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CRIMINAL LAW—ARE THERE CIRCUMSTANCES
OTHER THAN PROVOCATION WHICH MAY
“REDUCE” MURDER TO VOLUNTARY
MANSLAUGHTER?

Voluntary manslaughter is a degree or species of felonious homicide¹ and is a distinct crime.² It is distinguished from murder in that in murder “malice” or “malice aforethought” is present but is absent in voluntary manslaughter.³ This offense has been commonly defined as an intentional killing with provocation and in heat of passion.⁴ These words have become so associated, in the minds of students of the law, with voluntary manslaughter that their accuracy is hardly questioned. They may well be examined in the light of authority to determine whether in fact they completely define the crime presently

Though voluntary manslaughter is said to be an intentional killing, if great bodily harm is intended, the intent requirement is satisfied.⁵ But there is some authority which may indicate a

¹ *Boyett v State*, 69 Fla. 648, 68 So. 931 (1915) *Rhea v. Terr.*, 3 Okla. Cr. 230, 105 Pac. 314 (1909). I RUSSELL, TREATISE ON CRIMES AND MISDEMEANORS (5th ed. 1853) 579.

State v. Wilson, 166 Iowa 309, 144 N.W. 47 (1913), *State v. Brown*, 152 Iowa 427, 132 N.W. 862 (1911).

² I RUSSELL, TREATISE ON CRIMES AND MISDEMEANORS (5th ed. 1853) 579; 3 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883) 21. Stephen analyzed malice aforethought as:

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

(b) Knowledge that the act or omission 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,

(c) An intent to commit any felony whatever;

(d) An intent to oppose by force any officer of justice in arresting or keeping in custody a person whom he has a right to arrest or keep in custody, or in keeping the peace. 3 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883) 22.

⁴ *Olds v State*, 44 Fla. 452, 33 So. 296, 299 (1902) *Cottrell v. Commonwealth*, 271 Ky. 52, 59, 111 S.W. 2d 445, 449 (1937) *Commonwealth v. Carroll*, 326 Pa. 135, 191 Atl. 610, 611 (1937)

Reynolds v. State, 154 Ala. 14, 45 So. 894 (1908), *Harrington v. State*, 83 Ala. 9, 3 So. 425 (1888) *Commonwealth v. Micuso*, 237 Pa. 474, 117 Atl. 211 (1902) *Commonwealth v. Gable*, 7 Serg. & R. (Pa.) 423 (1821).

tendency to go further than this and hold negligence sufficient to support a conviction of voluntary manslaughter. Bishop states that carelessness (a poorly chosen word for criminal negligence) may supply affirmative criminal intent⁶ and some courts seem to have followed his statement.⁷ What these courts are really doing is applying a fiction of implied intent, perhaps believing that the state of mind accompanying negligent conduct may be just as reprehensible as intent to kill where malice is absent. For example, the Kentucky court in *Ewing v Commonwealth*, after rejecting the doctrine of implied malice from the use of a deadly weapon quoted Bishop "There is little distinction in degree between the will to do a wrongful thing and an indifference whether it is done or not. Therefore carelessness is criminal, and within limits supplies the place of affirmative criminal intent."⁸ What these cases really hold is that recklessness in the use of a dangerous agency is the *equivalent* of an intent to kill.

These cases may not be unsatisfactory in the *result* reached since they are confined to situations wherein dangerous instrumentalities such as automobiles⁹ or firearms¹⁰ are recklessly used. It is arguable that the reckless use of such agencies in some cases occupies a position somewhere between the negligent murder¹¹ and involuntary manslaughter in the degree of criminality. Nevertheless, it is believed that confusion will result in the scheme of classification of murder and manslaughter if states of mind other than intent to kill or inflict great bodily harm are recognized as constituents of the crime of voluntary manslaughter and that, consequently such cases belong in the invol-

⁶ I BISHOP CRIMINAL LAW (9th ed. 1923) sec. 313.

State v Moore, 129 Iowa 514, 106 N.W. 16 (1906), *Hawpe v Commonwealth*, 234 Ky 31, 27 S.W. 2d 394 (1930) *Jones v Commonwealth*, 213 Ky 356, 281 S.W. 164 (1926) *Montgomery v Commonwealth*, 26 Ky L. Rep. 356, 81 S.W. 264 (1904) see *Ringer v State*, 85 S.W. 410, 413 (Ark. 1905) 1 WHARTON, CRIMINAL LAW (11th ed. 1912) 618 (negligent use of dangerous agencies).

⁸ *Ewing v Commonwealth*, 129 Ky. 237, 243, 111 S.W. 352, 354-355 (1908)

Jones v Commonwealth, 213 Ky 356, 281 S.W. 164 (1926).

¹⁰ *Lambdin v Commonwealth*, 195 Ky 87, 241 S.W. 842 (1922) For a case not involving a dangerous agency see *Gibson v Commonwealth*, 106 Ky. 360, 50 S.W. 532 (1899).

¹¹ For a discussion of negligent murder see MORELAND, A RATIONALE OF CRIMINAL NEGLIGENCE (1944) Chap. 7.

untary manslaughter category. If the reckless use of a dangerous instrumentality is on a footing with intent to kill, why isn't every homicide from such conduct murder? No mitigating circumstance is apparent in these cases as, on the contrary, there often is in a case of an actual intentional killing, e.g., heat and passion resulting from provocation. Although one may not approve of these cases, it must be admitted that they are in the law. In fact, Professor Perkins goes so far as to say that, "Many statements can be found to the effect that voluntary manslaughter requires an intentional killing, but the tendency has been to give the phrase a meaning broad enough to cover any killing with a man-endangering state of mind that is neither murder nor innocent homicide."¹²

The crux of the inquiry, of course, is the question whether the offense of voluntary manslaughter may be committed in the absence of "heat and passion" caused by provocation. Or to pose the problem differently, are there circumstances other than provocation which may "reduce" murder to voluntary manslaughter? Had the cases in the above paragraph been fully accepted as sound law by many jurisdictions, the question would have an immediate affirmative answer. Believing these cases unsound and not likely to gain headway in American law, the inquiry must be extended further.

Before this is feasible it is necessary to understand what is meant by provocation causing murder to be "reduced" to voluntary manslaughter. Briefly, provocation may be said to be the cause of summoning, or stirring up an emotion such as anger, fear, or resentment¹³ resulting in action which is the product of heat and passion rather than reason.¹⁴ The test of whether in a given case adequate provocation occurred is objective, i.e., would a reasonable man under the circumstances have been provoked?¹⁵ Though a defendant satisfy this requirement, he must yet prove that heat and passion were in fact engendered. In such a case

¹² *Perkins, The Law of Homicide* (1946) 36 J. CRIM. L. & CRIMINOLOGY 392.

¹³ *State v Kidd*, 24 N.M. 572, 175 Pac. 772 (1917).

¹⁴ *State v. Hill*, 20 N.C. 629, 34 Am. Dec. 396 (1839) *Maher v. People*, 10 Mich. 212, 81 Am. Dec. 781 (1862). CLARK & MARSHALL, *LAW OF CRIMES* (4th ed. 1940) sec. 254.

¹⁵ CLARK, *CRIM. LAW* (3d ed. 1915) sec. 75.

the test is subjective.¹⁶ Circumstances that have been held to give rise to adequate provocation are assault and battery,¹⁷ mutual combat,¹⁸ unlawful arrest,¹⁹ and the detection by a husband of his wife in the act of adultery.²⁰

In these cases the effect of provocation is to produce a state of mind which precludes "malice" necessary for murder, but the offense is nevertheless felonious. Where, however, the homicide is founded upon the reasonable belief of the necessity of self-protection, it is a case of self-defense exonerating altogether.²¹ There are cases which lay down a doctrine of "imperfect self-defense" by which one who actually killed in self-defense is considered guilty of manslaughter because of some fault of his own in bringing on the difficulty, which resulted in the homicide.²² In *Reed v State*, the accused was caught in the act of adultery with the wife of the deceased and killed the latter to save his own life. He was convicted of manslaughter, the court saying, "whenever a party by his own wrongful act produces a condition of things wherein it becomes necessary for his own safety that he should take life or do serious bodily harm, then indeed the law wisely imputes to him his own wrong, and its consequences to the extent that they may and should be considered in determining the grade of offense, which but for such acts would never have been occasioned."²³ As stated by another court, "if he provoked the combat, or produced the occasion without any felonious intent, the final killing in self-defense will be manslaughter only."²⁴ These cases do not discuss provocation but rather as a matter of policy or from a desire to penalize one

¹⁶ CLARK, CRIM. LAW (3d ed. 1915) sec. 218; *Perkins, The Law of Homicide*, (1946) 36 J. CRIM. L. & CRIMINOLOGY 423.

¹⁷ *State v Joiner*, 161 La. 518, 109 So. 51 (1926)

¹⁸ *State v Cassim*, 112 W Va. 92, 163 S.E. 769 (1932)

¹⁹ *Plemmons v State*, 43 Ga. App. 344, 158 S.E. 630 (1931).

²⁰ *State v Yanz*, 74 Conn. 177, 50 Atl. 37 (1901)

²¹ *Commonwealth v. McGowan*, 189 Pa. 641, 42 Atl. 365 (1899)

²² *Wallace v U. S.*, 162 U. S. 466, 40 L. Ed. 1039, 16 Sup. Ct. 859 (1895) *Freeman v State*, 74 Ark. 1035, 298 S.W. 333 (1937), *Taber v. Commonwealth*, 26 Ky. L. Rep. 754, 82 S.W. 443 (1904), *State v. Crisp*, 170 N.C. 790, 87 S.E. 513 (1910) *Reed v State*, 11 Tex. App. 509, 518, 40 Am. Rep. 795, 797 (1892) *State v Flory*, 40 Wyo. 184, 276 Pac. 458 (1929) see *Allison v. State*, 74 Ark. 444, 86 S.W. 409, 413 (1904) *State v Thomas*, 184 N.C. 757, 114 S.E. 834, 837 (1922).

²³ 11 Tex. App. 509, 518, 40 Am. Rep. 795, 797 (1892).

²⁴ *State v. Flory*, 40 Wyo. 184, 276 Pac. 458, 463 (1929)

who is not without fault, limit the scope of self-defense. In other words, “ “ the law justly limits his right of self-defense, and regulates it according to the magnitude of his own wrong.’ ”²⁵ Thus, as provocation may “reduce” what would otherwise be murder to manslaughter, fault of the accused in bringing on the necessity of killing another may raise the killing from what would otherwise be justifiable homicide to voluntary manslaughter, even though heat and passion be absent. The reasoning by which the respective results are reached is much the same.

Similar to the “imperfect self-defense” cases are those in which the slayer erroneously and unreasonably believed himself endangered by the deceased.²⁶ Some of these cases expressly state that heat and passion are not always necessary to make out the offense of voluntary manslaughter.²⁷ As stated by one of them.

“It is not always necessary to show that the killing was done in the heat of passion to reduce the crime to manslaughter, for where the killing is done because the slayer believes that he is in great danger, but the facts do not warrant such belief, it may be murder or manslaughter according to the circumstances, even though there be no passion.”²⁸

Other cases, though not expressly stating that heat of passion due to provocation is not the only circumstance “reducing” a homicide from murder to manslaughter, do so in effect. Thus in *Commonwealth v Colandro*,²⁹ the court took the view that the death of another from a blow struck under the apprehension of danger which apprehension was not reasonable might constitute manslaughter. Though the defendant relied solely upon self-defense, not pleading provocation, he was held entitled to an instruction on manslaughter. Were the apprehension in these

²⁵ *King v. State*, 13 Tex. App. 277, 283 (1882)

²⁶ 2 BURDICK, LAW OF CRIME (1946) sec. 461.

²⁷ *Allison v State*, 74 Ark. 444, 86 S.W. 409, 413 (1904) *State v. Thomas*, 184 N.C. 757, 114 S.E. 834, 837 (1922).

²⁸ *Allison v. State*, 74 Ark. 444, 86 S.W. 409, 413 (1904).

²⁹ 231 Pa. 343, 80 Atl. 571 (1911) *Accord: Gadd v Commonwealth*, 305 Ky 318, 204 S.W. 2d 215 (1947)

“erroneous belief” cases reasonable, the homicide would have been committed in self-defense.³⁰

The rationalization behind these cases is not revealed within them. It is believed, however, that they can be justified in the light of reason and authority. Murder is one of the most serious and heinous crimes known to the law and reveals in the perpetrator an unusual callousness of heart. As pointed out by Stephen in his discussion of murder, “malice aforethought” is brutal wickedness and a homicide should be judged by the extent to which the circumstances show brutal ferocity.³¹ In the cases under discussion, the killer slew without the brutality characteristic of a murderer. That is, he killed due to a belief of danger to himself, erroneous though it may have been, and not from callousness of heart. Too, one may ask whether these cases cannot be rationalized as provocation cases. The answer is no. Provocation cannot be successfully pleaded here for the test, as we have seen, is objective, and a reasonable man in these cases would not have held the erroneous belief of danger as did the accused. Furthermore, the killing may have been done while the slayer was in full control of his reason which is not true in cases of provocation resulting in heat of passion. And the magnitude of the danger erroneously believed to exist exceeds that characteristic of the provocation cases. If the belief of danger were reasonable or the danger actual, the killing would have been in self-defense.

The rationalization of provocation rendering a homicide manslaughter and precluding murder is summed up in the statement that it does so because it produces action which is not primarily the product of reason. Authority emphasizes that where reason is swayed or out of control, the law attributes a slaying under such a condition to the frailty of human nature and murder is precluded.³² One immediately, therefore, asks if mental disorder not amounting to legal insanity rendering an accused

³⁰ *Glass v. State*, 201 Ala. 441, 78 So. 819 (1918); *Minor v. State*, 16 Ala. App. 401, 78 So. 317 (1918); *Commonwealth v. Miller*, 313 Pa. 567, 170 Atl. 128 (1934).

³¹ 3 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883) 71-73.

³² *Maher v. People*, 10 Mich. 212, 81 Am. Dec. 781 (1862); *State v. Hill*, 20 N.C. 629, 34 Am. Dec. 396 (1839). CLARK & MARSHALL, LAW OF CRIMES (4th ed. 1940) sec. 254.

altogether irresponsible, might not be considered as "reducing" murder to manslaughter. While it is not contended that such a view has been accepted to a large extent, there is some authority for it and its logic is persuasive. In *Fisher v. People*, the court was of the opinion that a degree of insanity might reduce from murder to manslaughter. Said the court, "Though such a state of mind would not excuse the homicide, it should reduce it to manslaughter, for deliberation would be absent, and that is essential to constitute murder."³³ In *State v. Green*, the court considered that the facts were insufficient to cause heat of passion in the mind of a reasonable person but held that the evidence that the accused had been wrought up, together with evidence of mental disorder was sufficient to entitle the defendant to an instruction on voluntary manslaughter. It was there said that, "When insanity is made an issue in a case of homicide, such insanity may have the effect of reducing the homicide to voluntary manslaughter."³⁴ In *Davis v. State*, the defendant was indicted for murder of one whom he had killed while under an "insane delusion" of an improper relation between his wife and deceased. The jury found that the defendant knew the difference between right and wrong. Nevertheless, a conviction of murder was reversed, the court evidently believing that the offense of voluntary manslaughter had been committed. Said the court, "How then can malice be imputed to a defendant when his reason is not merely obscured but has been swept away and kept away by an insane delusion under which he acts? How can such a defendant be guilty of murder while his delusion persists?"³⁵ There are many homicide cases in which it is said that the abnormal mental or emotional conditions of an accused should be considered.³⁶

³³ 23 Ill. 218, 232 (1859)

³⁴ 78 Utah 580, 6 P 2d 177, 186 (1931)

³⁵ 161 Tenn. 23, 28 S.W 2d 993, 996 (1930)

³⁶ *Quattlebaum v. State*, 119 Ga. 433, 46 S.E. 677 (1904) ("epilepsy") *Mangrum v. Commonwealth*, 19 Ky L. Rep. 94, 95, 39 S.W 703, 704 (1897) ("weak or feebleminded") *Rogers v. Commonwealth*, 96 Ky 24, 28, 27 S.W 813, 814 (1894) ("feebleminded") *Smith v. Commonwealth*, 62 Ky. (1 Duv.) 224, 227 (1864) ("moral insanity") *Maher v. People*, 10 Mich. 212, 221, 81 Am. Dec. 781, 786 (1862) ("peculiar weakness of mind") *State v. Adin*, 7 Ohio Dec. (Reprint) 25, 28 (1876) ("insanity, partial or temporary").

While one may hesitate to agree that the criminal law should consider mental or emotional conditions other than that of actual insanity, it is probably true that between the extremes of sanity and insanity exist many abnormalities³⁷ which may affect the ability to reason and to possess a murderous state of mind. Law should ally itself with medical science in the pursuit of a better understanding of the human mind. If it is found that reason due to disease, etc., may be defective so as to be similar to its state when affected by provocation, such should receive greater legal recognition than it has heretofore. As said by one court, "It is the condition, no matter how caused, overpowering and controlling reason, which reduces the offense to some lesser degree of criminal homicide."³⁸ Perhaps the statement of a distinguished legal writer is a fitting conclusion to this part of our study

" a technical, legal distinction would probably be drawn by the courts between the cases where intoxication and heat of blood (as factors operating upon the normal state of mind) are taken to reduce the degree of the offense, and cases where it is sought to have the presence of so called partial insanity reduce the degree of the crime of course such a technical distinction could not receive much support "³⁹

An additional category of the crime of voluntary manslaughter is comprised of those cases in which the accused intentionally killed one to prevent a crime not involving violence.⁴⁰ Thus, where the deceased when killed was committing larceny of the defendant's whiskey,⁴¹ or larceny of his hay,⁴² the homicide has been held to constitute the crime of voluntary manslaughter. These cases are not based upon heat of passion

³⁷ *Weihofen, Partial Insanity And Criminal Intent* (1930) 24 ILL. L. R. 505, 508.

³⁸ *Hempton v State*, 111 Wis. 127, 86 N.W. 596, 601 (1901).

³⁹ GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* (1925) 203. See also, *Keady Insanity and Criminal Responsibility* (1917) 30 HARV. L. R. 535, 551.

⁴⁰ *Commonwealth v. Beverly* 237 Ky 35, 34 S.W. 2d 941 (1931) (Note carefully the instruction drawn by the Court of Appeals. Also note that the facts show that the defendant killed calmly and in control of his reason having secreted himself at the scene of the attempted larceny. This probably negatives the idea of "heat and passion"). see *Gray v. Combs*, 30 Ky (7 J. J. Mar.) 478, 483, 23 Am. Dec. 431, 435-436 (1832).

⁴¹ *Howard v Commonwealth*, 198 Ky 453, 248 S.W. 1059 (1923)

⁴² *Bloom v State*, 155 Ind. 292, 58 N.E. 81 (1900)

resulting from provocation. Rather the results seem based upon the policy of the law to allow some mitigation for the desired end of preventing crime as such, or in some cases, as an indulgence to the social utility of protecting property

It is now proposed to consider together instances of voluntary manslaughter which are deemed undeserving of being designated as acceptable categories of that crime. There are cases which have taken the view that drunkenness may reduce from murder to voluntary manslaughter.⁴³ Dictum in a later case qualifies this view by saying drunkenness will reduce from murder to voluntary manslaughter only in extreme cases.⁴⁴ It is believed that such a theory is based upon a confusion of *malice* with *intent*. Of course it may be theoretically possible for drunkenness to obscure reason while yet not precluding ability to form an intention to kill. Even if this were capable of scientific proof, it might be expedient for the law to disallow a plea for mitigation due to drunkenness, as a matter of policy

Equally as weak as the drunkenness cases, are those cases which hold that homicide resulting from resistance to an attempted illegal arrest is reduced to manslaughter as a matter of law.⁴⁵ These cases, which hold that illegality of arrest always reduces murder to manslaughter have been termed "mandatory manslaughter cases."⁴⁶ Though the reasoning behind them is not readily apparent, they may be rationalized. As one writer has said

"Clearly these cases do not concern themselves with the mental condition of the killer; rather they continue to focus on the arresting official. Just as he must be vindicated and protected if acting lawfully, so in a vague way, he is punished and a deterrent against unlawful arrest is provided in an equally vague way by not making the taking of his life a supreme offense."⁴⁷

⁴³ King v. State, 90 Ala. 612, 8 So. 856, 862 (1891). see Ivory v. State, 237 Ala. 344, 186 So. 460, 462 (1939) Cagle v State, 211 Ala. 346, 100 So. 318, 320 (1924). Accord: State v. Rumble, 81 Kan. 16, 105 Pac. 1 (1909), Cheadle v. State, 11 Okla. Cr. 566, 149 Pac. 919 (1915) see U.S. v. King, 34 Fed. 302, 313 (1888).

⁴⁴ Curlee v. State, 70 Ala. 33, 195 So. 430, 431 (1940).

⁴⁵ Commonwealth v Carey, 12 Cush. (Mass.) 246 (1853) MAYES, CRIMINAL LAW (4th ed. 1938) sec. 173.

⁴⁶ Dickey *Culpable Homicides in Resisting Arrest* (1933) 18 CORN. L. Q. 373, 379.

⁴⁷ Dickey, *op. cit. supra.* n. 46 at 380.

Such cases do not talk provocation but stress individual liberty⁴⁸ "natural rights of personal liberty and security—rights held sacred by the common law and recognized and protected by constitutional enactments."⁴⁹ While this view of homicide occurring during the course of illegal arrest is held in behalf of highly valued individual liberty, it may result in using liberty unwarrantedly as a shield for murder. While it is said that "previous or express malice" will result in murder,⁵⁰ there may be malice at the time of the killing. It is believed that if it is shown that one who killed during the course of an illegal arrest was not provoked so as to kill in heat of passion, he is guilty of murder.⁵¹

In conclusion, it should be stated that the law of voluntary manslaughter is not without confusion and that cases can be found to prove almost anything. It seems clear that there is a tendency to broaden intention as a requisite constituent of voluntary manslaughter. Furthermore, to confine "mitigating" circumstances to provocation is to attempt to confine voluntary manslaughter within bounds that are too narrow to encompass it. There are cases such as drunkenness reducing from murder to manslaughter, and the illegal arrest "mandatory manslaughter cases" which should not be followed. Finally, the writer proposes the following analysis of voluntary manslaughter

Voluntary manslaughter is a separate and distinct species of felonious homicide committed intentionally or with intent to inflict great bodily harm under the following circumstances

- (1) Provocation resulting in heat of passion,
- (2) Necessity for self-preservation but the slayer was at fault in bringing on the difficulty which necessitated the homicide—"imperfect self-defense",
- (3) Killing under an erroneous and unreasonable belief of danger which if real or reasonable would constitute a killing in self-defense,

⁴⁸ *Wright v. Commonwealth*, 85 Ky 123, 2 S.W. 904 (1887).

⁴⁹ *Rafferty v. People*, 69 Ill. 111, 113, 18 Am. Rep. 601, 602 (1873)

⁵⁰ *People v. White*, 333 Ill. 512, 165 N.E. 168 (1929).

⁵¹ *State v. Cates*, 97 Mont. 173, 33 P. 2d 578 (1934), see: *Roberson v. State*, 43 Fla. 156, 29 So. 535, 539 (1901).

(4) "Partial insanity"—reason affected by mental disorder not amounting to legal insanity excusing altogether, though intention to kill existed,

(5) To prevent commission of a non-violent felony

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