

1962

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Recommended Citation

Edward H. Hunvald Jr., *Criminal Law in Missouri—Manslaughter, a Problem of Definition*, 27 Mo. L. REV. (1962)

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CRIMINAL LAW IN MISSOURI— MANSLAUGHTER, A PROBLEM OF DEFINITION*

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The law of homicide may be regarded as definitely established in this State by a series of well considered and consistent decisions, and it ought not to be unsettled or varied without gross mistakes have been made. *Supreme Court of Missouri in State v. Starr* (1866).¹

Four recent decisions by the Supreme Court of Missouri indicate that the established law of homicide may be neither well considered nor consistent. All four of these cases involve the propriety of giving an instruction on manslaughter when the defendant is on trial for murder. This was also one of the questions before the court in *State v. Starr*² and it has recurred with considerable frequency during the nearly one hundred years since the sentiment quoted above was expressed.³

In criminal trials the court is required to instruct the jury "upon all questions of law necessary for their guidance."⁴ Consequently, if the charge is murder and the evidence is such that the jury could justifiably find the defendant guilty of manslaughter, the court must instruct on manslaughter. If the evidence is such that the jury could not properly find the defendant guilty of manslaughter, then no instruction ought to be given on the subject.

When is the evidence such that a manslaughter instruction ought to be given, or, in other words, what is manslaughter? The statutory definition provides very little assistance.

* This article contains a discussion of selected 1960 and 1961 Missouri court decisions reported in volumes 335-347, South Western Reporter, Second Series.

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1. 38 Mo. 270, 272 (1866).

2. The court ruled that the defendant was not entitled to an instruction on manslaughter "where death ensues in a combat upon provocation sought by the slayer . . ." *Id.* at 277.

3. For cases arising in 1959-1960, see Hunvald, *Criminal Law in Missouri*, 25 Mo. L. REV. 369, 378-80 (1960). "A man who cites himself never lacks authority," Old Hungarian Proverb.

4. Mo. R. Crim. P. § 26.02(6), RSMo 1959. See also § 546.070(4), RSMo 1959.

Every killing of a human being by the act, procurement or culpable negligence of another, not herein declared to be murder or excusable or justifiable homicide, shall be deemed manslaughter.⁵

Thus, to know what manslaughter is, it is necessary to define murder. Murder, by the statutory definition is divided into degrees.

Every murder which shall be committed by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, and every homicide which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or mayhem, shall be deemed murder in the first degree.⁶

All other kinds of murder at common law, not herein declared to be manslaughter or justifiable or excusable homicide, shall be deemed murder in the second degree.⁷

With the exception of those homicides which are felony murders, these statutes are of no help for they state that murder is a homicide which is not manslaughter, and manslaughter is a homicide which is not murder, and neither exists if the homicide is justifiable or excusable.⁸ The definition

5. § 559.070, RSMo 1959. An indication that this definition has not been adequate is found in the existence of a number of special manslaughter statutes: § 559.080, RSMo 1959 (assisting in self-murder), § 559.100, RSMo 1959 (abortion), § 559.110, RSMo 1959 (death from vicious animal), § 559.120, RSMo 1959 (manslaughter by intoxicated physician), § 559.130, RSMo 1959 (by railroad conductors, engineers, steamboat pilots and others).

6. § 559.010, RSMo 1959.

7. § 559.020, RSMo 1959.

8. Section 559.040, RSMo 1959, provides:

Homicide shall be deemed justifiable when committed by any person in either of the following cases: (1) In resisting any attempt to murder such person, or to commit any felony upon him or her, or in any dwelling house in which such person shall be; or (2) When committed in the lawful defense of such person, or of his or her husband or wife, parent, child, brother, sister, uncle, aunt, nephew, niece, master, mistress, apprentice or servant, when there shall be reasonable cause to apprehend a design to commit a felony, or to do some great personal injury, and there shall be reasonable cause to apprehend immediate danger of such design being accomplished; or (3) When necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed, or in lawfully suppressing any riot or insurrection, or in lawfully keeping or preserving the peace.

Section 559.050, RSMo 1959, provides:

Homicide shall be deemed excusable when committed by accident or misfortune, in either of the following cases: (1) In lawfully correcting a child, apprentice or servant, or in doing any other lawful act by lawful means, with usual and ordinary caution, and without unlawful intent; or (2) In heat of passion, upon any sudden or sufficient provocation, or upon sudden combat, without any undue advantage being taken, and without

must then be found in case law, as the statutes do little more than declare that murder and manslaughter are crimes.

An intentional homicide, for which there is no justification or excuse, will usually be murder. If, however, the killing was committed in the "heat of passion" brought on by an "adequate provocation" and before a sufficient "cooling time" had elapsed, the crime is "reduced" to manslaughter.⁹ When is the evidence such that the court, in a trial for murder, should give an instruction on this type of manslaughter?

In *State v. Wright*¹⁰ the defendant, a woman, admitted that she had killed the deceased and had done so intentionally. She claimed, however, that she was acting in self-defense in repelling the deceased's attempt to satisfy his sexual desires; this attempt being coupled with threats of bodily harm if she did not acquiesce. The deceased, appropriately enough, was named "Mann." The court gave an instruction on self-defense but declined to instruct on manslaughter, apparently feeling that there was no evidence upon which a jury could return such a verdict. Prior decisions of the Missouri Supreme Court indicated that a threat of serious bodily harm is not adequate provocation unless there is physical violence, that is, at least a touching of the defendant by the deceased.¹¹

The only physical touching in the *Wright* case occurred in the front seat of Mann's automobile when he put his arm around the defendant¹² and unzipped his trousers. The defendant then got out of the car, went around to the window on the driver's side and told Mann not to bother her and that she did not want to see him anymore. Mann replied that she had

any dangerous weapon being used, and not done in a cruel and unusual manner.

In addition, Section 559.060, RSMo 1959, provides:

Whenever it shall appear to any jury, upon the trial of any person indicted for murder or manslaughter, that the alleged homicide was committed under circumstances or in any case where, *by any statute or the common law*, such homicide was justifiable or excusable, the jury shall return a general verdict of not guilty. (Emphasis added.)

While the statutes defining excusable and justifiable homicide are more positive than those defining murder and manslaughter these statutes are not too clearly worded nor are they all-inclusive for § 559.060, RSMo 1959, indicates that there are still in force the common law rules of justification and excuse.

9. PERKINS, *CRIMINAL LAW* 43 (1957). To say that the crime is "reduced" to manslaughter is, of course, saying nothing more than that it is manslaughter.

10. 336 S.W.2d 714 (Mo. 1960).

11. *State v. Bongard*, 330 Mo. 805, 814, 51 S.W.2d 84, 88 (1932), and cases cited therein; *State v. Haynes*, 329 S.W.2d 640, 645 (Mo. 1959), and cases cited therein.

12. The defendant was not too clear as to whether Mann put or attempted to put his arm around her. *State v. Wright*, *supra* note 10, at 716.

better get back into the car and reached toward the glove compartment wherein defendant knew he kept a gun. Defendant then shot her Mann.¹³

Left only with the choice of finding murder or no crime at all, the jury returned a verdict of guilty of second degree murder. On appeal, the Supreme Court reversed because of the failure of the trial court to instruct on manslaughter. The court stated that the touching in the automobile brought the facts "at least technically"¹⁴ within the physical violence rule. The court found an additional basis for ruling that there was adequate provocation by reasoning that if a close male relative of the defendant had discovered Mann attempting to have illicit sexual relations with the defendant, this discovery would be adequate provocation for the male relative, and therefore, as far as the defendant is concerned:

[T]he law should not put her in a less favorable position as regards provocation than that which would be occupied by her near male relative who had slain immediately upon discovery of the offending conduct. Why would it not generate heat of passion where a woman bent upon bringing about a cessation of her illicit sexual relations meets an equally determined counterforce on the part of her paramour or the former recipient of her favors, and the man nevertheless undertakes to violate her person?¹⁵

Then returning to the question of physical violence, the court continued:

If, as in the classic examples so often referred to in the cases cited above, "a mere tweaking of the nose" or the "comparative harmless jostling of a person on the highway" may be sufficient to constitute lawful provocation, then how much more grievous was Mann's amorous advance by way of actually putting his arm around defendant and unzipping his trousers.¹⁶

While one might agree that a homicide under these circumstances,

13. Those who are offended by this poor pun should consider the admirable restraint shown by not discussing the plight of the female defendant who was "Wright."

14. *State v. Wright*, *supra* note 10, at 717.

15. *Ibid.* As might be suspected from this quotation, this was not the first contact between the defendant and Mann. Defendant admitted that she and Mann had had sexual relations during a period of from four to five years. She claimed that these relations began at the point of a gun and continued only because of threats by Mann that he would kill her or disclose the existence of their relationship to defendant's husband and the community. Defendant also claimed that she had had nothing to do with Mann for the six month period preceding the killing and that Mann had made threats against defendant during that period. These were also the reasons why the defendant armed herself before going to meet Mann for the last time.

16. *Ibid.*

although still a crime, ought not to be murder, and that the provocation ought to be considered legally sufficient to entitle the defendant to a manslaughter instruction, the logic of the opinion is somewhat short of overwhelming.

Since "tweaking" and "jostling" are adequate provocation, the court reasons that undesired amorous advances should also be adequate provocation, as these are "much more grievous" and more likely to bring on heat of passion in a reasonable man (woman). If this is so, then should not the apparent threat of serious bodily harm without a physical touching also be adequate provocation as this also is far more likely to cause the severe emotional upset in a reasonable man than a mere tweaking or jostling? Yet, one year before, the court specifically rejected (and not for the first time) the proposition that such a threat without a touching could be considered as adequate provocation.¹⁷

Moreover, if in adjudging the existence of adequate provocation, we must view the defendant not only in the uncomfortable position in which she finds herself, but also must consider how provoked she would be if she were her own near male relative discovering herself in her embarrassing circumstances, then should we not also treat a person who fears a serious bodily harm from another (although there has been no touching) in the same position as a near relative who comes upon the scene and kills the apparent attacker?¹⁸

Rather than relying on the doubtful authority of the "classic examples" of tweaking and jostling¹⁹ or upon the gymnastics of putting a person in the

17. *State v. Haynes*, *supra* note 11.

18. *Cf.*, *State v. Johnson*, 6 S.W.2d 898 (Mo. 1928).

19. See, e.g., *State v. Kloss*, 117 Mo. 591, 601, 23 S.W. 780, 783-84 (1893). The two "classic examples" are probably apocryphal. Their first appearance in Missouri jurisprudence was in *State v. Starr*, *supra* note 1, at 277:

There must be an assault upon the person as where the provocation was by pulling the nose, purposely jostling the slayer aside in the highway (*Lannusses' case*, 1 Hale P. C. 455) or other direct and actual battery—*Rex v. Stedman*, Foster 292.

1 HALE, PLEAS OF THE CROWN 455 (1736), makes no mention of nose pulling but does cite the example of jostling another to take the wall. There is no mention of "Lannusses' case," but there is a reference to "17 Car. 1 *Lanure's case*," which becomes "Lambe's case, 17 Chas. 1, 1641 or 1642" in 3 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 62 (1883), and which apparently deals with provocation by the whipping of a horse upon which the slayer is riding. *Stedman's case* (1704) as reported in FOSTER, CROWN CASES 292 (1809), deals with neither tweaking nor jostling, but instead with the proposition that if a woman boxes a man's ear, this is insufficient provocation, but if she strikes him with an "iron patten," this is sufficient provocation.

The nose pulling example appears in 4 BLACKSTONE, COMMENTARIES 191

position of a near male relative stumbling upon the scene, would it not be better to rule that the threat of attack (without a touching) can be adequate provocation and thus recognize that such a threat can cause a reasonable person to lose his self-control, act hastily and kill without adequate reflection?²⁰

While the *Wright* case may have reached a proper result²¹ it indicates the difficulty of reaching this result in a framework of rules which arbitrarily limit adequate provocation to a small list of specific situations,²² without regard to the reasons why some intentional homicides, although

(Christian ed. 1822), "So also if a man be greatly provoked, as by pulling his nose, or other great indignity . . ." and in *EAST, PLEAS OF THE CROWN* 233 (1806). The authority cited for this proposition is *Regina v. Mawgridge*, Kelyng 119, 135, 84 Eng. Rep. 1107, 1114 (Q.B. 1706), and there it is dictum and there is no citation to any case. ". . . if one man upon angry words shall make an assault upon another, either by pulling him by the nose, or filiping upon the forehead . . ."

Nose pulling became "tweaking" and jostling aside in the highway became "comparatively harmless jostling of a person on the highway" in *State v. Bongard*, *supra* note 11 at 814, 51 S.W.2d at 89, a decision which proclaimed the minimum standard for provocation to be personal violence. This decision seems to confuse the question of provocation by insulting words or gestures and provocation by threat of serious bodily harm and arrives at the conclusion that neither is adequate provocation unless there is a physical touching.

Cf., 1 *HALE, op. cit. supra* at 456, discussing a case in which a court (with a dissent) ruled that fighting words are not adequate provocation, "but it was there held, that words of menace of bodily harm would come within the reason of such a provocation, as would make the offense to be but manslaughter."

It is submitted that the "classic examples" are examples of the proposition that insults by words or gestures are not adequate provocation, but that insults coupled with a nose pulling, or the highly insulting, but not harmful conduct of pushing another into the gutter are such that they could be sufficient provocation. It is doubtful if these "insults" should be adequate provocation today, and also doubtful if they have any bearing on the question of whether an assault (without a touching) can be an adequate provocation.

20. *Cf.*, *MORELAND, THE LAW OF HOMICIDE* 75, 77 (1952).

21. It is interesting to note that the court does not discuss the sufficiency of the evidence on the question of the existence of heat of passion, but merely assumes that once there is an adequate provocation, an instruction on manslaughter must be given, no matter what the evidence or lack of it is on the question of passion. Apparently, once the adequate provocation is shown, there is sufficient evidence of heat of passion to justify the submission of manslaughter to the jury.

22. For a listing based on Missouri cases, see *Cisel, Summary of Criminal Homicide in Missouri*, 2 *U. KAN. CITY L. REV.* 25 (1933). See also *MORELAND, op. cit. supra* note 20, at 68-69:

It is interesting that the list is so short, not over four or five acts are sufficient legal provocation to raise such heat of passion as to constitute a homicide manslaughter rather than murder. It may well be queried whether this is because our society considers that these are the only provocations which should justify such a reduction in the crime or whether it is because these are the provocations which were considered sufficient as the law was developing and crystallizing and the list has never seriously been questioned since.

still crimes, ought not to be as serious as murder.²³

As the *Wright* case indicates, the failure to give an instruction on manslaughter when the evidence will support a finding of manslaughter is reversible error.²⁴ Is it error to instruct on manslaughter when there is no evidence to support such a finding? If the jury convicts the defendant of murder, it is difficult to see how he has been harmed by an uncalled for manslaughter instruction.²⁵ But if the jury finds the defendant guilty of manslaughter when the evidence shows that he is either guilty of murder or of no crime at all, should the conviction be reversed on appeal?

This problem arose in *State v. Chamineak*.²⁶ As in the *Wright* case the defendant who was charged with murder admitted the killing and claimed self-defense. However, there was no evidence of prior physical violence nor

23. Cf. Michael & Wechsler, *A Rationale of the Law of Homicide II*, 37 COLUM. L. REV. 1261, 1281 (1937):

Provocation may be greater or less, but it cannot be measured by the intensity of the passions aroused in the actor by the provocative circumstances. It must be estimated by the probability that such circumstances would affect most men in like fashion; although the passions stirred up in the actor were violent, the provocation can be said to be great only if the provocative circumstances would have aroused in most men similar desires of comparable intensity. Other things being equal, the greater the provocation, measured in that way, the more ground there is for attributing the intensity of the actor's passions and his lack of self-control on the homicidal occasion to the extraordinary character of the situation in which he was placed rather than to any extraordinary deficiency in his own character. While it is true, it is also beside the point, that most men do not kill on even the gravest provocation; the point is that the more strongly they would be moved to kill by circumstances of the sort which provoked the actor to the homicidal act, and the more difficulty they would experience in resisting the impulse to which he yielded, the less does his succumbing serve to differentiate his character from theirs.

Cf. also MODEL PENAL CODE § 201.3 (Tent. Draft No. 9, 1959):

Criminal Homicide constitutes manslaughter when:

(a)

(b) a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is 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.

24. ". . . [B]ut if there was substantial evidence tending to show that defendant had lawful provocation, then he was entitled to a manslaughter instruction irrespective of whether such was requested." *State v. Martin*, 336 S.W.2d 394, 398 (Mo. 1960).

25. If the giving of the instruction was error the defendant cannot complain of error that was not prejudicial. Mo. R. Crim. P. § 24.11, RSMo 1959; § 543.030 (18), RSMo 1959.

26. 343 S.W.2d 153 (Mo. 1961). See also *State v. Chamineak*, 328 S.W.2d 10 (Mo. 1959) (conviction of second degree murder for same homicide reversed because of failure to instruct on self-defense).

of any other type of provocation heretofore considered to be adequate. If the trial court had refrained from giving an instruction on manslaughter, it would not have been error.²⁷ But the trial court did give an instruction on manslaughter, and the jury convicted of that offense. The conviction was affirmed. The Supreme Court stated that there was clearly sufficient evidence to support a conviction of second degree murder, and "the defendant is not entitled to complain that a submissible case was not made as to a lesser degree of homicide."²⁸ If this means that a conviction based on insufficient evidence shall be affirmed solely on the ground that there was sufficient evidence to support another crime (of which the defendant was not convicted), then the defendant would appear to have an excellent claim that he has been deprived of due process.²⁹

The ruling was based on a statute which provides that a defendant cannot claim error "because the evidence shows or tends to show him to be guilty of a higher offense than that of which he is convicted."³⁰ It is quite logical to say that the defendant cannot disclaim liability for a crime on the ground that he is guilty of a greater offense, but this should not preclude him from appealing on the grounds of insufficiency of evidence as to the very offense of which he was convicted.

If the evidence is sufficient to support a finding of guilty as to both offenses, the defendant should not be allowed to complain because the jury chose one and not the other. For example, on a charge of robbery, the defendant cannot complain of a conviction of larceny solely on the grounds that the evidence also showed him guilty of robbery, for the evidence sufficient to constitute robbery will of necessity be sufficient for larceny, as larceny is a lesser included offense of robbery.³¹ It would seem then that the statute could not apply unless the evidence were sufficient to convict

27. *State v. Haynes*, *supra* note 11; *State v. Finn*, 243 S.W.2d 67 (Mo. 1951); *State v. Clay*, 201 Mo. 679, 100 S.W. 439 (1907).

28. *State v. Chamineak*, *supra* note 26, at 157.

29. *Cf. Thompson v. Louisville*, 362 U.S. 199 (1960).

30. § 545.030(17), RSMo 1959. *Cf. Mo. R. Crim. P. § 24.11*, RSMo 1959. In addition, § 556.220, RSMo 1959 provides:

... any person found guilty of murder in the second degree, of any degree of manslaughter, shall be punished according to the verdict of the jury, although the evidence in the case shows him to be guilty of a higher degree of homicide.

See also § 556.230, RSMo 1959, which provides for conviction of a lesser included offense.

31. *State v. Lasky*, 133 S.W.2d 334 (Mo. 1939); *State v. Weinhardt*, 253 Mo. 629, 161 S.W. 1151 (1913).

of the lower offense, that is, unless the lower offense were "included" in the higher.³²

An offense is "included" in another when all of its elements are also elements of the other offense, or, stated differently, when the facts necessary to support a conviction of the other, higher offense will also support a conviction of the lower, "included" offense.³³

Is manslaughter a lesser included offense within murder? Are the elements of manslaughter also the elements of murder? Murder can be defined as a homicide with malice³⁴ and manslaughter as an unlawful homicide without malice. "Unlawful" here means without justification or excuse. Thus it can be argued that the only difference between the crimes of manslaughter and murder is the presence of "malice" in the latter,³⁵ and consequently manslaughter is a lesser included offense. Such an analysis provides a simple answer to the question, but unfortunately the analysis turns out to be meaningless, in that it does nothing more than state that all homicides are either murder, manslaughter, justifiable or excusable.

First of all, malice is a technical word and is little more than the name given to those states of mind sufficient for murder. For example, an "intent to kill" may be sufficient for malice. But not all such intents are

32. *State v. Willard*, 228 Mo. 328, 341, 128 S.W. 749, 753 (1910) (conviction of third degree forgery reversed):

The old familiar and well-recognized rule that a defendant cannot complain of conviction for a lower grade of the crime when the testimony tends to show him guilty of a higher grade can only be maintained upon the theory that in the charge of the higher grade of crime the lower grade is necessarily embraced.

33. As to whether the existence of a "lesser included offense" is determined by the statutory definition of the greater offense or by the matters alleged in the information or indictment, see *People v. Marshall*, 309 P.2d 456 (1957), noted 45 CALIF. L. REV. 534 (1957), 31 So. CAL. L. REV. 93 (1957).

34. The traditional phrase is "malice aforethought," but the latter word adds nothing to the present meaning. See PERKINS, *op. cit. supra* note 9, at 30.

35. Cf. *State v. Foster*, 355 Mo. 577, 591, 197 S.W.2d 313, 320 (1946): Assignment 23 in the motion predicated error on the inclusion in instruction No. 2 of the phrases 'without malice' and 'without premeditation,' and asserted they were not necessary elements of the crime of manslaughter and tended to confuse the jurors. . . . Apparently it attempts to say the absence of malice and premeditation are not necessary elements of manslaughter, or conversely, that the crime may still be manslaughter although they are present. This is not the law. Malice is an essential ingredient of murder, and if that element be present the homicide cannot be manslaughter; and premeditation (but not deliberation) is a necessary element of murder in the second degree.

Cf. also, *State v. Parker*, 355 Mo. 916, 923, 199 S.W.2d 338, 341 (1947): "The existence or nonexistence of *malice* determines whether homicide is murder or manslaughter."

malice. A man who kills in self-defense intends to kill, but this is not murder. The public executioner who pulls the switch for the electric chair or pushes the button for the gas chamber intends to kill, but this is not murder. A man who kills in the heat of passion brought on by an adequate provocation intends to kill, but this is not murder. But the man who kills in the heat of passion brought on by an *inadequate* provocation does commit murder and his intent to kill is malice. It is difficult, if not impossible, to distinguish on a subjective level, the states of mind of the last two examples, yet one is malice and the other is not. In short, an intent to kill is sufficient for malice unless there are circumstances of justification, excuse or mitigation.³⁶ If there is justification or excuse, the homicide is an innocent one; if there is mitigation, the crime is manslaughter.

To thus define murder as a homicide with malice is to define it as a homicide without excuse, justification or mitigation. Manslaughter defined as an unlawful homicide without malice becomes an unlawful homicide under circumstances of mitigation. Mitigation turns out to be those circumstances which the law deems sufficient to make an unlawful homicide not murder—for example, a killing in the heat of passion brought on by

36. Malice includes other states of mind in addition to an intent to kill. At one time the meaning was "a deliberate intent to kill formed prior to the fatal act. But its meaning has since been expanded by a series of extensions in the law until it has acquired a number of meanings and the term has become so ambiguous as to be not only valueless but misleading. Fortunately, in the case of murder, Stephen and others have broken down the phrase into categories which describe realistically the various states of mind or types of conduct which constitute 'malice aforethought' as the term is used in that offense." MORELAND, *op. cit. supra* note 20, at 60-61.

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

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

(b) Knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.

(c) An intent to commit any felony whatever.

(d) An intent to oppose by force any officer of justice on his way to or returning from the execution of the duty of arresting, keeping in custody, or imprisoning any person whom he is lawfully entitled to arrest, keep in custody, or imprison, or the duty of keeping the peace, or dispersing an unlawful assembly, provided that the offender has notice that the person killed in such an officer so employed. 3 STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* 80-81 (1883).

For a discussion of the continuation and modifications of these categories, see Perkins, *A Re-examination of Malice Aforethought*, 43 *YALE L.J.* 537 (1934).

an adequate provocation and before an adequate cooling time has elapsed. Each crime is defined in terms of the other, and this definition is circular and meaningless.³⁷

Is manslaughter factually a lesser included offense of murder? Will the facts necessary to support a conviction of murder also support a conviction of manslaughter?

Taking as an example the case of an intentional killing, it would seem that voluntary (intentional) manslaughter requires proof of several facts not necessary for murder, that is, facts which would show that there was adequate provocation and heat of passion. But it is a mistake to conclude from this that manslaughter is not a lesser included offense of murder. The problem is complicated by the presumption of malice. The law presumes that intentional homicides have been committed with malice.³⁸ This means that in the absence of evidence indicating the existence of justification, excuse or mitigation, these matters are presumed not to exist, and it is incumbent upon the defendant to bring forward evidence to indicate their existence rather than the state being required to bring forward evidence showing their nonexistence.³⁹ If there is no evidence of these matters, then the jury should not be instructed regarding them.

The net result of all of this is that it is possible to conclude that voluntary manslaughter is a lesser included offense of murder (from an intentional killing) since an intentional killing can be murder or it can be manslaughter if circumstances of mitigation are present. However, it is

37. Cf. MORELAND, *op. cit. supra* note 20, at 60-63:

To say, as the courts continue to do, "Manslaughter includes all unlawful homicides committed without malice aforethought" is to use a definition which does not define. It amounts to no more than saying, "All unlawful homicides which are not murder are manslaughter."

38. The rule is often stated as requiring as a premise, an intentional killing with a deadly weapon. Cf. *State v. Smith*, 240 S.W.2d 671, 674 (Mo. 1951); *State v. Whited*, 360 Mo. 956, 960, 231 S.W.2d 618, 620 (1950); *State v. Fitzgerald*, 130 Mo. 407, 435, 32 S.W. 1113, 1116 (1895); *State v. Gassert*, 65 Mo. 352, 354 (1877). See also MORELAND, *op. cit. supra* note 20, at 21.

39. Cf. *State v. Whited*, *supra* note 38, at 620-21:

"Malice is an essential ingredient of murder." And malice and second degree murder are presumed from proof of an intentional killing with a deadly weapon. However, this proof is only prima facie evidence of malice. "The ordinary result of the use of" a deadly weapon "raises a presumption of malice and shifts the burden of proof to repel the inference of same to the accused, *unless the evidence proving the killing shows its absence.*" Here the uncontradicted evidence shows the absence of malice and destroys the presumption. (Citations omitted without indication).

See also *State v. Evans*, 124 Mo. 397, 411, 28 S.W. 8, 12 (1894).

also clear that the court should not instruct on manslaughter unless there is evidence of mitigation.

One argument to support the result of the *Chamineak* case is that the improper instruction on manslaughter is error but it is error committed in defendant's favor.⁴⁰ If the trial court were to err and give an instruction on self-defense, the defendant would be in no position to complain. But to argue that an erroneous instruction on manslaughter is also favorable since both self-defense and manslaughter involve the negation of malice ignores the fact that if the jury improperly finds self-defense, the defendant is acquitted, but if the jury improperly finds manslaughter, the defendant is convicted of a felony. To allow such a conviction to stand is a benefit to the defendant only when he was in fact guilty of murder. If the jury had been left with only the proper choice of murder or acquittal, they might well have acquitted the defendant.

Our present approach allows for a compromise verdict to be affirmed, even though a compromise verdict can be unfair to both the state and the defendant. As it now stands, if there is no evidence to support a finding of manslaughter, the defendant cannot complain if an instruction is not given. Neither can he complain if an instruction is given. Such an approach may in fact result in justice being done, but it has not been demonstrated that it does so.

Although compromise verdicts are never desirable, the chances of a miscarriage of justice would be reduced if the opportunity for such a compromise were limited to intentional killings. That is, if in order to convict of manslaughter the jury were required by the instructions to find that the defendant intended to kill (and was in the heat of passion). Then, assuming the jury followed the instructions and found an intent to kill, the compromise would always be in the defendant's favor, as they should have found him to be guilty of murder if they found an intent to kill.

Unfortunately, the instructions given by the trial court do not necessarily make it clear to the jury what facts must be found for manslaughter.

Manslaughter was correctly defined in the instruction to be the killing of a human being not herein declared to be murder or excusable or justifiable homicide.⁴¹

40. Cf. *State v. Todd*, 194 Mo. 377, 384, 92 S.W. 674, 679 (1906), dealing with an alleged error in instructing on second degree murder. The evidence, however, was sufficient to support a finding of guilty of either degree of murder.

41. *State v. Chamineak*, 343 S.W.2d 153, 164 (Mo. 1961).

In other words, the choice improperly left to the jury in the *Chamineak* case was that they could return a verdict of guilty of manslaughter if they did not find the killing to be something else, but without any useful guide to the meaning of manslaughter. The jury, in effect, is told: "If you do not want to convict of murder, nor acquit, then you can return a verdict of guilty of manslaughter."⁴²

Intentional killings in the heat of passion are, of course, not the only homicides that are manslaughter. Manslaughter also includes unintentional homicides and the question arises as to when, in a trial for murder, an instruction on manslaughter by an unintentional homicide should be given. Manslaughter by an unintentional homicide is broken down into two categories: homicides which result from culpable negligence⁴³ and homicides during the commission of an unlawful act not amounting to a felony.⁴⁴

In *State v. Cheatham*⁴⁵ the defendant attempted to secure a reversal of his conviction of murder on the ground that the trial court erred in not giving an instruction on manslaughter. The State's evidence to show murder was provided primarily by the testimony of Sheila, aged ten, a

42. Another indication of the lack of meaning in the term "manslaughter" is found in the court's treatment of defendant's claim of error in that the trial court refused to allow him to testify that he did not intend to kill the deceased. The court agreed that this was an error but gave as one of the reasons why it was not prejudicial:

[D]efendant was not found guilty of second degree murder, the offense charged in the indictment, but was found guilty of manslaughter. An intent to kill is an essential element of murder in the second degree. That is, the killing, among other things, must be wilful. But while there may exist such an intent it is not an indispensable element of manslaughter. For this reason, the verdict cured the error, if any. (Citation omitted without indication). *Id.* at 161.

A better reason for this result is found in the court's statement:

We also note that it is somewhat incongruous for defendant to say that he did not intend to kill Harold Hogan when he intentionally shot him in the head with a shotgun from a distance of five or six feet. *Id.* at 161.

43. This type of manslaughter is most commonly found in cases dealing with criminal homicide resulting from automobile accidents. For two recent examples, see *State v. Feger*, 340 S.W.2d 716 (Mo. 1960), and *State v. Fennewald*, 339 S.W.2d 769 (Mo. 1960). The latter case involves the liability of a driver whose car was not involved in the accident but who was engaged at the time in a "drag race" with the car that was involved in the accident. The case contains a very interesting discussion of the problem of joint liability for an unintentional homicide.

44. For a classic and extreme example of this type of manslaughter, see *State v. Frazier*, 339 Mo. 966, 98 S.W.2d 707 (1936), discussed in HALL, *PRINCIPLES OF CRIMINAL LAW* 259-60 (2d ed. 1960).

45. 340 S.W.2d 16 (Mo. 1960).

daughter of the deceased.⁴⁶ The deceased was a woman with whom the defendant had been living but to whom he was not married. According to Sheila's eyewitness account, defendant tried to hit the deceased's head against the side of a tub in the bathroom. He then hit her in the back with his fist, put his foot in her back and stomped on her head with his bare feet. He then dragged the deceased by her collar to a bed, tore off her clothes and began going through her wallet. Defendant then noticed Sheila observing the scene and told her to go to bed. Sheila dutifully complied. When Sheila awoke later she found her mother, the deceased, on the floor with blood running out of her eye. She woke up the defendant and he put the deceased back onto the bed and sent Sheila to get help.

The defendant's account of the night's events differed somewhat. He claimed that the deceased had returned, with her lips and eyes swollen and in a drunken condition,⁴⁷ to her apartment where the defendant was staying. He took her into the bathroom and slapped her on the back a few times in an effort to make her "heave." She fell to the floor and he dragged her to a bed and removed her clothes. The stench of alcohol from the deceased became too much for the defendant and so he left her on the bed and went into another room. Later, aroused by a commotion, he returned and discovered the deceased lying on the floor. She tried to get up but fell against a chest. Defendant then noticed blood running out of her ear. Defendant denied that he had hit or kicked the deceased, but he did admit that he might have "stepped on partial (sic) of her body."⁴⁸

The deceased died five days later without having regained consciousness.⁴⁹

The court quickly disposed of defendant's contention that the evidence called for an instruction on manslaughter by stating:

Cheatham does not claim justifiable homicide, there was no evidence of provocation, and he does not claim that he accidentally killed her. If he was guilty at all he was guilty of murder and there

46. Defendant was the father of three of deceased's five children. The opinion does not disclose if he was the father of Sheila.

47. State's witnesses testified that when they left the deceased outside of the apartment she was neither drunk nor bruised.

48. 340 S.W.2d at 18.

49. The major portion of the opinion deals with the question of the sufficiency of the evidence as to the cause of death and holds that the post-mortem examination and report was admissible into evidence over an objection that it was hearsay.

was no circumstance or evidence demanding an instruction on manslaughter.⁵⁰

The decision affirming the conviction may well be correct. However, the quoted paragraph does not reveal the reasoning involved in the rejection of the defendant's claim on the manslaughter instruction. It does nothing more than to state that the defendant's contention is without merit. It is clear that there was no evidence showing justification nor adequate provocation. But does the statement that the defendant does not claim accident cover all the other possibilities of finding manslaughter? If the jury believed the defendant's account would it be possible for them to find that he killed the deceased but did not intend to kill her nor to cause serious bodily harm? If so, would this not be either manslaughter by culpable negligence or accidental, excusable homicide? It is true that the defendant did not claim that he accidentally killed her, but this is because he claimed that he did not kill her at all. The court seems to say that he is not entitled to an instruction on manslaughter unless he admits the killing but claims that it was accidental. But it is the duty of the trial court to instruct on "all questions of law," not just those consistent with the defendant's theory.⁵¹

It may well be that there was no evidence upon which the jury could believe the defendant and still find that he caused the death,⁵² or that there was insufficient evidence for the jury to find culpable negligence,⁵³ or that the question was not properly raised on appeal,⁵⁴ or that in a

50. 340 S.W.2d at 18.

51. There is also the possibility of finding manslaughter from the failure of the defendant to provide medical assistance to the deceased. This would depend upon whether or not the defendant had a legal duty to the deceased to provide such. *Cf. People v. Beardsley*, 150 Mich. 206, 113 N.W. 1128 (1907). See PERKINS, *op. cit. supra* note 9, at 513; HALL, *op. cit. supra* note 44, at 208-11.

52. It is highly unlikely that the jury could believe Sheila's account (plus the other evidence of the state) and not find that the defendant either intended to kill or to inflict serious bodily harm, either of which is a sufficient mental state for murder.

53. "The culpability necessary to support a manslaughter charge must be so great as to indicate a reckless or utter disregard of human life." *State v. Feger*, *supra* note 43, at 721.

54. "There is no evidence to the effect 'that the deceased pushed the defendant and at such time the defendant grabbed her while she was in a drunken and intoxicated condition and she . . . thereafter fell on and near objects which could have caused her death' as asserted in one of his assignments of error." *State v. Cheatham*, *supra* note 48, at 18.

close case due deference should be given to the decision of the trial court not to instruct on manslaughter.⁵⁵

The difficulty with the opinion is that it merely states the result without explanation. This, unfortunately, seems to be a rather common way of dealing with manslaughter.

The last of this grisly quartet is *State v. Foster*.⁵⁶ As in the prior case, the defendant was charged with the murder of a woman with whom he had been living but to whom he was not married. Here, however, he admitted the killing but claimed that it was accidental. According to the defendant, he was repairing his shotgun which had been jamming. The deceased returned to the apartment and after a discussion as to whether the defendant should go hunting on the following Sunday, defendant began putting the gun back together and as he did, it went off killing the deceased.

A son of the deceased, but not of the defendant,⁵⁷ testified that he heard his mother say, "Don't point it, it might go off" and the defendant reply that he did not care. According to the boy, he then told the deceased to "look at the barrel" and then that he was going to kill her. This was followed by the sound of the gun discharging.

On appeal the defendant claimed that the trial court had erred in instructing on "voluntary" manslaughter, and in failing to instruct on "involuntary" manslaughter. The manslaughter statute in Missouri makes no distinction between voluntary and involuntary manslaughter. Evidently, the court gave an instruction on manslaughter from an intentional killing, that is, a homicide in the heat of passion brought on by adequate provocation, but did not give an instruction on an unintentional killing by culpable negligence. It is clear that there was no evidence to support a finding of adequate provocation and the instruction on intentional manslaughter should not have been given. It is equally clear that there was evidence to support a finding of culpable negligence from the reckless handling of a dangerous weapon. But on this point no instruction was given.

Nevertheless, the conviction of manslaughter was affirmed by the

55. *But cf.* *State v. Davis*, 328 S.W.2d 706 (Mo. 1959), reversing conviction of murder for failure to give instruction on manslaughter by reason of a killing in heat of passion brought on by adequate provocation where defendant's testimony indicated that he was not in the heat of passion.

56. 338 S.W.2d 892 (Mo. 1960).

57. Defendant was the father of one of deceased's three children.

Supreme Court. Like most opinions in this area, the decision is not a model of clarity.⁵⁸

If the jury found that the defendant intended to kill the deceased, they should have convicted of murder. They were erroneously told that if they found an intent to kill they could return a verdict of guilty of manslaughter. As indicated in the discussion above this type of error cannot be a ground for reversal of a conviction of manslaughter.⁵⁹

But here there is the additional factor that the jury should have been instructed on manslaughter by culpable negligence, and normally, this failure to instruct will be reversible error. However, here, according to the court, there was no harm to the defendant by reason of this omission of the trial court.

The trial court did instruct on murder, manslaughter,⁶⁰ and death by accident. The jury did not find murder. If they had found accident they would have acquitted.⁶¹ Therefore, it is possible to conclude that the homicide was not murder, nor was it justifiable or excusable, and therefore it must be manslaughter as this is the only type of homicide left.

In other words, the jury may have found the defendant guilty of a type of homicide (intentional killing in heat of passion) as to which there was no evidence, and the jury was not instructed as to a type of homicide

58. For example, the court at 338 S.W.2d 896 distinguishes voluntary manslaughter as "the intentional killing of another," and involuntary manslaughter as "the unintentional killing of another while doing some unlawful act not amounting to a felony." The court then states, "By definition alone Foster's conduct does not fall within the latter definition." The citation for the definitions was 40 C.J.S. *Homicide* §§ 40, 55 and 57. The definition of involuntary manslaughter in C.J.S. § 55 includes an unintentional killing "in doing a lawful act negligently" in addition to the doing of an unlawful act not amounting to a felony. Involuntary manslaughter is usually defined as all manslaughter which is not voluntary manslaughter and clearly includes a killing by culpable negligence. See PERKINS, *op. cit. supra* note 9, at 56. The court's apparent elimination of the homicides by culpable negligence from the category of involuntary manslaughter creates only more confusion in an already confused area and certainly does not aid in understanding the reasoning of the opinion.

59. *Supra* pp. 7-13.

60. It is not clear whether in addition to giving an instruction on manslaughter from an intentional killing, the court gave a general instruction that manslaughter is all those homicides which are not murder nor justifiable nor excusable.

61. "Here the only issue was whether Foster accidentally killed Louise or whether he intentionally shot her." *State v. Foster, supra* note 56, at 896. This ignores completely the possibility of manslaughter by culpable negligence, unless the court by "accidentally" means "unintentionally," which judging by their prior use of the word "accident," *e.g.*, "the defense of accidental killing" in the preceding sentence, they definitely did not.

(unintentional killing by culpable negligence) as to which there was sufficient evidence. Apparently there is nothing wrong with this irregularity since both of these types of homicide are called "manslaughter," and therefore the defendant is in no position to complain.

The only possible effect of an instruction on culpable negligence would have been to reduce the offense from second degree murder to manslaughter and the jury has mercifully done that.⁶²

While such a result fits very well the conception of manslaughter as the grab-bag of homicides, it is doubtful if it fits well with either the letter or the spirit of the requirement that the court must instruct the jury "upon all questions of law necessary for their guidance."

Although this discussion has been critical of some portions of the four cases considered, its purpose has not been criticism of these particular cases but rather to point out by these examples the inadequacy of the court's present approach to manslaughter. All four of the cases discussed are supported by prior decisions (some almost identical) of the Missouri Supreme Court. What is objected to is the tendency of these and the prior cases to base the decisions on conclusions of law which masquerade as reasons or admittedly illogical rules which do not necessarily bear any relationship to a properly conceived and consistent approach to the problem of criminal homicide.

It is sometimes useful to say that manslaughter is those homicides which are not murder nor justifiable nor excusable homicide. But it should be remembered that this is only the inverse statement of the proposition that all homicides are either murder, manslaughter, justifiable or excusable and means only that our classification of homicides is all-inclusive. It is not a definition of murder, manslaughter, justifiable or excusable homicide.⁶³

It is, of course, possible to make a negative definition out of this formula by defining murder, excusable and justifiable homicide in other terms, and then say that all other homicides are, by definition, manslaughter. It is this negative approach (embodied in the statutory definition) that has caused much of the difficulty in instructions on manslaughter. For

62. *State v. Foster*, *supra* note 56, at 896.

63. A similar concept is the accounting equation, $A \text{ (assets)} = L \text{ (liabilities)} + N \text{ (net worth)}$. This can be stated as $N = A - L$, or $L = A - N$. No matter what form it takes it does not amount to a definition of assets, liabilities, or net worth.

while this may, by a rather complex process, tell us what homicides are manslaughter, it is not much help in determining what are the characteristics of the crime of manslaughter.

It is possible to define manslaughter in other terms, just as malice, the essential ingredient of murder, has been broken down into categories.⁶⁴

The unsatisfactory analysis of common law manslaughter has quite naturally carried over into the statutory law relating to that offense and in the courts' interpretation of it. No material relief can be expected until there is a critical reexamination of the offense and a determination of the fundamental principles which support, or should support, the crime. As in the case of murder, this can best be accomplished by dividing the types of acts constituting the offense into categories. Then the characteristics of each category can be pointed up and subjected to challenge.

With that in mind, the types of unlawful homicide constituting common law manslaughter have been divided into three categories:

(1) Homicide resulting from an intention to kill or to do grievous bodily harm, which would be murder but for some sort of extenuating circumstances.

(2) Unintentional homicide resulting from criminal negligence.

(a) Unintentional homicide while engaged in an act so dangerous as to indicate reckless indifference to human life and safety.

(b) Unintentional homicide resulting from the criminally negligent omission to perform a legal duty owed another.

(3) Unintentional homicide occurring in the commission of a misdemeanor or other unlawful act, dangerous in itself.⁶⁵

This analysis is merely a statement of the categories of manslaughter at common law. It is possible that not all of these should be manslaughter today.⁶⁶ However, it is impossible to work out satisfactorily the problem of defining manslaughter without such a breakdown for a beginning.

It is now possible for a court to instruct a jury that if they do not find the homicide to be murder nor a form of innocent homicide, they may return a verdict of guilty of manslaughter, even though there is nothing

64. See note 36 *supra*.

65. MORELAND, *op. cit. supra* note 20, at 63.

66. For example see the recently enacted criminal codes of Illinois and Wisconsin, both of which define manslaughter and eliminate the misdemeanor-manslaughter rule (the third category above): WIS. STAT. ANN. § 940.05 and 940.06 (1955). ILL. REV. STAT. §§ 9-2 and 9-3 (S.H.A. ch. 38) (1961).

in the case to indicate any possibility of manslaughter. And for the court to do so is not reversible error.⁶⁷

This is an indication that the law of homicide in Missouri in 1961 is not satisfactory and needs reexamination.

67. *Cf. State v. Morrow*, 188 S.W. 75, 76 (Mo. 1916):

Manifestly, however, there is no evidence of involuntary manslaughter in the case, and, since defendant was convicted of this offense, it may be urged that the point made in the motion for a new trial touching the lack of evidence to uphold the verdict of manslaughter ought to be sustained. Upon the record before us defendant was either guilty of murder in the second degree, or he should have been acquitted on the ground of self-defense. The instruction for manslaughter, as we say above, should not have been given, for there is no manslaughter in any degree in the case; but since the court so instructed and the jury saw fit to temper justice with mercy, and since we are forbidden to reverse a case where the evidence shows defendant to be guilty of a higher degree of crime than that of which he was convicted . . . we have no lawful excuse for interfering.

The two cases cited by the court for support of this admittedly somewhat illogical conclusion were *State v. Todd*, 194 Mo. 377, 92 S.W. 674 (1906) and *State v. Whitsett*, 232 Mo. 511, 134 S.W. 555 (1911). Both of these cases affirmed convictions of second degree murder after a trial on a charge of first degree murder. The facts of both were such that there was evidence to support a finding of second degree murder.