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VOLUNTARY MANSLAUGHTER UNDER STATE STATUTES*

Manslaughter, as defined at common law, consists of any unlawful killing of a human being without malice, express or implied. It is the element of malice which distinguishes manslaughter from murder, it being a constituent of the latter offense. At common law, the offense of manslaughter is divided into two classes, voluntary and involuntary. Voluntary manslaughter is a homicidal act committed with an intent to kill, but done under the influence of passion produced by some provocation which the law, recognizing human frailty, considers sufficient to take the act out of the murder category. Involuntary manslaughter is a homicide resulting from certain unlawful acts but without any intent to kill. Thus it is the element of intent which is the determining factor in distinguishing between voluntary and involuntary manslaughter.

From the above discussion the importance which attaches to the term "provocation" in determining whether an act is murder or voluntary manslaughter can readily be seen. Four situations came to be recognized at common law as providing adequate provocation to reduce a killing to the manslaughter level; these being homicides resulting from sudden combat, assault and battery, discovery of the wife in the act of adultery, or resistance to an illegal arrest.[1] The mere fact that a homicide results from one of these four situations is not of itself sufficient to make the act manslaughter instead of murder. Although there may have been adequate provocation present, it is necessary to prove that such provocation aroused a sufficient degree of passion. It must be shown that the provocation and passion *concur;* violent passion alone or provocation alone, however adequate, is insufficient. It is also necessary to negative the possibility that there was a cooling period following the provocation before the homicidal act was committed. In determining whether there existed a sufficient degree of passion, the test is objective. If the passion is of such a degree as would cause a reasonable man to act on impulse and without reflection under similar circumstances, then the act will not be murder.

Today every state, except Texas,[2] has a statute relating to the crime of manslaughter. These statutes represent a futile and chaotic attempt to codify the offense. Rather than aiding the courts in their efforts to do justice when confronted with homicides, many of the present statutes merely blur the issue and create confusion and bewilderment. The crime of manslaughter as it existed at common law forms the basis for the offense under many of the statutes. Some statutes have expanded the common law version; some have copied it; others have contracted it; few have succeeded in presenting a workable and satisfactory guide for the state courts. A look at the various statutes leaves the impression, even to the casual observer, that seldom has so much effort produced such meager results.

I. *Statutes which neither define nor classify manslaughter.*

The common law definition of manslaughter is generally applied under statutes which merely provide punishment for the offense or which define it sub-

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* This is a companion note to the one by Mr. Stephens on p. 108.

[1] MAY'S CRIMINAL LAW, sec. 226 (Third ed. 1921); Commonwealth v. Webster, 5 Cush. (Mass.) 295 (1850); State v. Murphy, 61 Me. 56 (1870); Preston v. State, 25 Miss. 383 (1853); Holly v. State, 10 Humph. (Tenn.) 141 (1849); Maria v. State, 28 Tex. 698 (1866).

[2] Manslaughter abolished in Tex. by act of 1927, 46th Leg., p. 412, as cited in 25 Cal. L. R. 3 (1936).

stantially according to the common law. Just how much the courts must of necessity rely upon the common law definition may be evidenced from the number of states which fall within such a group. Twelve states[3] do not define the crime by statute. The Kentucky manslaughter statute is typical of the importance which these state legislatures attach to the formulation of an enlightened definition. The statute states that:

> "Any person who commits voluntary manslaughter shall be confined in the penitentiary for not less than two nor more than twenty-one years."

Such a statute is little better than no statute. It merely marks a start and a finish line but leaves the court without anything to set the pace. Not only does such a statute fail to outline the elements necessary to constitute the crime in general, but it also fails to separate the offense into any classification. This factor places a double burden upon the court. Not only must that legal body determine whether a homicide is manslaughter, but it must rather blindly attempt to arrive at a just punitive measure. In effect the result is the same as if there were no statute, since the common law furnishes the mechanics with which a judicial decision is reached. How successful a court will be in such a situation depends upon the facility with which that body can interpret the common law and apply such interpretation to the facts of the case. Such circumstances leave the twelve states having such a statute with a vast area for improvement. Perhaps necessity will eventually change such an undesirable codification of the law.

II. *Statutes which classify but do not define.*

The legislatures of four states[4] went a step further than did the ones in the previous group, and in drawing up a statute, they distinguished between voluntary and involuntary manslaughter, adhering for the most part to the common law classification. Most of these statutes specify the minimum and maximum punishment for each class, the sentence being greater for voluntary than involuntary manslaughter. In reality, such a classification is of little aid to the courts in carrying out their judicial function. These statutes break down a general term into two categories, but fail to stipulate the fundamental elements necessary to deter-

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[3] CONN. GEN. STAT. 6046 (1930); DEL. REV. CODE 5161 (1935); IOWA CODE 690.10 (1946); KY. R. S. 435.020 (1948); LA. CODE OF CRIM. LAW AND PROC. 740-31 (Dart, 1943); MD. ANN. CODE art. 27, sec. 436 (Flack, 1939); MASS. GEN. LAWS c. 265, sec. 13 (1932); MICH. COMP. LAWS sec. 16717 (1929); N. J. R. S. 2:138-5 (1937); N. C. GEN. STAT. sec. 14-18 (1943); R. I. GEN. LAWS c. 606, sec. 3 (1938); VT. PUB. LAWS c. 335 sec. 8377 (1933). Note that all these statutes are worded practically the same as the Kentucky Statute cited, the only variations being in form. The Louisiana Statute is the only one that defines the crime to any extent, stating "manslaughter is a homicide which would be murder under subdivision (1) of art. 30 (murder), but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection."

[4] PA. STAT. ANN. tit. 18, sec. 2225 (Purdon, 1936); S. C. CODE OF LAWS vol. 1, sec. 1107 (1942); VA. CODE ANN. tit. 40, c. 178, sec. 4396 (1942); W VA. CODE ANN. c. 61, art. 2, sec. 5919 (1943); Note that Penna. and Virginia have statutes similar to that of West Virginia which is cited. The South Carolina Statute states "Manslaughter, or the unlawful killing of another without malice, express or implied, shall be punishable ... provided, that in case where the jury returns a verdict of guilty of involuntary manslaughter the punishment shall not be less than three months ..."

mine within which category any given state of facts falls. The West Virginia statute is typical. It provides:

> "Voluntary manslaughter shall be punished by confinement in the penitentiary not less than one nor more than five years.
>
> "Involuntary manslaughter is a misdemeanor, and any person convicted thereof shall be confined in jail not to exceed one year, or fined not to exceed one thousand dollars, or both, in the discretion of the court."

Such a statute would be meaningless should there be no common law upon which the courts could rely to fill in the missing links comprising the homicidal act of manslaughter. Most of the statutes under consideration, in defining voluntary manslaughter, employ the words "voluntary or voluntarily." This fact emphasizes the haphazard effort which has been made to place at the court's disposal a satisfactory and workable statute. Perhaps these states will someday give substance to their meager statutes.

III. *Statutes which define and classify.*

Twelve states[5] have statutes which define manslaughter generally as "the unlawful killing of a human being without malice." These statutes go further and divide the offense into two classes, voluntary and involuntary, with an accompanying definition for each. Wyoming's statute is a good example. It provides:

> "Whoever unlawfully kills any human being without malice, expressed or implied, either voluntarily, upon a sudden heat of passion, or involuntarily, but in the commission of some unlawful act, or by any culpable neglect or criminal carelessness, is guilty of manslaughter, and shall be imprisoned in the penitentiary not more than twenty (20) years."

[5] ARIZ. CODE ANN. 43-2904 (1939); ARK. STAT. ANN. 41-2208 (1947); CAL. PENAL CODE sec. 192 (1941); COLO. STAT. ANN., c. 48, sec. 34 (1935); GA. ANN. CODE., vol. 6, sec. 65 (Parks, 1914); IDAHO CODE ANN., 17-1106 (1932); IND. STAT. ANN., 10-3405 (Burns, 1933); MONT. REV. CODE ANN., 10959 (1935); N. M. STAT. ANN. 41-2407 (1941); TENN. CODE ANN., vol. 7, sec. 10774 (Williams, 1934); UTAH CODE ANN., vol 5, tit. 103, c. 28, sec. 5 (1943); WYO. COMP. STAT., 9-205 (1945). Note that Ariz., Cal., Idaho, Mont., N. M., and Tenn. have statutes similar to that of Utah which states "Manslaughter is the unlawful killing of a human being without malice. It is of two kinds: (1) Voluntary, upon a sudden quarrel or in a heat of passion ..." Indiana has a statute substantially similar to the Wyoming Statute cited in the text. The Arkansas Statute states "Manslaughter must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible." Colorado's Statute reads "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." The Georgia Statute says that "In all cases of voluntary manslaughter, there must be some actual assault upon the person killing, or an attempt by the person killed to commit a serious personal injury on the person killing, or other equivalent circumstances to justify the excitement of passion, and to exclude all idea of deliberation or malice either express or implied. Provocation by words, threats, menaces, or other contemptuous gestures shall in no case be sufficient to free the person killing from the guilt and crime of murder. The killing must be from the result of that sudden, violent impulse of passion supposed to be irresistible; for if there should have been an interval between the assault or provocation given and the homicide, of which the jury in all cases shall be the judges, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge, and be punished as murder."

Such a statute resembles the common law definition of manslaughter but fails to point up the offense adequately, leaving it to the court to manipulate a rather broad statement of the offense. Merely stating that the crime must be committed upon a sudden heat of passion does not substantially guide the court in arriving at a favorable decision. The court must decide in what instances sufficient passion is aroused and must determine whether the test is to be objective or subjective. Interpreting such a statute literally, sudden passion may result from any provocation. Since these statutes are so similar to the common law version of the crime, the courts may adhere to the latter rules in applying the statutes, or they may interpret them in much broader terms than is possible by operating on common law principles. It can readily be seen that such a situation will produce a great number of interpretations and that confusion is inevitable. With little effort such a statute may be clarified and made into a potential court weapon rather than a mediocre and inadequate codification.

IV *Statutes which define and classify in terms of degrees.*

Eight states[6] have statutes which divide manslaughter into degrees by adoptinging the common law concepts as a basis and then adding several legislative principles. Apparently this combination represents an effort to make these statutes as definite as possible and at the same time modernize the common law version by supplementing the latter wherever it is deemed necessary. Voluntary manslaughter in such statutes is designated as first degree manslaughter and is defined in elaborate terms, with the inclusion in addition of such specific behavior as killing an unborn quick child, assisting in self-murder and committing manslaughter while engaged in the commission of a misdemeanor. The Minnesota statute is representative of the type under consideration. It states:

> "Such homicide is manslaughter in the first degree when committed without a design to effect death: (1) By a person engaged in committing or attempting to commit a misdemeanor affecting the person or property, either of the person killed or of another; (2) In the heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon; or (3) By shooting another with a gun or other fire arm when resulting from carelessness in mistaking the person shot for a deer or other animal."

In substance, the rest of the statute says that:

> The killing of an unborn quick child or mother wilfully is manslaughter in the first degree unless done to preserve the life of the mother.

There can be no doubt that these statutes represent much effort to produce a codification which will be a valuable aid to the court. However, since the statutes represent a combination of common law and legislative principles, it is difficult to

[6] CODE OF ALA. tit. 14, sec. 320 (1940); KAN. REV. STAT. 21-407 *et seq.* (Corrick, 1935); MINN. STAT. 619.15 *et seq.* (1945); N. H. REV. STAT. c. 455, secs. 8-9 (1942); N. D. REV. CODE 12-2717 *et seq.* (1943); OKLA. STAT. tit. 21, sec. 711 *et seq.* (1941); S. D. CODE 13.2013 *et seq.* (1939); WIS. STAT. 340.10 *et seq.* (1943). Note that the statutes of Kan., N. H., N. D., Okla., S. D., and Wis. closely resemble the Minnesota Statute cited in the text. The Alabama Statute states "Manslaughter, by voluntarily depriving a human being of life is manslaughter in the first degree."

determine whether the legislatures intended that the courts adhere to the statutes strictly as stated or that they rely upon the common law at their discretion.

V *Miscellaneous*

The remainder of the states have statutes which cannot be included in any broad classification, although most of them are substantially similar to at least one of the groups set out above. Illinois, Nevada, and Oregon[7] have statutes which are worded alike, those of Illinois and Nevada being identical, stating:

> "Manslaughter is the unlawful killing of a human being without malice, express or implied, and without any mixture of deliberation whatever. It must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible; "

These statutes resemble those discussed in the third group except that they require that the act be done without deliberation as well as without malice. They are very similar to the common law definition but leave it for the courts to decide what will constitute adequate provocation to arouse irresistible passion. The Oregon statute makes no distinction between voluntary and involuntary manslaughter.

Florida, Mississippi, Missouri, Ohio, and Washington[8] have statutes which define voluntary manslaughter in a negative manner. The Florida Statute states:

> "The killing of a human being by the act, procurement or culpable negligence of another, in cases where such killing shall not be justifiable or excusable homicide nor murder shall be deemed manslaughter and shall be punished "

Such a statute merely points out what homicides are not manslaughter but fails to include any of the elements which distinguish manslaughter from murder or justifiable homicide. In effect, it *accomplishes* little more than do the statutes in the first group. The Mississippi, Missouri, and Washington Statutes cite certain acts falling within the statute (e.g., killing an unborn quick child or assisting in self-murder) as do the statutes in the fourth group. The Mississippi statute does not distinguish between voluntary and involuntary manslaughter.

The New York Statute[9] separates manslaughter from the common law definition to a greater extent than does that of any other state. It is a highly technical and complicated piece of legislation which divides the offense into degrees, voluntary manslaughter constituting the first degree. Under this statute, homicide "in the heat of passion" is first degree manslaughter if committed "in a cruel and unusual manner or by means of a dangerous weapon." A killing is also first degree

[7] ILL. REV. STAT. c. 38, sec. 361 (1947); NEV. COMP. LAWS, 10069 (Hillyer, 1929); ORE. COMP. LAWS ANN. 23-405 (1940). Note that the Oregon Statute reads "If any person shall, without malice, express or implied, and without deliberation, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible, voluntarily kill another, such person shall be deemed guilty of manslaughter."

[8] FLA. STAT. sec. 782.07 (1941); MO. REV. STAT. 4382 *et seq.* (1939); MISS. CODE ANN. Vol. 2, 2220 *et seq.* (1942); OHIO CODE 12404 (Page, 1939); WASH. REV. STAT. ANN. 2395 *et seq.* (Remington, 1932).

[9] Thompson s Laws of N. Y., 1049-1052 (1939); N. Y. CRIM. CODE secs. 1049-1052 (Thompson, 1939).

manslaughter if done "by a person engaged in committing or attempting to commit a misdemeanor affecting the person or property of another or of the person killed."

The Maine and Nebraska Statutes[10] define but do not classify the offense. The crime of manslaughter was abolished in Texas in 1927. Texas, however, has the statutory offense known as homicide by negligence which corresponds approximately to the crime of involuntary manslaughter.[11]

With such marked variations in the present state statutes, it is evident that statutory manslaughter is indeed a fertile field for research, interpretation, and application. However, little has been done to improve this unsatisfactory situation. When an attempt is made to formulate a model statute, the problems confronted explain the existence of the many statutory variations. Numerous issues arise which must be answered before a satisfactory statute can be constructed. Is the common law definition applicable today? In what ways can such definition be made more complete? Should the test be objective or subjective? What constitutes adequate provocation? These are only a few of the problems which must be dealt with. Failure to handle such issues successfully accounts for the large number of unwieldy statutes.

Since common law manslaughter still exerts strong influence today, it seems that the best approach to the creation of a statute is to use the common law principles as a basis and then proceed to expand, elaborate and clarify these principles. As a foundation there would have to be an unlawful killing of a person without either express or implied malice. It is at this point that the different states have departed from any semblance of uniformity. Consequently, this is the place to separate the chaff and add the necessary elements, the ultimate success of the statute depending on how well such contraction and expansion is effected.

While the absence of malice is essential to manslaughter, in contrast, the presence of passion for this crime is a necessity. In determining the adequacy of passion, it is apparent that the test must, for practical purposes, be objective. To make the test subjective would add to the many problems rather than decrease them. It would place an undue burden on the court in its efforts to protect the innocent, punish the guilty and prevent a failure of justice. Closely related to the element of passion is that of provocation. These two terms are not synonomous nor are they interchangeable. Both are indispensable and provocation must precede passion, the latter flowing directly from the former. As to what constitutes adequate provocation, the statutes are in discord. Some states rely solely on the common law provocations; others have adopted those four and have added to them; still others have failed to clearly specify just what will constitute adequate provocation.

The solution is not an easy one. Uniformity of statutes and their facility of interpretation and application are of prime importance. Therefore it appears that the common law provocations are sufficient with perhaps the addition of one other, that being oral provocation, i.e., words alone. As yet this last one has had little acceptance but possibly the trend is in that direction. Logically, oral provocation, as compared with the others, would rest upon solid ground.

The lapse of time between the passion and the homicidal act must preclude

[10] ME. REV. STAT. c. 129, sec. 2 (1930); NEB. REV. STAT. sec. 28-403 (1943); Note that both statutes are similar to the Wyoming Statute cited in the text.

[11] Riesenfeld, *Negligent Homicide*, 25 Cal. 1, p. 3, fn. 5, *A Study In Statutory Interpretation.*

the possibility of a subsidence of the passion. Here again the standard must be objective. To make it subjective would substantially increase the obstacles encountered by the court in its effort to apply the statute and arrive at a satisfactory decision.

Once the essentials have been formulated, the final task is to assemble them into a concise, yet flexible, statute. Care must be taken lest the legislative intent become lost in a morass of words. The success achieved in coordinating the parts into a coherent pattern will directly affect the ease with which it may be manipulated by the court and will indirectly influence the ultimate decision. The following statute, which incorporates the findings in this study as to voluntary manslaughter, is offered as a solution to the problem:

> "Voluntary manslaughter is an unlawful homicidal act committed without malice, in sudden passion immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection."

CHARLES GROMLEY