

MALICE AFORETHOUGHT, IN DEFINITION OF MURDER

The matter which it is desired to discuss under this title is the standard method of charging the jury in murder trials as to the meaning of the term "malice aforethought."

In most jurisdictions under an indictment for murder in the first degree the jury may find the accused guilty of murder in the first degree or of murder in the second degree or guilty of manslaughter. It becomes necessary, therefore, to instruct the jury as to the distinction between murder and manslaughter. The usual definition of murder is the unlawful killing of one person by another with malice aforethought; and the definition of manslaughter is the unlawful killing of one person by another without malice aforethought.

Let us, for simplicity of discussion, dismiss the question of the unlawfulness of the killing, and deal with the subject as related to an unlawful killing, so that we may concentrate our attention solely on the term malice aforethought. The problem is to present to the jury an explanation of the term malice aforethought so that they can determine its existence or absence and thereby determine whether the crime is murder or manslaughter.

Let us now consider two definitions taken from charges actually made and very extensively followed by trial judges. One was made by a Chief Justice of Massachusetts, one by a Chief Justice of Connecticut, both now deceased. Let us quote from the former:

"Malice in this definition is used in a technical sense including not only anger, hatred and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will toward one or more individuals, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done *malo animo*, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty and fatally bent on mischief, and therefore malice is implied from any deliberate or cruel act against another, however sudden."

Later, the Chief Justice quotes from an English work as to the meaning of malice:

"Murder is the voluntary killing of any person of malice pre-pense or aforethought, either express or implied by law; the

sense of which word *malice* is not only confined to a particular ill-will to the deceased, but is intended to denote, as Mr. Justice Foster expresses it, an action flowing from a wicked and corrupt motive, a thing done *malo animo*, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty and fatally bent on mischief."

Let us quote from the Connecticut Chief Justice:

"In common speech malice usually means hatred, ill-will, malice or animosity existing in the mind of the accused, but in the law of homicide its meaning is much wider. Malice, as the word is used in an indictment for murder, not only includes cases where the homicide proceeds from or is accompanied by a feeling of hatred, ill-will or revenge existing in the mind of the slayer towards the person slain, but also cases of unlawful homicide which don't proceed from and are not accompanied by any such feeling. In the law of homicide, if a man intends unlawfully to kill another or do him some grievous bodily harm, such intention, whether accompanied or not accompanied by a feeling of hatred, ill-will or animosity, constitutes malice. * * * Suppose A, intending to kill B, whom he hates, by mistake kills C, his friend, whom he loves; here he did not intend to kill his friend, and he did not hate him, but he loved him; and yet the law says he killed his friend with malice."

These citations give the standard treatment of the term in charges to the jury in murder cases. It seems apparent that if the jury were left with no instructions adapted to the particular facts in the specific case on trial, and with only the details of an unlawful homicide spread before them and were expected to determine whether a certain condition of mind or state of facts called malice aforethought existed, from these definitions, they would be hopelessly at sea. Yet as legal propositions to go to the Supreme Court for review these citations would be impregnable.

In the specific cases of the two Chief Justices cited, the jury were not left to helplessly struggle with the application of these definitions to the facts proven, but were told that such and such facts within the range of the evidence would constitute murder or manslaughter or innocence.

The impossibility of applying these standard definitions to the facts of a case and determining whether malice aforethought exists is made very manifest by considering a few examples of unlawful killing.

A father and mother are at the bedside of a little child dying with hydrophobia; the physicians say the child has forty-eight hours to live; its agony is indescribable; the father and mother cannot endure that the child should suffer so, and in their love for the child calmly, prayerfully soak a cloth with chloroform and put the child to a speedier death because of its agony; the killing was unlawful. Was it with malice aforethought and so murder?

A young man and his brother, whom he loves, enter a saloon; they meet companions; one of the brothers becomes so intoxicated that he has no appreciation of his surroundings; in his drunkenness he draws a revolver and shoots it aimlessly into a crowd and kills his brother. The killing is unlawful. Is it with malice aforethought, and therefore murder?

Both of these cases are in law an unlawful killing with malice aforethought, and therefore murder. In one love alone actuated the deed; in the other the mind of the slayer was a motiveless blank.

A consideration of these instances in the light of the standard definitions shows the hopelessness of attempting to guide the jury by such definitions. The definitions affect the jury by producing confusion in their minds, as they affect any one who has tried to get a clear conception of malice aforethought from them or the text-books on homicide, which speak of this malice as if it were a definite, comprehensible state of mind. Should we go on using confusing definitions, or should a general definition be abandoned and the court confine its charge to the facts of the given case, saying merely that if you find such and such facts, that would be murder, or manslaughter, or innocence?

It is an instructive commentary on these confusing standard definitions of malice aforethought, to know that when the facts are given there is not the slightest difficulty under the law in distinguishing a case of murder from one of manslaughter.

The jury are never the judges of whether a certain fixed state of facts constitutes one crime or the other. The law determines on a fixed state of fact whether the crime is murder or manslaughter, and it is the duty of the court to give the jury the facts which, under the evidence, would constitute either crime.

In support of the proposition that the court should abandon the standard text-book style of charging the jury and simply

give the jury instructions as to whether an unlawful killing is murder or manslaughter by saying in substance, if you find the facts to be so and so (never using the term malice), the crime is murder, if so and so, manslaughter, let us quote from the examination of Baron Bramwell before the Homicide Law Amendment Committee. The Baron said:

"I think a judge who knows his business never troubles the jury with needless definitions, but he deals with the particular case before him, and says, for instance, in the case which I have put: 'The first question that you have to consider is' (forgive a sort of model summing up) 'did the man die of the injuries which he received? The doctors prove he did. The next question is, did the prisoner commit them? As to which the evidence is so and so. Now, you have to consider if you are of opinion that he is at least guilty of having killed him, whether it is murder; and that depends on the extent of the blows and the place they were directed to. If you think he intended to kill him, and did, it matters not what means he used; but suppose he did not intend it, you must consider whether the means used were likely to do it.' If you observe, in that case you lay down no definition; you assume that the jury and you both know what the law is; or you tell them what the law is in that particular case. I frankly confess that if I had to give a jury a definition, 'First of all, gentlemen, I have to tell you what homicide is, and then what criminal homicide is, and then what is not criminal homicide,' I expect the jury would be utterly bewildered. It is my duty as a judge to inform myself of the meaning of the act, and not to trouble the jury with a definition except so far as necessary."

That certainly is refreshing.

Is it too much to say that our accustomed use of a standard definition of malice aforethought has not only confused juries, but sometimes counsel and court?

In his *Digest of the Criminal Law*, Sir James F. Stephen has made the best attempt yet made to give a rational and intelligible definition of malice aforethought. He there says on page 161:

"Malice aforethought means any one or more of the following states of mind preceding or co-existing with the act or omission by which death is caused and it may exist where the act is unpremeditated:

"(a) An intention to cause the death of or grievous bodily harm to any person whether such person is the person actually killed or not.

"(b) Knowledge that the act which causes death will probably cause the death of or grievous bodily harm to some person

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

“(c) An intent to commit a felony.

“(d) (As to opposing an officer).”

But at the close of these definitions he says: “This article is subject to the provisions contained in articles 224-226, both inclusive, as to the effect of provocation.” Then he regrets the use of such a term as malice aforethought.

Therefore these definitions of Stephen's cannot be used as general definitions unless you accompany them with a list of mitigating circumstances which may make an act causing death, in the states of mind as defined by him above, manslaughter. His definitions are, therefore, useful as a guide to the court in determining the crime in certain possible states of fact and thereby aiding the court to guide the jury, but they are not useful as specific general directions under which a jury could distinguish a murder from a manslaughter.

But suppose that we are wedded to the habit of giving broad, general definitions to the jury. Is there not some better method to pursue than by giving the standard confusing definitions?

A way out of the difficulty, presented to a trial judge in dealing with malice aforethought, is indicated in the case of *State v. Marx*.¹ On page 23 of the opinion in that case, the court quotes from the charge given by the trial judge the following:

“The matter has been summarized in these words: ‘Malice includes all those states of the mind in which a homicide is committed without legal justification, extenuation or excuse.’ And as a final word on the subject, I may say to you that when an unlawful homicide is shown to have been committed and its attending circumstances disclose nothing to mitigate, extenuate or excuse the act, malice in the slayer will be presumed.”

While this feature of the charge was not passed upon in the case, it suggests a solution.

Taking this quotation as a guide to clarity of treatment, is not the actual condition of the law as to malice aforethought in relation to unlawful homicide disclosed by a definition of the term in one of the two following ways?

¹ 78 Conn., 17.

Malice aforethought is any condition of mind in which a person kills another, unlawfully, in the absence of circumstances attending the act causing death which the law recognizes as sufficient to mitigate or extenuate the act and reduce the crime to manslaughter. Or, having the courage of the truth and abandoning the fiction that malice aforethought relates to a state of mind, define it as follows:

Malice aforethought means any conditions (state of facts) under which one person kills another, unlawfully, in the absence of circumstances attending the act causing death which the law recognizes as sufficient to mitigate or extenuate the act and reduce the crime to manslaughter.

As we stated in substance at the outset, the circumstances attending an act of unlawful homicide which the law recognizes as sufficient to mitigate the act and reduce the crime to manslaughter are all definitely defined. The jury are never left by the court to determine what facts ought to mitigate the offense and reduce the crime; on the contrary, if the state of the evidence calls for it, the court tells the jury the facts which so reduce the crime, and only leaves the existence or a reasonable supposition of the existence of such facts for their determination. This definition is, of course, only saying to the jury that murder is murder. But that is the only helpful thing that is ever said to the jury. I mean by this, that the trial court tells the jury the existence of what facts under the evidence they must find in order to find that an unlawful homicide is murder.

No intelligent court would ever think of giving the standard definitions of malice aforethought, and then tell the jury to apply such definitions to the facts and determine the crime. Would it not be sufficient in a murder trial to tell the jury that they must determine:

1. That the victim was killed by some person other than himself.
2. That the accused killed him.
3. That the killing was unlawful. (With such explanation, if any, as the evidence calls for as to justifiable or excusable homicide.)
4. (After stating that if the killing was unlawful, the crime is murder or manslaughter.) That in order to find the accused guilty of murder the jury must find that the act causing death

was not attended by circumstances which the law recognizes as sufficient to extenuate the act and reduce the crime to manslaughter. (Stating to the jury that it is the duty of the court to inform them what circumstances under the evidence in the case would so extenuate the act and giving instructions as to any evidence in the case, if any there were, tending to show the existence of any such mitigating circumstances.)

In dealing with the preliminary question of whether a killing is lawful or unlawful, the relation of a killing by accident in perpetrating a crime can be dealt with in the charge.

How has it arisen that the standard definitions are so generally used? It is a probable explanation, that they began to be used as warnings to the jury not to interpret the term malice aforethought by the ordinary meaning of the words as used in daily life; and that these warnings became perverted into definitions.

The real usefulness of the term malice aforethought is in the indictment. It there abridges the statement of facts. An unlawful killing by a blow of the fist on the head may be manslaughter or murder, the pleader is not required to recite the facts in the indictment, which make it in his opinion murder; he need only say that the accused killed him by a blow of the fist on the head with malice aforethought. It is only when we attempt to define the expression in the charge to the jury that it becomes a stumbling block.

As to the use of the terms express and implied malice, they became necessary only after the general definitions came into use, and these terms have rendered confusion worse confounded. When you tell the jury that a simple harmless person without a touch of malignity in his composition has committed murder by shooting a pistol into a crowd when so drunk as to be incapable of knowing what he was doing, then in order to get his state of mind to square with the general definition of malice as "a depraved heart fatally bent on mischief," you are compelled to inject such a state of mind into his brain and call it implied malice. If you say instead that he unlawfully killed another in the absence of any extenuating circumstances which the law recognizes as sufficient to mitigate the offense and reduce it to manslaughter (drunkenness not being an extenuating circumstance), you avoid the added confusion of definitions of express and implied malice.

A considerable examination of this subject discloses that malice aforethought has no useful function outside of the indictment, and that as to its being defined in an intelligible way for the guidance of the jury as a recognizable state of mind, it is a simple impossibility. In truth it has no meaning whatever in that sense. It is a technical term which is used for convenience as covering all unlawful killings which the law deems murder.

When an unlawful killing has been decided to be murder, the application of the statutory definitions of first degree murder is free from difficulty.

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