute defining an offense, when his conscious object is to cause that result or to engage in that conduct.” Proposed Pen. Law § 45.00(4).

\textsuperscript{88} Hall, General Principles of Criminal Law 118 (2d ed. 1960); see Kenny, Outlines of Criminal Law 35 (17th ed. Turner 1958).
depraved. Similarly, the conduct of the marksman, who shoots at a
target on the edge of a roof overlooking a crowded stadium, may be said
to deviate grossly from the standard of conduct of the reasonable man,
and to involve a grave risk of human fatality, but the marksman may
have convinced himself that he will not miss. The sniper who, deliberately
and indiscriminately, shoots from the roof into the bleachers has engaged
in no such rationalization. The marksman is reckless but the sniper is
depraved. Aside from evidence of motive, evidence of intoxication would
become relevant if the test were put in subjective terms and not phrased
as recklessness. Under the proposed penal law, voluntary intoxication is
never a defense when recklessness is an element of the offense charged.69
Yet, obviously, cases will arise when the intoxication is so intense that
there is not even a consciousness of risk, much less a willingness that
death should occur. In such instances it might be proper to convict the
actor of manslaughter in the second degree (reckless homicide), but it
would be extremely harsh, to say the least, to convict him of murder.90

What we must search for is not merely a consciousness of a grave risk
but, in addition, a full appreciation and comprehension of the nature and
gravity of the risk—a willingness that death should occur. Since such
an inquiry must be directed toward determining the actual mens rea
of the actor, the reference in the statute to recklessness, at best a mixed
subjective-objective concept, is self-defeating. An alternative formulation
is necessary but before proposing one, I should like to give attention to
another problem which may arise under the proposed statute.

The Temporary Commission has stated that the proposed depraved
mind murder section "is substantially a restatement of a similar crime
defined as first degree murder in the existing Penal Law [§ 1044(2)]."91
However, a colorable argument can be made that the omission from the
proposed section of the presently included phrase, "to others," brings
within the scope of the revision at least some homicides which result
from specifically directed violence. Certainly, if the actor can be
depravedly indifferent to the lives of many, he can also be depravedly

89. Proposed Pen. Law § 45.10(2).
90. Apparently the theory of § 45.10(2) is that the actor is initially reckless in becoming
inebriated and that his recklessness is presumed to continue up to and including the time of
the homicide. See Proposed Pen. Law § 45.10(2), Commission Staff Notes. An analogous
theory has been applied to epileptic drivers. See People v. Eckert, 2 N.Y.2d 126, 138 N.E.2d
794, 157 N.Y.S.2d 551 (1956). But the recklessness of both the drunk and the epileptic in-
evitably occurs at a time when the risk of causing a fatality is not immediate and therefore
not grave. For instance, the drunk may have started drinking several hours before he
fatally injures a pedestrian in an automobile accident.
91. Proposed Pen. Law § 130.25(2), Commission Staff Notes.
indifferent to the life of one. The inquiry in such a situation will still focus upon the actor's state of mind. Consequently, the jury will refer to such relevant factors as motive, knowledge of the victim's physical condition, and the length and severity of the attack, as means of determining whether the actor intended to stop short of killing or whether he was quite willing that his victim should die, i.e., whether he has committed manslaughter or murder.

3. A Proposed Substitute Formulation

Wantonness should be substituted for recklessness as the *sui generis* gravamen of the offense. Accordingly, I suggest that the following definition of "wantonly" be added to section 45.00 of the proposed law:

A person acts wantonly when he engages in conduct involving a grave risk of human fatality under circumstances evincing a realization and appreciation of the nature and gravity of the risk and a willingness that death should occur.

Section 130.25(2) would then read simply:

He wantonly causes the death of another.

D. Felony Murder

The felony murder doctrine apparently originated with the canonically oriented Bracton who stated that culpability for a homicide by misadventure depended upon the lawfulness, or unlawfulness, of the venture in which the actor was, at the time, engaged. With the further developments of the common law, the principle evolved that a killing occurring during the perpetration of a felony was murder. Several theories were advanced in rationalization of the doctrine. Under one the intent to commit the underlying felony was, by implication of law, transferred to

93. As to manslaughter, see pp. 184-33 supra. In Massachusetts a homicide committed with "extreme atrocity or cruelty" is murder in the first degree. Mass Gen. Laws ch. 265, § 1 (1932). It is proposed here that cruelty and atrocity be considered merely as evidence of a murderous mens rea.
94. This section defines the terms which "are applicable in the determination of culpability requirements for offenses defined in" the proposed law. It includes definitions of act, omission, intentionally, knowingly and criminal negligence.
96. Homicide Report 132-34; Moreland 42; Corcoran, Felony Murder in New York, 6 Fordham L. Rev. 43, 52 (1937). A homicide occurring during the commission of an unlawful act, not a felony, is discussed at pp. 200-03 infra.
the homicide,\textsuperscript{97} while according to another the intent to kill or do serious bodily injury was conclusively presumed from the commission of the felony.\textsuperscript{98} The felony murder rule was, for some time, not seriously challenged, probably because the punishment for the underlying felony was, more often than not, death and, as long as the felon was hanged, no one particularly cared why.\textsuperscript{99} However, in 1883, Judge Stephen launched a blistering attack upon the cruelty and harshness of the rule,\textsuperscript{100} and, in \textit{Regina v. Sern},\textsuperscript{101} he implemented his views by holding that the act, which resulted in death, must have been known to be dangerous to life, likely in itself to cause death, and done for the purpose of effectuating the underlying felony, and if all these factors were not present the homicide was not murder. In effect, Stephen equated felony murder with depraved mind murder.\textsuperscript{102}

Stephen's hard attitude toward felony murder did not remain the law. Through a series of cases, it was modified to an objective formulation which required only that the homicide result from an act of violence committed during the perpetration of, and in furtherance of, a violent felony.\textsuperscript{103} According to this test, the \textit{mens rea} of the actor, vis-à-vis the violent act which produced death, was irrelevant,\textsuperscript{104} and Stephen's equation of felony murder with depraved mind murder was abandoned. In 1957, the pendulum swung the other way and, by statute, felony murder was abolished in England, although it was provided that a murder (as limited by the statute to exclude felony murder) was to be a capital offense if committed in the course or furtherance of a theft.\textsuperscript{105}

\textsuperscript{97} Homicide Report 134.
\textsuperscript{98} Id. at 135; Moreland 14. The conclusive presumption seems to have been based on an inference that every felon was willing to kill since the victim of the felony had a right to defend himself, even to the point of killing the felon. See annotation to Regina v. Horsey, 3 Fost. & Fin. 287, 288, 176 Eng. Rep. 129, 130 (Nisi Prius 1862).
\textsuperscript{99} Powers v. Commonwealth, 110 Ky. 386, 414, 61 S.W. 735, 741 (1901).
\textsuperscript{100} 3 Stephen, History of the Criminal Law of England 57-75 (1883).
\textsuperscript{101} 16 Cox Crim. Cas. 311 (1887).
\textsuperscript{102} Moreland 44; Perkins, Alignment of Sanction with Culpable Conduct, 49 Iowa L. Rev. 325, 364 (1964).
\textsuperscript{103} Moreland 47-48. This statement of the rule is probably the best synthesis of the cases, although other theories have been advanced from time to time. See Homicide Report 148-49.
\textsuperscript{104} See, e.g., Rex v. Elnick, [1921] 30 Man. 415, 53 D.L.R. 298 (1920) (accidental shooting during a robbery held felony murder regardless of the state of mind of the robber).
1. Felony Murder in New York

Felony murder is first degree murder in New York by virtue of the following provision in section 1044:

The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed: . . .
2. . . without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise . . . .

There are several reasons for concluding that the final phrase, "or otherwise," in the statute brings within its scope all felonies which are independent of the homicide, whether or not they are of the type that usually breed violence. While the court of appeals has never been confronted with a case involving a non-violent felony, it has not hesitated to state, in dictum, that "although most jurisdictions limit its application to specified violent felonies (e.g., arson, rape, robbery and burglary), New York and the minority make homicide during the commission of any felony murder in the first degree . . . ." This dictum finds considerable support in the history of felony murder legislation in New York, for although the statute at one time specifically enumerated the felonies to which the doctrine applied, this enumeration was significantly omitted when the present section was enacted. Finally, the leading authorities are unanimously, albeit sometimes cautiously, in accord that all independent felonies are within the scope of the statute.

Not only is the New York felony murder statute indiscriminate with respect to the kinds of felonies which fall within its scope, but apparently it is almost as nonexclusive in selecting the kinds of homicidal acts which, having occurred during the commission of, or attempt to commit a felony, will support a first degree murder conviction. In People v. Luscomb, the court of appeals, in a four to three decision, affirmed

106. N.Y. Pen. Law § 1044(2).
107. People v. Wood, 8 N.Y.2d 48, 51 n.2, 167 N.E.2d 736, 738 n.2, 201 N.Y.S.2d 328, 331 n.2 (1960) (dictum); accord, People v. La Marca, 3 N.Y.2d 452, 144 N.E.2d 420, 165 N.Y.S.2d 753 (1957) (dictum). In People v. Greenwall, 115 N.Y. 520, 22 N.E. 15 (1889), the court rejected an argument that "otherwise" refers to other persons and not to other felonies. N.Y. Pen. Law § 1044(3) provides that an unjustifiable and inexcusable homicide is murder when perpetrated while the actor is committing arson in the first degree. The section has been said to be superfluous in view of the all-inclusiveness of felony murder. Homicide Report 156-57.
108. See Corcoran, supra note 96, at 55, for a brief review of the legislative history.
110. 292 N.Y. 390, 55 N.E.2d 469 (1944).
a conviction of murder in the first degree (felony murder), even though the defendant's homicidal act had not been committed in furtherance of the underlying felony. Defendant had been interrupted in an assault upon his wife by her father. He then commenced a new assault upon the latter, and while that felony was in progress, shot and killed his wife. The majority of the court of appeals considered it irrelevant that the homicide had not been committed in furtherance of the felony (just the opposite was true), and held that the mere contemporaneity of the two was sufficient.\textsuperscript{111} Despite broad language in the decision pointing toward the determinative significance of contemporaneity, it is colorably arguable that the case must be limited on its facts to circumstances which demonstrate a close connection between the felony and the homicide.

A corollary to the \textit{Luscomb} decision is the rejection of the rule of some jurisdictions that the homicide must be the natural and probable consequence of the felony.\textsuperscript{112} It seems logical to assume, therefore, that contemporaneity and close connection are all that need be found in order to place the felon's homicidal act\textsuperscript{113} within the operation of the felony murder statute. Specifically, a killing, which might otherwise have been deemed excusable homicide, \textit{i.e.}, caused by an unavoidable accident, might, in conjunction with these other factors, be considered murder in the first degree.\textsuperscript{114} The innocuousness of the act itself would seem to be entirely irrelevant since New York rationalizes its felony murder doctrine, not on any theory of risk of death, but on the basis of transferred intent.\textsuperscript{115} The underlying felony supplies the requisite \textit{mens rea}; the

\textsuperscript{111} "Mere contemporaneity between the homicide and the felony is not sufficient to spell out felony murder. There must be a causal connection between the two. The homicide must have resulted from an act performed in execution and in furtherance of the felony. As the dissenting opinion well pointed out, even if it be assumed that the assault upon the father was still in progress at the time the killing took place, it is clear that the act of shooting the wife was not in any way committed in execution and in furtherance of any assault on the father. On the contrary, the evidence apparently credited by the jury indicates, if anything, that the allegedly continuing assault on the father was in furtherance of the defendant's design to prevent any interference by the father in the defendant's assault upon his wife." 13 Fordham L. Rev. 243, 247-48 (1944). (Footnotes omitted.)

\textsuperscript{112} See Corcoran, supra note 96, at 65; Crum, Causal Relations and the Felony-Murder Rule, 1952 Wash. U.L.Q. 191.

\textsuperscript{113} The act which produces death must be the act of one of the felons. People v. Wood, 8 N.Y.2d 48, 167 N.E.2d 736, 201 N.Y.S.2d 328 (1960).

\textsuperscript{114} There are no New York cases in point. In People v. Lytton, 257 N.Y. 310, 178 N.E. 290 (1931), and People v. Udwin, 254 N.Y. 255, 172 N.E. 489 (1930), it was held that a homicide resulting from the accidental discharge of a gun by one of the felons was felony murder. However, in each of these cases, as in People v. Luscomb, 292 N.Y. 390, 55 N.E.2d 469 (1944), a contributing cause of the death was the dangerous use of the gun as a weapon.

\textsuperscript{115} People v. Wood, 8 N.Y.2d 48, 167 N.E.2d 736, 201 N.Y.S.2d 328 (1960); People v. Luscomb, supra note 114.
homicidal act becomes tainted with guilt, and the killing is presumed to be the *actus reus* of murder, the physical implementation of the *mens rea*.\(^{116}\) In short, the homicide will be murder in the first degree as long as it is caused by the felon in the immediate vicinity of the independent felony, and while he is in the process of committing or attempting to commit the felony.

If the New York felony murder doctrine is broadly inclusive of felonies and homicidal acts, it is limited in other ways. The act which produces death must be the act of one of the felons.\(^{117}\) Accomplices are equally guilty of felony murder though they be absent from the scene of the felony,\(^{118}\) though there be an express agreement not to kill,\(^{119}\) and though the actual killer be deemed legally incapable of the crime.\(^{120}\)

On the other hand, accomplices share no guilt for a killing which is not committed in pursuit and furtherance of the common felonious design,\(^{121}\) or which is committed after they have effectively abandoned the enterprise.\(^{122}\) If one of the felons accidentally kills himself, his accomplices are not thereby culpable.\(^{123}\) Other limitations have been set by cutting short the duration of the felony\(^{124}\) and by excluding flight from the *res gestae* of the felony.\(^{125}\)

While any one of these limitations may operate to exculpate a defendant in a given case, nevertheless, the New York felony murder doctrine retains a generally broad base. The revision, proposed by the

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116. Professor Norval Morris argues that the doctrine of implied malice bears only on the mens rea of murder and not upon the actus reus of homicide. Morris, The Felon's Responsibility for the Lethal Acts of Others, 105 U. Pa. L. Rev. 50, 59 (1956). However, his reasoning does not apply in a jurisdiction which has abandoned the natural and probable consequences rule.


118. People v. Michalow, 229 N.Y. 325, 128 N.E. 223 (1920).


120. People v. Porter, 54 N.Y.S.2d 3 (Kings County Ct. 1945) (actual killer incapable of committing a felony because of his age). In a reverse twist, the court of appeals in People v. Udwin, 254 N.Y. 255, 172 N.E. 459 (1930), affirmed convictions for felony murder based on a homicide which occurred during a jail break, even though one of the defendant-appellants, as a life prisoner, was not within the scope of the statute which made such an escape a felony under specified circumstances. The court found that he had acted on behalf of other escapees who were covered by the statute and, thus, had become a principal in their felonies.


123. People v. LaBarbera, 159 Misc. 177, 287 N.Y. Supp. 257 (Sup. Ct. 1936). If however, one of the felons accidentally kills a co-felon, all of the felons are guilty of felony murder. People v. Udwin, 254 N.Y. 255, 172 N.E. 459 (1930).


Temporary Commission, would narrow the base; however, the efforts of the Commission in this direction, though ingenious, only serve to emphasize the fundamental indefensibility of the felony murder doctrine.

2. The Proposed Statute

The text of the proposed felony murder statute is as follows:

A person is guilty of murder when: . . .

3. Either alone or in concert with others, he commits or attempts to commit a felonious crime of robbery, burglary, kidnapping, arson, escape or a forcible, felonious sex crime, and, in the course of and in furtherance of such crime or of the immediate flight of the perpetrators thereof or any one of them, one or more commits an act inherently dangerous to human life which causes the death of a person other than one of the perpetrators; except that it shall constitute an affirmative defense to a prosecution under this subdivision that a defendant, though a participant in the underlying felony:

(a) Did not commit the homicidal act or in any way solicit, counsel, encourage, cause or aid the commission thereof; and
(b) Was not armed with any deadly weapon, or any implement, article or substance capable of inflicting serious injury and of a sort not ordinarily carried about in public places by law-abiding persons; and
(c) Did not know that any of his confederates was armed with such a weapon, implement, article or substance; and
(d) Had no reasonable ground to believe that any of his confederates intended to commit an act inherently dangerous to human life.128

In one respect the revision broadens the felony murder doctrine by including immediate flight within the res gestae of the felony.127 On the other hand the area of accomplice-culpability is limited, first, by "extending a defendant an opportunity to fight his way out of a felony murder charge by persuading a jury, by way of affirmative defense, that he not only had nothing to do with the killing itself but was unarmed and had no idea that any of his confederates was armed or intended to engage in any conduct dangerous to life,"128 and second, by completely excluding from the operation of the section the death of a co-felon. In all other respects the section is closely akin to the felony murder doctrine as it existed in England immediately prior to the Homicide Act of 1957.129 It requires

126. Proposed Pen. Law § 130.25(3).
127. "[T]he crime is broadened to cover killings committed during 'immediate flight' from the underlying felony. The existing law, strictly limiting felony murder to homicides perpetrated in the course of the commission of the felony, is, in the Commission's opinion, unduly restrictive." Proposed Pen. Law § 130.25(3), Commission Staff Notes.
128. Proposed Pen. Law § 130.25(3), Commission Staff Notes. (Emphasis added.) Once evidence has been presented which raises an issue concerning the existence of an affirmative defense, the burden is placed upon the people to prove beyond a reasonable doubt that no such defense exists. Proposed Pen. Law § 55.00.
129. 5 & 6 Eliz. 2, c. 11; see p. 192 infra.
that the homicide result from a violent act (inherently dangerous to human life) committed in the course of, and in furtherance of, a presumptively violent felony. In addition, culpability is oriented to reasonable foreseeability, not to individual mens rea.129

The emphasis placed upon the foreseeability of risk to human life demonstrates an attempt by the Temporary Commission to close the gap between the mens rea of the felon and the actus reus of homicide which, as of now, need not concur—as in the case of an accidental homicide contemporaneous with, and closely related to, the felony. Despite the attempt, a substantial gap remains, and there is still no necessary correlation between mens rea and actus reus. The crimes of arson and robbery are presumptively violent but, as has been pointed out, they may be committed "safely" and with no thought of violence.130 On the other hand, a typically violent felony, aggravated assault, is omitted from the list,131 and, logically, it must be so excluded or every homicide resulting from such an assault would become felony murder.132 From the point of view, therefore, of either inclusion or omission, the mere enumeration of violent felonies is inadequate to reflect mens rea. The statute, however, requires more than a violent felony. It requires that the homicide result from an act inherently dangerous to human life. Does this additional requisite solve the problem? Manifestly it does not because it is indiscriminate with respect to violent acts. Pointing a gun during a robbery is probably an inherently dangerous act133 and, if the gun goes off accidentally, a felony murder has occurred.134 But such an accident can hardly be equal in culpability to a homicide which results from placing a gas tube under the nose of a bound robbery victim "to make her sleep" while the felons make their escape.135 Even if we were to

129. "The purpose of the indicated limitations is to exclude rare instances of accidental or not reasonably foreseeable fatality, and especially those which might happen to occur in a most unlikely manner in the course of a non-violent felony." Proposed Pen. Law § 130.25 (3), Commission Staff Notes.


131. Wechsler & Michael, supra note 129.

132. It has been held that when an assault culminates in a homicide, the former merges into the latter and, hence, the homicide cannot be said to have occurred while the defendant was engaged in committing the separate felony of assault. People v. Moran, 246 N.Y. 102, 158 N.E. 35 (1927); People v. Hüter, 184 N.Y. 237, 77 N.E. 6 (1906). If, however, independent assaults are committed on two or more persons, one of the assaults may become the underlying felony for the homicide which results from the other. See People v. Luscomb, 292 N.Y. 390, 55 N.E.2d 469 (1944); People v. Wagner, 245 N.Y. 143, 156 N.E. 644 (1927).

133. Corcoran, supra note 96, at 47-48.


135. Ibid.

136. These were the facts in People v. Michalow, 229 N.Y. 325, 128 N.E. 228 (1920).
concede *arguendo* that the combination of violent act in furtherance of violent felony evidences what Professor Perkins has called "a man-endangering-state-of-mind," still it fails to take into account that there are different degrees of culpability within such a state of mind.\(^{138}\)

Other formulations, which have recently been devised, are equally objectionable. The Model Penal Code attempts to solve the problem by raising a rebuttable presumption that the homicidal felon has manifested "extreme indifference to . . . human life."\(^{139}\) Presumptions of fact are not unknown to the criminal law. We presume that the actor who grievously and mortally wounds another had intended the natural and probable consequences (death) of his act.\(^{140}\) Again, a factual inference of larcenous intent arises from recent, conscious, exclusive, and unexplained possession of stolen articles.\(^{141}\) In each of these instances, however, the facts, which must be present to raise the presumption of a specific intent, point inexorably toward the existence of that intent. A homicide, resulting from an inherently dangerous act committed in furtherance of a violent felony, is equally consistent with depravity, intent, recklessness, and negligence, and no valid factual inference of a specific *mens rea* may be drawn. Unsatisfactory too is a Wisconsin statute which places felony murder in a separate category of third degree murder.\(^{142}\) Here again there is an arbitrary identification and classification of *mens rea*. Felony murder is first degree murder in Minnesota only when the homicide results from the commission, or attempted commission, of a forcible sex crime.\(^{143}\) While this may be the most sophisticated of refinements, it is still objectionable because it does not take into account actual intent, and it would presumably include death resulting from fright or accident.\(^{144}\) Moreover, it is the physical assault, not the sexual intercourse, which ordinarily presents the greater danger of death and, as with the proposed New York revision, a homicide resulting from an assault is not, and cannot be, within the scope of the statute.

All of the objections to the various felony murder formulations which have been discussed above may be distilled into one major criticism: the doctrine works an injustice because it fails to correlate the *mens rea*

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137. Perkins, A Re-Examination of Malice Aforethought, 43 Yale L.J. 537, 557 (1934).
138. See Note, supra note 131, at 431-35.
140. See People v. Cooke, 292 N.Y. 185, 54 N.E.2d 357 (1944).
144. Cf. Perkins, supra note 137, at 558.
of the actor with the act for which he is held culpable and the degree of punishment which may be inflicted upon him. While modern codes have narrowed the *mens rea* gap, it still exists to a substantial extent because it inheres necessarily in any felony murder statute which employs an objective test to determine the *mens rea* of the felon vis-à-vis the homicide. Continued adherence to the doctrine is undesirable, not only because it is manifestly unjust to the defendant, but also because it has no utilitarian value. The felony murder doctrine was not conceived as a deterrent and it does not operate as such. If rehabilitation, and not deterrence, is the purpose of punishment, then let the felon be reformed while he is detained upon conviction of the underlying felony.

The felony murder doctrine works an injustice to the felon with no corresponding benefit to society. Section 130.25(3) should be omitted from the proposed penal law.

E. *Homicide While Opposing an Arrest*

A homicide, which resulted from forcible opposition to an officer making a lawful arrest, was murder at common law. Stephen gives this illustration: “A, a thief, pursued by B, a policeman, who wishes to arrest A, trips up B, who is accidentally killed. A commits murder.” If all the circumstances remained the same except that the arrest was illegal, then the resulting homicide was voluntary manslaughter—a provoked killing in the heat of passion.

Killing an officer is not a separate species of culpable homicide in New York, but, of course, it may fall within one of the delineated degrees of murder or manslaughter, depending upon the circumstances of the homicide and the *mens rea* of the actor. On the other hand, the mere circumstance of forcible resistance, culminating in the death of an officer, will not support a charge of felony murder. Although forcibly resisting lawful arrest is a felony in New York, it has been held that the gist of the crime is assault and that the assault merges into the resulting homicide. No attempt has been made to revive this form of

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145. See Note, supra note 131.
146. See Perkins, supra note 102, at 364-65. Of course, if a subjective test is employed, the doctrine becomes superfluous. See discussion of Regina v. Serné, p. 192 supra.
147. See Crum, supra note 112, at 210; Note, 31 Ind. L.J. 534, 544 n.60 (1956).
148. If the homicide has resulted from an act intended to kill or to do great bodily harm, or from wantonness or recklessness, then the felon is also subject to punishment for murder or manslaughter as the case may be.
149. Stephen 185. A lawful arrest was not the only official act so protected. Id. at 183.
150. Id. at 186.
151. N.Y. Pen. Law § 242(5).
152. People v. Hütter, 184 N.Y. 237, 77 N.E. 6 (1905). As to the merger of assault and
common law murder in the proposed penal law, nor is forcible opposition to an officer included among the list of violent felonies, during the commission, or attempted commission, of which a felony murder may occur.

It has been held in New York that one is justified in using reasonable force to resist an unlawful arrest, and it would seem to follow that if death results from the use of such force, no culpable homicide has occurred. In the proposed penal law, resistance to unlawful arrest is expressly made to fall within the affirmative defense of justification.

F. Misdemeanor Manslaughter

At common law, the actor who caused a homicide while he was engaged in the commission of an act malum in se, but not felonious, was guilty of manslaughter if a causal connection could be established between the unlawful act and the homicide. Like the felony murder rule, the misdemeanor manslaughter doctrine had its genesis in Bracton's thesis that a homicide by misadventure was culpable if it occurred while the killer was engaged in the commission of an unlawful act. In Bracton's time, homicide had not yet been divided into murder and manslaughter. At the present time in New York, we have not only made the division, but we have also trichotomized Bracton's unlawful act principle into felony murder, which we have already discussed, misdemeanor manslaughter, and civil-wrong manslaughter. Both of the manslaughter categories have been eliminated in the proposed penal law. The death knell of civil wrong manslaughter does not really sound a change in the law, since there have been no reported convictions of this crime. On the other hand, the misdemeanor manslaughter section has been the subject of interesting, and sometimes anomalous, judicial interpretation.

156. Moreland 183.
157. Id. at 184.
158. "Such homicide is manslaughter in the second degree, when committed without a design to effect death: 1. By a person committing or attempting to commit a trespass, or other invasion of a private right, either of the person killed, or of another, not amounting to a crime . . . ." N.Y. Pen. Law § 1052.
Misdemeanor manslaughter is presently defined as follows:

Such homicide is manslaughter in the first degree, when committed without a design to effect death:

1. By a person engaged in committing, or attempting to commit, a misdemeanor, affecting the person or property, either of the person killed, or of another . . . .

Not every misdemeanor falls within the section. Rather, it is limited to those "affecting the person or property, either of the person killed or of another," and to this extent misdemeanor manslaughter is less inclusive than felony murder. However, the exact scope of the statute is by no means apparent. The legislature has made no attempt to enumerate the included misdemeanors, and the description, "affecting person or property," does not create a well-delineated classification. Every misdemeanor which results in death "affects" the person. The intended criterion must be narrower than this, and People v. Grieco gives us some indication of what it should be. Grieco had been convicted of manslaughter in the first degree for causing a homicide while committing the misdemeanors of reckless driving and driving while intoxicated. The court of appeals reversed and decided that it was improper to use hindsight in determining whether the offense was one affecting the person. "Defendant did not intentionally hit the deceased. He did not see her until the very instant of contact." In requiring not merely a misdemeanor, but also a guilty mind, the court was adhering at least to the spirit of the common law requirement that the underlying offense be malum in se.

Grieco might thus have settled matters were it not for People v. Nelson. The underlying misdemeanor in that case was a violation of certain sections of the Multiple Dwelling Law pertaining to the installation of fire protection devices. As a direct result of the defendant's failure to install required safety devices, two of his tenants had perished in a fire. This violation of the Multiple Dwelling Law was viewed by a majority of the court of appeals as a continuing misdemeanor affecting the person and property of his tenants, and his conviction of misdemeanor manslaughter was affirmed.

159. N.Y. Pen. Law § 1050.
160. 266 N.Y. 48, 193 N.E. 634 (1934). In People v. Grieco, the court of appeals gave de novo treatment to misdemeanor manslaughter. Any developmental analysis of the present state of the crime in New York must, therefore, begin with this decision.
162. 266 N.Y. 48, 193 N.E. 634 (1934).
163. Id. at 51, 193 N.E. at 635.
Assuming *arguendo* the fundamental validity of a theory of constructive homicide, certain of the innovations implicit in *Nelson* are logically supportable. For instance, the decision makes it clear that the underlying offense need not be *malum in se*. The distinction between offenses *mala in se* and *mala prohibita* is not always apparent, and, therefore, it forms no logical basis for a classification of offenses to be included within the misdemeanor-manslaughter section. Rather, the *Grieco* requirement of a guilty mind is the preferable criterion regardless of the character of the misdemeanor. *Nelson* also extends *Grieco* to encompass misdemeanors resulting from an *omission to act*. This expansion of the rule also makes sense. No logical principle of law requires that the defendant be excused from liability for the consequences of his failure to act solely because no neuromuscular movement on his part produced the harm. So far, then, *Nelson* and *Grieco* are in accord. However, there is a truly anomalous aspect of *Nelson* which causes a sharp parting of the ways. The trial court had excluded all evidence offered by Nelson that he had been unaware of the condition of the building. The affirmance by the court of appeals indicates agreement with the trial court's opinion that proof of guilty knowledge is not always necessary for conviction of misdemeanor manslaughter. But let us recall that transferred intent is the rationale of both felony murder and misdemeanor manslaughter. If guilty knowledge is lacking, there is no wrongful intent to be transferred, and there can be no constructive homicide. The court of appeals, thus, left misdemeanor manslaughter without even a pretext of rationality.

The effect of *Nelson* was to bring within the scope of the misdemeanor-manslaughter statute all misdemeanors with the exception of assault, which have for their purpose the protection of person or property. In *Grieco*, it had been held that the felony murder principle—an assault merges into the resulting homicide—applies also to misdemeanor manslaughter. This remained the rule until the recent case of *People v.*

166. See Wilner, supra note 155, at 828-30.
167. Id. at 825-26. A killing caused by an omission to act is within the definition of homicide in New York. See N.Y. Pen. Law § 1042.
169. Id. at 238-39, 128 N.E.2d at 395 (dissenting opinion); 24 Fordham L. Rev. 688, 691 (1956).
171. See, e.g., People v. Vollmer, 299 N.Y. 347, 37 N.E.2d 291 (1949); People v. May, 9 App. Div. 2d 508, 195 N.Y.S.2d 792 (1st Dep't 1960). At common law there was no problem
wherein the court of appeals reduced a conviction from murder in the second degree to manslaughter in the first degree (misdemeanor manslaughter) on these facts: defendant and one Fasano, both members of a teenage gang, set out to assault a member of a rival gang. Unknown to defendant, Fasano had a gun which he thereafter used to kill one of the rival gang members. The court of appeals found no evidence to support defendant’s conviction of murder but held that the record "would sustain a conviction for manslaughter, first degree (under Penal Law, § 1050, subd. 1), for it could be found as a matter of law that Monaco, with Fasano, was engaged in a plan to assault the deceased and that homicide without design by Monaco to effect death resulted . . . ." The only misdemeanor that Monaco committed was assault. If the Grieco merger rule had been observed, there would have been no conviction of misdemeanor manslaughter. Since there was such a conviction, it follows that Monaco has overruled Grieco. We may assume, therefore, that every homicide which results from a misdemeanor assault will hereafter be manslaughter in the first degree.

Nelson and Monaco have completely subverted Grieco and have made of misdemeanor manslaughter a monument to the absurdity of constructive homicide. The Temporary Commission has acted wisely in excluding the crime from the proposed penal law.

G. Culpably Negligent Homicide

In the early common law, a killing per infortunium was a culpable homicide, although a pardon was ordinarily granted to the perpetrator. As more sophisticated notions of mens rea were absorbed into the law, the defense of misadventure replaced the pardon; however, the pendulum swung too far, and the defense was broadly construed to include a wide sweep of palpable wrongs. The concept of negligence entered the criminal law as a practical limitation on the defense of misadventure. If the death of one was caused by the negligence of another while the latter was engaged in otherwise lawful activity, the defense was unavailable and the homicidal actor was liable to punishment for manslaughter. At first, a standard of ordinary negligence was employed as a means of determining guilt, but later, the more rigorous criterion of gross negligence was adopted. It was this latter criterion which was received into the com-

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173. Id. at 47, 197 N.E.2d at 535, 248 N.Y.S.2d at 45.
174. For informative discussions of the development of culpable negligence in the criminal law, see Moreland 99-104; Binavince, The Ethical Foundation of Criminal Liability, 33
mon law of New York and translated into our statutory precept of culpable negligence. As included in the Revised Statutes of 1829, it was carried forward into the Penal Code of 1881 and the Penal Law of 1909 without redefinition.

At present in New York, a homicide caused by culpable negligence is either manslaughter in the second degree or criminally negligent homicide. The manslaughter branch of the crime is defined in section 1052(3) of the Penal Law:

Such homicide is manslaughter in the second degree, when committed without a design to effect death: . . .

3. By any act, procurement or culpable negligence of any person, which, according to the provisions of this article, does not constitute the crime of murder in the first or second degree, nor manslaughter in the first degree.

The section goes on to enumerate several ways in which a defendant may be culpably negligent, but these need not concern us since they would seem to be adequately covered by the catchall wording of section 1052(3).

Criminally negligent homicide refers to deaths resulting from "reckless or culpably negligent" driving, hunting, or boating. The specific delineation of these homicides removed them from the operation of the manslaughter section, but the standard for determining guilt remained the same.


The repudiation of the tort standard of care in favor of gross negligence probably resulted from a popular revulsion toward punishment for slight negligence. Homicide Report 247; Moreland 112-14. All of us are careless, and sometimes the results of our carelessness are disastrous. Very few of us would be willing to condemn to penal discipline the ordinarily negligent man when "but for the grace of God, there go we."

177. N.Y. Sess. Laws 1881, ch. 676, § 193(3).
178. N.Y. Pen. Law § 1052(3).
180. N.Y. Pen. Law § 1052(3).
181. At common law manslaughter was a catchall for those unlawful homicides which did not fall within the definition of murder. Perkins 41. N.Y. Pen. Law § 1052(3) is apparently a codification of the common law approach to manslaughter. "This approach [of section 1052(3)] is a curious echo of the time when in the ancient common law all unexplained homicides were culpable." Homicide Report 244.
184. N.Y. Pen. Law § 1053-e.
186. People v. Dawson, 205 Misc. 297, 133 N.Y.S.2d 423 (Sup. Ct. 1954); People v.
It is easy enough to postulate a standard of culpable negligence, but it is much more difficult to apply it. It is true that we are on firm ground in excluding from the definition the minimal negligence required for a cause of action in tort, but beyond this there is only a quagmire of confusion. The troublesome issue is whether guilt requires proof that the actor was conscious of the risk inherent in his conduct, or whether it is sufficient to find that he unreasonably failed to perceive the risk. The case law, to put it euphemistically, is inconclusive. The landmark decision is *People v. Angelo* wherein culpable negligence was defined as "something more than the slight negligence necessary to support a civil action for damages. It means, disregard of the consequences which may ensue from the act, and indifference to the rights of others." This definition has been called an "ambiguous formulation" with good reason. "Disregard of the consequences" may imply disregard of a perceived risk or disregard of circumstances which would have caused a reasonable man to perceive the risk. Following *Angelo*, several decisions emphasized the determinative significance of "consciousness of the probable consequences" (conscious risk-taking), while still another seemed to equate negligent homicide with depraved mind murder. In *People v. Gardner*, however, the norm was characterized as "a reckless disregard by the accused of the consequences of his conduct . . . ." If "reckless disregard" was intended to be used in contradistinction to conscious disregard, then the proffered standard of culpability was an unreasonable failure to perceive

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Williams, 187 Misc. 299, 61 N.Y.S.2d 252 (Suffolk County Ct. 1946). If the standard of culpability is the same, why enact separate sections? "The purpose, at least insofar as the vehicle homicide section (§ 1053-a) is concerned, is to provide a crime of homicide for fatal automobile negligence cases carrying less stature and punishment than does 'manslaughter,' the theory being that juries are reluctant in this type of case to convict of manslaughter with its severe penalty." Second Report 40.

188. Ibid.
189. Id. at 457, 159 N.E. at 396.
191. In the opinion of the Temporary Commission, the Angelo rule is more closely akin to conscious risk-taking (recklessness). Proposed Pen. Law § 130.10, Commission Staff Notes.
193. "The facts and circumstances concerning the operation of the vehicle by the accused must be aggravated in character. They must indicate such a recklessness and wanton 'devil may care' attitude on the part of the accused as to evince a contumacious disregard for consequence to life and limb of others. In sum, the evidence must disclose what would almost be tantamount to a willfulness to do harm on the part of the offender." People v. Brucato, 32 N.Y.S.2d 689, 691 (Kings County Ct. 1942). See pp. 183-90 supra for a discussion of the distinction between depravity and conscious risk-taking.
195. Id. at 687, 8 N.Y.S.2d at 921.
risk (inadvertent risk-taking). The cases remained in confusion until 1956 when the court of appeals seemed to settle matters in People v. Eckert: 196

[T]his conduct arises when the actor has knowledge of the highly dangerous nature of his actions or knowledge of such facts as under the circumstances would disclose to a reasonable man the dangerous character of his action, and despite this knowledge he so acts.197

The Eckert rule has been termed an “explicitly external formulation,”198 but apparently it was not explicit enough for at least one court. In People v. Joseph,199 culpable negligence was inconsistently interpreted as a species of depravity, as conscious risk-taking, and as an unreasonable failure to perceive risk:

The jury will . . . be required to determine whether or not the defendant was actually and consciously aware of the fact that by his acts or his omissions he was creating a risk; that the risk created was both unreasonable and unjustifiable under all the circumstances established by the evidence; that for a risk to be both unreasonable and unjustifiable it must involve conduct so highly culpable and blame-worthy as to be tantamount or equivalent to an intent to injure another; and that the defendant in disregarding such a risk knew or should have known that the probable (as distinguished from possible) consequences of his conduct would result in death or serious injury to another.200

Obviously a need exists for reformulation of the rule of culpably negligent homicide in terms sufficiently definitive and precise to achieve uniformity of application. However, precision is not the only end to be sought; the rule must also be defensible as a proper postulate of criminal conduct. The Temporary Commission has proposed a dual test for culpably negligent homicide. One of these tests, recklessness, meets the requirements above stated. The other, criminal negligence, does not.

1. The Proposed Statute

Recklessness and reckless homicide (manslaughter in the second degree) have already been touched upon.201 The test of culpability is essentially conscious risk-taking. The risk to human life must be substantial and the actor’s conduct in the face of the risk must be grossly unreasonable. Although the objective risk and the actor’s conduct seem to be stated as distinct elements in the determination of culpability, they cannot be applied as such. The conduct creates the risk, and the con-

197. Id. at 130-31, 138 N.E.2d at 797, 157 N.Y.S.2d at 556.
199. 11 Misc. 2d 219, 172 N.Y.S.2d 463 (Kings County Ct. 1958).
200. Id. at 241-42, 172 N.Y.S.2d 486-87. (Emphasis added.)
201. See pp. 188-89 supra.
scious creation of a substantial risk of causing the death of another is, of itself, grossly unreasonable. Even though the separation of risk from conduct is illusory, the test, as a whole, is satisfactory. Indeed, it is difficult to envision a more definitive test unless it were an enumeration of specific kinds of reckless conduct, and such an enumeration would inevitably be inadequate in view of the infinite opportunities for recklessness in our complex society. As to the propriety of incriminating the reckless actor, not even the most profound critic of negligence as a standard of criminal liability has come to the defense of conscious risk-taking.\textsuperscript{202}

Criminal negligence is quite another matter:

A person acts with criminal negligence when he fails to be aware of a substantial and unjustifiable risk (a) that the result described by a statute defining an offense will occur, or (b) that a circumstance described by a statute defining an offense exists, and the failure to be aware of such risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation.\textsuperscript{203}

A person who, with criminal negligence, causes the death of another person is guilty of "criminally negligent homicide,"\textsuperscript{1} a lesser offense than reckless manslaughter. A number of arguments have been advanced against punishing an unreasonable failure to perceive risk,\textsuperscript{205} including an argument that the proposed statute lacks precision because it fails to draw a discernible line between criminal negligence and ordinary negligence.\textsuperscript{206} We will concentrate on only one of the several objections: that there is no utilitarian end to be served by punishing criminal negligence.

We begin with the proposition that "the desirability of inflicting a penal sanction in cases of various types of negligent homicides will depend upon the deterrent effect of such sanctions and the necessity of segregating or rehabilitating persons guilty of such conduct."\textsuperscript{207} The initial question is

\textsuperscript{202} See Hall, Negligent Behavior Should Be Excluded From Penal Liability, 63 Colum. L. Rev. 632 (1963). Professor Hall does not seem to be particularly happy with the prospect of including the ill, tired, or drunken driver within the reckless actor category, but he has raised no serious arguments in opposition. Id. at 634.

\textsuperscript{203} Proposed Pen. Law § 45.00(7).

\textsuperscript{204} Proposed Pen. Law § 130.10. The Model Penal Code has also dichotomized culpable negligence into recklessness and criminal negligence, Model Penal Code § 2.02(2)(c), (d) (Off. Draft 1962), as have the statutes of some states. See, e.g., Ill. Ann. Stat. ch. 33 §§ 4-6, 4-7 (Smith-Hurd 1964); Wis. Stat. Ann. §§ 940.05, 940.03 (1953). For surveys of the law of culpable negligence, see Model Penal Code § 201.4, comment 1 (Tent. Draft No. 9, 1959); Moreland 104-111; Riesenfeld, Negligent Homicide—A Study In Statutory Interpretation, 25 Calif. L. Rev. 1 (1936); Note, 44 Iowa L. Rev. 555 (1959).

\textsuperscript{205} Hall, supra note 202.

\textsuperscript{206} Id. at 633.

\textsuperscript{207} Homicide Report 249. For an exposition of the law of homicide in these utilitarian terms, see Wecheler & Michael, A Rationale of the Law of Homicide (pts. 1-2), 37 Colum. L. Rev. 701, 1261 (1937).
whether punishment or the threat of it will be effective as a deterrent. Professor Wechsler thinks that it will:

Knowledge that conviction and sentence, not to speak of punishment, may follow conduct that inadvertently creates improper risk supplies men with an additional motive to take care before acting, to use their faculties and draw on their experience in gauging the potentialities of contemplated conduct. To some extent, at least, this motive may promote awareness and thus be effective as a measure of control. Certainly legislators act on this assumption in a host of situations and it seems to us dogmatic to assert that they are wholly wrong.\[208\]

Professor Hall takes the opposite view:

The theory of deterrence rests on the premise of rational utility, i.e. that prospective offenders will weigh the evil of the sanction against the gain of the imagined crime. This, however, is not relevant to negligent harm-doers since they have not in the least thought of their duty, their dangerous behavior, or any sanction. Insofar as potential offenders do think of these matters, they are at least reckless when they act dangerously. . . .

In any event, no evidence whatever supports the assumption that, in some mysterious way, insensitive negligent persons are improved or deterred by their punishment or that of other negligent persons.\[209\]

Professor Wechsler’s reliance on legislators, as authorities on the deterrence of criminals, is ill-placed. If legislators always did the right thing, we would not need committees of revisors, and a penal law would not become an amalgam of anachronisms.\[210\] Moreover, a distinction must be made between malum prohibitum legislation, which proscribes specific conduct, and a generally worded statute which promulgates an unspecific requirement to be careful. For instance, it seems safe to say that there are people in New York City who were once wont to cross the street without regard to the traffic signal, and who now cross only “on the green” because of the threat of a two-dollar fine. Would they have been similarly moved to change their ways if the ordinance had merely required “reasonable care” in crossing the street? One doubts it. It is one thing to proscribe, without exception, a specified course of conduct, and to punish the actor who intentionally engages in it; it is another to proscribe and punish inadvertence. As Professor Hall points out, the very fact that the conduct is inadvertent indicates that no thought has been given to the sanctions which may be consequent upon it. Furthermore, if in a given

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208. Model Penal Code § 2.02, comment 3 (Tent. Draft No. 4, 1955) (Professor Wechsler was the chief reporter of the Model Penal Code). See Wechsler, Foreword to Symposium on the Model Penal Code, 63 Colum. L. Rev. 589, 592; Wechsler & Michael, supra note 207, at 750-51.


set of circumstances, the immediate prospect of causing injury to another has not been sufficient to stir the actor to awareness of risk, then we certainly cannot assume that a statute, which makes absolutely no reference to these circumstances, will prompt alertness.

The additional argument may be advanced that punishment of the actor will, at least, cause him to be alert to the same risks in the future. This may be true. But it would seem that the realization of having caused the death of another will provide sufficient incentive for the exercise of care when the actor is again in the same risk-situation.

So far, we have been speaking, indiscriminately, of criminal negligence and ordinary negligence. Let us recall that the proposed section requires a gross deviation from the standard of conduct of a reasonable man. We are dealing, in other words, with conduct so dangerous to life that the ordinary negligent man could not have failed to perceive the risk. The actor who is contemplated by the section must, therefore, be someone who is afflicted with an extraordinary lack of perception. To put it another way, his unawareness passes beyond the point of inadvertence, and enters the realm of incompetence. We know, for instance, that in the law of torts, a person of low intelligence is held to a standard of ordinary intelligence,211 and an inexperienced adult is presumed to possess the minimum knowledge common to the community.212 There is nothing in the proposed penal law to indicate that the same rules would not apply in the determination of criminal negligence.213 For all practical purposes, then, the only violators of the criminally negligent homicide section will be those who are least likely to be deterred by it. How can one obey a mandate to be careful when he is incapable of foreseeing the risk?

There is just as little to be said for the proposed statute as an instrumentality of rehabilitation. First of all, the mentally deficient are pre-

211. See Prosser, Torts 156 (3d ed. 1964).
212. Id. at 162.
213. It seems unlikely that the mentally deficient will be able to plead, successfully, that they lack substantial capacity to conform their conduct to the requirements of law. "Severely or moderately deficient persons are apt to be institutionalized or otherwise only remotely in contact with community life, many of the mildly deficient or persons of borderline intelligence may, however, be able to function in everyday life if heavy demands and responsibilities are not placed on them. Functioning in such a way, their low intelligence is often unrecognized. Such persons are amenable to basic social controls and moral standards. They can control their conduct." Curran, Tort Liability of the Mentally Ill and Mentally Deficient, 21 Ohio St. L.J. 52, 66 (1960). (Footnote omitted.) Thus the mental defective may be unable to cope with the heavy demands of a serious risk-situation, and, as a result, he may cause the death of another. His mental deficiency will be no defense to his grossly unreasonable conduct because, fundamentally, such mental defectives "can control their conduct." Ibid.
sumably incapable of learning. Secondly, how do we "rehabilitate" the inexperienced adult? Even presuming the existence of a pedagogical penal system, how do we determine the point at which he has attained the experience of "a fictitious person, who never has existed on land or sea"?214

One begins to suspect that the criminally negligent homicide section is not really aimed at the inadvertent risk-taker. Perhaps, after all, it is intended as a sop to the conscience of a jury, which is unwilling to punish a reckless driver as severely as a reckless school builder,215 but, at the same time, is unwilling to set him free.216 If such is the fact, then the better course would be to eschew benevolent guile and provide a lesser penalty for vehicular homicides.

There is no valid rationale for the proposed crime of "criminally negligent homicide." Section 130.10 should be omitted from the proposed penal law.

IV. CONCLUSION

The purpose of this article has been a limited one—to critique certain of the homicidal offenses contained in the Proposed New York Penal Law. Criticisms have been made, but they must not be blown out of proportion. The proposed law, as a whole, is a monumental achievement, a telling solution to what has been called the "increasingly urgent issue" of codification of the criminal law.217 Justice Vanderbilt considered revision and codification of the law as one of the primary responsibilities of a lawyer;218 while Dean Pound urged the need for "competent, scientific, impartial agencies" to abet the legislative process.219 The Temporary Commission and its staff represent the agency which Pound envisioned, and the proposed penal law is the product of the skill and scholarship which Vanderbilt considered necessary for competent revision and codification.

215. See note 186 supra.
216. "Presumably, the proposed section under discussion, carrying only a four year maximum prison term, would be used for prosecution of the vast majority of vehicle homicides, although higher crimes of 'recklessness' could be used for the more heinous offenses . . . ." Proposed Pen. Law § 130.10, Commission Staff Notes.