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Second Degree Murder, Malice, and Manslaughter in Nebraska: New Juice for an Old Cup

John Rockwell Snowden
University of Nebraska College of Law

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Second Degree Murder, Malice, and Manslaughter in Nebraska: New Juice for an Old Cup

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I. INTRODUCTION

The law is a hollow vessel; inexhaustible in its uses, fathomless.¹

In 1932, Professor Francis Bowes Sayre began his now foundational article on *mens rea* by stating that no problem of the criminal law has been of more fundamental importance or more baffling.² The problem, of course, is that the law mandates that every criminal offense must be comprised of a *mens rea*, or mental element, and an *actus reus*, or particular prohibited act. As Bishop said, "[t]here can be no crime, large or small, without an evil mind."³

In the law of homicide the *actus reus* is always the same—someone has caused the death of another. Yet, homicide offenses are traditionally graded into at least two categories: murder or manslaughter. It is the mental element, the *mens rea*, that distinguishes the offenses. For the murder or manslaughter distinction, Bishop clearly was correct: "the essence of an offence is the wrongful intent . . ."⁴ The *mens rea* that most critically distinguishes murder from manslaughter is known as malice. A killing with malice is murder; a killing without malice may be no greater than manslaughter.

A second degree murder conviction in Nebraska has a possible sentence of twenty years to life.⁵ A manslaughter conviction has a sentencing range from one to twenty years.⁶ Beyond the context of the accused individual, the murder-manslaughter distinction is also of significant concern to the people, either as direct participants in the legal process or as watchers for the salvation of the state.

In 1994, the Nebraska Supreme Court unleashed a whirlwind of controversy with its unanimous opinion in *State v. Myers*,⁷ which firmly established malice as one of the required *mens rea* elements for second degree murder.⁸ Scholarly controversy primarily has focused

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1. "The Tao is like the emptiness of a vessel; and in our employment of it we must be on our guard against all fullness. How deep and unfathomable it is, as if it were the Honored Ancestor of all things!" THE TEXTS OF TAOISM ch. 4, at 49-50 (F. Max Müller ed., James Legge trans., 1962)(writings of Tao Te Ching).
 2. Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1932).
 3. JOEL PRENTISS BISHOP, BISHOP ON CRIMINAL LAW § 287 (John M. Zane & Carl Zollman eds., 9th ed. 1930). Professor Sayre relies upon Bishop's statement of law. See Sayre, *supra* note 2, at 974.
 4. See Sayre, *supra* note 2, at 974.
 5. NEB. REV. STAT. §§ 28-105, -304 (Reissue 1995).
 6. *Id.* §§ 28-105, -305.
 7. 244 Neb. 905, 510 N.W.2d 58 (1994).
 8. See Leslie Boellstorff, *Effort Mounted to Vote Out Judge*, OMAHA WORLD HERALD, Sept. 5, 1996, at 13A; Leslie Boellstorff, *Legal Experts Argue "Malice" Rule Merits*, OMAHA WORLD HERALD, June 2, 1996, at 10A; Leslie Boellstorff, *Nelson Degrades Campaign to Oust High-Court Judge*, OMAHA WORLD HERALD, Sept. 6, 1996, at 15A; Leslie Boellstorff, *State Court Abused Power*, *Stenberg Says*, OMAHA WORLD HERALD, Aug. 10, 1995, at 1A; Editorial, *Judge's Rulings Become an Election Issue*, OMAHA WORLD HERALD, Sept. 6, 1996, at 20A; Editorial, *Supreme*

on whether or not the court stepped outside the appropriate judicial role in *Myers*,⁹ and whether or not the court's explanation for its *Myers* opinion two years later in *State v. Ryan*¹⁰ carried the day.¹¹ The focus here will not question *Myers* or its justification in *Ryan*. Rather, the turn is toward malice and the substantive criminal law.

Malice is almost as old as the common law of homicide. But, its meaning and function has changed over time with the law itself. Part II will present a brief history of malice and murder. Malice began as a general criminal intent, an evil mind or bad attitude. It became tied to the idea of prior planning of a killing and today is almost everywhere understood as (1) an intent to kill, (2) an intent to do grievous bodily harm, or (3) an intent to act with a "depraved heart" conscious disregard of an extreme risk to human life.

Part III will trace the statutory history of murder, malice, and manslaughter in Nebraska and then will discuss the case law dealing with malice. By the time Nebraska became a state, the statutes had dropped any definition of malice. Yet, from the first appearance of malice in the Nebraska Supreme Court opinions until the present, malice consistently has been defined as the intentional doing of a wrongful act without just cause or excuse. This definition comes from the early days of the common law. It is the ancient idea of a general criminal intent, which distinguishes the criminal from the merely wrongful. Until very recently, the function of malice in Nebraska homicide law was minimal at best. But today its hoary visage is matched by the electric kool-aid elixir the concept carries.

Part IV will consider four recent homicide cases and the puzzles they create for Nebraska law. What is the *mens rea* for second degree murder? May an intentional homicide be manslaughter? Must the State prove beyond a reasonable doubt that the accused did not act from an adequate provocation? May excuses or justifications, although not recognized and mandated by law, negate malice?

II. A BRIEF HISTORY OF MURDER AND MALICE

In the English law before the 1200s, homicide was treated almost entirely as a civil matter. The "slayer," as the killer was called, was required to pay damages to the victim's family and to persons whose

Court's Flawed Reasoning May Free Two Convicted Killers, OMAHA WORLD HERALD, Oct. 12, 1995, at 30A; George F. Will, Editorial, *Nebraska Problem: Judges as Legislators*, OMAHA WORLD HERALD, Oct. 1, 1995, at 11B.

9. See Don Stenberg, *Malice in Wonderland*, 30 CREIGHTON L. REV. 15 (1996).

10. 249 Neb 218, 543 N.W.2d 128 (1996).

11. Richard E. Shugrue, *The Second Degree Murder Doctrine in Nebraska*, 30 CREIGHTON L. REV. 20 (1996).

"peace" had been "broken" by the killing.¹² No criminal sanctions were imposed. It was lawful and even proper for kindred of the victim to avenge themselves by killing the offender. Few saw any need for the government to impose punishment.¹³ When the slayer was unknown, "*morth-works*" or "*murdrum*" described deeds of darkness,¹⁴ or, more specifically, secret killings, which resulted in a fine on the township (known as a *murdrum* fine or as "Englishry").¹⁵ This possibly may have been the first emergence of the use of the word murder to describe a type of homicide.¹⁶ Thinking that the fine was too heavy of a burden for the township to bear, a transition occurred in which the homicide was viewed as an offense against the state, not just a wrong against the victim's survivors.¹⁷ Thereafter, the state took on the responsibility of punishing the offender.

Two broad categories of homicides were created: felonious homicide (often simply called culpable homicide),¹⁸ which was a capital offense; and nonfelonious homicide (a noncapital offense).¹⁹ Felonious homicide described any homicide that was not justifiable or excusable.²⁰ The most typical felonious homicide in the thirteenth century was a killing upon a sudden occasion, usually a drunken quarrel followed by a brawl and the use of a knife or club, which every man carried.²¹ Pleas of misadventure or self-defense (raised when seeking a grant of pardon) were claims that the offender had acted in an excusing, nonfelonious circumstance.²²

12. 3 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 23 (London, MacMillan 1883).

13. *Id.* at 24-25.

14. *Id.* at 25. "*Murdrum*" is the Latinized form of "*morth*."

15. *Id.* at 28, 31, 35.

16. *Id.* at 25. See also J.M. Kaye, *The Early History of Murder and Manslaughter—Part I*, 83 LAW Q. REV. 365, 369 (1967) (stating that in the thirteenth century, the word murder was connected to the murder fine and ancient meaning of "*morth*," but it was also used to refer to all culpable homicide—being used generally as a "nontechnical" term, i.e., not a legally defined term); Sayre, *supra* note 2, at 995 (stating that by the end of the twelfth century, murder was used to describe the most serious homicide, which was a killing committed in secret with no one seeing or knowing about it).

17. 3 STEPHEN, *supra* note 12, at 26.

18. Kaye, *supra* note 16 (using the term culpable homicide to refer generally to homicides not justified or excused).

19. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 7.1, at 605 (2d ed. 1986); Thomas A. Green, *The Jury and the English Law of Homicide, 1200-1600*, 74 MICH. L. REV. 413, 419 (1976) (stating that all felonious homicides were capital offenses).

20. Sayre, *supra* note 2, at 996.

21. Kaye, *supra* note 16, at 370.

22. *Id.* at 374.

Nonfelonious homicide was further divided into justifiable homicide and excusable homicide.²³ Justifiable homicides were killings done in furtherance of justice or in execution of a warrant and resulted in outright acquittals.²⁴ Excusable homicides (or pardonable homicides) were homicides committed in self-defense or by "misadventure" (also referred to as *per infortunium*).²⁵ Homicide by misadventure occurred when "a man doth an act that is not unlawful, which without any evil intent tendeth to a man's death."²⁶ Although responsibility did attach to offenders, they were allowed to ask the king for a pardon (which was almost always granted). In such cases, the offender suffered only imprisonment until the pardon was granted; the expense of procuring a pardon; forfeiture of the offender's property; and continued liability until the disposition of an appeal by the next of kin of the victim.²⁷

A. Malice Emerges as a General Criminal Intent or Bad Attitude

Homicide law experienced considerable change throughout the thirteenth, fourteenth, and fifteenth centuries.²⁸ In 1278, a statute purported to limit the use of pardons by requiring any claim of justifiable homicide, killing by misadventure, or killing in self-defense to be tried first by a jury. If the jury found that the homicide occurred by misadventure or self-defense, then a special verdict was issued, and the King could grant a pardon.²⁹

This statute also required the jury to find that the killing was "not by felony or of malice aforethought."³⁰ Malice aforethought (also referred to as "premeditated malice"³¹ or "malice prepense"³²) had become a term of law during the late 1200s.³³ When associated with homicides, however, it meant no more than "deliberately," "wickedly," "willfully," or "without lawful excuse"—a general expression used to denote the mental element required of felonious homicide, but had

23. Green, *supra* note 19, at 419 (stating that the two subcategories of nonfelonious homicide, justifiable and excusable, were firmly established by the early thirteenth century).

24. Sayre, *supra* note 2, at 994-95.

25. *Id.*; 3 STEPHEN, *supra* note 12, at 57.

26. 3 STEPHEN, *supra* note 12, at 57.

27. Sayre, *supra* note 2, at 994-95. An appeal was a private prosecution brought by close relatives of the victim to recover the civil damages discussed above. See Green, *supra* note 19, at 419 n.22.

28. Sayre, *supra* note 2, at 994.

29. *Id.* at 995; 3 STEPHEN, *supra* note 12, at 37-38, 76.

30. 3 STEPHEN, *supra* note 12, at 41; Sayre, *supra* note 2, at 996.

31. Kaye, *supra* note 16, at 375.

32. Sayre, *supra* note 2, at 996.

33. Kaye, *supra* note 16, at 371-73.

nothing to do with actual premeditation, malevolence, or spite.³⁴ Put another way, felonious homicides were defined as killings with malice (meaning deliberate and neither justifiable nor excusable), but malice was understood only as a "threshold degree" of *mens rea*.³⁵ Malice was a bad attitude, a lack of any colorable, noncriminal explanation or legitimating reason. Professor Kaye argues that if it had meant premeditation, malevolence, or spite—a much narrower definition—it would have allowed persons who killed another deliberately "upon a sudden occasion" (the most typical culpable homicide) to ask for a pardon since those persons would, in most instances, neither have planned the killing nor acted with particular ill will.³⁶

After 1340, the fine for *murdrum* was abolished, yet the term "murder" continued to be commonly used to describe the worst kind of homicide.³⁷ During this time, evidence tends to show that Parliament desired to create four types of homicide: (1) murder—killing by secrecy or stealth, (2) killing by ambush, (3) killing by assault along the highway, and (4) killing "par malice prepense," which included all other killing not excused or justified.³⁸ In 1380, the King authorized a commission to study types of homicide. The commission described similar categories, distinguishing between "murders" and "killings by ambush or by malice prepense."³⁹ These distinctions had no procedural or substantive affect on homicide law. Instead, they merely caused diversity in the enrolling of indictments since the procedure and punishment for the crimes were the same—all were culpable and thus punishable by death. In addition, killings by "malice prepense," although distinguished categorically, still included all culpable homicides because by definition they were killings "without justification or excuse."

B. Malice Becomes Premeditation or Prior Planning

In 1389, because the King was granting pardons too readily, a decree was issued stating that "no charter of pardon shall be henceforth allowed before any justice for murder, the death of a man killed by making assault or malice prepense (*ou malice purpense*)."⁴⁰ Commentators on malice aforethought argue that the codification of this decree in the Statute of 1390 was the first statutory recognition of "malice

34. *Id.* at 369, 372-73, 375, 377.

35. Green, *supra* note 19, at 419.

36. Kaye, *supra* note 16, at 374.

37. 3 STEPHEN, *supra* note 12, at 40; Kaye, *supra* note 16, at 377 (stating that the word murder was popularly used to describe the *actus reus* of all homicides and more specifically the *actus reus* of secret or "stealthy" homicide); Sayre, *supra* note 2, at 995.

38. Kaye, *supra* note 16, at 369.

39. *Id.* at 390.

40. Sayre, *supra* note 2, at 996.

aforethought."⁴¹ There is disagreement, however, on what type of killings were murder and what malice aforethought actually meant. The Statute of 1390 was written when old ideas that ambushing constituted the worst kind of homicide (murder) were giving way to new ideas that killings done with premeditation, malevolence, or spite were the worst kind and warranted the title of murder.⁴² Stated another way, the heinousness of the crimes began to depend on degrees of *mens rea* or mental intentions instead of different types of *actus reus* or the manner and circumstance of the killing act.⁴³

The Statute of 1390 tried to carry out the decree by making pardon requests for homicides committed through murder, ambush, assault, or by malice aforethought very expensive, and by requiring that a jury determine the type of killing committed.⁴⁴ Professor Kaye argues that (1) the Statute of 1390 defined types of homicides considered to be particularly heinous and tried to make it impossible for the Crown to pardon them;⁴⁵ (2) Parliament intended to categorically distinguish killings by secrecy or stealth (entitled murder), killings by ambush (adding to this category killings as a result of highway attacks), and all other killings that were not excusable or justifiable (killings by malice aforethought—the “residue of culpable homicide”); (3) murder still meant killings by secrecy or stealth, and these types were distinguished only by their method and setting; and (4) “malice prepense,” as used in the Statute of 1390, had not yet come to mean “premeditated, spite or malevolence.”⁴⁶

Professor Green, however, argues that malice aforethought in the Statute of 1390 was not simply the “threshold degree of *mens rea* for felony,” as Professor Kaye suggests, because this would have “swallowed up” the other categories of homicides listed in the statute (murder, ambush, and assault) and would have restricted the King’s pardoning power in all cases of felonious homicide. Green argues instead that malice aforethought was “a new term of art encompassing homicides committed through true planning or premeditation,” and therefore the King’s pardoning power would be restrained only in cases involving the most serious felonious homicides.⁴⁷ Kaye’s response to this argument is that in the sixteenth century, when *malice prepense* began to be interpreted literally as premeditation, denoting the *mens rea* for murder, it was easy for writers to make an “*ex post facto* rationalization of the 1390 Statute, since premeditation can

41. *Id.*; 3 STEPHEN, *supra* note 12, at 42-43; Kaye, *supra* note 16, at 366.

42. Kaye, *supra* note 16, at 367.

43. *Id.* at 367-68.

44. Green, *supra* note 19, at 462.

45. Kaye, *supra* note 16, at 368.

46. *Id.* at 369.

47. Green, *supra* note 19, at 462.

without much effort be discerned in 'killing by secrecy or stealth' and in 'killing from ambush[.]'⁴⁸

The Statute of 1390 was short-lived and by the end of the fifteenth century seemed to be obsolete.⁴⁹ The next major change in homicide law developed throughout the fifteenth century and culminated with the Statute of 1512, which divided felonious homicide into murder and "chance medley" (later called manslaughter).⁵⁰ Chance medley included both "sudden encounter" homicides⁵¹ (also called "sudden occasion" or "sudden falling out" homicides)⁵² and accidental killings that were not excusable.⁵³ Although deliberate, the sudden encounter homicide was considered manslaughter if it resulted from "presumably any fight which has broken out without any prior ambushing of one party by another."⁵⁴ An accidental killing resulting from unlawful acts of violence was manslaughter as long as the violence was not directed at the victim.⁵⁵ If the violent act was directed at the victim, the perpetrator would be liable for murder.⁵⁶ If the act was lawful, it would have been excusable as a homicide by misadventure.⁵⁷ These distinctions were not yet based on the presence or absence of malice aforethought; rather, they simply determined whether the accused warranted benefit of clergy.⁵⁸

Both murder and manslaughter (chance medley) were still capital felonies, but murder was "unclergyable."⁵⁹ Benefit of clergy involved a process that ultimately allowed people who could read (called "clerks") the privilege of exemption from the criminal death penalty.⁶⁰ After simply reading a psalm correctly, the offender was removed from the secular court jurisdiction and turned over to the ecclesiastical courts to be tried—a much less rigorous process resulting in minimal punishment.⁶¹ The benefit of clergy had been greatly expanded during the fifteenth century, and in an attempt to curtail its use, the Statute of

48. Kaye, *supra* note 16, at 393.

49. Green, *supra* note 19, at 469; J.M. Kaye, *The Early History of Murder and Manslaughter—Part II*, 83 LAW Q. REV. 569, 569 (1967).

50. LAFAYE & SCOTT, *supra* note 19, § 7.1(a), at 605; Kaye, *supra* note 49, at 573.

51. Kaye, *supra* note 49, at 574.

52. Kaye, *supra* note 16, at 365.

53. *Id.* at 369; Green, *supra* note 19, at 485 n.258.

54. Kaye, *supra* note 49, at 574.

55. Kaye, *supra* note 16, at 369.

56. *Id.* at 370.

57. Kaye, *supra* note 49, at 582.

58. *Id.* at 572; Green, *supra* note 19, at 483.

59. Green, *supra* note 19, at 483; Kaye, *supra* note 16, at 365.

60. BLACK'S LAW DICTIONARY 158 (6th ed. 1990).

61. *Id.*

1512 excluded laymen who had committed predatory and premeditated acts of violence, known as "murders," from its protection.⁶²

Following the Statute of 1512 was a series of "Tudor Statutes," completed in 1547, which withdrew benefit of clergy from murder.⁶³ At that time, murder was described as "wilful prepered murders," "prepensedly murder," "murder upon malice prepered," "willful murder of malice prepered," and "murder of malice prepered."⁶⁴ Whatever the understanding of "malice" and its adjectives had been in the Statute of 1390, the common law judges now treated malice as referring to a premeditated killing. As a result, felonious homicides were divided into premeditated killings (murder-malice), which were punishable by death, and killings without malice aforethought (manslaughter), which, since clergyable, were usually punishable only by imprisonment for one year and branding on the brawn of the thumb.⁶⁵

C. Malice Matures as Particular States of Intention

Beginning in 1547, the English courts attached varying meanings to malice aforethought.⁶⁶ Malice continued to be understood generally as "a deliberate premeditated design to kill or hurt,"⁶⁷ and still referred more to planning and motive than an isolated intent.⁶⁸ Nevertheless, in an attempt to establish a greater range of homicides as worthy of the death penalty, the common law judges began to designate certain types of killings as murder without fitting them into the prior planning requirement. Thus, the idea of implied malice began to emerge. Sir Anthony Fitzherbert, the greatest common law lawyer of the time,⁶⁹ argued that "[w]ilful murder of malice prepered" did not cover just killings by ambush or with premeditation; rather, the division between murder and manslaughter was still unclear.⁷⁰ Implied malice was one way of fitting the older types of murders (that were not premeditated) under the "with malice aforethought" requirement without forcing common law judges to create exceptions to the rule requiring malice for murder.⁷¹ It was also a way for judges to convict offenders they thought deserving of murder, even though the offender had not killed with premeditation.

62. Green, *supra* note 19, at 473, 475-76. See also Kaye, *supra* note 49, at 572 (stating that the Statute of 1512 was the first statute to withdraw the benefit of clergy from culpable homicide other than petty treason).

63. 3 STEPHEN, *supra* note 12, at 44; Kaye, *supra* note 16, at 368.

64. Sayre, *supra* note 2, at 996.

65. *Id.* at 996-97; 3 STEPHEN, *supra* note 12, at 45; Kaye, *supra* note 16, at 369-70.

66. Kaye, *supra* note 16, at 369; Sayre, *supra* note 2, at 997.

67. 3 STEPHEN, *supra* note 12, at 63.

68. Sayre, *supra* note 2, at 997.

69. Kaye, *supra* note 49, at 575.

70. *Id.* at 577.

71. Kaye, *supra* note 16, at 370.

Mansell and Herbert's Case,⁷² heard in 1558, is one early example in which the court implied malice.⁷³ Herbert and a band of some forty followers went to the house of Sir Richard Mansfield intending to fight with Mansfield, but without any intention to cause the death of any person. One person in Herbert's party, without any prior plan or intent to kill, threw a stone that killed a woman. It was never clear whether the woman killed was an adherent of Mansfield or a complete stranger to the affray. Due to this question, the case was never brought to conclusion. Nevertheless, the majority of the judges agreed that if the victim had been associated with Mansfield, and thus an intended victim of some violence, murder would have been established. After *Herbert's Case*, "wilful murder of malice prepensed" was broadly interpreted to include cases in which the killing was intended (but not premeditated), and the intent was only to do physical harm or to do any unlawful act of violence.⁷⁴

In 1576, the doctrine of "heated blood" (known today as provocation) emerged, allowing what normally would have been murder to be reduced to manslaughter when the killing was done in the heat of passion. In the typical case of provocation, a sudden quarrel (the provocation) between two combatants raises the "heat of passion" in one who then forms an intent to kill. But, the provocation is seen as a partial excuse for the intent to kill, and the homicide is reduced to manslaughter. In discussing the history of murder and malice, it is most important to notice that the "malice aforethought" of murder was continuing to shed notions of prior planning, i.e., a premeditated intent to kill. Courts found murder if the defendant's passion was unreasonable or if sufficient time allowed the passion to cool.⁷⁵

Eventually, a general set of rules for malice and murder emerged, leaving behind the notion that malice referred to an undifferentiated criminal intent or required premeditation. These rules were summarized in 1628 by Coke,⁷⁶ whose writings "had extra ordinary influence on every part of the law," and, as Stephen suggests, whose rules were the "root of the branch of the law as to malice aforethought."⁷⁷ According to Coke's definition, murder occurred "when a man . . . unlawfully killeth . . . any reasonable creature . . . with malice aforethought, either expressed by the party or implied by law."⁷⁸ Malice aforethought occurred when one "compasseth to kill, wound or beat an-

72. 73 Eng. Rep. 279 (K.B. 1558).

73. Kaye, *supra* note 49, at 577-92.

74. *Id.*

75. Kaye, *supra* note 49, at 589-90.

76. Sayre, *supra* note 2, at 997.

77. 3 STEPHEN, *supra* note 12, at 54.

78. Kaye, *supra* note 16, at 365; Sayre, *supra* note 2, at 997 (citing EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 47).

other, and doth it *sedato animo*,"⁷⁹ meaning that he went about or took a step toward killing "with a settled purpose."⁸⁰ Malice could be implied when (1) the killing was without provocation or was by poison, (2) when an officer was killed in resistance to executing a warrant, and (3) when the killing resulted from commission of an unlawful act.⁸¹ This understanding of malice allowed courts to enlarge the category of homicides designated as murder, effectively allowing more killers to be punished with capital crimes instead of clergyable crimes.⁸²

Some courts felt that the category of killings by an unlawful act was too broad and subsequently narrowed the category to include only unlawful acts intended to inflict bodily injury.⁸³ The words used in connection with malice—"aforethought," "premeditation," and "deliberate"—no longer had any real meaning except to require the state of mind that caused the act to precede it.⁸⁴ In 1762, Sir Michael Foster published his discourse on homicide, stating that he understood malice aforethought to mean that "the fact hath been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, malignant spirit," and that most cases of murder dealt with implied malice and turned on whether or not the killing had "been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty and fatally bent upon mischief."⁸⁵ This seems to be the birth of what is known today as "depraved heart" murder.

Stephen's *Digest of the Criminal Law*⁸⁶ and the Criminal Code Commission's *Draft Code* (1878-79) both distinguished murder from manslaughter by the existence of a given state of mind—described in the *Digest* as malice aforethought.⁸⁷ Malice aforethought was (1) intent to kill or cause grievous bodily harm (which did not have to be directed at the person actually killed); (2) intent to do an act with knowledge that the act causing the death was likely to cause death or grievous bodily harm (even if the offender hoped that neither would result or was indifferent to the outcome); (3) intent to commit a felony; and (4) intent to oppose by force any officer in the execution of his duties.⁸⁸ The second category encompassed "depraved-heart" murder

79. 3 STEPHEN, *supra* note 12, at 55.

80. BLACK'S LAW DICTIONARY, *supra* note 60, at 1357.

81. 3 STEPHEN, *supra* note 12, at 54; Sayre, *supra* note 2, at 997.

82. Sayre, *supra* note 2, at 998.

83. 3 STEPHEN, *supra* note 12, at 65.

84. *Id.* at 70.

85. *Id.* at 74.

86. *Id.* at 80. See JAMES F. STEPHEN, DIGEST OF THE CRIMINAL LAW 225 (7th ed. 1926).

87. 3 STEPHEN, *supra* note 12, at 82.

88. *Id.* at 80; 2 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 137 (14th ed. 1979).

and was narrowed, as before, by requiring the act to be dangerous to life.⁸⁹

American law followed the general pattern of the English common law. To the present, American casebooks and treatises consistently define malice as

(1) An intent to kill someone, not necessarily the victim. . . . (2) An intent to commit "serious" or "grievous" bodily injury upon someone. (3) A wanton and reckless disregard of a very great risk of causing death or serious bodily injury The older statutes use language such as "depraved heart" or an "abandoned and malignant heart" to refer to this type of culpability. (4) Malice is also implied when the defendant or his accomplice commits a killing in the perpetration of certain felonies.⁹⁰

As in the past, disputes and problems continue to surround the use of malice to distinguish murder from manslaughter. One commentator has even suggested that the use of the word should be removed from statutes since it seems only to confuse and mislead the jury.⁹¹ Ironically, in 1977, Nebraska did just that. Nonetheless, much confusion remains.⁹²

III. A HISTORY OF MURDER, MALICE, AND MANSLAUGHTER IN NEBRASKA

A. The Statutes

The Territory of Nebraska passed its first set of laws at the First General Assembly early in 1855, adopting Iowa's criminal code:

[Murder, generally]

[§] 4. Whoever kills any human being with malice aforethought either express or implied is guilty of murder.

[First Degree Murder]

[§] 5. All murder which is perpetrated by means of poison or lying in wait or any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate any arson, rape, robbery, mayhem, or burglary, is murder of the first degree and shall be punished with death.

[Second Degree Murder]

89. Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide: I*, 37 COLUM. L. REV. 701, 703 (1937).

90. PHILLIP E. JOHNSON, CRIMINAL LAW 160 (5th ed. 1995). See RICHARD J. BONNIE ET AL., CRIMINAL LAW 658 (1997); JOSEPH G. COOK & PAUL MARCUS, CRIMINAL LAW § 5.05, at 398-400 (3d ed. 1995); GEORGE E. DIX & M. MICHAEL SHARLOT, CRIMINAL LAW 400 (4th ed. 1996); JOSHUA DRESSLER, CRIMINAL LAW 194-95 (1994); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 31.02[B][2], at 468 (2d ed. 1995); SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 385-88 (6th ed. 1995); LAFAVE & SCOTT, *supra* note 8, § 7.1(a), at 607; ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 57-78 (3d ed. 1982).

91. Jonathan Matthew Purver, *The Language of Murder*, 14 UCLA L. REV. 1306, 1308-11 (1967).

92. Act of June 1, 1977, L.B. 38, §§ 18-20, 1977 Neb. Laws 88, 97.

[§] 6. Whoever commits murder otherwise than is set forth in the preceding section is guilty of murder of the second degree, and shall be punished by imprisonment in the penitentiary for life or for a term of not less than ten years.

.....
[Manslaughter]

[§] 12. Any person guilty of the crime of manslaughter shall be punished by imprisonment in the penitentiary not more than eight years nor less than one year and by fine not exceeding one thousand dollars nor less than one hundred dollars.⁹³

In addition, whoever injured someone with a deadly weapon during a duel was guilty of murder if death resulted.⁹⁴

Although malice was not defined, the code distinguished murder from manslaughter: any killing done with malice aforethought constituted murder. Murders (1) committed by poison or lying in wait, (2) deliberate and premeditated, and (3) resulting from the commission of certain other crimes (known today as the felony murder doctrine) were classified as first degree murders and warranted the death penalty. All other types of murders not covered by the first degree murder statute would have fallen under the residual category of second degree murder.

Since all murders required malice aforethought, applying the traditional common law, or *mens rea*, definition of malice, second degree murders would have included killings done (1) with an intent to kill (but not deliberate or premeditated); (2) with an intent to do serious bodily harm; or (3) with a "depraved heart" conscious disregard of an extreme risk to human life.⁹⁵ Apparently, all other killings not done with malice aforethought would have fallen under the manslaughter statute.

In the Third Session of the Legislative Assembly in January 1857, the entire criminal code was repealed, but no replacement acts were added.⁹⁶ The *Nebraska Legal Research & Reference Manual* indicates that some evidence showed that members of the legislative council finagled this repeal to free one member's client who had been charged with manslaughter.⁹⁷

The criminal code was not reenacted until late 1858.⁹⁸ No distinctions were made between degrees of murder; instead, express and implied malice were statutorily defined, and manslaughter was divided into voluntary and involuntary manslaughter.

[Murder, generally]

93. Criminal Code, Part Third, ch. 2, §§ 4-6, 12, 1855 Neb. Terr. Laws 255.

94. *Id.* § 8.

95. See *supra* note 90 and accompanying text.

96. Act of February 13, 1857, Part Second, 1857 Neb. Terr. Laws 137.

97. PAUL F. HILL, NEBRASKA LEGAL RESEARCH & REFERENCE MANUAL § 301, at 44 (1983).

98. Criminal Code, Part First, ch. 1, §§ 19-26, 1858 Neb. Terr. Laws 41, 43-44.

§ 19. Murder is the unlawful killing of a human being, with malice aforethought, either express or implied. The unlawful killing may be perpetrated by poisoning, striking, starving, drowning, stabbing, shooting, or by any other of the various forms or means by which human nature may be overcome and death thereby occasioned.

[Express Malice]

§ 20. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof.

[Implied Malice]

§ 21. Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart. The punishment of any person or persons convicted of the crime of murder shall be death.

[Manslaughter, generally]

§ 22. Manslaughter is the unlawful killing of a human being, without malice, express or implied, and without any deliberation whatever. It must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible or involuntary, in the commission of an unlawful act, or a lawful act without due caution or circumspection.

[Voluntary Manslaughter]

§ 23. In cases of voluntary manslaughter, there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing.

§ 24. The killing must be the result of that sudden, violent impulse of passion, supposed to be irresistible; for if there should appear to have been an interval between the assault or provocation given and the killing, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge, and punished as a murder.

[Involuntary Manslaughter]

§ 25. Involuntary manslaughter shall consist in the killing of a human being without any intent so to do, in the commission of an unlawful act, or a lawful act, which probably might produce such a consequence, in an unlawful manner: *Provided, always*, That where such involuntary killing shall happen in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense shall be deemed and adjudged to be murder.

[Punishment for Manslaughter, generally]

§ 26. Every person convicted of the crime of manslaughter shall be punished by imprisonment to the penitentiary for a term not exceeding ten years.⁹⁹

These laws were first codified in the Revised Statutes of the Territory of Nebraska in 1866.¹⁰⁰ Murder and manslaughter were again distinguished by the presence of malice for murder and the absence of malice for manslaughter. Although not explicitly clear, the late common law "specific intentions" understanding of malice also was expressed in this statutory scheme. The express malice definition encompassed intent-to-kill murder; the implied malice definition incorporated "depraved heart" murder; and the caveat in the involun-

99. *Id.*

100. NEB. TERR. REV. STAT., ch. 4, §§ 18-20, 24 (1866)(§ 18 repealed 1869; §§ 19-20, 24 repealed 1873).

tary manslaughter statute covered intent-to-do-serious-bodily-harm murder. The involuntary manslaughter statute distinguished (1) unlawful acts (or lawful acts done in an unlawful manner) that carried a risk of death ("probably might" lead to death) from (2) unlawful acts that carried a higher risk of death ("naturally tends" to lead to death). The former constituted involuntary manslaughter and the latter constituted murder. Therefore, a killing that resulted from an intent to do only bodily harm would be an involuntary or unintentional killing, but the intentional infliction of serious harm would be an unlawful act that carried with it a high possibility of death and therefore would be adjudged murder. In other words, as at common law, malice would be implied from such dangerous acts, elevating the unintentional killing to murder.

The 1866 statute also is the origin of the continuing confusion between what must be proved to establish manslaughter and the way in which provocation partially excused an intended homicide. First, manslaughter was the "killing of a human being, without malice." The statute then described the most typical "without malice" situation, i.e., provocation, in the remainder of section 22 and in sections 23 and 24. Finally, section 25 defined involuntary manslaughter where a killing was not intended.

Killings done upon provocation were considered voluntary manslaughter. The language in the voluntary manslaughter statute also indicates the provocation must have caused an "irresistible passion," and the killing must quickly follow the provocation in time. It should be clear, however, that in a situation in which the prosecution believed the killing to be a result of provocation and so charged manslaughter in the first instance, the State was not required to prove the provocation. Rather, the issue of whether or not provocation was present arose only when the original charge was murder.

This statutory scheme perhaps broadened the manslaughter category by specifically including a statutory reference to provoked killings. At the same time, it broadened the category of killings punishable by death. Since murder no longer was divided into degrees, as long as the killing was done with malice aforethought, the punishment was death, unlike the first scheme in 1855, in which only first degree murders were capital offenses.

Over the next seven years, the only change in the homicide law was an amendment allowing the punishment for murder to be death or life imprisonment and allowing the jury that tried the case to decide the penalty.¹⁰¹ In 1873, however, after the territory was granted statehood, the General Statutes of the State of Nebraska was published, codifying the legislative act passed to establish a state criminal

101. Act of Feb. 15, 1869, § 1, 1869 Neb. Laws 94.

code.¹⁰² Murder again was divided into degrees, but malice was not defined.

[First Degree Murder]

SEC. 3. If any person shall purposely, and of deliberate and premeditated malice, or in the perpetration, or attempt to perpetrate any rape, arson, robbery, or burglary, or by administering poison, or causing the same to be done, kill another; or, if any person, by wilful and corrupt perjury, or by subornation of the same, shall purposely procure the conviction and execution of any innocent person; every person so offending shall be deemed guilty of murder in the first degree, and, upon conviction thereof, shall suffer death.

[Second Degree Murder]

SEC. 4. If any person shall purposely and maliciously, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree; and on conviction thereof, shall be imprisoned in the penitentiary not less than ten years, or during life, in the discretion of the court.

[Manslaughter]

SEC. 5. If any person shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, every such person shall be deemed guilty of manslaughter; and, upon conviction thereof, shall be imprisoned in the penitentiary, not more than ten years, nor less than one year.¹⁰³

Both degrees of murder required the killings to be done purposely and maliciously. Malice for first degree murder, however, also had to be deliberate and premeditated. Killings done without malice, either because the killing was upon a sudden quarrel or was unintentional in the commission of an unlawful act, were considered manslaughter. Malice remained the distinguishing factor between murder and manslaughter, but the Legislature returned to the murder scheme used in the first statutes in 1855, designating deliberate and premeditated malicious killings and killings in the commission of certain other serious crimes as first degree murder with a potential punishment of death. Second degree murder again was a residual category for all other purposeful and malicious killings.

Unfortunately, no statutory definition of malice was supplied, and the Legislature's understanding of malice at that time was unclear. If the language indicating that the killing had to be done "purposely" is interpreted to indicate that the actor had to purposely form one of the types of common law *mens rea* known as malice (i.e., the killing must result from a purposely formed malicious intent), then the late common law understanding of malice (intent to kill, intent to do serious bodily harm, or depraved heart) still could have defined types of *mens rea* that were necessary for the killing to qualify as murder. If, however, "purposely" is interpreted more strictly to mean that the killing had to be done purposely (meaning intentionally), then only killings done with an intent to kill would be considered murder. Malice would

102. NEB. GEN. STAT., ch. 58, §§ 3-5 (1873)(§ 3 repealed 1893; §§ 4-5 repealed 1977).

103. *Id.*

not be implied from killings done with an intent to do serious bodily harm or with a "depraved heart" conscious disregard of an extreme risk to human life.

Under this strict interpretation, the late common law understanding of malice could not be employed logically, and it would be reasonable to assume that the Legislature understood malice as a general criminal intent—the intentional doing of a wrongful act without just cause or excuse.¹⁰⁴ This interpretation is consistent with the manslaughter statute omitting the distinction regarding the dangerousness of the acts. All unintentional killings were considered manslaughter, and malice no longer could be implied from certain dangerous acts to elevate an unintentional killing to murder.¹⁰⁵

If the strict interpretation of the statutory language is followed, the class of killings deemed murder would be quite restricted—limited to intentional killings only; the manslaughter statute would be broadened to include all unintentional killings. If "purposely" is read to apply to the formation of one of the specific malicious intentions, the number of homicides that would fall under the murder and manslaughter statutes would remain relatively consistent with the past. Under either interpretation, the category of killings that could be punished by death was restricted to only first degree murders—deliberate and premeditated killings.

Voluntary and involuntary manslaughter were merged into a single statute. All manslaughter was without malice. The terms "provocation" and "heat of passion" were replaced by the phrase "upon a sudden quarrel." The statutory scheme, however, continued to blur the partial excuse of provocation and the manslaughter offense. Nevertheless, no reason suggests that the category of manslaughter via provoked killing was either broadened or narrowed, as perhaps was the category of unintended homicide.

In 1891, the Consolidated Statutes of Nebraska was published. The 1891 criminal code recodified all the statutes passed in 1866 that had not been repealed by subsequent acts and codified all other acts in force at that time. The language of this statute regarding murder and malice is identical to the General Statutes of the State of Nebraska.¹⁰⁶

Except for a few, minor procedural changes and changes in the applicability of the death sentence, no other major substantive changes

104. *Milton v. State*, 6 Neb. 136, 143 (1877).

105. The Nebraska criminal code in 1858 specifically adjudged certain unintentional killings to be murder. See *Criminal Code*, Part First, ch. 1, § 25, 1858 Neb. Terr. Laws 41, 44.

106. NEB. CONSOL. STAT. § 5579(3)-(5) (1891)(§ 5579(3) repealed 1893; § 5580(4)-(5) repealed 1977).

were made to the homicide laws until 1977.¹⁰⁷ It is interesting to note, however, that some major revisions were proposed and rejected in 1973.¹⁰⁸ The comments following the proposed first degree murder

107. Note the development of the law from 1893 until present. *See* Act of April 8, 1893, ch. 44, 1893 Neb. Laws 385-86 (adding life imprisonment as a possible punishment for first degree murder with the choice left to the discretion of the jury); NEB. REV. STAT. §§ 8581-8583 (1913)(§ 8581 repealed 1963; §§ 8582-8583 repealed 1977); NEB. COMPILED STAT. §§ 9544-9546 (1922)(§ 9544 repealed 1963; §§ 9545-9546 repealed 1977); NEB. COMPILED STAT. §§ 28-401 to -403 (1929)(§ 28-401 repealed 1963; §§ 28-402 to -403 repealed 1977); NEB. REV. STAT. §§ 28-401 to -403 (1943)(§ 28-401 repealed 1963; §§ 28-402 to -403 repealed 1977); NEB. REV. STAT. §§ 28-401 to -403 (1948)(§ 28-401 repealed 1963; §§ 28-402 to -403 repealed 1977); Act of June 22, 1963, L.B. 463, 1963 Neb. Laws 529 (indicating the place where a life sentence is to be served, that the jury will fix the punishment if the defendant is convicted by the jury's verdict, and that the court will fix the punishment if the defendant pleads guilty); NEB. REV. STAT. §§ 28-401 to -403 (Reissue 1964)(§ 28-401 repealed 1969; §§ 28-402 to -403 repealed 1977); Act of March 19, 1969, L.B. 701, 1969 Neb. Laws 829 (indicating that the court will fix the punishment if the defendant is found guilty at a bench trial); Act of March 24, 1973, L.B. 146, § 2, 1973 Neb. Laws 1-2 (allowing *only* a sentence of life imprisonment); Act of April 20, 1973, L.B. 268, § 3, 1973 Neb. Laws 1-2 (reinstating the death penalty and adding kidnapping and hijacking "of any public or private means of transportation" to the list of crimes in which death may be imposed); NEB. REV. STAT. § 28-401 (Supp. 1973)(repealed 1975); Act of May 1, 1975, L.B. 23, § 6, 1975 Neb. Laws 1-3 (substituting "sexual assault in the first degree" for "rape"); NEB. REV. STAT. §§ 28-401 to -403 (Reissue 1975)(repealed 1977).
108. *See* JUDICIARY COMM. OF THE 84TH NEBRASKA LEGISLATURE, WORKING PAPERS AND PRELIMINARY INTERIM STUDY REPORT ON A REVISED NEBRASKA CRIMINAL CODE, L.B. 8, vol. 1, §§ 15-17 (1974)(analyzing the provisions of L.B. 8, which was introduced (and rejected) in January 1973).

[First Degree Murder]

Sec. 15. (1) A person commits murder in the first degree if

(a) With premeditated intent to cause the death of a person other than himself, he causes the death of the person or another person; or

. . . .

[Second Degree Murder]

Sec. 16. (1) A person commits murder in the second degree if:

(a) He causes the death of a person intentionally, but without premeditation; or

(b) With the intent to cause serious bodily injury to a person other than himself, he causes the death of such person or of another person; or

(c) Under circumstances manifesting extreme indifference to the value of human life, he engages in conduct which creates a grave risk of death to a person other than himself, and thereby causes the death of another person.

. . . .

[Manslaughter]

Sec. 17. (1) A person commits manslaughter if:

(a) He recklessly causes the death of another person; or

(b) He commits a homicide, which would otherwise be murder, while under the influence of extreme mental or 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 he believes them to be.

statute indicate that the previous statute included “purposely” or “deliberate” and “premeditated malice” as the *mens rea* element, and that this seemingly would not qualify as a “significant” substantive change. No explanation is given as to why the author of the comment felt that the term “premeditated intent” in the proposed statute was the equivalent of the term “premeditated malice” referred to in the comment or why this was not substantively different. The comment relating to the second degree murder revision points out the replacement of “purposely” and “maliciously” with “intentionally” and indicates that the second and third clauses are entirely new and would broaden the scope of the crime of second degree murder. Interestingly, this scheme describes the typical late common law understanding of malice—intent to kill, intent to do serious bodily harm, and depraved heart. The comments for manslaughter point out that the revision would broaden the scope of the manslaughter statute, especially the second clause, which allows extreme mental or emotional disturbance to reduce a murder to manslaughter. In 1977, the Legislature made minor changes to the wording of the first degree murder statute; but, more importantly, the second degree murder statute no longer stated that the killing had to be done purposely and maliciously.¹⁰⁹ The statutes have not changed since 1977. The present statutes are as follows:

28-303. Murder in the first degree; penalty. A person commits murder in the first degree if he kills another person (1) purposely and with deliberate and premeditated malice, or (2) in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary, or (3) by administering poison or causing the same to be done; or if by willful and corrupt perjury or subornation of the same he purposely procures the conviction and execution of any innocent person. The determination of whether murder in the first degree shall be punished as a Class I or Class IA felony shall be made pursuant to sections 29-2520 to 29-2524.

....

28-304. Murder in the second degree; penalty. (1) A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation. (2) Murder in the second degree is a Class IB felony.

....

28-305. Manslaughter; penalty. (1) A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act. (2) Manslaughter is a Class III felony.¹¹⁰

The change to the second degree murder statute, which omitted the word “maliciously,” created much debate as to whether the ele-

Id.

109. Act of June 1, 1977, L.B. 38, §§ 18-20, 1977 Neb. Laws 88, 97.

110. NEB. REV. STAT. §§ 28-303, -305 (Reissue 1995).

ment of malice is still required.¹¹¹ Substituting “intentionally” for “purposely” rectified the previous interpretation problem—the statute itself now made it clear that second degree murder must be done intentionally. The late common law understanding of malice as specific intentions to kill, do grievous bodily harm, or act with a “depraved heart” conscious disregard of an extreme risk to human life is not apposite in Nebraska’s second degree murder law; malice must be understood in the more general sense of criminal intent as the “intentional doing of a wrongful act without just cause or excuse.”¹¹² The remainder of the reenacted homicide statutes were almost identical to the 1873 statutes.

B. The Cases

As early as 1877, malice in Nebraska homicide case law was defined as “[t]he doing [sic] a wrongful act intentionally without just cause or excuse.”¹¹³ From the beginning until the present, the Nebraska Supreme Court has consistently defined malice, using minor variations of “intentionally doing a wrongful act without just cause or excuse,” and sometimes adding “a willful or corrupt intention of the mind” to the definition.¹¹⁴ This is the old understanding of malice as a general criminal intent. Many other states apparently adopted the late English common law specific intentions understanding of malice (intent to kill, intent to do serious bodily harm, and depraved heart).¹¹⁵ In Nebraska, however, no cases seem to exist in which the court has ever been asked to define malice as a specific intent, in which the court has ever done so on its own initiative, or in which anyone has ever challenged the sufficiency of this early common law definition of malice.

Although the Nebraska Supreme Court has uniformly considered malice to be a general criminal intent, only recently has the court given it any critical bite that would make a difference in result in a homicide case. Older cases are devoid of in-depth discussion of the definition of malice other than to assume malice meant a general

111. See generally *State v. Ryan*, 249 Neb. 218, 543 N.W.2d 128 (1996); *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994); *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994).

112. *State v. Dean*, 246 Neb. 869, 885, 523 N.W.2d 681, 693 (1994)(citation omitted).

113. *Milton v. State*, 6 Neb. 136, 143 (1877).

114. See *State v. White*, 249 Neb. 381, 383, 543 N.W.2d 725, 728 (1996)(currently defining malice as “that condition of the mind shown by ‘intentionally doing a wrongful act without just cause or excuse’—a ‘willful or corrupt intention of the mind’”); *Beers v. State*, 24 Neb. 614, 618, 39 N.W. 790, 792 (1888)(previously stating that “[m]alice, in its legal sense, denotes that condition of one’s mind which is manifested by his intentionally doing a wrongful act without just cause or excuse. It means any willful or corrupt intention of the mind.”).

115. See *supra* note 90 and accompanying text.

criminal intent. These older cases never reached the question of how malice would operate to distinguish second degree murder from manslaughter. Jury instructions on presumptions of malice, which existed from the 1800s through the early 1900s, made an explicit discussion even less imperative. Malice could be presumed in two situations: from the mere fact that there was a killing,¹¹⁶ and from the use of a deadly weapon, if, in either case, the defendant presented no evidence "which throws a different light on the situation or which establishes exculpating or mitigating circumstances."¹¹⁷ In no other cases could a jury instruction be given that directed the jury to presume malice when no evidence of excuse, justification, or alleviation existed.¹¹⁸ Therefore, much of the discussion in the early cases dealt with

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116. *Preuit v. People*, 5 Neb. 377, 384 (1877)(stating that the rule in Nebraska is that "where the fact of killing is established, and there is no explanatory circumstance proven, malice is presumed, and the crime is murder"); *Milton v. State*, 6 Neb. 136, 138 (1877). See also *Kastner v. State*, 58 Neb. 767, 79 N.W. 713 (1899); *Davis v. State*, 51 Neb. 301, 70 N.W. 984 (1897); *Vollmer v. State*, 24 Neb. 838, 40 N.W. 420 (1888); *Schlencker v. State*, 9 Neb. 241, 1 N.W. 857 (1879), *rev'd on other grounds*, 9 Neb. 300, 2 N.W. 710 (1879); *Williams v. State*, 6 Neb. 334 (1877).
117. *Quijas v. State*, 133 Neb. 410, 275 N.W. 588 (1937). See also *Chauncey E. Barney, Homicide—Malice—Presumption of Malice from Use of Deadly Weapon*, 17 NEB. L. BULL. 231, 233 (1938).
118. Remember that it was not until the latter half of this century that the United States Supreme Court and the Nebraska Supreme Court concluded in a series of cases that jury instructions on presumptions are unconstitutional. See *In re Winship*, 397 U.S. 358 (1970)(finding that the Constitution requires the State to prove every fact essential to establish the crime charged beyond a reasonable doubt); *Mullaney v. Wilbur*, 421 U.S. 684 (1975)(finding jury instructions unconstitutional if they cause a jury to believe that the burden of persuasion is shifted to the defendant); *Sandstrom v. Montana*, 442 U.S. 510 (1979)(finding unconstitutional a jury instruction in which the jury could have concluded that if the State proved the existence of the killing and additional facts that did not by themselves establish the intent element, that the burden to prove the lack of intent was shifted to the defendant); *Francis v. Franklin*, 471 U.S. 307 (1985)(finding a jury instruction on a mandatory *rebuttable presumption* unconstitutional because it relieved the State of the burden of persuasion as to the presumed element when it instructed the jury that it must find the element unless the defendant presented evidence that persuaded the jury otherwise; permissive *inferences*, however, were found to be constitutional because the State was still required to persuade the jury that the element reasonably could be inferred from the proven facts, and the jury had the choice to accept or reject the suggested conclusion); *State v. Parks*, 245 Neb. 205, 209-11, 571 N.W.2d 774, 777-79 (1994)(adopting the United States Supreme Court rulings, holding that "[a] jury instruction which shifts the burden of proof to a defendant on any essential element of a crime charged violates a defendant's due process right to a fair trial," and that "when a trial court instructs a jury on an inference regarding a specific fact or set of facts, the instruction must include that the jury may regard the basic facts as sufficient evidence of the inferred fact, but that the jury is not required to do so and that, in any event, the existence of the inferred fact must, on all the evidence, be proved beyond a reasonable doubt").

whether or not it was appropriate to give an instruction directing the jury to presume malice on the facts of the case,¹¹⁹ and no other complications surrounding the element of malice seemed to exist.

It was not until 1994, in *State v. Myers*, that the real controversy with malice started. Recall that by this time the current statutes were in force, and second degree murder no longer required a killing to be done "maliciously," but only "intentionally."¹²⁰ In *Myers*, the defendant was convicted of second degree murder, and the jury was not instructed on the element of malice. The Nebraska Supreme Court unanimously ruled that the law continued to require malice as an element of second degree murder, and the failure of the trial court judge to instruct the jury on that element was reversible error.¹²¹ Ironically, malice was never defined in *Myers*.

In *State v. Ryan*,¹²² the majority defended the decision in *Myers*, giving a clearer justification for continuing to require the element of malice when the statute is entirely silent on the element.

Without the element of malice or mens rea, . . . the second degree murder statute of which Ryan was convicted, would be of doubtful validity and perhaps unconstitutional. Through acceptable statutory construction principles, we have held and continue to hold that under § 28-304(1), malice is a necessary element of second degree murder. By such statutory construction, there can be no question of § 28-304(1)'s validity.

. . . .
 . . . Legislative silence as to a mental element in a crime already so well defined in common law and statutory interpretation is not to be construed as eliminating that element from the crime. . . .

. . . .
 . . . Construing the legislative silence of § 28-304(1) as eliminating malice as a material element of second degree murder would result in the absurd consequence of an overbroad murder statute making certain legal acts illegal.

119. See *Kennison v. State*, 80 Neb. 688, 115 N.W. 289 (1908).

120. See *supra* notes 109-11 and accompanying text.

121. 244 Neb. 905, 908-09, 510 N.W.2d 58, 63 (1994)(citing *State v. Rowe*, 214 Neb. 685, 335 N.W.2d 309 (1983)(convicting the defendant of second degree murder for a killing done after the enactment of the new statute, in which the court held that elements of second degree murder require that the killing be done purposely and maliciously)). See also *State v. Williams*, 247 Neb. 931, 531 N.W.2d 222 (1995); *State v. Williams*, 243 Neb. 959, 966, 503 N.W.2d 561, 566 (1993)(stating that "purposely" means "intentionally"); *State v. Thompson*, 244 Neb. 375, 399, 507 N.W.2d 253, 270 (1993)(stating that "purposely" means "intentionally"); *State v. Franklin*, 241 Neb. 579, 489 N.W.2d 552 (1992); *State v. Dean*, 237 Neb. 65, 464 N.W.2d 782 (1991); *State v. Illig*, 237 Neb. 598, 467 N.W.2d 375 (1991); *State v. Ettleman*, 229 Neb. 220, 425 N.W.2d 894 (1988); *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988); *State v. Moniz*, 224 Neb. 198, 397 N.W.2d 37 (1986); *State v. Clermont*, 204 Neb. 611, 284 N.W.2d 412 (1979)(involving a murder for which the defendant was convicted, and which was committed three weeks after the enactment of the new statute, yet the court continued to hold that for second degree murder, the killing had to have been done purposely and maliciously).

122. 249 Neb. 218, 227-28, 543 N.W.2d 128, 137 (1996).

If malice is not read into § 28-304(1), these individuals [law enforcement officials forced to kill in the line of duty, corrections employees or agents forced to carry out a criminal's death sentence, prosecutors who successfully persuade a court to sentence the defendant to death, Nebraska's Board of Pardons who may turn down a request to reduce a sentence of a defendant awaiting execution] carrying out state duties would be in violation of that statute unless the statute is properly construed.

. . . Such persons would have to defend themselves through an affirmative defense or justification. . . . This results in a shifting of the State's burden of proving every element of the crime charged in a criminal case. As a practical matter, the defendant would be forced to forego his or her presumption of innocence and be required to produce evidence that he or she in causing the death of a person acted lawfully.¹²³

Despite the language of the majority opinion, a division among the court began to emerge with a strong dissent by Judge Gerrard, who was joined by Judges Wright and Connolly. The dissent asserted that

[t]he Legislature is presumed to have known the preexisting law, and in enacting an amendatory statute, we are compelled to conclude that the language was intentionally changed for the purpose of effecting a change in the law itself. . . .

. . . .

. . . By removing malice from the statutory text of only the second degree murder statute, the Legislature acted affirmatively with the intention of changing only the second degree murder statute and eliminating malice as an element of that particular crime.¹²⁴

Judge Gerrard also pointed out that the Nebraska Legislature had recently statutorily defined several affirmative defenses that require the defendant to initially produce evidence to raise the defense (more than just a "scintilla" of evidence will suffice). But, after the defendant has done so, the burden shifts to the State to disprove the defense beyond a reasonable doubt.¹²⁵ The elimination of malice from second degree murder, Gerrard claimed, was an effort to relieve the prosecution of the unnecessary burden of disproving justifications or defenses when they were not first raised as an issue by the defendant.¹²⁶

In attacking the majority's claim that the statute was unconstitutionally overbroad, Gerrard maintained that section 28-1408, which justifies the use of force in the execution of a public duty, would require the State to "prove, beyond a reasonable doubt, that such public officer was acting outside his or her duties or functions or outside the judgment or order of a competent court or tribunal," and that malice, accordingly, does not need to be a required element to protect public officials.¹²⁷ Finally, Gerrard reasoned that even without malice as an element of second degree murder, intent would still have to be proved

123. *Id.* at 223-27, 543 N.W.2d at 135-37 (citations omitted).

124. *Id.* at 243-44, 543 N.W.2d at 145-46 (Gerrard, J., dissenting)(citations omitted).

125. *Id.* at 244, 543 N.W.2d at 146.

126. *Id.* at 245-46, 543 N.W.2d at 146-47.

127. *Id.* at 247, 543 N.W.2d at 147-48.

as a *mens rea* element. The element of intent was not absent without malice as an element since the jury still must find that the murder was done intentionally—with the “requisite criminal intent.”¹²⁸ Also, the requirement that the defendant raise the affirmative defense of justification is not an unconstitutional shifting of the State’s burden of proof since it is the burden of *persuasion*, not *production*, that cannot be shifted to the defendant.¹²⁹

Perhaps not surprisingly, the court’s unanimous opinion in *Myers* resulted in the strongly divided court in *Ryan* and has sparked intense commentary. Nebraska’s Attorney General, Don Stenberg, recently argued that the supreme court overstepped its powers by requiring malice as an element in the second degree murder statute.¹³⁰

By adding an element to the crime of second degree murder, the Nebraska Supreme Court ignored long-standing precedent concerning statutory construction. It also usurped the authority of the legislative branch, ignoring the constitutional mandate of separation of powers and depriving the citizens of Nebraska of their right to a republican form of government under the United States Constitution.¹³¹

Attorney General Stenberg attempted to refute the supreme court’s constitutional justification for requiring malice in the statute, stating the statute as written was not at all ambiguous. If the clear language was in fact unconstitutional, then it was the court’s responsibility to find it so, but not to rewrite “the statute to conform with its own image of second degree murder.”¹³² Under the Nebraska Constitution, defining the elements of a criminal offense is the function of the legislature, not the judiciary.¹³³

An extensive examination of the majority and minority opinions in the recent cases dealing with the judicial requirement of malice as an element of second degree murder was undertaken by Professor Richard E. Shugrue.¹³⁴ By approaching the problem on constitutional criminal procedure grounds, Shugrue generally concluded that the minority, which purported that malice was not intended to be an element of the statute and was not a necessary element, had made a more persuasive case.¹³⁵ He pointed out, however, that the United States Supreme Court decisions dealing with these complicated due process issues have confounded courts and scholars alike, and yet the state courts are still left with the tough job of applying the rules.¹³⁶ He

128. *Id.* at 248, 543 N.W.2d at 148.

129. *Id.* at 250-51, 543 N.W.2d at 149-50 (citing *Patterson v. New York*, 432 U.S. 197, 210 (1977)).

130. Stenberg, *supra* note 9.

131. *Id.* at 17.

132. *Id.* at 20.

133. *Id.* at 21.

134. Shugrue, *supra* note 11.

135. *Id.* at 30.

136. *Id.* at 65-66.

closed his article with a suggestion to the Nebraska majority to retrace its steps and reach the correct conclusion in future cases.¹³⁷

Despite the advice, the Nebraska Supreme Court has not backtracked. A great deal of water has now passed under the *Myers* bridge, carrying the reversals of many second degree murder convictions and the promise of fidelity to law. Malice, the intentional doing of a wrongful act without just cause or excuse, is one of the required *mens rea* elements of second degree murder. Questions remain, however, about the substance of Nebraska homicide law and the still elusive distinction between second degree murder and manslaughter.

IV. PUZZLES OF NEBRASKA HOMICIDE JURISPRUDENCE

A. The Problem of *State v. Dean*: What Is the *Mens Rea* for Second Degree Murder?

The traditional relationship between malice and intention has tended to inhibit careful judicial elaboration of the notion of intentional killing.¹³⁸

*State v. Dean*¹³⁹ offers a clear manifestation of the problem of finding the necessary *mens rea* for second degree murder. Malice is the *mens rea* element that separates second degree murder from manslaughter, and careful consideration is required to avoid either a distorted view of the facts or a misshapen measuring stick.¹⁴⁰ Following a bench trial, JaRon Dean was found guilty of second degree murder. On appeal, Dean argued that the trial judge had failed to specify a finding of malice and that the evidence was insufficient to support a finding of an intention to kill.

The evidence showed Dean and several other young men had been supplied with weapons by one person in their party. The group then drove to the trailer house of the decedent, Deron Haynes. One man in Dean's party had been in an argument earlier that day with Haynes. When the group arrived at Haynes' trailer, two automobiles were parked nearby, positioned with the car lights shining on the middle portion of the trailer. Dean's party drove by and then returned. On their return, only one car remained parked by the trailer, but the lights still illuminated the middle section of the trailer. Each member of Dean's group selected a weapon provided, and then all shot into the lighted trailer. Haynes' body was found inside, the fatal bullet coming from the weapon fired by Dean. Once in custody, Dean confessed to

137. *Id.* at 66.

138. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 259 (1978).

139. 246 Neb. 869, 523 N.W.2d 681 (1994). A reading of *Dean* also reminds one of *Mansell and Herbert's Case*, 73 Eng. Rep. 279 (K.B. 1558). *See supra* notes 73-74. *Mansell and Herbert's Case* was a leading case in the development of the notion of implied malice, i.e., the intent to do grievous bodily harm or to act with a "depraved heart." Such notions are not part of the Nebraska law of malice.

140. James W. McElhaney, *Briefs That Sing*, A.B.A. J., Mar. 1997, at 80.

shooting into the trailer, but stated that although he knew the trailer had been occupied earlier that evening, he did not believe anyone was in the trailer at the time he fired his weapon. He also claimed to have shot high to avoid hitting anyone who might have been inside.¹⁴¹

The trial court agreed with the defendant to make specific findings, but failed to state specifically that Dean had acted with malice. The trial court did state that the "killing of the decedent was intentionally done in that it was done willfully or purposefully and not accidentally or involuntarily."¹⁴² The Nebraska Supreme Court stated that malice, "the intentional doing of a wrongful act without just cause or excuse,"¹⁴³ was established, and that it would not reverse when the trial court, acting as finder of fact, "neglected" to mention the mental state that was sufficiently identified by other findings implying its presence.¹⁴⁴

Dean also argued that the evidence was insufficient to prove an intention to kill beyond a reasonable doubt. The supreme court rejected this argument by pointing to the testimony of two other participants at the scene. One witness "thought he saw someone in the window of the trailer and said so, but was unsure whether anyone heard him." Another witness "saw someone peek out from the front window before he and other participants parked their automobile and handed out the guns."¹⁴⁵ According to the court, such testimony was "direct evidence that someone was inside the trailer."¹⁴⁶ The court concluded "that evidence that one, intentionally and with malice, shot into a residence, lighted or unlighted, and that a death resulted is, in and of itself, sufficient to establish murder in the second degree."¹⁴⁷

The court's strong declaration in *Dean* cannot be correct. And, it demonstrates the potential confusion of the double *mens rea* requirement of second degree murder. In Nebraska, second degree murder requires both an intention to kill and malice, a condition of the mind that is manifested by the intentional doing of a wrongful act without just cause or excuse.¹⁴⁸

In a jurisdiction where malice is a substitute for the specific mental states of (1) intent to kill, (2) intent to do grievous bodily harm, or (3) "depraved heart" conscious disregard of extreme risk to human life,

141. *State v. Dean*, 246 Neb. 869, 871-73, 523 N.W.2d 681, 686-87 (1994).

142. *Id.* at 884, 523 N.W.2d at 693.

143. *Id.* at 885, 523 N.W.2d at 693.

144. *Id.* at 885-86, 523 N.W.2d at 694.

145. *Id.* at 887, 523 N.W.2d at 695.

146. *Id.*

147. *Id.* at 888.

148. See *State v. Franklin*, 241 Neb. 579, 585, 489 N.W.2d 552, 558 (1992); *Whitehead v. State*, 115 Neb. 143, 212 N.W. 35 (1927); Robert S. Hinds, Note, *Criminal Law—Homicide—Is Purpose or an Intent an Indispensable Element of Murder in Nebraska?*, 33 NEB. L. REV. 481 (1954).

any one of the mental states will suffice to prove murder. In Nebraska, however, second degree murder may be established only by proving an intent to kill and that the intent to kill is accompanied by malice, an additional condition of the mind that seems to indicate that the intention to kill is neither justified nor excused by a legally recognized defense or a fact-finder's recognition that the actor had some other nonlegally recognized excuse or justification.¹⁴⁹ The court's "here and now" declaration in *Dean* may confuse the two separate *mens rea* requirements of second degree murder.

The court believed it was obvious that the trial judge must have found the required malice because Dean purposely shot into a trailer when there was a car nearby, and he did not offer any sort of excuse or justification.¹⁵⁰ It does seem clear that this was an act done with the general criminal intent notion of malice. On the other hand, it seems less clear that Dean intended to kill anyone. And, to this writer, it seems as if the presence of malice, the general criminal intent manifested by the absence of any excuse or justification, distorted both the factual conclusion of an intention to kill and confused the focus of the intention—to fire a weapon into a dwelling or to kill someone.

In *State v. Franklin*,¹⁵¹ the defendant, in a bench trial, was convicted of second degree murder as a result of shooting into the door of a house after seeing a person in a window three or four feet from the door. The defendant claimed that he was "just trying to scare [the decedent]." The prosecution in *Franklin* argued that Nebraska's second degree murder statute did not require an intention to kill, and "firing of a gun into a house where the shooter knows there are people constitutes, in itself, second degree murder."¹⁵² The Nebraska Supreme Court rejected both propositions. The court stated it always had held that second degree murder requires an intention to kill.¹⁵³ Moreover, the court held that firing into a house known to be occupied may constitute second degree murder if the fact-finder infers an intent to kill from the deliberate use of a deadly weapon in a manner reasonably likely to cause death.¹⁵⁴

Certainly the court's declaration in *Dean* is, at the least, overstated and inconsistent with *Franklin*. Suppose an actor intentionally shoots into a house where she, perhaps unreasonably, believes no one to be, and she does so with a general criminal intent, i.e., without any offered excuse or justification. Someone dies. Second degree murder, or

149. *State v. Ryan*, 249 Neb. 218, 543 N.W.2d 128 (1996); *State v. White*, 249 Neb. 381, 543 N.W.2d 725 (1996).

150. *State v. Dean*, 246 Neb. 869, 885, 523 N.W.2d 681, 693 (1994).

151. 241 Neb. 579, 489 N.W.2d 552 (1992).

152. *Id.* at 582, 584, 489 N.W.2d at 555-56.

153. *Id.* at 585, 489 N.W.2d at 556. *Franklin* is also one of those cases in which the court recites the necessity of malice, but does not develop the concept.

154. *Id.* at 584, 586, 489 N.W.2d at 556-57.

manslaughter? An intentional killing with malice or a killing without malice? Unintentional while in the commission of an unlawful act? Read again the court's declaration in *Dean*. "Indeed, we declare here and now that evidence that one, intentionally and with malice, shot into a residence, lighted or unlighted, and that a death resulted is, in and of itself, sufficient to establish murder in the second degree."¹⁵⁵ If one intentionally shoots into a house, and this intentional shooting into a house lacks any offer of an excuse or justification, and a death results, that is second degree murder, an intentional killing with malice.

If the first declaration seems plausible and the second does not, it perhaps is due to the weight that "malice" carries in the first declaration. That weight, of course, is the idea of malice as a conceptual substitute for the distinct mental states of an intent to kill, to do grievous bodily harm, or to act with a "depraved heart" in conscious disregard of a extreme risk to human life. But, the second degree murder law of Nebraska does not use "malice" in that way, and both judges and juries need to be aware of the possible confusion the symbol may cause.

*Commonwealth v. Malone*¹⁵⁶ is the classic case of "depraved heart" second degree murder. Almost every lawyer and judge either has read or encountered *Malone* as a case or hypothetical in law school. In *Malone*, two youths were sitting in a dairy store, and Malone suggested that they play "Russian Poker." The decedent consented, and Malone placed his revolver to the decedent's side and pulled the trigger three times. Malone claimed to have loaded the revolver with one bullet so that it would not fire with only three pulls.

The Pennsylvania Supreme Court affirmed Malone's conviction of second degree murder. The court did not reject Malone's version of the facts and did not find an intent to kill. Rather, the court turned to malice, the "grand criterion" of murder. Malice was present in Malone's "gross recklessness," "wicked, depraved, and malignant heart," and "reckless and wanton disregard of the consequences." Further, the court referred to Blackstone's example of murder, "coolly discharging a gun among a multitude of people."¹⁵⁷ Could it be that the memory of *Malone* remains with the Nebraska judiciary and bar? If so, it must also be remembered as inapposite to Nebraska law.¹⁵⁸

155. *State v. Dean*, 246 Neb. 869, 888, 523 N.W.2d 681, 695 (1994).

156. 47 A.2d 445 (Pa. 1946).

157. *Id.* at 447.

158. The confusion between "malice" as a symbol for specific mental intentions on one hand, and a general criminal intent without any excuse or justification on the other, is not new. *Davis v. State*, 51 Neb. 301, 70 N.W. 984 (1897), is an early example and may be the closest the Nebraska Supreme Court has ever come to recognizing "depraved heart" second degree murder. *Davis* derailed a train and caused a death, but claimed to have intended only to signal the train to stop before the derailment and then collect a reward from the passengers. Yet, the

It is of course true that an intention to kill may be inferred from the facts. More particularly, an intent to kill may be inferred from the use of a deadly weapon in a manner reasonably likely to cause death.¹⁵⁹ *State v. Rokus*¹⁶⁰ is similar to the situation in *Malone*. Rokus shot the decedent Joseph Kashuba in the head, at point-blank range, with a .44 magnum. Rokus provided three different versions of the facts of the killing, but all three versions explained that he was "just joking around."¹⁶¹ A jury found Rokus guilty of second degree murder, and the Nebraska Supreme Court affirmed, holding that the use of a deadly weapon in a manner reasonably likely to cause death may be the basis for an inference of the required intent to kill.¹⁶²

It should be emphasized that an actor's use of a deadly weapon in a manner reasonably likely to cause death may be the factual basis for inferring an answer to two distinct questions: (1) do the actions prove a "depraved heart" conscious disregard of extreme risk to human life?; or (2) do the actions prove an intent to kill? Only the second question is germane to second degree murder in Nebraska. Any unintended death, no matter how wanton, reckless, or depraved, might be the risk in doing the act that caused a death, which in Nebraska would constitute manslaughter, an unintended death while in the commission of an unlawful act.¹⁶³ But, an unintended death during perpetration or attempted perpetration of the statutorily identified felonies—sexual assault in the first degree, arson, robbery, kidnapping, hijacking, or burglary—would constitute first degree felony murder.¹⁶⁴ An ironic symmetry thus ensues: no matter how little the risk of an unintended death during a named felony, it is first degree murder, and no matter how big the risk of an unintended death during any other unlawful act, it is manslaughter. Second degree murder sits in the middle, requiring both an intent to kill and malice, the intentional doing of a wrongful act without just cause or excuse.

In *State v. Hansen*,¹⁶⁵ the defendant appealed a bench trial conviction of first degree murder. Of interest is the trial judge's factual conclusion, affirmed on appeal, that Hansen intended to kill when he fired

decision in *Davis* may simply turn on a jury finding that Davis was not to be believed and that his intent was to kill. *Id.* at 311, 70 N.W. at 987.

159. *State v. Rokus*, 240 Neb. 613, 622, 483 N.W.2d 149, 155 (1992); *State v. Franklin*, 241 Neb. 579, 586, 489 N.W.2d 552, 557 (1992). See generally Walter E. Oberer, *The Deadly Weapon Doctrine—Common Law Origin*, 75 HARV. L. REV. 1565 (1962); Note, *Criminal Law—Deadly Weapon Doctrine*, 34 Ky. L.J. 320 (1946).

160. 240 Neb. 613, 483 N.W.2d 149 (1992).

161. *Id.* at 619, 483 N.W.2d at 153.

162. *Id.* at 622, 483 N.W.2d at 155.

163. NEB. REV. STAT. § 28-305 (Reissue 1995). An unintended death resulting from the operation of a motor vehicle might be prosecuted alternatively as motor vehicle homicide. *Id.* § 28-306.

164. *Id.* § 28-303.

165. 252 Neb. 489, 562 N.W.2d 840 (1997).

from an automobile a 20-gauge shotgun loaded with 3/4 ounce "deer slugs," at a distance of approximately fifteen feet from a group in which the victim was standing. Hansen claimed that he used deer slugs to reduce the chance of accidentally hitting anyone because the slug consisted of only one large piece of metal, rather than many BBs in a regular shotgun shell. Hansen testified that he intended only to "scare the shit out of" the group when he fired and purposely shot "up in the air."¹⁶⁶

The supreme court stated that intent to kill may be inferred from the use of a deadly weapon in a manner likely to cause death.¹⁶⁷ In addition, either Hansen or members of his group had stated that they wanted to kill some members in the group and that they used the deer slugs to do some damage.¹⁶⁸ Following this reasoning, the supreme court affirmed a finding of not only an intent to kill, but also that it was deliberate and premeditated.¹⁶⁹

The facts of *Franklin*, *Rokus*, and *Hansen* all resulted in a finding that an actor who fired a deadly weapon had an intent to kill. They all rely on the notion that such an intent may be inferred from the deliberate use of the weapon in a manner reasonably likely to cause death. The most striking difference between the manner of the weapon's use in *State v. Dean* and the cases just discussed is that in *Franklin*, *Rokus*, and *Hansen* the weapons were fired at people known to be present by the shooter. Franklin knew someone was in the house; Rokus knew he was "joking around" with someone; Hansen knew he was firing in the direction of a group standing on the corner. Perhaps JaRon Dean should have reasonably expected someone to be in the trailer house, but the evidence was insufficient to show Dean knew someone was there.¹⁷⁰ Perhaps the risk he took was wanton, depraved, or reckless. Even so, this would result only in manslaughter liability. Perhaps, but only perhaps, a fact-finder could conclude beyond a reasonable doubt that he intended to kill.

Second degree murder requires two *mens rea* elements. The actor must intend to kill, and the actor must act with malice, without any justification or excuse. Just as an intent to kill does not mean the actor necessarily acted with malice, acting without a justification or excuse of any kind, or with a "depraved heart" consciousness of an

166. *Id.* at 494-95, 562 N.W.2d at 846.

167. *Id.* at 501, 562 N.W.2d at 850.

168. *Id.* at 495, 562 N.W.2d at 846.

169. *Id.* at 501, 503, 562 N.W.2d 850-51.

170. *State v. Dean*, 246 Neb. 869, 885, 887, 523 N.W.2d 681, 693, 695 (1994). The court noted the testimony of two witnesses who thought they had seen someone in the trailer. The court stated this was direct evidence someone was present. Of course, the body of the victim is also direct evidence someone was there, but the court did not affirm any finding of Dean's knowledge other than stating that he reasonably could have expected someone to be there.

extreme risk to human life, does not necessarily mean the actor intended to kill. Judges, juries, and lawyers need to be aware of the potential for confusion when both of these distinct mental states are to be inferred from the underlying facts of a killing.

B. The Problem of *State v. Jones*: May an Intentional Homicide Be Manslaughter?

Intentional killings are ranked in ascending order from manslaughter, to second-degree murder, to first-degree murder.¹⁷¹

*State v. Jones*¹⁷² is the latest in a series of Nebraska cases dealing with the problem of distinguishing the *mens rea* of second degree murder from the *mens rea* of voluntary manslaughter. *Jones* overruled *State v. Pettit*,¹⁷³ which had overruled *State v. Batiste*.¹⁷⁴ *Jones*¹⁷⁵ leaves unclear the question of whether or not a provoked killing, the quintessential case of voluntary manslaughter, may properly be manslaughter if the provoked actor intended to kill. Moreover, the "acquittal first" "step" instruction used in *Jones* is imbued with problems when combined with instructions defining provocation and malice, but neglecting to tell juries what to do with the concepts.

Roy Jones was charged with first degree murder and convicted by a jury of second degree murder for the death of his wife, Tara Jones. Jones killed his wife after several days of escalating argument, which culminated in Tara dying from two shots to her head. The defendant claimed that Tara pointed a gun at him, they struggled, and then he "snapped." A witness saw Tara running away from a window of the house and a hand clinging to a gun extending from the window. The witness heard approximately four shots. Tara staggered and fell.¹⁷⁶

On appeal Jones argued that the trial court's step instructions improperly prevented the jury from considering a voluntary manslaughter conviction. Step instructions are both common and critical. Consequently, the entire Instruction No. 6 will be set forth here.

Under Count 1 of the Information in this case, depending on the evidence, you may find the defendant

- A. Guilty of murder in the first degree; or
- B. Guilty of murder in the second degree; or
- C. Guilty of voluntary manslaughter; or
- D. Not guilty.

171. FLETCHER, *supra* note 138, at 256.

172. 245 Neb. 821, 515 N.W.2d 654 (1994).

173. 233 Neb. 436, 445 N.W.2d 890 (1989).

174. 231 Neb. 481, 477 N.W.2d 125 (1989). The history of *Batiste* and *Pettit* may be found in Veronica L. Bowen, Comment, *Intent as an Element of Voluntary Manslaughter*: *State v. Pettit*, 24 CREIGHTON L. REV. 583 (1991).

175. *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994).

176. *Id.* at 822-25, 515 N.W.2d at 654-56.

The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime of murder in the first degree in Count 1 are:

1. That the defendant, Roy L. Jones, killed Tara L. Jones;
2. That the defendant, did so purposely and with deliberate and premeditated malice;
3. That the defendant did so on or about March 30, 1992; and
4. That the defendant did so in Douglas County, Nebraska.

The State has the burden of proving beyond a reasonable doubt each and every one of the foregoing material elements of the crime of murder in the first degree necessary for conviction.

If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements is true, it is your duty to find the defendant guilty of the crime of murder in the first degree in Count 1, and you shall complete Verdict Form 1, and you shall not then consider the next lesser-included offense hereafter set forth in the instruction. On the other hand, if you find that the State has failed to prove beyond a reasonable doubt any one or more of the foregoing material elements, it is your duty to find the defendant not guilty of the crime of murder in the first degree in Count 1. You shall then proceed to consider the lesser-included offense of murder in the second degree.

The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime of murder in the second degree are:

1. That the defendant, Roy L. Jones, killed Tara L. Jones;
2. That the defendant did so intentionally but without premeditation.
3. That the defendant did so on or about March 30, 1992; and
4. That the defendant did so in Douglas County, Nebraska.

The State has the burden of proving beyond a reasonable doubt each and every one of the foregoing material elements of the crime of murder in the second degree necessary for conviction.

If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements is true, it is your duty to find the defendant guilty of the crime of murder in the second degree in Count 1, and you shall complete Verdict Form 2, and you shall not then consider the next lesser included offense hereinafter set forth in this instruction. On the other hand, if you find the State has failed to prove beyond a reasonable doubt any one or more of the foregoing material elements, it is your duty to find the defendant not guilty of the crime of murder in the second degree in Count 1. You shall then proceed to consider the next lesser included offense of voluntary manslaughter.

The material elements which the state must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime of voluntary manslaughter are:

1. That the defendant, Roy L. Jones, killed Tara L. Jones;
2. That the defendant did, without malice, kill Tara L. Jones intentionally upon a sudden quarrel;
3. That the defendant did so on or about March 30, 1992; and
4. That the defendant did so in Douglas County, Nebraska.

The State has the burden of proving beyond a reasonable doubt each and every one of the foregoing material elements of the crime of voluntary manslaughter necessary for conviction.

If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements is true, it is your duty to find the defendant guilty of the crime of voluntary manslaughter in County 1; and you shall complete Verdict Form 1. On other [sic] hand, if you find the State has failed to prove beyond a reasonable doubt any one or more of the foregoing material ele-

ments, it is your duty to find the defendant not guilty of the crime of voluntary manslaughter and not guilty of any charge in the case in Count 1, and you shall complete Verdict Form 4.

The burden of proof is always on the State to prove beyond a reasonable doubt all of the material elements of the crime charged or included therein, and the burden never shifts.¹⁷⁷

Instruction No. 6 needs to be placed in the context of two other instructions, No. 11 and No. 12.

[No. 11]

The Nebraska Criminal Code in full force and effect at the time alleged in the Information pertaining to the crime of voluntary manslaughter provides in substance as follows:

"(1) A person commits manslaughter if he kills another without malice . . . upon a sudden quarrel . . . [.]"

"Malice" is defined as that condition of the mind which is shown by intentionally doing a wrongful act without just cause or excuse. It means any willful or corrupt intention of mind.

. . . .

[No. 12]

A sudden quarrel is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self control.

The phrase "sudden quarrel" does not necessarily mean an exchange of angry words or an altercation contemporaneous with an unlawful killing and does not require a physical struggle or other combative corporal contact between the defendant and Tara Jones.

In considering the offense of voluntary manslaughter, you should determine whether the defendant acted under the impulse of passion suddenly aroused which clouded reason and prevented rational action, whether there existed reasonable and adequate provocation to excite the passion of the defendant and obscure and disturb his power of reasoning to the extent that he acted rashly and from passion, without due deliberation and reflection, rather than from judgment, and whether under all the facts and circumstances as disclosed in the evidence, a reasonable time had elapsed from the time of provocation to the instant of the killing for the passion to subside and reason resume control of the mind.

You should determine whether the suspension of reason, if shown to exist, arising from sudden passion, continued from the time of provocation until the very instant of the act producing death took place.

Therefore, if the evidence convinces you beyond a reasonable doubt that the defendant killed Tara Jones intentionally upon a sudden quarrel, you should find him guilty of the offense of manslaughter.¹⁷⁸

Jones argued that the second degree murder step in the instructions asked if the killing was done intentionally. Jones' argument followed that if the jury answered yes, they would end the matter at that point. Consequently, they would not consider the possibility that Jones intentionally killed his wife, but that the intention to kill was the result of a reasonable and adequate provocation and therefore con-

177. *Id.* at 825-28, 515 N.W.2d at 656-58.

178. *Id.* at 831-32, 515 N.W.2d at 659-60.

stituted voluntary manslaughter.¹⁷⁹ The court answered that the step instruction was simply a logical way to proceed and that the jury was not required in its preliminary deliberations to be unanimous before considering whether the defendant was guilty of a lesser offense.¹⁸⁰

The court did recognize, however, that instruction No. 6 "effectively negated"¹⁸¹ the possibility of a manslaughter conviction, but blamed the problem on *State v. Pettit*.¹⁸² The court found that under *Pettit*, a conviction of manslaughter upon a sudden quarrel required the killer to act with an intention to kill. Under the current Nebraska statutes, however,

second degree murder is the intentional killing of another without premeditation. Manslaughter is the killing of another without malice, upon a sudden quarrel, or an unintentional killing while in the commission of an unlawful act.

Malice has most recently been defined in our cases as "that condition of the mind which is manifested by the intentional doing of a wrongful act without just cause or excuse." . . .

. . . .

Since our statutes define manslaughter as a killing without malice, there is no requirement of an intention to kill in committing manslaughter. The distinction between second degree murder and manslaughter upon a sudden quarrel is the presence or absence of an intention to kill. *State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890 (1989), was incorrect in its reasoning and holding, and to that extent, it is overruled.¹⁸³

After proceeding to this point, the court abruptly shifted gears away from the provocation-intentional killing issue. Instruction No. 6 was plain error and prejudicial since it failed to include malice as a necessary element of second degree murder. The judgment was reversed and remanded.¹⁸⁴

The court returned to the provocation problem, but never addressed Jones' argument that instructions No. 11 and No. 12 confuse or fail to explicate the relationship of malice and sudden quarrel, a legally recognized and sufficient provocation. The court did note that both Instructions No. 6 and No. 12 were now erroneous in stating that

179. *Id.* at 828, 515 N.W.2d at 657-58.

180. *Id.* But see *State v. Derry*, 248 Neb. 260, 267-69, 534 N.W.2d 302, 307-08 (1995). In *Derry*, the defendant complained of an erroneous definition of "sudden quarrel" and its relation to manslaughter. The court in *Derry* assumed, without deciding, that the definition was wrong, but held that *Derry* was not prejudiced thereby since the jury followed the step instruction and never considered the district court's definition of "sudden quarrel."

181. *State v. Jones*, 245 Neb. 821, 829, 515 N.W.2d 654, 658 (1994).

182. 233 Neb. 436, 445 N.W.2d 890 (1989).

183. *State v. Jones*, 245 Neb. 821, 830, 515 N.W.2d 654, 659 (1994)(citation omitted).

184. *Id.* at 831, 515 N.W.2d at 659 (citing *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994)).

the State was required to prove that the defendant intentionally killed the victim to sustain a voluntary manslaughter conviction.¹⁸⁵

If *Jones* determined that voluntary manslaughter need not be intentional, the question remains if it may be. Additionally, step instruction schemes either confuse, fail to explicate, or negate a defendant's chance to defend a second degree murder charge with the partially excusing defense of provocation. The situation is exacerbated because Nebraska statutes describe one version of the manslaughter offense (voluntary manslaughter) with language that is appropriate not to the offense, but to the partial defense of provocation when it is raised to defend against a second degree murder charge.¹⁸⁶

It is possible for a prosecutor to believe that an actor killed as a result of provocation and to proceed with an original charge of manslaughter. In such a situation it makes little difference if the killer acted with an intention to kill. The key is that there is no serious possibility that the State in such a situation has to prove a "sudden quarrel" or adequate provocation. Under *Pettit*, the State simply would have prove a death and an intention to kill.¹⁸⁷

In *State v. Pettit*,¹⁸⁸ the Nebraska Supreme Court attempted to clarify the law of the manslaughter offense. The court traced the common law and Nebraska statutory history of manslaughter. Nebraska statute section 28-305(1) articulated that manslaughter is "an inclusive disjunction." "A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or unintentionally while in the commission of an unlawful act."¹⁸⁹ The statute thus creates two categories of manslaughter: (1) intentional killing, without malice, "upon a sudden quarrel" (partially excused by provocation and

185. *Id.* at 832, 515 N.W.2d at 660.

186. See John R. Snowden, *The Case for a Doctrine of Provocation in Nebraska*, 61 NEB. L. REV. 565, 575-76 (1982)[hereinafter Snowden, *Doctrine of Provocation*]; John R. Snowden, *Provoking Provocation*, HABEAS CORPUS, Sept. 1991, at 6 (1991)[hereinafter Snowden, *Provoking Provocation*]. In *State v. Cave*, 240 Neb. 783, 789, 484 N.W.2d 458, 464 (1992), then Judge White suggested that the State must prove the defendant killed upon a sudden quarrel to sustain a voluntary manslaughter conviction. The suggestion was dicta and not relevant to any issues raised in the case. Moreover, no authority is cited for the proposition and none can be found in Nebraska or nationally.

187. *State v. Pettit*, 233 Neb. 436, 445 N.W. 2d 890 (1989). *Pettit* was decided prior to *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994), and lawyers in *Pettit* may then have thought, incorrectly as it turns out, that second degree murder requires only an intent to kill. If that was true, second degree murder and voluntary manslaughter would have identical elements: killing and intent to kill. That is not a problem as long as the prosecutorial decision to choose one or the other is based on an honest assessment of culpability. *State v. Roth*, 222 Neb. 119, 123, 382 N.W.2d 348, 351 (1986). Today it is clear that malice distinguishes second degree murder from voluntary manslaughter.

188. 233 Neb. 436, 445 N.W.2d 890 (1989).

189. *Id.* at 445, 445 N.W.2d at 896 (emphasis omitted).

usually the result of using provocation as a defense); and (2) involuntary manslaughter, an unlawful but unintentional killing, without malice, as the result of the defendant's commission of an unlawful act.

In *Jones*, the court pointed out that the terms "voluntary" and "involuntary" have not been a part of the Nebraska manslaughter statute since 1873.¹⁹⁰ Moreover, the court did not discuss the disjunctive nature of the statute. Instead, the court noted that after *Pettit*, "the only element that distinguishes manslaughter upon a sudden quarrel and second degree murder is the element of the sudden quarrel, since both killings are intentional."¹⁹¹ The court did not phrase this in terms of malice. But, it is malice that distinguishes the offenses, and "sudden quarrel" or provocation either negates or excuses malice.

The *Jones* court then repeated the Nebraska homicide law and stated the definition of malice: "the intentional doing of a wrongful act without just cause or excuse." Somehow the court then found that "the presence or absence of an intention to kill" is the distinction between the offenses. Because "our statutes define manslaughter as a killing without malice, there is no requirement of an intention to kill in committing manslaughter."¹⁹²

The court seems confused. Malice in Nebraska was defined in the opinion. Malice does not now, and perhaps never did, refer to specific *mens rea* intentions (to kill, to do grievous bodily harm, to act with "depraved heart" conscious disregard of extreme risk to human life). It is malice that distinguishes the offenses: was the intention to kill "without just cause or excuse?"

If the court continues to hold that a "voluntary" manslaughter situation does not require an intent to kill, then that path to obtaining a manslaughter conviction seems to be a strict liability offense. Yet, it cannot reasonably be that the law intends any death during a provoked situation to be manslaughter.¹⁹³ Suppose an actor returns home and finds her spouse in the arms of another. The actor starts to yell, scream, and accuse. While throwing this fit, the actor trips, causing a lamp and portable TV to fall onto the spouse, and death results. This is a tragic accident; but without some *mens rea* requirement, it could be prosecuted as manslaughter.

Avoiding this problem is easy enough for the State. In the unusual situation of an original manslaughter charge in which the prosecution's investigation has determined that the death was the result of an adequate provocation, the State could proceed by proving an unintended death while in the commission of an unlawful act. Certainly

190. *State v. Jones*, 245 Neb. 821, 829, 515 N.W.2d 654, 658 (1994).

191. *Id.*

192. *Id.* at 830, 515 N.W.2d at 659.

193. Whatever the law intends, a strict liability homicide would raise serious constitutional problems. See generally *Morrisette v. United States*, 342 U.S. 246 (1952).

the presence of an even greater culpability (an intention to kill) would not affect a conviction. The real problem arises in the typical situation in which the actor raises provocation as a defense.

Provocation always has been a controversial defense. Despite the controversy, provocation is the traditional analytic device for distinguishing between the more or less blameworthy intentional killers.¹⁹⁴ It is beyond the scope of this Article to consider all of the issues of the provocation defense in Nebraska or to argue for its expansion or contraction.¹⁹⁵ The doctrinal function of the provocation defense, however, is fairly clear in Nebraska, and its structure is well recognized.

All but the last paragraph of instruction No. 12 in *Jones* accurately reflects Nebraska law. The statutory phrase "sudden quarrel" is a code or symbol for the notion of an adequate and reasonable provocation. If a killer kills while in a provoking situation, the heat of passion, clouding his reason with no time to restore it, then the homicide is partially excused, and the actor is convicted of manslaughter rather than murder.¹⁹⁶ The most commonly recognized situation in which an adequate provocation reduces murder to manslaughter is when one kills after actually observing his or her spouse in an act of adultery.¹⁹⁷ Here the question is whether such a killer may intend the death, or to put it another way, does provocation negate the *mens rea* of murder. Or, are the *mens rea* elements of murder present, but excused in a provoked killing?¹⁹⁸

For Professor Dressler and others, the answer is clear.

Various courts explain the doctrine on the basis that the provoked killer lacks the specific intent to kill. This is an acceptable excusing theory, but not in provocation cases. Provocation not only causes anger, it motivates the actor to want to kill the provoker. Proof, then, of adequate provocation does not negate intent. It magnifies it. Case law to the contrary is erroneous.¹⁹⁹

194. See Richard Singer, *The Resurgence of Mens Rea: I—Provocation, Emotional Disturbance, and the Model Penal Code*, 27 B.C. L. REV. 243, 248 (1986); Snowden, *Doctrine of Provocation*, *supra* note 186.

195. See generally Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. LAW & CRIMINOLOGY 421 (1982); Alan Reed, *Duress and Provocation as Excuses to Murder: Salutory Lessons from Recent Anglo-American Jurisprudence*, 6 FLA. ST. U. J. TRANSNAT'L L. & POL'Y 51, 70-92 (1996). Both Dressler and Reed argue to expand the definition of provocation. Compare Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331 (1997)(arguing for a more limited reformulation of provocation).

196. *State v. Jones*, 245 Neb. 821, 831-32, 515 N.W.2d 654, 659-60 (1994).

197. See generally *Manning's Case*, 83 Eng. Rep. 112 (1671). See also *Rowland v. State*, 35 So. 826 (Miss. 1904); LAFAVE & SCOTT, *supra* note 19, at 656.

198. LAFAVE & SCOTT, *supra* note 19, at 653-54; Singer, *supra* note 194, at 306-14.

199. LAFAVE & SCOTT, *supra* note 19, at 654 ("The usual type of voluntary manslaughter involves the intentional killing of another . . ."); Dressler, *supra* note 195, at 462.

For Professor Singer, it is less clear that provoked killers always intend to kill. In some situations the actor may intend to kill, but in other cases, this may not be true. Some may simply "lose control" and flail out, while others may have an intent to kill that was inspired by the provocation.²⁰⁰

All disputes over whether "malice" is or is not negated by "heat of passion" are bound to be fruitless . . . just as disputes over whether all killers "in the heat of passion" "intend" to kill are fruitless, for one simple reason—they are sterile doctrinal controversies over semantic fictions. This is not to say that the emotions themselves are fictions—it is not uncommon to experience malice, or hatred, or a "blinding rage." But these are mere metaphors, and to expect one metaphor to "annul" another metaphor is ludicrous.²⁰¹

The obvious point of the partial excuse of provocation is to separate the more (murder) from the less (manslaughter) blameworthy killer, and the distinction turns on acting from extreme provocation rather than sheer ill will.²⁰²

Although *Jones* states that a conviction for "voluntary" manslaughter does not require an intent to kill, it leaves open the question of whether an actor defending a second degree murder charge by the partial excuse of provocation may have a manslaughter instruction if the actor intended to kill. The answer must be yes. Although in rare situations the provocation is so extreme that the actor is unable to form any intent and simply flails out,²⁰³ most provoked actors want and intend to kill. Nevertheless, such a conclusion is not required for the provocation defense.

In Nebraska, second degree murder requires the prosecutor to establish two *mens rea* elements. It must be shown both that the actor intended to kill and that the actor did so with malice—without just cause or excuse.²⁰⁴ In whatever way provocation affects intention to kill—negating or excusing—provocation remains a legally recognized and mandated partial excuse. If a provocation defense is possible, it must be considered; if the facts establish the defense, it must partially excuse.²⁰⁵ There cannot be malice if there is provocation.

200. Singer, *supra* note 194, at 309-12.

201. *Id.* at 313 (citations omitted).

202. *Id.* at 314. Provocation is widely recognized. See generally *Winnebago v. Cheyenne*, reported in KARL LLEWELLYN & EDWARD HUBEL, *THE CHEYENNE WAY* 140-46 (1941); *THE ETHICS OF ARISTOTLE: THE NICOMACHEAN ETHICS* 112 (J.K.A. Thomson trans., 1955); H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 22-24 (1968). See also *Exodus* 21:12-36; *Deuteronomy* 4:22:22, 4:41-42.

203. Dressler suggests such an extreme provocation should be a completely excusing defense similar to insanity. Dressler, *supra* note 195, at 467. Singer is not quite so bold, but does question why an extreme situation does not completely excuse. Singer, *supra* note 194, at 309-10.

204. *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994).

205. *State v. Rowe*, 210 Neb. 419, 315 N.W.2d 250 (1982).

Unfortunately, although Nebraska law is clear on the definition and result of a provocation defense, only a record of confusion or obfuscation tells juries how the defense works. For example, look at the last paragraph of Instruction No. 12 in *Jones*: "Therefore, if the evidence convinces you beyond a reasonable doubt that the defendant killed Tara Jones intentionally upon a sudden quarrel, you should find him guilty of the offense of manslaughter."²⁰⁶ This was the last paragraph of an instruction that defined the notion of provocation. But, the context in which it appeared and the way in which it was phrased reasonably could have led a juror to conclude that the defendant had to prove beyond a reasonable doubt that the killing was provoked. Of course, that is not the case. Provocation is the excuse that negates malice and yields manslaughter—"kill another without malice."²⁰⁷

The step instruction asks the jury to consider for second degree murder whether the defendant intended to kill and also should ask whether the defendant acted with malice. If one believes, as did the court in *Jones*, that the step instruction does not unfairly prevent the jury from a preliminary consideration of the lesser manslaughter charge,²⁰⁸ the instruction nevertheless provides the jury with no indication as to how to reach that result. Following the statutory definition of second degree murder with the statutory definition of manslaughter (whether or not its "voluntary" variety requires an intent to kill) does not guide the jury's decision. The instruction must tell the jury how provocation (assuming it is properly defined) works to partially excuse a killing that otherwise would be murder.

The courts must tell the fact-finder more than the definition of the offenses and more than the definition of an adequate provocation. The jury needs to be told how the defense works. Some version of the instruction suggested here should be included:

The defense has produced evidence that makes provocation important to this case. Provocation may explain an intent to kill so that even if such an intent exists, the homicide that otherwise would be murder is partially excused and punished as manslaughter.

You have been instructed that to prove second degree murder the actor must have both intended to kill and acted with malice. Malice is the intentional doing of a wrongful act without just cause or excuse. Provocation is a legally recognized excuse and one of the excuses or justifications that, if pres-

206. *State v. Jones*, 245 Neb. 821, 832, 515 N.W.2d 654, 660 (1994).

207. NEB. REV. STAT. § 28-305 (Reissue 1995).

208. *State v. Jones*, 245 Neb. 821, 828, 515 N.W.2d 654, 658 (1994). *But see* *State v. Derry*, 248 Neb. 260, 534 N.W.2d 302 (1995) (holding that the defendant was not prejudiced by an instruction on provocation that was assumed to be erroneous because the step instruction prevented the jury from considering it). It also should be noted that a "step" instruction ascending from manslaughter to second degree murder and then to first degree murder seems more coherent with the presumption of innocence than the descending instructions used in Nebraska.

ent, would mean the defendant did not act with malice, even if you believe the defendant intended to kill the deceased.

When the act causing the death of another is done as a result of an adequate provocation for which there is reasonable explanation or excuse, any resulting intentional or unintentional homicide is no greater than manslaughter.

An adequate provocation, for which there is reasonable explanation or excuse, causes the actor to lose normal self-control. 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.

To establish that a killing is murder and not voluntary manslaughter, the burden is on the State to prove beyond a reasonable doubt each element of murder and to prove beyond a reasonable doubt that the actor did not act as a result of adequate provocation.

C. The Problem of *State v. Cave*: Must the State Prove Beyond a Reasonable Doubt that the Accused Did Not Act from an Adequate Provocation?

[T]he fact at issue here—the presence or absence of the heat of passion on sudden provocation—has been, almost from the inception of the common law of homicide, the single most important factor in determining the degree of culpability attaching to an unlawful homicide.²⁰⁹

In a criminal case the State must prove every element of the offense beyond a reasonable doubt.²¹⁰ The State may not shift the burden of persuasion to the defendant to disprove any element of an offense by any persuasive burden.²¹¹ On the other hand, once the elements of an offense are defined, the state may create defenses of avoidance that excuse or mitigate the offense after its elements have been established and may require the defendant to prove these defenses.²¹² The law has not found any principled basis to distinguish (1) that which must be defined as an element of an offense, and (2) that which, once the elements of an offense have been established, may be considered as a defending excuse or justification and thus place the burden of persuasion on the accused.²¹³ Consequently, the

209. *Mullaney v. Wilbur*, 421 U.S. 684, 696 (1975).

210. *In re Winship*, 397 U.S. 358 (1970).

211. *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979). *Cf.* *Martin v. Ohio*, 480 U.S. 228 (1987) (holding that the defendant may be required to prove self-defense by a preponderance of the evidence since self-defense does not negate an element of the offense of purposely causing the death of another).

212. *Patterson v. New York*, 432 U.S. 197 (1977).

213. *See generally* FLETCHER, *supra* note 138, at 545-52; Ronald Jay Allen, *Mullaney v. Wilbur, The Supreme Court, and the Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention*, 55 TEX. L. REV. 269 (1977); John Jeffries & Paul Stephan III, *Defenses, Presumptions, and the Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325 (1979); Stephen Saltzburg, *Burdens of Persuasion in Criminal Cases: Harmonizing the Views of the Justices*, 20 AM. CRIM. L. REV. 393 (1984).

law simply looks to what has been done—what are the elements of the offense and does the offered defense negate one of the elements?

Although raised in *State v. Cave*,²¹⁴ the Nebraska Supreme Court did not answer this matter regarding the defense of provocation and the elements of second degree murder. But, the questions can no longer be set aside.

In *State v. Cave*, John Cave was convicted after a bench trial of second degree murder for killing Rose Kimball. Cave had asked to remain at Kimball's house and was refused. He became upset and angry, and after a somewhat protracted argument, Cave shot Kimball from the backseat of her car as she was preparing to drive him home.²¹⁵ On appeal, Cave argued that the prosecution was constitutionally required to prove beyond a reasonable doubt that the killing was not inspired by an adequate provocation.²¹⁶

The supreme court stated that Nebraska law requires three elements to prove second degree murder: (1) the death, (2) the intent to kill, and (3) causation.²¹⁷ Consequently, the court thought it was at least unclear whether or not the State had the burden of proving the

214. 240 Neb. 783, 484 N.W.2d 458 (1992). States vary on the placement of the burden to prove or disprove provocation and on the appropriate instruction to the jury. The differing instructions are, of course, driven by the unique homicide law of each state.

Some states place the burden of disproving provocation on the prosecution. *See, e.g.*, ALASKA STAT. §§ 11.41.115, -81.900(b)(16) (Michie 1996); *People v. Wharton*, 809 P.2d 290 (Cal. 1991); *Miner v. State*, 485 S.E.2d 456 (Ga. 1997); *Baird v. State*, 604 N.E.2d 1170 (Ind. 1992); *Commonwealth v. Shelley*, 584 N.E.2d 629 (Mass. 1992); *Sims v. State*, 573 A.2d 1317 (Md. 1990); *State v. Heslop*, 639 A.2d 1100 (N.J. 1994); *State v. Hatcher*, No. 95-279, 1997 WL 659359 (Vt. Oct. 24, 1997); *State v. Lee*, 321 N.W.2d 108 (Wis. 1982).

Other states place the burden on the defendant to prove provocation. *See, e.g.*, *State v. Kingsley*, 851 P.2d 370 (Kan. 1993); *State v. Smith*, 571 So. 2d 133 (La. 1990); *State v. Michaud*, 611 A.2d 61 (Me. 1992); *State v. Auchampach*, 540 N.W.2d 808 (Minn. 1995); *State v. Montague*, 259 S.E.2d 899 (N.C. 1979); *State v. Rhodes*, 590 N.E.2d 261 (Ohio 1992); *Commonwealth v. Speight*, 677 A.2d 317 (Pa. 1996); *State v. Trusty*, 919 S.W.2d 305 (Tenn. 1996); *State v. McGuire*, No. 23671, 1997 WL 403714 (W. Va. July 18, 1997); *Yung v. State*, 906 P.2d 102 (Wyo. 1995).

Still other states use extreme emotional distress rather than provocation as the exculpatory concept. *See, e.g.*, ARK. CODE ANN. § 5-10-104 (Michie 1997); HAW. REV. STAT. §§ 707-702 (1993); *State v. Raguseo*, 622 A.2d 519 (Conn. 1993); *Moore v. State*, 456 A.2d 1223 (Del. 1983); *McGinnis v. Commonwealth*, 875 S.W.2d 518 (Ky. 1994); *People v. Patterson*, 347 N.E.2d 898 (N.Y. 1976); *State v. Trieb*, 315 N.W.2d 649 (N.D. 1982).

Finally, one state uses provocation solely as a mitigating factor at the punishment stage. *See* TEX. PENAL CODE ANN. § 19.02 (West 1994).

215. *State v. Cave*, 240 Neb. 783, 784-86, 484 N.W.2d 458, 461-62 (1992).

216. *Id.* at 787, 484 N.W.2d at 463.

217. *Id.* at 789, 484 N.W.2d at 464. Although *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994), states that in 1994, Nebraska recognized malice as an element of second degree murder, the court did not notice or discuss malice in *Cave*. *See*

absence of provocation beyond a reasonable doubt. That is, it was unclear whether (1) provocation negated an intent to kill, which was an element of the offense, and thus provocation could not be an issue that the defendant was required to prove; or (2) provocation was a defense of avoidance that did not affect the elements of second degree murder and provocation was an issue the defense could be required to prove.²¹⁸ The court then refused to decide the proper placement of the burden. Instead, for the purpose of its decision, the court assumed that even if the State had the burden, the evidence was sufficient to sustain the conviction.²¹⁹

After *State v. Myers* and the malice revolution or rediscovery, it now seems clear that the State has the burden of proving beyond a reasonable doubt that the defendant did not act from an adequate provocation. Second degree murder has two *mens rea* elements: (1) an intent to kill, and (2) malice, the intentional doing of a wrongful act without just cause or excuse.²²⁰ The State must prove both *mens rea* elements beyond a reasonable doubt and may not shift the burden on either element to the defendant.

If the crime of second degree murder requires only the *mens rea* element of intent to kill, then it might be possible to force the defendant to prove an adequate provocation by some burden, most likely by a preponderance of the evidence.²²¹ If second degree murder requires only an intent to kill, and voluntary manslaughter requires no intent to kill, as held in *State v. Jones*,²²² then the question remains, as discussed earlier, whether a killer having a provocation defense, as distinguished from an original manslaughter charge, may act with an intent to kill. It was argued that many, if not most, provoked killers do indeed have an intent to kill.²²³ In such a situation, intent to kill, an element of second degree, would not be negated by provocation.

also *State v. Grimes*, 246 Neb. 473, 489-93, 519 N.W.2d 507, 518-21 (1994)(Wright, J., dissenting); Shugrue, *supra* note 11, at 36-39.

218. *State v. Cave*, 240 Neb. 783, 790, 484 N.W.2d 458, 464 (1992). Compare *Mullaney v. Wilbur*, 421 U.S. 684 (1975)(holding that when malice is an element of murder, the State must prove absence of provocation beyond a reasonable doubt), with *Patterson v. New York*, 432 U.S. 197 (1977)(holding that when murder requires only an intent to kill, the state may require the defendant to prove by a preponderance of the evidence that he acted under "extreme emotional disturbance"). See also *Martin v. Ohio*, 480 U.S. 228 (1987)(holding that the state may require the accused to prove self-defense by a preponderance of the evidence since self-defense does not negate an element of intentional killing).
219. *State v. Cave*, 240 Neb. 783, 790-92, 484 N.W.2d 458, 464-66 (1992).
220. *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994); *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994).
221. See *Patterson v. New York*, 432 U.S. 197 (1977); *State v. Grimes*, 246 Neb. 473, 488-93, 519 N.W.2d 507, 518-21 (1994)(Wright, J., dissenting).
222. 245 Neb. 821, 515 N.W.2d 654 (1994).
223. See *supra* notes 199-202 and accompanying text.

The state could then ask that the accused prove provocation as an avoidance defense—the elements of the crime have been satisfied, but an excusing or justifying circumstance still remains.²²⁴

As discussed earlier, the law does not provide any principled basis from which to distinguish issues that must be an element of the offense and issues that may be assigned to the accused as matters of avoidance.²²⁵ In *Martin v. Ohio*,²²⁶ the United States Supreme Court approved an Ohio law that required a defendant to prove self-defense by a preponderance of the evidence since self-defense did not negate an intent to kill. But, beyond statutory language and maneuvering, each state must determine for itself as a matter of justice who should bear the burden on crucial issues. With regard to the justifying defense of self-defense, for example, Nebraska requires the State to disprove self-defense beyond a reasonable doubt once the defendant has met a minimal burden of production on the issue.²²⁷ The same should be the case for the partially excusing defense of provocation, which has deep and powerful roots as an issue that distinguishes between murder and manslaughter.

If the law determines that a provoked killer must be so provoked that it is impossible to form an intent to kill, then provocation would negate intention when raised as a defense.²²⁸ Of course, the law could meet the obligation of requiring the State to prove every element of the offense simply by reiterating the requirement of proof beyond a reasonable doubt and leaving the jury to imply how provocation negates intention. Yet in such a situation, clarity and fairness should direct the trial court to instruct the jury that the defendant has raised the provocation issue, and the State now must prove its absence beyond a reasonable doubt.

Whatever the outcome of the relation of intent to kill and provocation, the second required *mens rea* element of second degree murder—malice—seems to demand that the State prove beyond a reasonable doubt the absence of adequate provocation. Unlike the situation at the time of *State v. Cave*,²²⁹ malice, the intentional doing of a wrongful act without just cause or excuse, is clearly now required for a sec-

224. In his dissent in *State v. Grimes*, 246 Neb. 473, 486-94, 519 N.W.2d 507, 517-21 (1994), Judge Wright suggested this possibility while arguing that *Myers* erroneously required malice as an element of second degree murder. Yet, Wright did not consider the difference between proving a manslaughter charge in a "voluntary" manslaughter situation and using provocation as a defense to murder. Moreover, *Myers* is the law and requires a second *mens rea*—malice.

225. See *supra* note 213.

226. 480 U.S. 228 (1987). At the time, only two states took such a position. *Id.*

227. *State v. Thompson*, 244 Neb. 375, 403, 507 N.W.2d 253, 272 (1993).

228. In such a situation, the question should arise why such a killer is not excused entirely as would be one who was insane. See *supra* note 203.

229. 240 Neb. 783, 484 N.W.2d 458 (1992).

ond degree murder conviction. Consequently, Nebraska's statutory scheme now positively looks like Maine's scheme in *Mullaney v. Wilbur*,²³⁰ and malice as an element requires the State to disprove provocation. Moreover, malice in Nebraska is not a symbol for the specific intentions to kill, to do grievous bodily harm, or to act with a "depraved heart" conscious disregard of an extreme risk to human life. It involves precisely what provocation is all about—whether or not the killer had an excuse or justification²³¹ for the killing.²³²

When the defendant meets the minimal burden of production and puts provocation at issue, due process requires that the State prove the absence of provocation because the *mens rea* element of malice cannot be present if there is an excuse or justification. The State must prove that the killing was intentionally done without the excuse of provocation. This obligation might be met by reiterating the State's burden to prove both an intent to kill and malice (including its definition) beyond a reasonable doubt. Again, however, clarity and fairness would seem to require that the matter be explained and precisely put before the jury. Without a specific instruction, neither a statement of the second degree murder and manslaughter offenses, nor a definition of malice and adequate provocation reasonably directs the jury.

Provocation is a legally recognized and mandated excuse. If an adequate provocation is present, the fact-finder lacks any discretion to ignore it and then convict of murder.²³³ Due process and human justice require a specific instruction in appropriate cases.

To establish that a killing is second degree murder and not voluntary manslaughter, the burden is on the State to prove beyond a reasonable doubt each element of second degree murder and to prove beyond a reasonable doubt that the actor did not act as a result of adequate provocation.

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230. 421 U.S. 684 (1975)(holding that when malice is required as an element of murder, due process requires the State to prove the absence of provocation beyond a reasonable doubt).
231. It often is important to distinguish between an excuse and a justification. See generally FLETCHER, *supra* note 138, at 759-62, 810-11. Professor Fletcher argues that justification challenges the wrongfulness of the act, while excuse concedes wrong, but challenges blame or attribution of the act to the actor. *Id.* at 759. The excuse-justification distinction also may affect issues of other's rights to resist the actor, the rights of others to aid the actor, and the precedential value of a not guilty finding. *Id.* at 760-62, 810-11. There is no reason to believe, however, that the distinction "just cause or excuse" makes any difference in regard to malice. Either an excuse or justification negates malice when, as in Nebraska, it is a general criminal intent or bad attitude.
232. "Malice is that condition of the mind which is manifested by the intentional doing of a wrongful act without just cause or excuse." *State v. Dean*, 246 Neb. 869, 885, 523 N.W.2d 681, 693 (1994).
233. If evidence supports the fact-finder's finding of provocation, a trial court must instruct on manslaughter. *State v. Rowe*, 210 Neb. 419, 424-25, 315 N.W.2d 250, 255 (1982).

D. The Problem of *State v. Ryan* and *State v. White*: Are There Excuses or Justifications that Although Not Recognized and Mandated by Law May Negate Malice?

People distinguish right and wrong.²³⁴

A person accused of second degree murder might admit the killing act, but then might offer an excuse or justification for that act. Some excuses or justifications are recognized and mandated by law. If the killing was the result of adequate provocation, it may be punished only as manslaughter. If the actor proves that she was criminally insane at the time of the killing, she must be acquitted. If the actor killed in justified self-defense, conviction may not follow.

A killer also may have an excuse or justification that is neither recognized nor mandated by law. Consider, the following examples:

"I had been beaten and abused, and didn't know what else to do."

"I followed the will of God."

"I was just trying to protect myself."

"I was brainwashed."

"That's just the way I am."

"He asked to die."

*State v. Ryan*²³⁵ and *State v. White*²³⁶ suggest that all of the excuses or justifications imagined above might negate malice in Nebraska even though none of them are recognized or mandated as a matter of law.

In *State v. Ryan*, on a postconviction motion, the court held that Dennis Ryan was entitled to a new trial because the jury that convicted him of second degree murder had not been instructed that it had to find that malice was an element of the offense.²³⁷ In so holding, the court explained in depth why it believed malice should be included as an element of second degree murder.²³⁸ Here, the focus

234. John Rockwell Snowden, *The Justification Story: Law as Integrity and Deviantist Doctrine*, 9 J. L. & RELIGION 49, 68 (1991). See also G.S. KIRK, HERACLITUS THE COSMIC FRAGMENTS 232 (1962) ("If all existing things were to become smoke the nostrils would distinguish them.").

235. 249 Neb. 218, 543 N.W.2d 128 (1996).

236. 249 Neb. 381, 543 N.W.2d 725 (1996).

237. *State v. Ryan*, 249 Neb. 218, 228-29, 543 N.W.2d 128, 137-38 (1996).

238. *Id.* at 223-28, 543 N.W.2d at 135-38. See also Shugrue, *supra* note 11. Professor Shugrue analyzes the court's argument that due process principles of constitutional criminal procedure require that malice be an element of second degree murder. Professor Shugrue does not discuss the substantive criminal law issues of malice in Nebraska. When Professor Shugrue does refer to malice, he defines it as specific intentions to kill, do grievous bodily harm, or act with a depraved heart. *Id.* at 32-33. This is a common mistake. See Snowden, *Doctrine of Provocation*, *supra* note 186, at 565 n.1. Nevertheless, it is doubtful that malice has ever been so defined by the Nebraska Supreme Court, and it clearly is not the current definition of malice.

turns to the court's conclusion that the error in failing to require the jury to find malice was not harmless error.

Dennis Ryan killed James Timm while both were members of a cult led by Ryan's father. The father referred to God as "Yahweh" and claimed divine direction for his strict and brutal control of the cult. Timm had fallen out of favor, and Dennis Ryan was ordered by his father to torture and then kill Timm. Dennis Ryan properly raised an insanity defense, but was convicted by a jury of second degree murder.²³⁹ The State argued that the failure to require the jury to find malice was harmless error because Ryan did not produce evidence to show a lack of malice, i.e., a just cause or excuse. The court rejected this argument, however, because Ryan "did present evidence at trial that he was under 'mind control' during the crime and 'was not acting on his own free will.'"²⁴⁰

Unlike provocation, insanity, or self-defense, "mind control" is not a legally recognized and mandated defense. Nevertheless, *Ryan* holds that such an excuse might be considered by a jury to negate malice. Malice in Nebraska derives from the early days of the common law; it is the notion of a general criminal intent—a bad or evil attitude without any just cause or excuse.²⁴¹

It did not suffice that Ryan properly raised an insanity defense.²⁴² Insanity must be proved by the defendant.²⁴³ More importantly, following the *McNaghten* rule, insanity must be a result of mental disease or defect that caused the actor not to understand the nature of what was being done or to not know the difference between right and wrong with respect to what was being done.²⁴⁴

The insanity plea, rejected by the jury, did not fit the reality of Ryan's situation. He offered "mind control" as an excuse. It was caused by his father, the cult, and isolation, not by mental disease or defect. Ryan may have known his acts and their quality. His excuse was "mind control," and a jury should have been instructed that the State had to prove that it was not a just cause or excuse.

239. *State v. Ryan*, 226 Neb. 59, 409 N.W.2d 579 (1987).

240. *State v. Ryan*, 249 Neb. 218, 230, 543 N.W.2d 128, 138-39 (1996). The court referred to the trial testimony of Dr. Cole, who stated that "the defendant was totally under the domination of his father," and the testimony of Priscilla Coates, who stated that "the element of mind control was present at the Rulo farm, in that the members were isolated and there was a kind of group paranoia." *State v. Ryan*, 226 Neb. 59, 72, 74, 409 N.W.2d 579, 587, 589 (1987).

241. Sayre, *supra* note 2, at 988-94. See *State v. Moniz*, 224 Neb. 198, 204, 397 N.W.2d 37, 41 (1986)(describing malice as "any willful or corrupt intention of the mind").

242. *State v. Ryan*, 249 Neb. 218, 234-36, 543 N.W.2d 128, 140-42 (1996).

243. NEB. REV. STAT. § 29-2203 (Reissue 1995).

244. *State v. Vosler*, 216 Neb. 461, 345 N.W.2d 806 (1984).

It might be possible to couch a "mind control" excuse in the language of duress. Duress often is legally recognized and mandated as a defense in situations in which the actor engaged in conduct due to threats of force against his person that a person of reasonable firmness would be unable to resist.²⁴⁵ Yet, Nebraska and most jurisdictions do not recognize duress in a homicide case.²⁴⁶ Likewise, the threat of force type of coercion fails to capture the "mind control" in the cult situation presented in *Ryan*.²⁴⁷

It is apparent from *Ryan* that a just cause or excuse that might negate malice need not be a legally recognized and mandated defense. A jury must find that the defendant killed without just cause or excuse, and a jury might recognize an excuse or justification that the law does not recognize. In such a situation the defendant's homicide would be without malice and reduced to manslaughter.

Just two weeks after *Ryan*, the Nebraska Supreme Court again found that in a second degree murder case, malice might be negated by a "just cause or excuse" that was not recognized or mandated by law. In *State v. White*, again on a postconviction motion, the court held that Calvin White was denied due process of law when the jury that convicted him of second degree murder was not instructed that malice was an element of the offense.²⁴⁸ This time, the offered justification or excuse was that White had acted "with a protective intent rather than with a criminal intent devoid of justification or excuse, [in which case] such person does not act with malice and cannot be convicted of second degree murder."²⁴⁹

The State argued that the jury had found the equivalent of malice when it rejected White's self-defense claim,²⁵⁰ i.e., the justification of self-defense was rejected, and so the killing must have been without just cause or excuse. The court held that "[t]he absence of self-defense

245. See generally *United States v. Contento-Pachon*, 723 F.2d 691 (9th Cir. 1984); *State v. Hunter*, 740 P.2d 559 (Kan. 1987); MODEL PENAL CODE § 2.09 (1985).

246. *State v. Fuller*, 203 Neb. 233, 278 N.W.2d 756 (1979). Duress might be available to a coerced participant in a felony murder situation. See *State v. Hunter*, 740 P.2d 559 (Kan. 1987). But see *State v. Perkins*, 219 Neb. 491, 364 N.W.2d 20 (1983).

247. See *United States v. Fishman*, 742 F. Supp. 714 (N.D. Cal. 1990)(rejecting the defense of "brainwashing" as not sufficiently established in the scientific community).

248. 249 Neb. 381, 543 N.W.2d 725 (1996).

249. *Id.* at 386, 543 N.W.2d at 729.

250. The jury was instructed on second degree murder as follows:

The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict [White] of the crime of murder in the second degree are:

1. That [he] caused the death
2. That [he] did so intentionally but without premeditation;
3. That [he] did not act in self defense.

Id. at 384, 543 N.W.2d at 728.

may coexist with the absence of malice."²⁵¹ Because a successful self-defense claim must have both a reasonable and honest or actual (good faith) belief in the necessity of using deadly force,²⁵² an accused might have an honest but unreasonable belief that would not establish self-defense, but would negate malice.²⁵³ Consequently, the rejection of self-defense was not equivalent to finding malice, the intentional doing of a wrongful act without just cause or excuse.²⁵⁴

Judge Gerrard dissented, stating that "[a]n intentional killing is either justified, as defined by statute, or it is murder, as defined by statute."²⁵⁵ Gerrard is correct that an honest and reasonable belief in the necessity of deadly force should completely exonerate the defendant and result in a not guilty verdict. But, the law at different times and places has given different answers to the effect of an "imperfect" self-defense claim.

The classic case of "imperfect" self-defense is *Commonwealth v. Colandro*.²⁵⁶ Dominic Colandro had been intimidated and threatened by the deceased, Ferdinand Rocco. But, the facts were in dispute as to the events surrounding the shooting of Rocco. The jury was instructed that its choice was either murder or self-defense. On appeal the Pennsylvania Supreme Court held that

in addition to the instruction on the law of self-defense, the jury should have been told, if they found that at the time of the shooting the defendant was not actuated by malice, but that he acted under the influence of an uncontrollable mortal fear raised by the threats and conduct of Rocco, and if they thought that the immediate circumstances, though adequate to raise the fear, were not sufficient reasonably to justify a belief on the part of the defendant that he was in immediate danger of death or great bodily harm, the grade of the crime would not rise higher than manslaughter.²⁵⁷

Early Nebraska cases recognized the "imperfect" self-defense. *Lucas v. State*²⁵⁸ is perhaps the best known case to so hold and was fol-

251. *Id.* at 385-86, 543 N.W.2d at 729.

252. *Id.* at 386 (citing *State v. Thompson*, 244 Neb. 375, 507 N.W.2d 253 (1993)).

253. *Id.* at 386-87, 543 N.W.2d at 729-30.

254. *Id.* at 387, 543 N.W.2d at 730.

255. *Id.* at 393, 543 N.W.2d at 733 (Gerrard, J., dissenting).

256. 80 A. 571 (Pa. 1911).

257. *Id.* at 574. Several jurisdictions follow the direction of *Colandro*. See *People v. Flannel*, 603 P.2d 1 (Cal. 1979); *Faulkner v. State*, 458 A.2d 81 (Md. 1983). Some states also recognize an "imperfect" self-defense when deadly force is used in a situation that would justify only nonlethal force. See *State v. Clark*, 77 P. 287 (Kan. 1904). The "imperfect" self-defense also has been recognized when the defendant was at fault in provoking the affray at a nondeadly level of force. See *State v. McAvoy*, 417 S.E.2d 489 (N.C. 1992). Finally, the problem might be treated as one of recklessness. See *Shannon v. Commonwealth*, 767 S.W.2d 548 (Ky. 1988).

258. 78 Neb. 454, 111 N.W. 145 (1907).

lowed²⁵⁹ until *State v. Beers*²⁶⁰ in 1978. In *Beers*, Robert Beers was driving around Nebraska City looking for his estranged wife and drinking beer. When two police officers attempted to talk with him and settle him down, Beers shot at the officers with the shotgun he was carrying. One of the officers was killed, and Beers was charged and convicted of murder in the first degree.

On appeal Beers argued that it was error to not instruct on manslaughter.²⁶¹ Beers argued that he believed he was fired upon without warning by someone, making it necessary for him to shoot in self-defense. The trial court instructed on self-defense. On appeal the court affirmed the "either-or-situation": either Beers was innocent because the killing was done in self-defense or he was guilty of murder.²⁶²

Today, Robert Beers would raise his "protective intent" to negate malice. The "imperfect" self-defense, although not legally recognized or mandated, could be considered by the jury as a justification or excuse that would reduce the homicide to manslaughter if the jury believed the "just" or normative worth of the claim and its basis in the facts.

It is important to be clear that a jury that fails to find malice and convicts of the lesser manslaughter offense is not making law and creating a mandated legally recognized defense.²⁶³ *Sparf v. United States*²⁶⁴ is cited in *State v. Ryan* for the proposition that an accused is entitled to have a jury rather than a judge reach the requisite finding of guilt.²⁶⁵ *Sparf* more often is recognized as the watershed case in which the United States Supreme Court held that in federal trials a

259. See *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977); *State v. Kimbrough*, 173 Neb. 873, 115 N.W.2d 422 (1962); *Vollmer v. State*, 24 Neb. 838, 40 N.W. 420 (1888); *Housh v. State*, 43 Neb. 163, 61 N.W. 571 (1895). But see *Veneziano v. State*, 139 Neb. 526, 297 N.W. 92 (1941). The availability of an "imperfect" self-defense may have particular relevance to cases of spouse or child abuse. See Donald L. Creach, Note, *Partially Determined Imperfect Self-Defense: The Battered Wife Kills and Tells Why*, 34 STAN. L. REV. 615 (1982).

260. 201 Neb. 714, 271 N.W.2d 842 (1978).

261. *Id.* at 716, 271 N.W.2d at 844.

262. *Id.* at 724-25, 271 N.W.2d at 848.

263. This reading of the law is based on the idea that *State v. White*, 249 Neb. 381, 543 N.W.2d 725 (1996), did not overrule *Beers* and mandate that the "imperfect" self-defense be legally recognized. Rather, one jury might be convinced of the normative appeal of "imperfect" self-defense, and another jury may not. Consequently, the court's statement in *White* that "such person does not act with malice and cannot be convicted of second degree murder," *id.* at 386, 543 N.W.2d at 729, is not to be taken literally. Rather, such a person may not have acted with malice. If *White* has established an "imperfect" self-defense as a mandated defense, then *State v. Ryan*, 249 Neb. 218, 543 N.W.2d 128 (1996), still supports the unlimited possibility of negating malice.

264. 156 U.S. 51 (1895).

265. *State v. Ryan*, 249 Neb. 218, 231, 543 N.W.2d 128, 139 (1996).

jury need not be informed of its nullification power.²⁶⁶ The Nebraska law of murder, malice, and manslaughter allows a second degree murder defendant to introduce any "just cause or excuse" that is articulated and based in fact to be considered by the jury or fact-finder to negate malice and reduce the homicide to manslaughter. *Ryan* and *White* are watershed cases.

This Author has suggested that every defendant should be entitled to tell his story of justification or excuse and ask the judge or jury to enter a general verdict of not guilty on that basis. Such a right would be in addition to any and all legally recognized defenses that if established must result in an acquittal or conviction of only a lesser charge.²⁶⁷ Nebraska law does not go so far. But, Nebraska's use of malice as a general criminal intent—an intent without any just cause or excuse—does allow a jury in Nebraska to hear the plea of the accused and reduce what might otherwise be second degree murder to manslaughter whether or not such plea is grounded as a legally recognized defense.²⁶⁸

From its earliest judicial recognition to the present, the measurement of homicides in Nebraska has included the notion that the jury or fact-finder must believe beyond a reasonable doubt that the killer acted "without just cause or excuse." *Ryan* and *White* have made clear that any excuse is to be considered. As a result, battered spouses or children who kill have an avenue for the jury to consider their story. The mercy killer will no longer find ears completely closed. The slayer of a person who killed a loved one might be partially excused. And, a person from a culture where a killing of the deceased would be appropriate in the circumstances would be able to bring a more complete account of culpability to the jury.

If the purpose of the criminal law is to impose punishment, to deter, isolate, or even rehabilitate, rather than simply to provide society a legitimated avenue for its repressed desires for violence, then surely the law must concern itself with the mysterious matter of just proportion. The difference between murder and manslaughter is a quintes-

266. See RICHARD G. SINGER & MARTIN R. GARDNER, *CRIMES AND PUNISHMENT: CASES, MATERIALS, AND READING IN CRIMINAL LAW* 28-30 (2d ed. 1996). See generally Alan W. Sheffin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168 (1972)(reviewing jury nullification from the eighteenth century until 1972).

267. See Snowden, *supra* note 234. But see Robert F. Schopp, *Justification Defenses and Just Convictions*, 24 PAC. L.J. 1233 (1993).

268. See also NEB. REV. STAT. § 29-2027 (Reissue 1995)(“verdict in trials for murder; conviction by confession; procedure to determine degree of crime. In all trials for murder the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it be murder in the first or second degree, or manslaughter; and if such person be convicted by confession in open court, the court shall proceed by examination of witnesses in open court, to determine the degree of the crime, and shall pronounce sentence accordingly.”).

sential manifestation of this mystery. Both the murderer and the manslaughterer are said to be deserving of the criminal sanction, but who justly deserves life and who justly deserves twenty years?

In the case of provocation, the law has evolved from an attempt to clearly demarcate the two by strict rules toward a tendency to present the matter to the jury with an explanation of the appropriate legal concepts.²⁶⁹ Professor Singer argues that this is a positive trend and is a case of "less really is more."²⁷⁰ He points out that more than one hundred years ago, the Kentucky Supreme Court saw the virtue of simply leaving the matter of "adequate provocation" to the jury. Further, such a procedure eradicates the errors and difficulties of inconsistency, inaccuracy, and formalism.²⁷¹

Leaving the question of whether or not the accused acted with malice, without any just cause or excuse, to the fact-finder's discretion does not create anarchy, though it may yield boundaries different from what the law may proscribe.²⁷² The common sense justice of the jury is grounded in the material world—the conditions and experiences of social life. The jury would not follow the simple heuristic of a rule in deciding whether or not a defendant has a just cause or excuse for killing a sleeping spouse who had brutally abused the killer for years. Rather, the jury would look holistically at all the facts and apply a "complex calculus" of psychology, narrative, and subjectivity.²⁷³ There is every reason to believe that people will distinguish right and wrong.

Blackstone stated that "an unwarrantable act without a vicious will is no crime at all."²⁷⁴ Of course, who is to define "vicious will?" In the Nebraska law of homicide, it is left to the jury. As Professor Sayre noted more than sixty-five years ago, "[i]t is, in last analysis, underlying ethical concepts which shape and give direction to the growth of the criminal law."²⁷⁵

V. CONCLUSION (AND A JURISPRUDENTIAL ASIDE THAT MAY BE THE HEART OF THE MATTER)

Malice always has distinguished murder and manslaughter. Malice began in the early common law as a general criminal intent or bad attitude. As part of the struggle between the King, Parliament, and

269. Singer, *supra* note 194, at 261-304.

270. *Id.* at 322.

271. *Id.* (citing *Campbell v. Commonwealth*, 11 S.W. 290, 292 (Ky. 1889)).

272. See Norman J. Finkel, *Achilles Fuming, Odysseus Stewing, and Hamlet Brooding: On the Story of the Murder/Manslaughter Distinction*, 74 NEB. L. REV. 742, 795-96 (1995).

273. *Id.*

274. 4 WILLIAM BLACKSTONE, COMMENTARIES *21.

275. Sayre, *supra* note 2, at 988.

the People, it at one time focused on the prior planning of a killing and eventually matured as a symbol for specific intentions to kill, do grievous bodily harm, or act with a "depraved-heart."

Although the early territorial statutes of Nebraska may have reflected the late common law understanding of malice as specific intentions, from the time of statehood the homicide law of Nebraska has consistently treated malice as a general criminal intent. Malice in Nebraska is the state of mind reflected in the intentional doing of a wrongful act without just cause or excuse. Until very recently, it has been an easily ignored issue in the cases.

Today malice has become a critical issue. The law and the fact-finder must be careful to distinguish malice from the other *mens rea* that has always been required for second degree murder, an intention to kill. The law must decide whether or not a killer who raises provocation as a partial excuse to second degree murder may have acted with an intent to kill that was inspired by an adequate provocation. The courts must face the problem of whether or not the State must prove that the accused acted without provocation (or any other offered just cause or excuse) beyond a reasonable doubt. Satisfactory resolution is necessary for the issue of whether to clarify this for the fact-finder or to leave it hidden in a general instruction that demands that the State must prove every element of the offense beyond a reasonable doubt. Finally, will the law continue to offer the accused killer the opportunity to argue that the actor's intent is not criminal by bringing culpability and just punishment into full consideration grounded in reality by allowing a jury to recognize that justifications or excuses not yet legally mandated may be considered to negate malice?

On April 14, 1997, Judge Laurence Silberman, United States Circuit Court of Appeals for the District of Columbia, spoke at the Nebraska College of Law at the invitation of the College and the Federalist Society. Judge Silberman's topic was "Activism in the Courts—Who is Responsible?" At one point in his very interesting and insightful talk, Judge Silberman attempted to distinguish the judge who is appropriately creative in following the law from the judge who just cannot or will not follow the law.

This Author always has found it difficult to follow the law. Perhaps, I thought, my "following-the-law" faculty is underdeveloped. The thought came to me because I had just finished reading *Law and Phrenology* by Professor Pierre Schlag.²⁷⁶ Professor Schlag raises difficult questions about the ontological status of law. Particularly, is law similar to the now deceased science of phrenology?

Phrenology was a practice that identified basic brain functions or "faculties" and then found their presence or absence in cranial fea-

276. Pierre Schlag, *Law and Phrenology*, 110 HARV. L. REV. 877 (1997).

tures. For instance, one phrenologist had this to say about Chief Justice Marshall.

[H]is head was "remarkable for its fine proportions." Chief Justice Marshall's head displayed "strong preponderance" of the "higher sentiments and higher intellect." The organs of Comparison, Causality, Individuality, Benevolence, Reverence, Firmness, Conscientiousness, and Ideality were "noticeably large," while the organs of Self-esteem and Love of Approbation were "but moderate."²⁷⁷

Professor Schlag argues that law is quite similar to phrenology in that its basic units of analysis, doctrines, and principles share an ambiguous ontological status with the "faculties" of phrenology. They have, like "faculties," a "reified animism." Doctrines and principles are not just descriptive classifications, but the law itself in object-form and propositional statements.²⁷⁸ Moreover, these doctrines and principles do things that are fully animated all by themselves. "Provocation," for example, partially excuses homicide. It is the legal doctrine that performs, not human beings, not human attitudes, not human understandings, not human psychic experiences of right and duty.²⁷⁹ The law, like the "faculties" of phrenology, lives with ghost beings, which it directs to punishment or reward.²⁸⁰

Schlag argues that even if "we are all realists now," the ontological nature of law remains the same. The legal academy perhaps has expanded the search to include economics, literature, social sciences, and strange philosophies of foreign lands, but the unit sought remains the same—the principles and doctrines.²⁸¹ Moreover, the units of analysis cannot be stabilized because they are in part intelligent knowledge and in part authoritative action. The law and its disciplinary knowledge is true because the state makes it true.²⁸²

This Article has examined the Nebraska statutes and cases, felt for their cranial features, and followed the cerebral localization hypothesis.²⁸³ Nevertheless, as the phrenologists found out, the future is not yet written.

277. *Id.* at 893 (citing *Character of Chief Justice Marshall*, 1 AM. PHRENOLOGICAL J. 382, 383-84 (1839)).

278. *Id.* at 898, 900.

279. *Id.* at 898.

280. See John Rockwell Snowden, *Living With Ghosts*, 70 NEB. L. REV. 446 (1991).

281. Schlag, *supra* note 276, at 902-06. It is as if the phrenologists looked beyond the cranial features to find the "faculties" in the feet, arms, and torso.

282. *Id.* at 915-17.

283. The cerebral localization hypothesis is that the brain is subdivided into various cortical organs, each of which serve as the unique locale for certain functions. *Id.* at 879.