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Memorandum Concerning the National Symposium (2nd Series)--The Law of Homicide

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MEMORANDUM CONCERNING THE NATIONAL SYMPOSIUM (2nd Series)

The Journal, in this issue, is printing articles from the national Symposium series dealing with "Scientific Proof and Relations of Law and Medicine" (2nd series). The Symposium contains fifty or more studies prepared by legal and scientific writers on problems of joint interest; it is one phase of a program directed to the correlation of law and science. The papers will be published in the pages of participating legal and medical journals during the Spring and Summer of 1946. The intent of the effort is to muster up legal and scientific learning relevant to various type problems which need illumination from both sources for their proper solution. The scientific writers have undertaken, under editorial direction, to prepare their studies in a basic style comprehensible to lawyers, without, however, any sacrifice of scientific authority.

The new Symposium is a continuation of the first series, published by leading law reviews and medical journals in the Spring of 1943. As before, the general Editor of the Symposium is Hubert Winston Smith, (A.B., M.B.A., L.L.B., M.D.) who holds an appointment, under the Distinguished Professorship Fund, as Professor of Legal Medicine in the University of Illinois affiliated with the College of Law and with the College of Medicine. At the time of the first Symposium, Professor Smith was Research Associate on the faculties of Harvard Law School and Harvard Medical School. Readers interested in procuring a master index containing citations to the studies published in both the first and second series of "Scientific Proof and Relations of Law and Medicine," may do so by sending 20c in currency or stamps to Professor Smith, College of Law, University of Illinois, Urbana, Illinois. Copies so reserved will be mailed between May 15 and June 1.

THE LAW OF HOMICIDE

Rollin M. Perkins

Homicide involves social behavior which commands the intense interest of lawyers and medical men, of law enforcement officers and specialists in scientific crime detection, to say nothing of the public at large. It is peculiarly fitting that a Symposium series devoted to "Scientific Proof and Relations of Law and Medicine" should feature a comprehensive, yet basic, presentation of the law of homicide.

Professor Perkins has produced a monograph on the subject which will be read with confidence and admiration by a varied audience. His exposition is illuminated by years of scholarly research which have won for him a position of eminence among scholars of the Criminal Law.—
EDITOR.

The author of this study has written upon all or part of the field on two previous occasions and needed to draw upon some of the material previously used in each. The Foundation Press, Inc., Chicago, kindly authorized the author to reproduce here all or any part of Chapters VII and X of *Elements of Police Science* (1942). And the *Yale Law Review* gave similar permission with reference to the article "A Re-Examination of Malice Aforethought," which appeared in its volume 47 at page 537 (1934). The author is deeply indebted to both publishers for such permission.

A. MURDER, MANSLAUGHTER, AND NEGLIGENT HOMICIDE

Murder is the most serious offense against the person. Indeed, it is the greatest crime of all, unless it be treason which threatens the very existence of the state itself. No other social interest is more important than that of safeguarding the lives and limbs of the individual members of the community. This social interest has given rise to the common-law crimes of murder and manslaughter, and in a few jurisdictions to an additional statutory crime of negligent homicide. All of these offenses have one common element and hence it is important to speak first of homicide.

1. HOMICIDE

Homicide is the killing of a human being by another human being.¹

The older authorities gave this definition: Homicide is the killing of a human being by a human being.² The difference between the two is that suicide is excluded by the first but included in the second. The problems of self-destruction are so different from those involved in the killing of another that it is desirable to use "suicide" and "homicide" as mutually exclusive terms, and the modern trend is in this direction.

Killing by a Human Being. It is not homicide for a man to kill an animal or for an animal to kill a man.³ An animal might be used as a *means* of committing homicide, as if one man on horseback should purposely run down another on foot with fatal consequences; but in such a case the law attributes the killing to the human rider and declares it to be homicide for this reason. In fact, whether a certain loss of life was brought about by a human being is a problem of fact rather than law except as a matter of causation. By an arbitrary rule, the law will not recognize a homicide unless the death has resulted within a year and a day from the time of the act which is alleged to have caused the death.⁴ The New York court has held that this rule has been abrogated by statute in that state;⁵ but the rule of the common law, still in effect in most jurisdictions, is that death cannot be attributed to a blow or other harm which preceded it by more than a year and a day. In such a case the loss of life is attributed to natural causes rather than to the human act which occurred so long ago.⁶

¹ *Kinsey v. State*, 49 Ariz. 201, 65 P. 2d 1141 (1937).

² Bracton, Henry de, *De Legibus et Consuetudinibus Angliae*, (London, 1569) New Haven, Yale University Press, 1940, edit. by Woodbine, George E. p. 340 (f. 120B).

³ *Ibid.*

⁴ *Head v. State*, 68 Ga. App. 759, 24 S.E. 2d 145 (1943).

⁵ *People v. Brengard*, 265 N.Y. 100, 191 N.E. 850 (1934).

⁶ *State v. Moore*, 196 La. 617, 199 So. 661 (1941).

Problems of causation in homicide cases may be much more complicated than the one having reference only to the lapse of time. If, for example, one strikes another with his fist, causing the other to fall and strike his head on a stone, thereby incurring an injury requiring an operation, and the victim dies under an anesthetic properly administered for such operation, the aggressor is recognized by law as the cause of death.⁷

The blow caused the fall, which made necessary the operation for which the anesthetic was administered. It was the "cause of a cause."⁸ In such a case there is an unbroken chain of causation and the law looks back to see the original cause. But if one man strikes another and knocks him down, whereupon a third takes advantage of the opportunity to inflict a fatal blow upon the fallen and defenseless man, the one who struck the first blow is not recognized by law as being the cause of the death if he did not anticipate the attack by the slayer and there was no agreement or cooperation between the two with reference to the attack on the deceased.⁹ If there was no such agreement, cooperation or anticipation the act of the third person is said to be a supervening cause and the death will be attributed by law solely to that cause even though that person might never have struck the fatal blow except for the peculiar opportunity afforded him by having his enemy prostrate at his feet.

For the same reason, if one man knocks down another and goes away leaving his victim not seriously hurt but unconscious, on the floor of a building in which the assault occurred, and before the victim recovers consciousness he is killed in the fall of the building which is shaken down by a sudden earthquake, this is not homicide. The law attributes such a death to the "Act of God" and not to the assault, even if it may be certain that the deceased would not have been in the building at the time of the earthquake, had he not been rendered unconscious.¹⁰ The blow was the occasion of the man's being

⁷ *Regina v. Davis*, 15 Cox C. C. 174 (1883).

Other illustrations could be given. The driver of one vehicle ran into another, frightening the horses attached to the second vehicle and causing them to run away. The run-away horses overturned that carriage with fatal consequences to the occupant. The act of the driver of the first vehicle was held to be the proximate cause of the death. *Belk v. People*, 125 Ill. 584, 17 N.E. 744 (1888).

A man struck his wife in the face with his open hand, knocking her down. As she fell her head came in contact with a chair and death resulted. The blow was held to be the proximate cause of the death. *Commonwealth v. McAfee*, 108 Mass. 458 (1871).

The defendant shot a pregnant woman. The wound caused a miscarriage, the miscarriage caused septic peritonitis, and the septic peritonitis caused the death of the woman three days later. The shooting was the proximate cause of the death. *People v. Kane*, 213 N. Y. 260, 107 N.E. 655 (1915).

⁸ See *Bishop v. State*, 73 Ark. 568, 84 S.W. 707 (1905).

⁹ *People v. Flock*, 100 Mich. 515, 59 N.W. 237 (1894).

¹⁰ See the cases discussed in *Green-Wheeler Shoe Co. v. Chicago R. I. and P. Ry. Co.*, 130 Iowa 123, 106 N.W. 498 (1906).

there, but the blow did not cause the earthquake, nor was the deceased left in a position of obvious danger. On the other hand if the blow had been struck on the sea shore, and the assailant had left his victim in imminent peril of an incoming tide which drowned him before consciousness returned, it would be homicide. The problem could be complicated by assuming death from a cause neither so obvious nor so wholly unexpected as those suggested here, but this would involve a discourse quite beyond the scope of the present undertaking.

Killing of a Human Being — Infanticide. The victim of the homicide — or alleged homicide — must also receive attention. The killing of an unborn child is not homicide according to the common law.¹¹ Statutes in a few states have provided punishment under the name of manslaughter for the killing of an unborn quick child under certain circumstances,¹² and in at least one state such a killing may constitute murder;¹³ but most states still follow the common law rule that there is no homicide of any grade unless the deceased had been born alive. If a pregnant woman is injured by some act of another person and a child is born alive who dies of the injury inflicted before birth,¹⁴ or who dies because that injury caused it to be born too soon,¹⁵ this is homicide. But if such injury caused the child to be born dead it is not homicide (except, as mentioned, in a few states by reason of special enactments). The deed may be punishable, if committed under circumstances of culpability, but is given some other label such as "foeticide,"¹⁶ "abortion" (where death is required by the statute, but the death of either the mother or the child is specified),¹⁷ or merely "felony."¹⁸

A very practical approach to this problem as a matter of social discipline is the enactment of a special statute making it a crime to conceal the birth of an infant. Most of the cases of killing before birth, or just after, are followed by concealment of the fact of birth, and could be prosecuted most success-

¹¹ Coke, Sir Edward, *Institutes of the Laws of England*, London, Lee and Pakeman, 1648. Third Part, p. 50.

By the ancient common law the killing of an unborn child was homicide, at least if the child had quickened before its death. See Bracton, Henry de, *De Legibus et Consuetudinibus Angliæ*, (London, 1569) New Haven, Yale University Press, 1940 edit. by Woodbine, George E., p. 341 (f. 121).

¹² Mich. Stats. Ann. (1935) sec. 28,554; Mo. Rev. Stats. (1929) sec. 3991; N. Y. Penal Law (1935) sec. 1050. See also the statutes in Arkansas, Florida, Kansas, Minnesota, Mississippi, Nevada, North Dakota, Oklahoma, Oregon, South Dakota, Washington and Wyoming.

¹³ See N. M. Stats. (1941) sec. 41—2405.

¹⁴ *Morgan v. State*, 148 Tenn. 417, 256 S.W. 433 (1923).

¹⁵ *Regina v. West*, 2 Car. and K. 784 (1848).

¹⁶ See Ga. Code (1933) sec. 26—1103 (making foeticide punishable by death or imprisonment for life); Neb. Rev. Stats. (1943) sec. 28—404 (one to ten years).

¹⁷ Ore. Comp. Laws (1940) sec. 3. 23—408.

¹⁸ S. C. Code (1942) sec. 1112.

fully on that basis. "It has always been difficult to procure convictions in cases like these," said the Tennessee court speaking of murder or manslaughter prosecutions based upon alleged infanticide. "The necessary evidence is hard to obtain. In England there is a statute making it a crime to conceal the birth of an infant, and reference to the English cases will show that most of the convictions obtained are of concealment. . . ."¹⁹ A few of the states in this country have legislation of this nature, such as statutes providing a penalty for concealing birth,²⁰ concealing child's death,²¹ concealing the death of a bastard,²² concealing a child so that it cannot be told whether it was born dead or alive,²³ or attempting to conceal the death of a child.²⁴

The Killing of One Seriously Ill or Wounded. At the other extreme, since no homicide ever does more than to "hasten the inevitable event,"²⁵ it is homicide to shorten the life of one suffering from an incurable disease,²⁶ or one already dying from a mortal injury.²⁷ For example, one who cuts off the head of a person who was alive when the blow first touched the body, has killed that person whether the victim had a reasonable life expectancy of many years, or could not have lived more than an hour because of some previous injury.²⁸

On the other hand, two or more, though acting quite independently, may be the cause of a single homicide. Thus if *A* stabs *B* with a knife, and a few moments later *X*, acting quite independently, shoots *B*, whereupon *B* bleeds to death, with the blood gushing from both injuries, this is homicide by both *A* and *X*.²⁹ *B* has not been killed twice, but two men contributed to his death. Since *B* died from hemorrhage, each of the wounds shortened his life and the cause of each was a cause of his death. But if *X* had chopped off *B*'s head with an axe, *B* would have died instantly and no previous injury would have contributed to his death even if it had been so severe that it would have caused death if *B* had not been killed by the axe.³⁰

¹⁹ *Morgan v. State*, 148 Tenn. 417, 421, 256 S.W. 433 (1923).

²⁰ Wash. Rev. Stats. (Remington, 1931) sec. 2452.

²¹ Ark. Dig. of Stats. (1937) sec. 2991.

²² Colo. Ann. Stats. (1935) c. 48, sec. 51; Mich. Stats. Ann. (1935) sec. 28,347; N. H. Rev. Laws (1942) c. 455, sec. 15.

²³ Mo. Rev. Stats. (1939) sec. 4392.

²⁴ N. D. Rev. Code (1943) sec. 12—2505.

²⁵ *Commonwealth v. Fox*, 73 Mass. 585, 587 (1856).

²⁶ *State v. Morea*, 2 Ala. 275 (1841). And see *Nelson v. State*, 58 Ga. App. 243, 198 S.E. 305 (1938); *Gardner v. State*, 44 Tex. C. R. 572, 575, 73 S.W. 13 (1903).

²⁷ *Walker v. State*, 116 Ga. 537, 42 S.E. 587 (1902).

²⁸ *People v. Ah Fat*, 48 Cal. 61 (1874).

²⁹ *Pitts v. State*, 53 Okla. Cr. R. 165, 8 P. 2d 78 (1932).

³⁰ A blow is not the cause of death if the loss of life was due solely to arsenical poisoning. *Lewis v. Commonwealth*, 19 Ky. L. Rep. 1139, 42 S.W. 1127 (1897).

An injury which would have been mortal is not the cause of death if some other injury intervened in such a manner that the first was not a substantial factor in the loss of life. *State v. Scates*, 50 N. C. (5 Jones) 420 (1858).

Shooting or otherwise damaging a corpse is not homicide even if done by one wholly unaware of the lifeless condition of the body.³¹

As far as the criminal law is concerned, homicide is divided into two classes — (1) innocent homicide and (2) criminal homicide.

Innocent Homicide. Innocent homicide, as a matter of criminal law, means homicide which does not involve criminal guilt. Whether a killing classed as innocent homicide in criminal law might under some circumstances impose upon the slayer an obligation to pay damages in a civil action need not receive attention here.³² Innocent homicide is of two kinds, (1) justifiable and (2) excusable.³³ Homicide is justifiable if it is either commanded or authorized by law. The two typical instances in which homicide is commanded by the state are (1) the killing of an enemy on the field of battle as an act of war and within the rules of war,³⁴ and (2) the execution of a sentence of death pronounced by a competent tribunal.³⁵ In certain other instances a homicide may be duly authorized by law although not actually commanded by the state. The typical instances are killings which are necessary in (1) arresting a felon or preventing his escape or recapturing him after escape;³⁶ (2) lawful self-defense against an assault which places the slayer in imminent peril of death or great bodily harm,³⁷ (3) actual resistance of an attempt to commit a violent felony,³⁸ such as rape³⁹ or robbery.

Homicide which is neither commanded nor authorized by law is excusable if committed under circumstances not involving criminal guilt. Common illustrations include: (1) Killing as the result of an unfortunate accident by one who was neither criminally negligent nor engaged in any unlawful act at the time,⁴⁰ (2) death caused by a firearm discharged by a

³¹ It is not homicide to throw into the sea a dead body supposed to be alive. *United States v. Hewson*, Fed. Case No. 15,360 (1884).

³² See *State v. Baublits*, 324 Mo. 1199, 1211, 27 S.W. 2d 16 (1930).

³³ *Elix v. State*, Okla. Cr. R., 138 P. 2d 139 (1943).

³⁴ *In re Fair*, 100 Fed. 149 (1900); *Commonwealth v. Shortall*, 206 Pa. 165, 55 Atl. 952 (1903). This sometimes receives specific mention in the statutes. See Tex. Stats. (Vernon, 1936) Pen. Code art. 1208.

³⁵ Hale, Sir Matthew, *The History of the Pleas of the Crown*, London, F. Gyles, 1736, vol. 1, p. 484. And see Tex. Stats. (Vernon, 1936) Pen. Code art. 1209.

³⁶ *People v. Adams*, 85 Cal. 231, 24 Pac. 629 (1890); *Scarborough v. State*, 168 Tenn. 106, 76 S.W. 2d 106 (1934).

³⁷ *Foster v. Shepherd*, 258 Ill. 164, 101 N.E. 411 (1913). And see *Cook v. State*, 194 Miss. 467, 12 So. 2d 137 (1943). As to defense of the dwelling see *Clack v. State*, 29 Ala. App. 377, 196 So. 286 (1940).

³⁸ *Williams v. State*, 70 Ga. App. 10, 27 S.E. 2d 109 (1943).

³⁹ *People v. Angeles*, 61 Cal. 188 (1882).

⁴⁰ *Jarich v. People*, 58 Colo. 175, 179, 143 Pac. 1092, 1094 (1914); *State v. Brown*, S. C. 32 S.E. 2d 825, 828 (1945). This situation is discussed *infra*, under "involuntary manslaughter."

little child,⁴¹ (3) homicide by a raving maniac, (4) certain killings in self-defense. The self-defense cases offer a nice distinction between the proper use of the words "justifiable" and "excusable" as applied to homicides. Suppose one, himself free from fault, kills an assailant under the firm belief that this drastic act is necessary to save himself from death or great bodily harm. If the killing really is necessary to save him from such grievous harm at the hands of a murderous assailant, it is authorized by law and hence justifiable. On the other hand, if he was in no danger at all but was the victim of a practical joker with a rubber dagger, who played his part so effectively that the victim reasonably believed he was in imminent danger of being killed, the law does not authorize the killing but the homicide is excusable because of the reasonable mistake of fact.⁴² Or suppose a murderous attack upon an innocent victim sufficient to authorize him to kill his assailant but the shot fired for that purpose misses the assailant and kills a bystander. The law does not authorize the slayer to kill the bystander; but if the fatal shot is fired without criminal negligence the homicide is excusable.⁴³

Criminal Homicide. Criminal homicide is homicide without lawful justification or excuse. Just one offense under the ancient common law of England, it was divided into two crimes—(1) murder and (2) manslaughter—several centuries ago. Certain statutes played an important role in this division, but these are so old that murder and manslaughter are entirely creatures of the common law as far as this country is concerned.

A. MURDER

Murder is homicide committed with malice aforethought.⁴⁴

Malice Aforethought. The phrase "malice aforethought" is peculiarly confusing to the layman because each word has a different significance in legal usage than in ordinary conversation. Interestingly enough, while the law has gradually whittled away the original meaning of the second of these words, it apparently employs the term "malice" with very little variation from its ancient import, whereas the popular usage has undergone substantial change.

Aforethought. Undoubtedly the word "aforethought" was added to "malice" in the ancient cases to indicate a design

⁴¹ See *Unkelsbee v. Homestead Fire Ins. Co.*, D. C. Mun. App. 41 A. 2d 168 (1945).

⁴² See *Wireman v. Commonwealth*, 290 Ky. 704, 162 S.W. 2d 557 (1942).

⁴³ *Pinder v. State*, 27 Fla. 370, 8 So. 837 (1891). And see *State v. Metcalfe*, 203 Iowa 155, 206 N.W. 620, 212 N.W. 382 (1927); *Noe v. Commonwealth*, 290 Ky. 194, 160 S.W. 2d 600 (1942).

⁴⁴ *Commonwealth v. Gricus*, 317 Mass. 403, 58 N.E. 2d 241 (1944); *State v. Russell*, Utah 145 P. 2d 1003 (1944).

thought out well in advance of the fatal act. But as case after case came before the courts for determination, involving killings under a great variety of circumstances, there came to be less and less emphasis upon the notion of a well laid plan. And at the present day the only requirement in this regard is that it must not be an *afterthought*. "Killing with malice" is sufficient of itself to negative any possible notion of an *afterthought*, and apart from the historical background the word "*aforethought*" would not be needed. However, since the whole development of the mental requirement of the crime of murder has centered around the words "*malice aforethought*," it will probably be wise to retain this phrase to express the concept.

The use of the word *aforethought*, however, must not be permitted to obscure the result. As a matter of law a killing may be with *malice aforethought* although it is conceived and executed "on the spur of the moment."⁴⁵ For example, if one should find himself alone with a political opponent, and should suddenly slay the other with a heavy iron bar which happened to be at hand, the slayer would be guilty of murder even if no such thought had ever entered his mind before, and he carried out the idea as rapidly as thought can be translated into action.

Malice. In ordinary conversation the word "*malice*" conveys some notion of hatred, grudge, ill-will or spite. But no such idea is incorporated in the legal concept of "*malice aforethought*."⁴⁶ Many murders are committed to satisfy a feeling of hatred or grudge, it is true, but this crime may be perpetrated without the slightest trace of personal ill-will. Illustrations include the case of a mother who kills her illegitimate offspring to hide her own disgrace, feeling at the time no hatred toward it or any other person and even having the yearnings of a mother's love toward the innocent victim — loving its life just less than her own reputation.⁴⁷ There may be added the case of the husband who killed his wife at her request, because his love was too great to permit the continuance of her suffering from a hopeless disease.⁴⁸ Even such extreme cases as these fill every requirement of *malice aforethought*.

Malice — Intent to Kill or to Inflict Great Bodily Injury. In fact every intentional killing is with *malice aforethought* unless under circumstances sufficient to constitute (1) justification, (2) excuse or (3) substantial mitigation.⁴⁹ Any intent to kill under other circumstances is malicious. The more difficult

⁴⁵ *State v. Heidelberg*, 120 La. 300, 306, 45 So. 256, 258 (1908).

⁴⁶ *People v. Lucas*, 244 Ill. 603, 91 N.E. 659 (1910).

⁴⁷ *Jones v. State*, 29 Ga. 594, 607 (1860).

⁴⁸ *People v. Roberts*, 211 Mich. 187, 178 N.W. 690 (1920).

⁴⁹ *State v. Pasour*, 183 N. C. 793, 111 S.E. 779 (1922).

aspect of the problem is that there may be malice aforethought without an actual intent to kill. The older authorities assumed the necessity of an intent to kill and then resorted to an "implied intent" of this nature when none in fact existed.⁵⁰ But now the courts speak more factually and say frankly that murder may be committed under some circumstances without an intent to kill⁵¹ (unless such intent is required by statute in the particular jurisdiction).⁵²

An intent to inflict great bodily injury is sufficient for malice aforethought if there is no justification, excuse or substantial mitigation.⁵³ Thus if one should shoot at another's leg, intending to break his leg and keep him inactive for a few weeks, but not to kill him, this would be murder if the victim should die and there was no justification, excuse or substantial mitigation for the shooting. Substantial mitigation most frequently arises under the so-called "rule of provocation" — to be considered in connection with manslaughter. Justification or excuse might arise in many ways. If, for example, a sheriff attempting to arrest a fleeing murderer finds it impossible to stop him by milder measures he may shoot. He would not be required to aim at a leg, but if he should do so with fatal consequences he would not be guilty of crime. (Nor would he under these facts if he had aimed at a vital point).⁵⁴

Malice — Intent to Do a Dangerous Act in Wanton and Wilful Disregard of Unreasonable Human Risk. Assuming the absence of justification, excuse or substantial mitigation, an act may involve such a wanton and wilful disregard of an unreasonable human risk as to constitute malice aforethought even if there is no actual intent to kill or injure.⁵⁵ For example, a

⁵⁰ Echoes of this ancient fiction appear from time to time, as in a recent Georgia case in which the court said in substance: Legal "malice" is the intent unlawfully to take human life in cases where the law neither mitigates nor justifies the killing. *Smithwick v. State*, Ga. 34 S.E. 2d 28 (1945). But a wanton or reckless state of mind may be the equivalent of a specific intent to kill and may be treated by the jury as amounting to such intention when the wilful and intentional performance of an act is productive of violence resulting in death. *Myrick v. State*, Ga. 34 S.E. 2d 36 (1945).

⁵¹ *Wright v. State*, 166 Ga. 1, 141 S.E. 903 (1927); *People v. Hartwell*, 341 Ill. 155, 157, 173 N.E. 112, 113 (1930).

⁵² For example, a few statutes modify the common law of murder by adding "purposely" to the definition. See Ohio Gen. Code (Page, 1939) sec. 12403; *Robbins v. State*, 8 Ohio St. 131 (1857); *Jones v. State*, 51 Ohio St. 331, 38 N.E. 79 (1894). See also the statutes of Minnesota, New York, Oklahoma, South Dakota and Wisconsin.

⁵³ *State v. Calabrese*, 107 N. J. L. 115, 151 Atl. 781 (1930); *Commonwealth v. Marshall*, 287 Pa. 512, 135 Atl. 301 (1926).

⁵⁴ *Petrie v. Commonwealth*, 114 Ky. 103, 109, 70 S.W. 297, 299 (1902).

⁵⁵ This is sometimes expressed in the murder statutes in some such form as this: an unlawful act "imminently dangerous to others and evincing a depraved mind, in disregard of human life, although without any premeditated design to effect the death of any particular individual." N. D. Rev. Code (1943) sec. 12—2708. It is "not the less murder because there was no actual intent to injure others." *Id.* at sec. 12—2710. See also Okla. Stats. (1941) tit. 21, secs. 701, 705.

man wants to destroy certain property by an explosion which he has no right to cause. He realizes there is great danger of killing someone by the kind of explosion he has in mind. He hopes no one will be killed but is determined to go on with his unlawful scheme notwithstanding this great risk. After taking such precautions as he can without abandonment of his plan he sets off the explosion; but in spite of his precautions a person is killed. This is homicide with malice aforethought and hence murder. In the early authorities an intent to kill was said to be "implied" from his act in such a case in spite of his obvious effort to avoid killing if possible. Now, as previously mentioned, this fiction is abandoned and it is frankly stated that such a reckless and wanton disregard of an obvious human risk is with malice aforethought even if there was no actual intent to kill or injure.⁵⁶

On this basis one may be guilty of murder for death caused by shooting "regardless of consequences" into a house,⁵⁷ or a room,⁵⁸ or a train,⁵⁹ or an automobile,⁶⁰ in which persons are known to be at the time. "If he did this," said one court in a case of this nature, "not with the design of killing anyone, but for his diversion merely, he is guilty of murder."⁶¹ In a very well-known case a man threw a heavy glass tumbler in the direction of his wife. The glass hit a lamp she was carrying and caused the oil therein to take fire and burn her, causing her death. This was held to be murder whether he intended the tumbler to hit his wife, or some other person, or whether, without any specific intent, he threw the glass with a general malicious recklessness, disregarding any and all consequences.⁶²

In other words, the intent to do an act under such circumstances that there is obviously a plain and strong likelihood that death or great bodily injury may result, is with malice aforethought unless done under circumstances of justification, excuse or substantial mitigation.⁶³

⁵⁶ "This implication of a species of malice which did not exist seems to have been invented for the purpose of bringing cases of constructive murder, so called, within what was supposed to be the legal definition of the crime. It was evidently supposed... that the phrase, *malice aforethought*, used in indictments for murder, necessarily imputed a charge of premeditated design to kill. To meet this averment, which in cases of constructive murder was not required to be proved the law was said to *imply*, that is, to supply by *mere fiction*, the requisite degree of malice. There was, however, in truth not the slightest necessity for this fiction; the interpretation of the word malice, on which it was founded, being entirely erroneous." *Darry v. People*, 10 N. Y. 120, 138 (1854).

⁵⁷ *People v. Jernatowski*, 238 N. Y. 188, 144 N.E. 497 (1924).

⁵⁸ *State v. Capps*, 134 N. C. 622, 46 S.E. 730 (1904).

⁵⁹ *Banks v. State*, 85 Tex. Cr. R. 165, 211 S.W. 217 (1919).

⁶⁰ *Davis v. State*, 106 Tex. Cr. R. 300, 292 S.W. 220 (1927).

⁶¹ *Brown v. Commonwealth*, 13 Ky. L. Rep. 372, 373, 17 S.W. 220, 221 (1891).

⁶² *Mayes v. People*, 106 Ill. 306 (1883).

⁶³ An act done with "knowledge of such circumstances that according to common experience there is a plain and strong likelihood that death will follow the contemplated act." Per Holmes, C. J., in *Com-*

Malice — Intent to Commit a Dangerous Felony — The "Felony-Murder Rule." An ancient writer spoke of death resulting from any unlawful act as murder. "If the act be unlawful," said Coke, "it is murder."⁶⁴ Lord Hale was unwilling to speak in such sweeping terms and gives illustrations of killings resulting from unlawful acts, some of which he says are murder, and others manslaughter.⁶⁵ This limitation is given more definite form by Foster, who says that an accidental homicide resulting from an unlawful act (with the qualification—"if it be *malum in se*") is murder if the crime be of the grade of felony, but that otherwise it is manslaughter.⁶⁶ Foster's view is accepted by Blackstone: "And if one intends to do another a felony, and undesignedly kills a man, this is also murder."⁶⁷

Many of the generalizations of the present day seem to indicate, as suggested by the very name of the so-called "felony-murder rule," that any homicide resulting from the perpetration or attempted perpetration of a felony is murder.⁶⁸ But Judge Stephen was inclined to believe that this, although an improvement over the original statement by Coke, is still too broad. "To take a very old illustration," he said in a famous case,⁶⁹ "it was said that if a man shot at a fowl with intent to steal it, and accidentally killed a man, he was to be accounted guilty of murder, because the act was done in the commission of a felony. I very much doubt, however, whether that is really the law, or whether the court for the Consideration of Crown Cases Reserved would hold it to be so."

The present law of England seems to come closer to the view of Judge Stephen than to that of any of the earlier writers. Not every death resulting from an act done in the perpetration of a felony is murder, but such a homicide may constitute this crime without the same degree of human risk being involved as would otherwise be requisite. In a case of death resulting from a felonious act it is not necessary to show the wilful doing of an act under such circumstances that there is obviously a plain and strong likelihood that death or great bodily injury may result. On the other hand, the element of human risk cannot be excluded entirely without at the same time

monwealth v. Chance, 174 Mass. 245, 252, 54 N.E. 551, 554 (1899).

Some of the statutes include, within first degree murder, a killing by an act greatly dangerous to others, committed under circumstances evidencing a depraved mind regardless of human life although without a design to kill. Ala. Code (1940) tit. 14, sec. 314.

⁶⁴ Coke, Sir Edward, *Institutes of the Laws of England*, London, Lee and Packman, 1648, Third Part, p. 56.

⁶⁵ Hale, Sir Matthew, *The History of the Pleas of the Crown*, London, F. Gyles, 1736, vol. 1, p. 465.

⁶⁶ Foster, Sir Michael, *Crown Case Reports*, London, W. Clark and Sons, 1809, edit. 3, p. 258.

⁶⁷ Blackstone, Sir William, *Commentaries on the Laws of England*, Oxford, Clarendon Press, 1768, Book 4, pp. 200-1.

⁶⁸ *Commonwealth v. Gricus*, 317 Mass. 403, 58 N.E. 2d 241 (1944).

⁶⁹ *Regina v. Serne*, 16 Cox C. C. 311, 312-3 (1887).

eliminating the possibility of murder. "If a man by the perpetration of a felonious act brings about the death of a fellow creature he is guilty of murder, unless when he committed the felonious act the chance of death resulting therefrom was so remote that no reasonable man would have taken it into consideration. In that case he is not guilty of murder, but only of manslaughter."⁷⁰

Such a position has much to commend it. It places upon a man who is committing or attempting a felony the hazard of guilt of murder if he creates any substantial human risk which actually results in the loss of life; and it does this without including within this offense those homicides which occur so unexpectedly that no reasonable man would have considered any risk of this nature involved. Certain felonies have been attended so frequently with death or great bodily harm, even when not intended or contemplated by the particular wrongdoer, that they must be classified as "dangerous."⁷¹ Common experience points to the presence of a substantial human risk from the mere perpetration of such wrongful acts as arson, burglary, rape or robbery. The intent to avoid all personal harm, formed in the mind of the transgressor at the time he embarks upon such felonies, is no reasonable safeguard that death will not result before he has finished. If we add to the misdeeds mentioned the crime of larceny and those offenses which directly contemplate death or great bodily harm, we will have completed the list of common-law felonies.⁷² In other words, with the single exception of larceny, the common-law felonies were either directed toward death or great bodily injury, or involved a substantial risk of this nature. And while an attempted larceny happens to be the subject of a much cited dictum,⁷³ a study of the cases repeating the formula that homi-

⁷⁰ *Regina v. Whitmarsh*, 62 Just. P. 711 (1898). The quotation is from the syllabus. To the same general effect see *Rex v. Lumley*, 22 Cox C. C. 635 (1911).

⁷¹ It has not been uncommon to provide by statute that murder committed by perpetrating or attempting certain felonies shall be of the first degree. See, for example, *Ariz. Code* (Off. 1939) sec. 43—12902; *Cal. Pen. Code* (Deering, 1941) sec. 189; *Conn. Gen. Stat.* (1930) sec. 6403. The list of offenses so named quite generally includes arson, burglary, rape and robbery. The fact that the element of human risk involved has been influential in the framing of such statutes is emphasized by additions to this list, such as mayhem, which is common, or "injury to any person or property by means of any explosive compound" (Conn.).

⁷² Pollock and Maitland add false imprisonment. Pollock, Sir Frederick, and Maitland, Frederic William, *The History of English Law*, edit. 2, Cambridge, University Press (and Boston, Little, Brown and Company) 1899, p. 470. But see Blackstone, Sir William, *Commentaries on the Laws of England*, Oxford, Clarendon Press, 1767, Book 3, p. 127.

It may be added that false imprisonment is by no means free from the risk of human harm.

⁷³ *Rex v. Plummer*, Kel. 109, 117 (1701). "So if two men have a design to steal a hen, and one shoots at the hen for that purpose, and a man be killed, it is murder in both, because the design was felonious." But the actual case involved armed resistance to arrest which is unquestionably dangerous.

cide resulting from a felony is murder, will disclose that the felony actually involved in any such case is usually one which may properly be classed as "dangerous," such as robbery,⁷⁴ rape,⁷⁵ burglary,⁷⁶ arson,⁷⁷ malicious burning,⁷⁸ or criminal abortion.⁷⁹

To test whether the so-called "felony-murder rule," in its unlimited form, actually represents the law in this country, it is necessary to consider felonies of a non-dangerous nature. Furthermore, an additional caution must be added. One who is perpetrating a felony which seems not of itself to involve any element of human risk, may resort to a dangerous method of committing it, or may make use of dangerous force to deter others from interfering. If the dangerous force thus used results in death, the crime is murder just as much as if the danger was inherent in the very nature of the felony itself. For obvious reasons a felony which does not of itself involve any substantial element of human risk, and which is not accompanied in the particular instance by the use of dangerous force, will very rarely result in the death of a human being. Because of this very few cases squarely raise the question. The matter, however, has not escaped attention in this country. The Kentucky Court has given a striking illustration in a very famous case.⁸⁰ "Under our statute," said the court, "the removal of a cornerstone is punishable by a short term in the penitentiary, and is therefore a felony. If, in attempting this offense, death were to result to one conspirator by his fellow accidentally dropping the stone upon him, no Christian court would hesitate to apply this limitation." The "limitation" mentioned is that the homicide would be manslaughter rather than murder notwithstanding it resulted from the commission of a felony. An intimation to this effect, though not so directly stated, was mentioned by the New Jersey Court over a hundred years ago.⁸¹

The leading American decision on this point is one handed down in Michigan.⁸² The defendant sold liquor under cir-

⁷⁴ *People v. Koerber*, 244 N. Y. 147, 152, 155 N.E. 79, 82 (1926).

⁷⁵ *State v. Cross*, 72 Conn. 722, 729, 46 Atl. 148, 151 (1900); *Commonwealth v. Gricus*, 317 Mass. 403, 58 N.E. 2d 241 (1944).

⁷⁶ *People v. Greenwall*, 115 N. Y. 520, 522-3, 22 N.E. 180 (1889).

⁷⁷ *State v. Cooper*, 13 N. J. L. 361, (1883).

⁷⁸ *Regina v. Horsey*, 3 Fost. and F. 287, 288-9 (1862).

⁷⁹ *State v. Leeper*, 70 Iowa 748, 30 N.W. 501 (1886).

⁸⁰ *Powers v. Commonwealth*, 110 Ky. 386, 416, 61 S.W. 935, 63 S.W. 776 (1901).

⁸¹ In stating the rule that death resulting from felony is murder, the court added this significant qualification, — "especially if death were a probable consequence of the act." *State v. Cooper*, 13 N. J. L. 361, 370 (1883). This qualification requires a greater degree of human risk than would be insisted upon for malice aforethought in a felony case, but it indicates that the court, even at that time, was not entirely satisfied with the statement in unlimited form.

⁸² *People v. Pavlic*, 227 Mich. 562, 119 N.W. 373 (1924).

cumstances amounting to a felony, to a purchaser who became drunk and died from exposure. The court refused to hold that the mere fact of this accidental death resulting from such a felony was murder. "Notwithstanding the fact that the statute has declared it to be a felony," reads the opinion, "it is an act not in itself directly and naturally dangerous to life."

The "felony-murder rule" is often couched in some such form as this: "Homicide committed while perpetrating or attempting a felony is murder." This suggests mere coincidence as sufficient for the result; but the actual requirement is causation. It is necessary to show that "death ensued in consequence of the felony."⁸³ It is not necessary, however, to show that the killing was intended or even that the act resulting in death was intended. It may have been quite unexpected. If the victim of a robbery attempts to disarm his assailant, and is killed by an accidental discharge of the weapon during a struggle for its possession, the robber is guilty of murder.⁸⁴ Emphasis upon causation rather than coincidence is important also for quite a different reason. If the killing resulted from the perpetration of the felonious design it falls within the rule even if the felony itself had been completed before the fatal blow was struck. It is homicide resulting from robbery, for example, although the robber had taken the money from his victim and was running away with it when the killing occurred.⁸⁵ And a killing has been committed during the perpetration or attempted perpetration of rape, if the fatal blow was struck either to render the victim helpless before the attack or while it was taking place, or to still her outcries after the act was completed, as an incident of the rape and at the scene thereof.⁸⁶

Another point must not be overlooked. It would be futile to recognize the sudden heat of passion, engendered by great provocation, as sufficiently mitigating to reduce a voluntary homicide to manslaughter, if in the next breath it was added that manslaughter is a dangerous felony and hence any homicide resulting from such an attempt must be murder. The distinction between murder and manslaughter, felonies both, makes it necessary to qualify any rule as to homicide resulting from felony by limiting it to felonies other than felonious homicide itself. This has usually been taken for granted, but at times has been forced upon the attention of the court. In such cases it has been held essential, in order to bring the case within the "felony-murder rule," that the slayer was engaged

⁸³ *Buel v. People*, 78 N. Y. 492, 497 (1879).

⁸⁴ *State v. Best*, 44 Wyo. 383, 12 P. 2d 1110 (1932).

⁸⁵ *State v. McCarthy*, 160 Ore. 196, 83 P. 2d 801 (1938).

⁸⁶ *Commonwealth v. Gricus*, 317 Mass. 403, 58 N.E. 2d 241 (1944).

in some *other felony*, so distinct "as not to be an ingredient of the homicide" itself.⁸⁷

Legislation in a particular jurisdiction may change this rule of the common law, the same as any other. If the statute changes the common law by adding the word "purposely" in the definition of murder, an unintentional killing will not qualify even if it results from a dangerous felony.⁸⁸ If the statute dealing with involuntary manslaughter includes under that offense any involuntary killing "in the perpetration of or attempt to perpetrate any unlawful act, other than arson, rape, robbery, burglary, or mayhem,"⁸⁹ this shows a limitation of the "felony-murder rule" not only to a dangerous felony but to these particular five.⁹⁰ At the other extreme, a statute providing that "the killing of a human being without any design to effect death by a person engaged in the commission of any felony" shall be murder seems to cover every case in which there was a legally recognizable causal connection between the felonious act and the death, however remote the element of human risk may seem to have been.⁹¹

In the absence of these or other statutory changes the "felony-murder rule" should be stated as follows: Homicide is murder if the death ensues in consequence of the perpetration or attempted perpetration of some other felony unless such other felony was not dangerous of itself and the method of its perpetration or attempt did not appear to involve any appreciable human risk. To this may be added the explanation, previously suggested, that the danger here referred to may fall considerably short of a plain and strong likelihood that death or great bodily injury will result, but must not be so remote that no reasonable man would have taken it into consideration.

⁸⁷ *State v. Fisher*, 120 Kan. 226, 230, 243 Pac. 291, 293 (1926); *People v. Huter*, 184 N. Y. 237, 244, 77 N.E. 6, 8 (1906).

⁸⁸ See Ohio Code (1930) sec. 12403; *Robbins v. State*, 8 Ohio St. 131 (1857). Compare section 12401 in which the word "purposely" does not appear.

An interesting federal case gives a comparison of the Ohio law with the Missouri law in this regard. *United Commercial Travelers of America v. Meinsen*, 131 F. 2d 176 (C.C.A. 8th, 1942).

⁸⁹ Idaho Code (1932) sec. 17—1106.

⁹⁰ The statutory limitation is at times even narrower. For example, the Mississippi Code is similar to that of Idaho in this respect, but includes only arson, rape, robbery and burglary. Miss. Code (1943) sec. 2220. But as mayhem involves a malicious intent to inflict great bodily harm a resulting homicide is murder for a reason other than the "felony-murder rule." The Louisiana Code specifies aggravated arson, burglary, aggravated kidnapping, aggravated rape, and robbery. La. Crim. Stats. (1943) art. 740-30.

⁹¹ See Wis. Stat. (1943) sec. 340.09; N. Y. Pen. Law (Gilbert, 1943) sec. 1044. And see *State v. Welch*, 25 P. 2d 211 (N. M. 1933); *Morris v. State*, 68 Okla. Cr. R. 147, 96 P. 2d 88 (1939).

The same legislative intent is indicated by including under the head of manslaughter, an involuntary homicide in the commission of an unlawful act not amounting to felony. See Ariz. Code (Off. 1939) sec. 43—2904; Cal. Pen. Code (Deering, 1941) sec. 192; Mont. Rev. Code (1935) sec. 10959.

Malice — Intent to Resist Lawful Arrest. Homicide resulting from resistance to a lawful arrest seems to require a similar explanation. It was stated by the early writers that the killing of one who was making a lawful arrest was murder.⁹² And it has frequently been stated that homicide resulting from resistance to lawful arrest, with knowledge of the facts, is murder. However, a study of the cases in which this statement appears will ordinarily disclose that the killing resulted from shooting⁹³ or from the use of some other dangerous force, such as stabbing with a knife⁹⁴ or striking with a heavy club.⁹⁵ It is sometimes said that no particular malice is required to establish murder in such a case;⁹⁶ but it would be more accurate to say that one who is resisting a lawful arrest (that is, an arrest which is authorized by law and is being made in a proper manner) is acting without justification, excuse,⁹⁷ or provocation,⁹⁸ and hence his intent to make use of deadly force is malice aforethought.

The act of resisting arrest is not likely to result in death if made under circumstances which seem to involve no substantial element of human risk. Unexpected accidents have happened, however, even in such situations; and these cases have forced the courts to re-examine the statement that any homicide resulting from resistance to lawful arrest, knowing it to be lawful arrest, is murder. The rule developed by these cases is that such homicide is manslaughter only if the loss of life was brought about quite unexpectedly from the use of force which seemed to involve no substantial element of human risk; but the use of force at all likely to cause human harm will be sufficient for malice aforethought if it is used by one who is resisting what he knows to be a lawful attempt to arrest him, even if it is a type of force that might not be sufficient for this purpose under other circumstances.

An interesting case involved these facts. One who was be-

⁹² Coke, Sir Edward, *Institutes of the Laws of England*, 1648, Third Part, p. 52; Hale, Sir Matthew, *The History of the Pleas of the Crown*, England, 1678, vol. 1, p. 457.

⁹³ *Cornett v. Commonwealth*, 198 Ky. 236, 248 S.W. 540 (1923); *Saxon v. Commonwealth*, 239 Ky. 177, 179, 39 S.W. 2d 229, 230 (1931); *State v. Genese*, 102 N. J. L. 134, 130 Atl. 642 (1925).

⁹⁴ *State v. Zeibart*, 40 Iowa 169 (1874).

⁹⁵ *Glaze v. State*, 156 Ga. 807, 120 S.E. 530 (1923).

⁹⁶ *Donehy and Prather v. Commonwealth*, 170 Ky. 474, 186 S.W. 161 (1916). The killing was by shooting.

⁹⁷ If there is legal authorization for the arrest and it is being made in a proper manner the person to be arrested has no right to resist. *Floyd v. State*, 82 Ala. 16, 2 So. 683 (1886). This is true even if he is innocent of the charge for which he is being arrested. *Ibid.* As the one being arrested is entirely in the wrong if he resists, he cannot invoke the principle of self-defense. *White v. State*, 70 Miss. 253, 11 So. 632 (1892).

⁹⁸ A lawful arrest "can, of itself, be no provocation in law, since every person is bound to submit to the regular course of justice." *State v. Spaulding*, 34 Minn. 361, 363, 25 N.W. 793 (1885).

ing lawfully arrested, objected to being put in a vehicle which was to take him to jail. As he was being forced inside, his foot came in contact with the head of one of his arresters, with fatal consequences. In a trial for murder the judge directed the jury to inquire into the circumstances of the actual contact, and to find the defendant guilty of murder if it resulted from a kick intentionally directed at the deceased, or anyone else; but to find the defendant guilty of manslaughter only, if they should find the blow was not an intentional kick, but an unintentional contact while the defendant was merely struggling in the effort to keep out of the vehicle. The verdict in that case was "guilty of manslaughter."⁹⁹ The same problem was presented in quite a different form in another case. An officer stepped upon the running board of defendant's car for the purpose of making an arrest which was entirely lawful under the circumstances. The defendant was quite near the state line at the moment and attempted to drive across a bridge into the neighboring jurisdiction. In this attempt the car struck the bridge and the officer was killed. It is quite possible that the act may have been sufficiently dangerous to support a conviction of murder; but the jury was not permitted to inquire into this aspect of the matter. The trial judge had in mind the old statement that one who has caused death by resisting an arrest he knew to be lawful is guilty of murder, and he submitted the case to the jury on this basis. This was held to be such prejudicial error as to call for a new trial. The defendant was entitled to have the jury determine whether his wrongful conduct in resisting a lawful arrest did, or did not, involve a substantial element of human risk.¹⁰⁰

"Man-Endangering-State-of-Mind." Since murder cannot be adequately defined in terms of an intent to kill, without resort to the ancient fiction whereby such an intent was "implied" in certain cases in which it did not exist in fact, some other phrase must be used. And since malice aforethought is neither a self-explanatory phrase, as used in the law, nor one which designates any single and invariable frame of mind, it is probably wise to employ a phrase to which a meaning may be assigned quite arbitrarily. The phrase "man-endangering-state-of-mind" is suggested for this purpose with the assumption that it be arbitrarily understood to include every attitude of mind which includes (1) an intent to kill, or (2) an intent to inflict great bodily injury, or (3) an intent to do an act in wanton and wilful disregard of an unreasonable human risk (i.e. the

⁹⁹ *Regina v. Porter*, 12 Cox C. C. 444 (1873).

¹⁰⁰ *State v. Weisengoff*, 85 W. Va. 271, 101 S.E. 450 (1919).

The Louisiana Code expressly provides that it is manslaughter to kill by resisting arrest by means and in a manner not inherently dangerous. La. Crim. Stats. (1943) art. 740-30.

wilful doing of an act under such circumstances that there is obviously a plain and strong likelihood that death or great bodily injury may result), or (4) an intent to perpetrate a dangerous felony, or a felony not dangerous in itself, by means involving a substantial element of human risk (or under some statutes any felony) or (5) an intent to resist a lawful arrest by means involving a substantial element of human risk.¹⁰¹

Definition of Malice Aforethought. The phrase "man-endangering-state-of-mind," if accepted for this purpose and with this explanation, tells only part of the story, for such a state of mind will not constitute malice aforethought if there are circumstances of justification, excuse or mitigation. It is the course of caution to call attention to the fact that malice aforethought is a matter of mind, however convenient it may be to speak in terms of the absence of circumstances of justification, excuse or mitigation. It is a psychical fact just as homicide is a physical fact. It is the particular kind of mens rea or mind at fault required for the more serious of the two types of felonious homicide. Perhaps it would be more accurate to speak of it as a label placed upon a group of states of mind, any one of which is sufficient for murder. A man-endangering-state-of-mind is not malice aforethought if there are circumstances of justification, excuse or mitigation; but such a state of mind in the presence of these circumstances is a different psychical fact than it would be if they were wanting. An intent to kill, to give a very limited illustration, may be the same intent, in a certain sense, whether it is for self-preservation, or is formed in a sudden rage engendered by great provocation, or is part of a well-laid plan for financial gain; but the psychical fact in its totality is not the same in any two of these. Furthermore, the appraisal or evaluation of appearances is also a psychical fact. Hence an intent to kill for the purpose of self-defense under circumstances in which there is reasonable ground for believing this drastic step to be necessary, is psychically different from an intent to kill in self-defense with the same belief but when there is nothing to warrant such a belief. In fact no inquiry into justification, excuse or mitigation in a homicide case can be dissociated from the mental element involved in criminal guilt. Perhaps the most extreme test of this point is found in the act of carrying out a lawful sentence of death.

If a sheriff is carrying out such a sentence what difference does it make what his state of mind may be? The fallacy in-

¹⁰¹ A recent case overlooked the fifth subdivision but included the other four, pointing out that malice arises from a design to kill, or to do great bodily injury, or the design to do an act knowing that it is likely to cause death or great bodily injury, or the design to perpetrate one of the felonies designated in the statute. *State v. Russell*, Utah, 145 P. 2d 1003 (1944).

volved in this question lies in the fact that the mental element — the mind without fault — has been satisfied by the assumption that he is "carrying out" a lawful sentence of death. If a sheriff who had no knowledge of any sentence of death having been pronounced should take the life of his prisoner for some unlawful purpose of his own, it would be no answer to a murder charge that there existed, unknown to him, a mandate for him to execute that man on that very day. The extreme unlikelihood of the officer's being unaware of the existence of the sentence does not affect the legal view of the situation. The knowledge that he is carrying out a sentence of the court makes this altogether different as a psychical fact than if he acted in ignorance of this matter. A felon may be killed lawfully under certain circumstances other than the execution of a sentence of death, as for example where this is the only means of preventing him from murdering an innocent victim, or of stopping his flight from arrest after the murder is committed. And there is an interesting case in which the killing of an actual felon under circumstances sufficient to justify the killing, had the facts been known, was held not to constitute a justification in favor of one who did not know or have any reason to believe that the person was a felon.¹⁰²

With this emphasis upon the fact that the focus is centered entirely upon the mental facts involved, although the mental picture cannot be portrayed adequately without reference to peculiarities in the factual situation in which the mind is called upon to function, the following definition is suggested: *Malice aforethought is an unjustifiable, inexcusable and unmitigated man-endangering-state-of-mind.* In other words this phrase requires the presence of one, or more, of the five intents mentioned above and the absence of every sort of justification, excuse or substantial mitigation.

Even an intentional killing is no crime at all if done under circumstances constituting a legally recognized justification or excuse. Such a homicide is not criminal, and this field has been considered above under the heading of "innocent homicide." It is unnecessary to repeat here what was said in that connection. By definition a man-endangering-state-of-mind does not constitute malice aforethought if it is justifiable or excusable.

A man-endangering-state-of-mind may fall short of malice aforethought even in the absence of justification or excuse. This is because of the requirement that it must also be unmitigated. As a matter of juridical science, any circumstance of substantial mitigation should be sufficient to reduce to manslaughter, a killing that would otherwise be murder. Suppose, for example, the defendant thought he was in imminent dan-

¹⁰² *People v. Burt*, 51 Mich. 199, 16 N.W. 378 (1833).

ger of death and must kill to save himself from being murdered, and that he did kill for that reason. Suppose, also, there was no actual danger to his life at the moment, and the facts fell a little short of reasonable grounds for a belief in such danger. His homicide is not excused; but if the circumstances came rather close to such as would constitute an excuse his guilt is of manslaughter rather than murder,¹⁰³ assuming the absence of any peculiar statute in the jurisdiction which might change the common law in this regard. For the same reason, a killing to prevent crime may fall short of justification or excuse and yet come close enough to be regarded as having been committed under circumstances of substantial mitigation, sufficient to reduce the homicide to manslaughter.¹⁰⁴ In the vast majority of cases, however, such mitigation has involved the so-called "rule of provocation."

B. MANSLAUGHTER

Classification of Manslaughter. The common law tended to focus attention upon two points in homicide cases. At one side, careful attention was given to homicides committed with malice aforethought. At the other extreme, close study was given to all claims of justification or excuse in homicide cases. All homicides committed without malice aforethought, but also without justification or excuse, were dealt with as manslaughter.¹⁰⁵ Hence this is definitely a "catch-all" group, and confusion can best be avoided by thinking of this crime in terms of this process of elimination. Manslaughter is any homicide which is neither murder nor innocent homicide, — and such a killing may be either intentional or unintentional.¹⁰⁶

Manslaughter is commonly referred to as being of two kinds, — (1) voluntary and (2) involuntary. This was purely a factual distinction at common law, the punishment being the same for both. Some statutes use the common-law plan in this regard,¹⁰⁷ some follow the same plan except for the establishment of a different penalty for the two types mentioned,¹⁰⁸ and a few have an entirely different scheme of classification as will be pointed out under "degrees of criminal homicide."

¹⁰³ *Bliss v. State*, 117 Wis. 596, 94 N.W. 325 (1903).

¹⁰⁴ *Williams v. State*, 127 Miss. 851, 90 So. 705 (1922).

¹⁰⁵ Some of the statutes have employed this definition. For example: "Every other killing of a human being by the act, procurement, or culpable negligence of another, when such killing is not murder in the first or second degree, or is not justifiable or excusable as provided in this chapter, shall be deemed manslaughter." *Oreg. Comp. Laws* (1940) sec. 3.23—410. See also *Fla. Comp. Stats. Ann.* (1941) sec. 782.07; *N. Y. Pen. Law* (Gilbert, 1943) sec. 1049.

¹⁰⁶ *Pecple v. Freel*, 48 Cal. 436, 437 (1874); *Dye v. State*, 127 Miss. 492, 90 So. 180 (1921); *State v. Nortin*, 170 Ore. 296, 133 P. 2d 252 (1943).

¹⁰⁷ See, for example, *Iowa Code* (1939) sec. 12919.

¹⁰⁸ See, for example, *Utah Code* (1943) sec. 103-28-6.

An act causing death may have been intentional or unintentional. Moreover, an intended act may have unintended consequences. If death results from shooting, for example, the discharge itself may have been intentional or unintentional; and if the one holding the gun purposely pulled the trigger, the resulting loss of life may have been the very end he was seeking to achieve, or it may not have been contemplated by him at all, — to mention only the extreme possibilities. Hence in such a case it is essential to distinguish between an intentional shooting and an intentional killing. An intentional act, in the sense of pulling a trigger or driving an automobile, may cause involuntary manslaughter;¹⁰⁹ but an intentional killing cannot fall within this category.¹¹⁰ The other side of the problem is not so simple. Many statements can be found to the effect that voluntary manslaughter requires an intentional killing;¹¹¹ 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.¹¹² This latter usage has the advantage of simplicity because unlawful homicide with a man-endangering-state-of-mind is murder in the absence of mitigation, whereas unlawful homicide without such a state of mind is only manslaughter in any event.¹¹³

(1): VOLUNTARY MANSLAUGHTER

It is not the purpose of the law to unbridle the passions of men. On the contrary, one very important aim of the criminal law is to induce men to keep their passions under proper control. At the same time the law does not ignore the weaknesses of human nature. Hence, as a matter of common law, an unlawful killing may even be intentional and yet of a lower grade than murder.¹¹⁴ This has been changed in some jurisdic-

¹⁰⁹ *State v. McVay*, 47 R. I. 292, 297, 132 Atl. 436 (1926).

¹¹⁰ *Jeffries v. State*, 23 Ala. App. 401, 126 So. 177 (1930); *Nichols v. State*, 187 Ark. 999, 63 S.W. 2d 655, 657 (1933). And see *Jackson v. State*, 69 Ga. App. 707, 26 S.E. 2d 485 (1943).

¹¹¹ See, for example, *Alexander v. State*, 160 Ga. 769, 129 S.E. 102 (1925); *Curtis v. Commonwealth*, 169 Ky. 727, 184 S.W. 105 (1916); *People v. Ryczek*, 224 Mich. 106, 194 N.W. 609 (1923).

¹¹² See, for example, *Reynolds v. State*, 154 Ala. 14, 17, 45 So. 894 (1908); *Burchett v. Commonwealth*, 247 Ky. 21, 56 S.W. 2d 571 (1933); *State v. Cantieny*, 34 Minn. 1, 24 N.W. 458 (1885); *Commonwealth v. Micuso*, 237 Pa. 474, 477, 117 Atl. 211 (1922); *Beauregard v. State*, 146 Wis. 280, 285, 131 N.W. 347 (1911).

The requirement of a "voluntary killing" for first degree manslaughter is satisfied if death resulted from an act greatly dangerous to the lives of others. *Rainey v. State*, Ala. . . ., 17 So. 2d 687 (1944).

¹¹³ The phrase "man-endangering-state-of-mind" is used arbitrarily to include the state of mind of one intending to commit a dangerous felony (or in some jurisdictions any felony), as well as the intent to kill, the intent to inflict great bodily injury or the intent to do an act which obviously involves a strong likelihood that death or great bodily injury may result. See under "malice aforethought."

¹¹⁴ *People v. Slater*, 60 Cal. App. 2d 358, 371, 140 P. 2d 846 (1943).

tions by a statutory definition of murder broad enough to include such homicides. This is true, for example, where the enactment provides in substance that the killing of a human being, unless excusable or justifiable, is murder when perpetrated with a design to effect the death of the person killed or another¹¹⁵ (and also in certain instances when committed without such design). As such change is the exception rather than the rule it is important to give careful consideration to the common law in this regard.

The common statement with reference to the first type is this: An intentional homicide committed in a sudden rage of passion engendered by adequate provocation, and not the result of malice conceived before the provocation, is voluntary manslaughter. It is necessary to add that intentional homicide committed under other circumstances of mitigation may be voluntary manslaughter; but the consideration of those problems will be postponed for later consideration because they are not involved in most of the actual cases.

The "Rule of Provocation." In order for a killing which would otherwise be murder to be reduced to manslaughter under the "rule of provocation" there are four requirements:

- (1) There must have been adequate provocation.
- (2) The killing must have been in the heat of passion.
- (3) It must have been a sudden heat of passion — that is, the killing must have followed the provocation before there had been a reasonable opportunity for the passion to cool.
- (4) There must have been a causal connection between the provocation, the passion, and the fatal act.

Adequate Provocation. There must not only be provocation, but provocation of such a nature as to be recognized by law as *adequate*¹¹⁶ for this purpose. To emphasize this requirement some courts have spoken in other terms such as *great*¹¹⁷ provocation or *lawful*¹¹⁸ provocation. The latter form of expression is objectionable because the provocation is itself an *unlawful* act of another, since a *lawful* act, even if it involves physical violence, is not recognized by law as a mitigating circum-

¹¹⁵ "The killing of a human being, unless it is excusable or justifiable, is murder in the first degree when perpetrated with a premeditated design to effect the death of the person killed or another, and shall be punished by imprisonment for life in the state prison.

"Such killing of a human being is murder in the second degree, when committed with a design to effect the death of the person killed or of another, but without deliberation and premeditation...." Minn. Stats. (Mason, 1927) secs. 10,067, 10,068. (The following section does not require such design). See also the statutes of New York, Oklahoma, South Dakota and Wisconsin.

¹¹⁶ *McHargue v. Commonwealth*, 231 Ky. 82, 87, 31 S.W. 2d 115 (1929).

¹¹⁷ *State v. Horn*, 116 N. C. 1037, 21 S.E. 604 (1895).

¹¹⁸ *State v. McKinzie*, 102 Mo. 620, 633, 15 S.W. 149 (1890).

stance.¹¹⁹ The choice between the other two is merely a matter of convenience; the result is the same whether the requirement is worded in terms of "adequate provocation" or "great provocation." A provocation not "adequate" or "great" enough to reduce a voluntary killing to manslaughter may nevertheless be sufficient to bring it within the category of second degree murder rather than first,¹²⁰ or to entitle it to consideration in the assessment of the punishment for murder if the law gives discretion in this regard,¹²¹ but such are not the problems under consideration here.

The problem of provocation in the homicide cases cannot be considered effectively without keeping constantly in mind the relation of the retaliatory act to the provocative one. The foundation principle is that where the former is not unreasonably excessive and out of proportion to the latter, the basis of mitigation is established (if the latter was not altogether inadequate); but where it is unreasonably excessive and out of proportion no mitigation will be recognized.¹²² Thus a greater provocation will be required to reduce an intentional killing to manslaughter than would be sufficient for this purpose if the homicide was not actually intended, although under circumstances that would make it murder apart from the rule of provocation.¹²³

Whether or not a certain provocation is legally adequate for this purpose is determined by an objective test.¹²⁴ The question is not its effect upon the particular person, but the effect it would be expected to produce upon the ordinary reasonable man. To be "adequate" the provocation must be of a nature calculated to inflame the passions of the ordinary reasonable man.¹²⁵ The standard is the same for all men, — sober or drunk.¹²⁶

Adequate Provocation — Battery. Not every technical battery is sufficient to constitute adequate provocation,¹²⁷ but a hard blow inflicting considerable pain or injury will ordinarily be sufficient.¹²⁸ Knocking a person down with a heavy stick,¹²⁹ or hitting him over the head with a revolver,¹³⁰ are rather obvious instances of such force; but a weapon is not indispensable.

¹¹⁹ *Holmes v. State*, 88 Ala. 26, 30, 7 So. 193 (1889); *State v. Spaulding*, 34 Minn. 361, 364, 25 N.W. 793 (1885).

¹²⁰ *State v. Robinson*, Mo. . . ., 185 S.W. 2d 636 (1945).

¹²¹ *Kiersey v. State*, 131 Ark. 287, 491, 199 S.W. 532 (1917).

¹²² *State v. Ellis*, 101 N. C. 765, 7 S.E. 704 (1888).

¹²³ *State v. Hoyt*, 13 Minn. 132 (1868). And see *State v. Vance*, 17 Iowa 138, 144-5 (1864).

¹²⁴ *People v. Gingell*, 211 Cal. 532, 545, 296 Pac. 70 (1931).

¹²⁵ *Rivers v. State*, 75 Fla. 401, 407, 78 So. 343 (1918).

¹²⁶ *Bishop v. United States*, 107 F. 2d 297 (App. D. C., 1939).

¹²⁷ *Commonwealth v. Webb*, 252 Pa. 187, 97 Atl. 189 (1916).

¹²⁸ *State v. Joiner*, 161 La. 518, 524, 109 So. 561 (1926).

¹²⁹ *State v. Brodnox*, 61 N. C. 41 (1866).

¹³⁰ *Scott v. State*, 49 Tex. Cr. R. 386, 93 S.W. 112 (1906).

ble for this purpose. Thus even a blow with the fist may be sufficient to reduce an intentional killing to manslaughter,¹³¹ particularly if it is a blow in the face¹³² or a "staggering" blow.¹³³

The need of considering all of the circumstances of the particular case must not be overlooked. In one case, for example, a man killed his wife by inflicting five slashes with a razor after she had hit him over the head with a small poker about fifteen inches long. He claimed the blow caused a swelling but it left no mark visible later in the day. This killing was held to have been without adequate provocation,¹³⁴ although no one would doubt the possibility of a blow with a fifteen-inch poker being sufficient for mitigation if struck with sufficient violence.

No amount of force which an individual was privileged by law to use will be recognized as adequate provocation, and hence the hard blow must have been unlawful to meet the present requirement.¹³⁵

Adequate Provocation — Assault. If an assault results in a battery, the latter receives chief attention as far as provocation is concerned. There are homicide cases, however, in which the fatal force was used by the slayer because of an actual or apparent attempt to commit a battery upon him although it did not result in an actual application of force to his person. In these cases it is necessary to make a sharp distinction between defensive force and vindictive force. If the one assailed has killed his assailant within the legal privilege of self-defense he is guilty of no crime at all.¹³⁶ That is not the present problem. For the moment we are concerned with a killing caused, not in self-defense, but in the heat of passion engendered by an attack that failed and after the immediate danger had passed. In one case, for example, deceased shot at the defendant and missed him. This so angered the defendant that he shot the other in the back while he was running away, thus causing his death. This was clearly not within the privilege of self-defense, but this provocation was held sufficient to reduce the grade of homicide to manslaughter.¹³⁷

An unsuccessful attempt to commit a battery is seldom likely to arouse the same degree of passion in a reasonable man as will be engendered by the actual blow intended. Hence the fact that the assailant did not actually hit the defendant is one

¹³¹ *State v. Ferrell*, 320 Mo. 319, 6 S.W. 2d 857 (1928).

¹³² *Stewart v. State*, 78 Ala. 436, 440 (1885).

¹³³ *State v. Yarbrough*, 8 N. C. 78 (1820).

¹³⁴ *Commonwealth v. Webb*, 252 Pa. 187, 97 Atl. 189 (1916).

¹³⁵ *Holmes v. State*, 88 Ala. 26, 30, 7 So. 193 (1889); *State v. Spaulding*, 34 Minn. 361, 364, 25 N.W. 793 (1885).

¹³⁶ *People v. Motuzas*, 352 Ill. 340, 185 N.E. 614 (1933); *State v. Shannon*, 214 Iowa 1093, 243 N.W. 507 (1932).

¹³⁷ *Beasley v. State*, 64 Miss. 518, 8 So. 234 (1886).

of the important circumstances in the particular case. Such an attack is less likely to be regarded as adequate provocation than one that succeeds. But just as not every actual blow will be sufficient for this purpose, so not every failure will leave it insufficient. The unsuccessful attack may be so vicious in extreme cases as to constitute adequate provocation. As said by one court: "A wilful killing of a human being may be voluntary manslaughter rather than murder if it be provoked by... an attempt to commit a serious personal injury upon the slayer or by other equivalent circumstances calculated to excite sudden and uncontrollable passion."¹³⁸

Adequate Provocation — Mutual Quarrel or Combat. A wordy altercation will not of itself be sufficient to mitigate to manslaughter a killing that is otherwise murder.¹³⁹ On the other hand a mutual encounter which goes beyond words to actual blows or to a manifestation of intent to use immediate and violent force may constitute adequate provocation;¹⁴⁰ and in determining the adequacy of the provocation in such a case the entire quarrel, including the words, will be taken into consideration.¹⁴¹ Several cautions are needed in this regard. (1) If homicide results from force which was neither intended nor likely to cause death or great bodily injury, it will not be murder if no more than ordinary (non deadly) fight or struggle was involved,¹⁴² hence the problem of provocation does not become important in such a situation. (2) Attack and defense are not mutual.¹⁴³ If one person attacks another who defends himself with no more force than he is privileged by law to use for his own protection, there is no problem of provocation. The assailant is acting without mitigation of any sort¹⁴⁴ and the defender is fully justified or excused.¹⁴⁵ (3) If an unlawful attack is resisted by force obviously in excess of what is needed in self-defense, the case may or may not be within the rule of provocation. There is no mitigation in favor of the original assailant if he intended in the beginning to kill or to inflict great bodily injury;¹⁴⁶ whereas if the original assailant intended only a non-deadly scuffle the counter attack may be so excessive as to constitute adequate provocation.¹⁴⁷ Whether the original assault was of a deadly nature or not, it may be

¹³⁸ *Swain v. State*, 151 Ga. 375, 376-7, 107 S.E. 40 (1921).

¹³⁹ *State v. Lee*, 6 W. W. Harr. 11, 171 Atl. 195 (Del. 1933).

¹⁴⁰ *Richardson v. Commonwealth*, 128 Va. 691, 104 S.E. 788 (1920).

¹⁴¹ *Regina v. Smith*, 4 Fost. and F. 1066, 176 Eng. Rep. 910 (1866).

¹⁴² *Lanier v. State*, 31 Ala. App. 242, 15 So. 2d 278 (1943).

¹⁴³ *McDuffie v. State*, 46 Ga. App. 691, 168 S.E. 910 (1933).

¹⁴⁴ *Ballard v. Commonwealth*, 156 Va. 980, 993-4, 159 S.E. 222 (1931).

¹⁴⁵ *Allen v. United States*, 157 U. S. 675, 39 L. ed. 854, 15 Sup. Ct. R. 720 (1895).

¹⁴⁶ *Murphy v. State*, 37 Ala. 142, 146 (1861).

¹⁴⁷ *State v. Hill*, 20 N. C. 518, 4 Dev. and Bat. 491 (1839).

sufficient to constitute adequate provocation as far as the victim of the original assault is concerned.

Suppose, for example, two men were engaged in a tussle on a vacant lot and one caused the death of the other. If it was a friendly encounter — a mere test of strength without anger and without intent to cause serious harm, it was not unlawful. And if death resulted quite unexpectedly from such a struggle it is no crime at all, but excusable homicide. If the facts were the same except that the two were mutually engaged in an angry fight — but without intent to cause death or great bodily injury — and death should result quite unexpectedly to one, the other would be guilty of manslaughter.¹⁴⁸ This is not because of the rule of provocation but because the death resulted from an unlawful, although apparently not dangerous, battery. Such an accidental killing is not excused by the common law because it resulted from unlawful conduct characterized as *malum in se*.¹⁴⁹ This, it may be added, is the law in most of our states today, although statutes in some states excuse an *accidental* killing in the heat of passion upon a sudden combat when no undue advantage is taken, and no dangerous weapon used.¹⁵⁰

If the struggle mentioned was an encounter in which one had made an unlawful attack and the other was defending with merely such force as he was privileged by law to employ for his protection, and death should result quite unexpectedly from force neither intended nor likely to cause death or great bodily injury, the issue of crime would depend upon who survived. If the assailant caused the death of his victim he would be guilty of manslaughter, — death unexpectedly resulting from an *unlawful* battery which was not intended or likely to produce such a result. If the innocent defender unexpectedly caused the death of his assailant by force he was privileged to use in his own defense, it is excusable homicide.

If the killing was intentional, or resulted from the use of deadly force (force either intended or likely to cause death or great bodily injury) then it may become important to consider the question of provocation. If the two were engaged in a mutual fight of an angry and unlawful nature the killing is not excused but the blows inflicted upon the slayer in the encounter may be sufficient for adequate provocation. If one unlawfully attacked the other, and killed him intentionally,

¹⁴⁸ *Kearns v. Commonwealth*, 243 Ky. 745, 43 S.W. 2d 1009 (1932).

¹⁴⁹ *Regina v. Canniff*, 9 Car. and P. 359, 173 Eng. Rep. 868 (1840). But see *Flourney v. State*, 124 Tex. Cr. R. 395, 63 S.W. 2d 558 (1933). The actual holding in the Texas case was that the facts did not constitute an aggravated assault under the statutes of that state. See Tex. Stats. (Vernon, 1936) Art. 1147.

¹⁵⁰ See, for example, Cal. Pen. Code (Deering 1941) sec. 195; Miss. Code, (1942) sec. 2219; Oreg. Comp. Laws (1940) sec. 3.23—418; Wis. Stats. (1943) sec. 340.30.

he is guilty of murder unless he had no intent to kill in the beginning and the one assaulted struck back with force obviously unnecessary for self-defense and greatly excessive in view of the nature of the original attack. Such a counter attack may be so obviously excessive as to constitute adequate provocation, and if so the slayer, — although the original assailant — is guilty of manslaughter rather than murder.¹⁵¹ If the victim of the assault killed his assailant under circumstances in which he is not excused (because he used force obviously in excess of that needed for his own defense) he is probably guilty of manslaughter only because of the provocation, except that if the "attack" was only a technical assault and battery which neither caused nor threatened any serious pain or injury it would be insufficient for adequate provocation and the killing would be murder.

No killing is attributed to a sudden mutual combat if the intent to kill or to inflict great bodily harm was formed prior to the commencement of the encounter.¹⁵² If one by words or acts provokes a difficulty for the purpose of killing the other, or of doing him great bodily injury, and does kill the other in carrying out his plan, he is guilty of murder.¹⁵³ Whatever blows he may receive from his adversary in such an encounter are ignored as far as mitigation is concerned because his deadly intent was formed before the blows were received.¹⁵⁴

Another matter requires special attention. One who is not in any sense seeking an encounter, but has reason to fear an unlawful attack upon his life, does not forfeit his privilege of self-defense merely by arming himself in advance.¹⁵⁵ But one who has reason to expect an encounter into which he will enter as willingly as his adversary, and who secretly arms himself in order to have an unfair advantage over the other during their mutual combat, has given the matter entirely too much thought to be entitled to the rule of mitigation recognized in certain cases of killing in a *sudden* heat of passion.¹⁵⁶ This is not to be understood to exclude from mitigation every case in which

¹⁵¹ *State v. Hill*, 20 N. C. 518, 4 Dev. and Bat. 491 (1839). The explanation is sometimes given in terms of a privilege of "imperfect self-defense." Because of having entered the combat willingly he does not have the privilege of perfect self-defense, which would exculpate him entirely, but because he entered the fight with no intent to kill or inflict great bodily injury and during the contest was required to kill to save his own life, his act was within a privilege of "imperfect self-defense," leaving him guilty of manslaughter rather than murder. *Reed v. State*, 72 Tex. Cr. R. 103, 105, 161 S.W. 97 (1913).

¹⁵² *State v. Miller*, 223 N. C. 184, 25 S.E. 2d 623 (1943).

¹⁵³ *State v. Flory*, 40 Wyo. 184, 201, 276 Pac. 458 (1929).

¹⁵⁴ *Ballard v. Commonwealth*, 156 Va. 980, 159 S.E. 222 (1931).

¹⁵⁵ *Allen v. United States*, 157 U. S. 675, 39 L. ed. 854, 15 Sup. Ct. R. 720 (1895); *State v. Bristol*, 53 Wyo. 304, 84 P. 2d 757 (1938).

¹⁵⁶ *Ex parte Nettles*, 58 Ala. 268 (1877); *State v. Hildreth*, 31 N. C. 429 (1849); *State v. McCants*, 1 Speers 384 (S. C. 1843); *Slaughter v. Commonwealth*, 11 Leigh 681 (Va. 1841).

an unarmed fighter is killed with a deadly weapon. Heat of passion suddenly engendered by actual blows received in mutual combat may be sufficient to reduce even such a homicide to manslaughter.¹⁵⁷ The mere fact that when the quarrel began the slayer had a deadly weapon upon his person while the other was not so armed is not alone sufficient to preclude the possibility of mitigation,¹⁵⁸ unless such a result is required by some unusual statute.¹⁵⁹ The question is whether or not the slayer entered the combat with the intention of using this dangerous instrument.¹⁶⁰ Hence it is necessary to discriminate between the use of a deadly weapon procured beforehand for this purpose, and the sudden angry use, in the heat of combat, of a weapon which the slayer merely happened to have available at the moment.¹⁶¹

The fact that both participants have an unlawful intent to kill will not be a mitigating circumstance for either if such intent was not formed and acted upon suddenly in the heat of combat.¹⁶² In "the case of a deliberate fight, such as a duel, the slayer and his second are murderers."¹⁶³ Even he who acted as second for the one vanquished in the duel has been held guilty of murder.¹⁶⁴ The absence of seconds or other requisites of the formal duel will not prevent the homicide from being murder.¹⁶⁵ Nor is it important, on the other hand, that the duel was fairly conducted.¹⁶⁶ If sufficient time elapsed "between the quarrel and the 'going out to fight' to enable blood to cool and passion to subside, the killing will be murder and not manslaughter."¹⁶⁷

A mere challenge to a fist fight by an unarmed man is not sufficient to reduce an intentional killing to manslaughter.¹⁶⁸ The same must be said of a threat to slap, made in the course of a verbal dispute,¹⁶⁹ and the further step of removing the coat in preparation for fisticuffs.¹⁷⁰ Even an actual physical contact during the course of a quarrel may be insufficient for this purpose. In one case, for example, the deceased pushed

¹⁵⁷ *State v. Hoyt*, 13 Minn. 132, 149 (1868).

¹⁵⁸ *Gourks v. United States*, 153 U. S. 183, 38 L. ed. 680, 14 Sup. Ct. R. 806 (1894).

¹⁵⁹ It was held that the Alabama statute required a conviction of murder where the killing was in a sudden affray, by means of a weapon concealed before the fight started, if the deceased had no deadly weapon drawn. *Caldwell v. State*, 203 Ala. 412, 84 So. 272 (1919).

¹⁶⁰ *Rivers v. State*, 75 Fla. 401, 78 So. 343 (1918).

¹⁶¹ *State v. Barnwell*, 80 N. C. 466 (1879).

¹⁶² *Strong v. State*, 85 Ark. 536, 109 S.W. 536 (1908).

¹⁶³ *State v. Rhodes*, *Houst. Cr. R.* 476, 497 (Del. 1877).

¹⁶⁴ *Regina v. Barronet*, *Dears* 51, 169 Eng. Rep. 633 (1852).

¹⁶⁵ *Thomas v. State*, 61 Miss. 60, 66 (1883); *Bundrick v. State*, 125 Ga. 753, 54 S.E. 683 (1906).

¹⁶⁶ *Regina v. Barronet*, *supra* f.n. 164.

¹⁶⁷ *People v. Sanchez*, 24 Cal. 17, 27 (1864).

¹⁶⁸ *Slaughter v. Commonwealth*, 11 Leigh 681 (Va. 1841).

¹⁶⁹ *Ballard v. Commonwealth*, 156 Va. 980, 159 S.E. 222 (1931).

¹⁷⁰ *State v. Doherty*, 72 Vt. 381, 48 Atl. 658 (1900).

one of two persons with whom he was quarreling, whereupon they stabbed him to death with a knife. This homicide was held to be murder because the "provocation given by the deceased was but slight, and in the progress of the fight, the prisoners used an excess of violence, out of all proportion to the provocation."¹⁷¹

If the fight is really "mutual" in the sense that both enter into it willingly, as distinguished from the case in which one is clearly attacking and the other merely defending; if the intent to kill or to inflict great bodily injury is formed in the heat of the encounter, rather than in advance, and the slayer does not deliberately take unfair advantage of the other by secretly arming himself with a weapon to have ready "just in case;" and if the encounter reaches the proportion of actual physical contact, or dangerous threat of serious and immediate harm, sufficient to arouse the passions of the ordinary reasonable man, the law takes the position that in such mutual combat there is mutual provocation.¹⁷² The combat is mutual if the intent to fight is mutual,¹⁷³ and in such situations the question of which one actually strikes the first blow is not controlling.¹⁷⁴ In fact, if both intend to fight and are ready to do so it may be a "mutual combat" although one party did not actually strike any blow.¹⁷⁵

Adequate Provocation — Words. Well established in the common law is the rule that provocative words are not recognized as adequate provocation to reduce a wilful killing to murder, however abusive,¹⁷⁶ aggravating,¹⁷⁷ contemptuous,¹⁷⁸ false,¹⁷⁹ grievous,¹⁸⁰ indecent,¹⁸¹ insulting,¹⁸² opprobrious,¹⁸³ provoking,¹⁸⁴ or scurrilous¹⁸⁵ they may be. Actual cases afford extreme illustrations.

In 1666 it was said: "If one calls another son of a whore and giveth him the lie, and upon those words the other kill him that gave the words, this notwithstanding those words, is mur-

¹⁷¹ *State v. Gooch*, 94 N. C. 987, 1014 (1886).

¹⁷² *State v. Green*, Houst. Cr. R. 217 (Del. 1866).

¹⁷³ *McDuffie v. State*, 46 Ga. App. 691, 168 S.E. 910 (1933).

¹⁷⁴ *Hall v. State*, 177 Ga. 794, 171 S.E. 274, 279 (1933); *State v. Kennedy*, 169 N. C. 288, 292, 84 S.E. 515 (1915).

¹⁷⁵ *Roberts v. State*, 189 Ga. 36, 44, 5 S.E. 2d 340 (1940).

¹⁷⁶ *State v. Hardisty*, 122 Kan. 527, 529, 253 Pac. 615 (1927).

¹⁷⁷ *Allen v. United States*, 164 U. S. 492, 497, 41 L. ed. 528, 17 Sup. Ct. R. 154 (1896).

¹⁷⁸ *State v. White*, 81 W. Va. 516, 519, 94 S.E. 972 (1918).

¹⁷⁹ *Commonwealth v. Gelfi*, 282 Pa. 434, 439-40, 128 Atl. 77 (1925).

¹⁸⁰ *State v. Elliott*, 90 Mo. 350, 355 (1886).

¹⁸¹ *State v. Trujillo*, 27 N. M. 594, 597, 203 Pac. 846 (1921).

¹⁸² *Coleman v. State*, 149 Ga. 186, 188, 99 S.E. 627 (1919).

¹⁸³ *State v. Levelle*, 34 S. C. 120, 129, 13 S.E. 319 (1890).

¹⁸⁴ *People v. Russell*, 322 Ill. 295, 301, 153 N.E. 389 (1926).

¹⁸⁵ *State v. Nevares*, 36 N. M. 41, 44, 7 P. 2d 933 (1932).

der...."¹⁸⁶ And modern cases involving equally vile epithets have reached the same conclusion.¹⁸⁷

There have been a few rare instances in which some court has questioned the soundness of this rule as to provocative words.¹⁸⁸ Even rarer instances of actual legislative modification exist, such as the former Texas statute to the effect that "insulting words or conduct of the person killed toward a female relation of the party killing"¹⁸⁹ were "adequate cause" to reduce a voluntary homicide to manslaughter.¹⁹⁰ There is also the more recent legislative action in that state repealing its general provision dealing with words or gestures, — as judicially interpreted.¹⁹¹ For the most part, however, it has been held with remarkable uniformity that even words generally regarded as "fighting words" in the community have no recognition as adequate provocation in the eyes of the law.¹⁹² Adequate provocation may sometimes be established by a combination of insulting words with some other circumstance which would not of itself be sufficient. For example, insulting words plus a blow too slight for provocation in itself may together constitute adequate provocation;¹⁹³ and the same is true of insulting words plus an aggravated trespass to property.¹⁹⁴

Insulting words, let it be added by way of caution, may be considered in determining the *degree of murder*,¹⁹⁵ or in assessing the punishment for murder¹⁹⁶ if the law provides more than one possible penalty.

Under the sound rule, recognized by most courts,¹⁹⁷ informational words are placed upon a different footing than in-

¹⁸⁶ *Huggett's Case*, Kelying 59, 60, 84 Eng. Rep. 1082 (1666).

¹⁸⁷ "Liar," *Brown v. State*, 175 Ga. 329, 337, 165 S.E. 252 (1932); "S— of B—," *Harrison v. State*, 18 Okla. Cr. R. 403, 408, 195 Pac. 511 (1921); "G— D— bastard," *Barrett v. State*, 98 Tex. Cr. R. 627, 267 S.W. 511 (1925).

¹⁸⁸ *Commonwealth v. Hourigan*, 89 Ky. 305, 313, 12 S.W. 550 (1889); *State v. Jarrott*, 23 N. C. 76, 82 (1840); *Seals v. State*, 62 Tenn. 459 (1874). But compare *Sawyers v. Commonwealth*, 18 Ky. L. Rep. 657, 38 S.W. 136 (1896); *State v. McNeill*, 92 N. C. 812, 816-7 (1885); *Freddo v. State*, 127 Tenn. 376, 155 S.W. 170 (1912).

¹⁸⁹ Tex. Rev. Crim. Stats. (1925) sec. 1248. Repealed by Acts of 40th Legislature (1927) ch. 274.

¹⁹⁰ *Ibid.* sec. 1244. Repealed in 1927.

¹⁹¹ Repeal of the statute declaring that words or gestures alone were not adequate cause for sudden passion reducing homicide to murder without malice held to manifest an intent that insulting words or gestures might be sufficient to constitute "adequate cause." *Elsmore v. State*, 132 Tex. Cr. R. 261, 104 S.W. 2d 493 (1937).

¹⁹² See *supra* f.n. 176-186.

¹⁹³ *Lamp v. State*, 38 Ga. App. 36, 37, 142 S.E. 202 (1928).

¹⁹⁴ *State v. Davis*, 34 S.W. 2d 133 (Mo. 1930).

¹⁹⁵ *State v. Williams*, 186 Mo. 128, 84 S.W. 924 (1904); *State v. Robinson*, Mo. ..., 185 S.W. 2d 636 (1945).

¹⁹⁶ *Kiersey v. State*, 131 Ark. 487, 491, 199 S.W. 532 (1917).

¹⁹⁷ Georgia has held that under the statute in that state the wife's sudden confession of adultery will not reduce the husband's act of killing her to manslaughter. *Humphreys v. State*, 175 Ga. 705, 165 S.E. 733 (1932).

sulting words.¹⁹⁸ The sound theory is that it is the fact, or alleged fact, which really constitutes the adequate provocation, but the sudden disclosure of the fact may have the same effect as if it had just happened. Thus an intentional killing may be manslaughter only if the deceased had just told the slayer that he had raped the latter's wife¹⁹⁹ or had committed adultery with her,²⁰⁰ or had ravished the latter's young daughter,²⁰¹ or committed a serious battery upon his child.²⁰² To satisfy the requirement of *suddenness*, to be considered presently, it is necessary for mitigation in such a case that the slayer should not have previously acquired the information from some other source.²⁰³ On the other hand, if the slayer is told of such great harm which he had not heard of before, this may be sufficient for adequate provocation (according to most courts) even if the statement is untrue — provided it is made under circumstances calculated to cause it to be believed and it is actually believed by the slayer.²⁰⁴ This is merely a particular application of the reasonable mistake of fact doctrine.

Adequate Provocation — Gestures. Insulting gestures alone are not adequate provocation.²⁰⁵ Gestures indicating an intent to attack with deadly force will be adequate provocation in a mutual encounter,²⁰⁶ and under other circumstances may completely justify or excuse a homicide under the self-defense privilege.²⁰⁷

Adequate Provocation — Trespass. If the force used is privileged under the circumstances, no problem of provocation is involved because no crime is committed even if death results. Hence discussions of trespass as constituting, or not constituting, adequate provocation presuppose a use of force beyond that authorized by law. A purely technical trespass, even in the dwelling house, will not be recognized as sufficient for this purpose;²⁰⁸ but it is clearly recognized that a trespass in or upon the dwelling, may be of a nature insufficient to authorize the use of deadly force, and yet sufficiently aggravating to constitute adequate provocation.²⁰⁹ It is often stated that no trespass will of itself amount to adequate provocation if it is not in or upon the dwelling house and does not involve any personal

¹⁹⁸ *Regina v. Rothwell*, 12 Cox C. C. 145, 147 (1871).

¹⁹⁹ *State v. Flory*, 40 Wyo. 184, 276 Pac. 458 (1929).

²⁰⁰ *Davis v. State*, 161 Tenn. 23, 28 S.W. 2d 993 (1930).

²⁰¹ *State v. Grugin*, 147 Mo. 39, 47 S.W. 1058 (1898).

²⁰² *People v. Rice*, 351 Ill. 604, 184 N.E. 894 (1933).

²⁰³ *State v. Grugin*, 147 Mo. 39, 47 S.W. 1058 (1898). Compare *State v. Privett*, 175 Mo. 207, 75 S.W. 457 (1903).

²⁰⁴ *State v. Yantz*, 74 Conn. 177, 181, 50 Atl. 37 (1901).

²⁰⁵ *State v. Lee*, 6 W. W. Harr. 11, 171 Atl. 195, 199 (Del. 1933).

²⁰⁶ *Hall v. State*, 177 Ga. 794, 171 S.E. 274, 279 (1933).

²⁰⁷ *State v. Mason*, 115 S. C. 214, 217, 105 S.E. 286 (1920).

²⁰⁸ *Carroll v. State*, 23 Ala. 28, 36 (1853).

²⁰⁹ *State v. Adams*, 78 Iowa 292, 43 N.W. 194 (1889); *State v. Welch*, 37 N. M. 549, 25 P. 2d 211 (1933).

danger to the slayer.²¹⁰ The Georgia court spoke with commendable caution in referring to this as true "generally" and indicating the possibility of exceptions in cases of such trespasses more highly provoking in their nature than any yet involved in adjudicated cases.²¹¹ And the Missouri court has held that tearing down a man's fence may be under circumstances sufficiently provocative to reduce a killing to manslaughter.²¹²

Adequate Provocation — Other Acts. An unlawful arrest, or an attempted arrest, may be under circumstances sufficient to constitute adequate provocation;²¹³ but the mere fact that the apprehension is beyond the actual authority of law will not necessarily produce this result.²¹⁴ Certain outrageous acts are very generally recognized as adequate provocation. In this list may be included, without attempting to exhaust the list, (1) adultery²¹⁵ (2) seduction of the slayer's infant daughter,²¹⁶ (3) rape of the slayer's wife²¹⁷ or close female relative,²¹⁸ (4) murder or other felonious injury inflicted upon a close relative of the slayer.²¹⁹ In a few jurisdictions there are statutes, going beyond anything recognized by common law,²²⁰ declaring homicide to be justifiable if committed in the sudden heat of passion engendered by certain extremely provocative misdeeds, such as the defilement or attempted rape of the slayer's wife or close female relative.²²¹

Heat of Passion. To be within the rule of provocation the slayer must have killed the deceased in the heat of passion. In

²¹⁰ See *State v. Naylor*, 28 Del. (5 Boyce) 99, 90 Atl. 88 (1914); *Atkinson v. State*, 137 Miss. 42, 101 So. 490 (1924).

²¹¹ *Hayes v. State*, 58 Ga. 35, 47 (1877).

²¹² *State v. Matthews*, 148 Mo. 185, 49 S.W. 1085 (1898). See also *State v. Reed*, 154 Mo. 122, 55 S.W. 278 (1899).

²¹³ *People v. White*, 333 Ill. 512, 165 N.E. 168 (1929).

²¹⁴ *Galvin v. State*, 46 Tenn. 283 (1869).

²¹⁵ *Manning's Case*, T. Raym. 212, 83 Eng. Rep. 112 (1671); *Crowder v. State*, 18 Ala. App. 632, 93 So. 338 (1922); *Sheppard v. State*, 243 Ala. 498, 10 So. 2d 822 (1942).

²¹⁶ *Toler v. State*, 152 Tenn. 1, 260 S.W. 134 (1923).

²¹⁷ *State v. Flory*, 40 Wyo. 184, 276 Pac. 458 (1929).

²¹⁸ *State v. Cooper*, 112 La. 281, 36 So. 350 (1904).

²¹⁹ *People v. Rice*, 351 Ill. 604, 184 N.E. 894 (1933).

²²⁰ "It is well established law that no provocation whatever can render homicide justifiable or excusable. It can only reduce it to manslaughter." *Commonwealth v. Beverly*, 237 Ky. 35, 34 S.W. 2d 941 (1931).

²²¹ See, for example, Utah Code (1943) sec. 103-23-10. And see *People v. Halliday*, 5 Utah 467, 17 Pac. 118 (1888).

"Homicide is justifiable when committed by the husband upon one taken in the act of adultery with the wife, provided the killing take place before the parties have separated..." Tex. Pen. Code (Vernon, 1936) art. 1220.

This will not justify the husband in killing his wife, caught in the act of adultery. *Jordan v. State*, 107 Tex. Cr. R. 137, 294 S.W. 1109 (1927). And by emphasis upon the exact wording of the statute it was held not to justify the wife in killing a woman committing adultery with the slayer's husband. *Reed v. State*, 123 Tex. Cr. R. 348, 59 S.W. 2d 122 (1933); *Barr v. State*, 146 Tex. Cr. R. 178, 172 S.W. 2d (1943).

speaking of the previous requirement it was mentioned that in determining whether or not there was adequate provocation an objective test is used: would what was done have inflamed the passions of the ordinary reasonable man? But the present requirement is measured by a subjective test; it depends upon the actual state of mind of the slayer at the moment of the fatal act. The question here is not what would have been the state of mind of someone else, but did the slayer kill in the actual heat of passion?²²² As frequently stated by the courts, neither adequate provocation without passion nor passion without adequate provocation will be sufficient to reduce voluntary homicide to manslaughter.²²³

To constitute the *heat of passion* included in this requirement it is not necessary for the passion to be so extreme that the slayer does not know what he is doing at the time;²²⁴ but it must be so extreme that for the moment his action is being directed by passion rather than by reason.²²⁵ In this connection it is essential to keep in mind the statutory change in a few states whereby all intentional homicide is murder if not justifiable or excusable.²²⁶ Under such legislation the killing would be murder in spite of the heat of passion engendered by adequate provocation, unless the killing was unintended in the ordinary sense or was by one so inflamed by passion as not to know what he was doing.

Sudden — The Cooling Time. No matter how extreme the provocation, or how great the passion engendered thereby, there will be no mitigation sufficient to reduce voluntary homicide to manslaughter in the absence of another requirement. The killing must have been in a *sudden* heat of passion. That is, the fatal act must have followed the provocation before there

²²² *Green v. State*, 195 Ga. 759, 25 S.E. 2d 502 (1943).

"On the other hand, a killing upon provocation ordinarily calculated to excite the passion beyond control, would not make the killing voluntary manslaughter if the provocation did not, in fact, produce the sudden heat of passion, which is an essential ingredient of the offense." *Cavanaugh v. Commonwealth*, 172 Ky. 799, 805, 190 S.W. 123 (1916).

²²³ *Vance v. State*, 70 Ark. 272, 278, 68 S.W. 37 (1902).

²²⁴ "We nowhere find that the passion which in law rebuts the imputation of malice, must be so overpowering as for the time to shut out knowledge and destroy volition." *State v. Hill*, 20 N. C. 518, 522-3, 4 Dev. and Bat. 491, 496 (1939).

It is incorrect to say no authority can be found for such a position. See, for example, *State v. Anderson*, 2 Overt. 6, 8 (Tenn. 1804), suggesting that the passion must be so great as to produce a temporary loss of reason. And see *Sanders v. State*, 26 Ga. App. 475, 478, 106 S.E. 314 (1921), in which the court speaks of a "sudden violent impulse of passion supposed to be irresistible." But the sound view of the common law is as stated in the text. *People v. Freel*, 48 Cal. 436, 437 (1874); *Commonwealth v. Demboski*, 283 Mass. 315, 186 S.E. 589 (1933); *Dye v. State*, 127 Miss. 492, 90 So. 180 (1921).

²²⁵ *Smith v. State*, 83 Ala. 26, 28, 3 S.E. 11 (1887); *Commonwealth v. Wucherer*, 351 Pa. 305, 41A. 2d 574 (1945); *Hannah v. Commonwealth*, 153 Va. 863, 870, 149 S.E. 419 (1929).

²²⁶ See, for example, Ohio Gen. Code (Page, 1939) secs. 12400—12403; *Jones v. State*, 51 Ohio St. 331, 38 N.E. 79 (1894).

had been a reasonable opportunity for the passion of the slayer to cool.²²⁷

This, like the adequacy of the provocation itself, is measured by an objective test. Whether or not there was a reasonable opportunity for the passion to cool, depends upon whether or not, under all of the circumstances of the particular case,²²⁸ there has been such a lapse of time since the provocation was received that the mind of the ordinary reasonable man would have cooled sufficiently so that action once more would be directed by reason rather than by passion.²²⁹ If such time has elapsed before the fatal act the slayer does not have the benefit of the rule of provocation even if his own mind is still inflamed by passion at the time of the killing.²³⁰ He is guilty of murder in such a case.

Requirement number two must not be forgotten in the consideration of number three. If the passion of the slayer actually had cooled at the time of the killing it was homicide with malice aforethought and hence murder, however short the time may have been, and however much might have been the continued passion of the ordinary reasonable man. In one case, for example, in which the killing took place within a very few moments of the provocation, there was evidence to show an attempted telephone call by the slayer in the interim. He was trying to reach the sheriff; and this incident, said the court, showed the most rational and reasonable state of mind, entirely inconsistent with the theory of overpowering excitement.²³¹ This particular individual had unusual control over his passions, but the law would not treat a cold-blooded killing as one committed in the sudden heat of passion. As said by another court in a leading case: "If in fact the defendant's passions did cool, which may be shown by such circumstances as the transaction of other business in the meantime, rational conversation upon other subjects, evidence of the preparation for the killing, etc., then the length of time intervening is immaterial."²³²

In certain other cases the killer has had less than the usual control over his passions and has been deprived of the benefit of the rule of provocation because the cooling time had passed

²²⁷ *Sanders v. State*, 26 Ga. App. 475, 106 S.E. 314 (1921); *State v. Farris*, 6 S.W. 2d 903 (Mo. 1928).

²²⁸ *State v. Robinson*, Mo. . . ., 185 S.W. 2d, 636 (1945).

²²⁹ "If such an interval of time elapsed between the provocation and the killing as is reasonably sufficient for reason to resume its sway, the act is not mitigated to manslaughter." *State v. Agnesi*, 92 N.J.L. 53, 104 Atl. 299 (1918). *Aff'd*, 92 N. J. L. 638, 106 Atl. 893, 108 Atl. 115 (1918).

²³⁰ *State v. Robinson*, . . Mo. . . ., 185 S.W. 2d 636 (1945).

²³¹ *State v. Delbruno*, 306 Mo. 553, 268 S.W. 60 (1924).

²³² *Re Fraley*, 3 Okla. Cr. R. 719, 109 Pac. 295 (1910).

although his passions were still inflamed.²³³ There is no inconsistency between such cases because the second requirement is measured by an objective test and the third by a subjective test, and one accused of murder must satisfy both (as well as the first and the fourth), in order to prove that his crime is only manslaughter.²³⁴

There is no simple rule of thumb by which to measure the length of the cooling time in terms of so many hours or minutes. It varies according to the circumstances of each particular case.²³⁵ The greater the provocation, the longer will be the cooling time.²³⁶ It may also be affected by other factors. For example, if the provoker should flee immediately after the provoking act, and should be pursued for a considerable distance before being overtaken and killed, the very chase itself would tend to keep the passion inflamed — at least for a longer period than if no chase were involved. If the period is very short²³⁷ or very long²³⁸ the court will instruct the jury as a matter of law that there was no time for the passion to cool, or that there was adequate time for this purpose, as the fact may be; but ordinarily when this problem arises in a case it is left to the jury with an instruction for them to find as a fact whether the fatal act followed the provocation before the lapse of such time that the mind of the ordinary reasonable man, under all of the circumstances of the case at hand, would have cooled sufficiently for his conduct to be directed by reason rather than passion.²³⁹

It is the lapse of the cooling time which prevents the recognition of any mitigation where the fatal act resulted from a formal duel, and what was said in that regard under the head of "mutual quarrel or combat" might have been reserved for this subdivision.

Causal Connection Between Provocation, Passion, and Fatal Act. In addition to the three requirements mentioned above it is necessary that they exist, not by coincidence, but by direct causal relation. The adequate provocation must have engendered the heat of passion,²⁴⁰ and the heat of passion must have been the cause of the act which resulted in death.²⁴¹ There is

²³³ *People v. Sanchez*, 24 Calif. 17, 27 (1864); *State v. Farris*, 6 S.W. 2d 903 (Mo. 1928).

²³⁴ If the prisoner's passion did actually cool or there was reasonable time for cooling,—in either situation, the mitigating effect of the provocation is lost. *State v. McCants*, 1 Spears 384, 388 (S. C. 1843).

²³⁵ *State v. Rosa*, 87 Conn. 585, 89 Atl. 163 (1913).

²³⁶ *State v. Connor*, 252 S.W. 713 (Mo. 1923).

²³⁷ *State v. Yarbrough*, 8 N. C. (1 Hawks) 78 (1820).

²³⁸ *Re Fraley*, 3 Okla. Cr. R. 719, 109 Pac. 295 (1910).

²³⁹ The question is whether the interval was sufficient "to permit the passions to cool and to allow thought and reflection and reason to reassert itself." *State v. Lee*, 6 W. W. Harr. 11, 171 Atl. 195 (Del. 1933).

²⁴⁰ *State v. Sloan*, 22 Mont. 293, 56 Pac. 364 (1899).

²⁴¹ *Rex v. Thomas*, 7 Car. and P. 817, 819, 173 Eng. Rep. 356 (1837).

no mitigation, for example, if the intent to kill was formed before the provocation was received (unless such intent had been definitely abandoned by a change of mind) because in such a case the provocation, no matter how adequate, was not the cause of the fatal act.²⁴²

Killing Innocent Bystander. Additional light may be thrown upon this subject by reference to an exceptional situation. If one who has received adequate provocation is so enraged that he intentionally vents his wrath upon an innocent bystander, causing his death, he will be guilty of murder;²⁴³ but if his deadly force was directed at the provoker and hit the other by accident,²⁴⁴ or if as a reasonable mistake of fact he thought the provocative act had been perpetrated by the deceased,²⁴⁵ he is guilty of manslaughter only, if he otherwise meets the requirements of the rule of provocation.

Mitigation Other Than Provocation. Since manslaughter is a "catch-all" concept, covering all homicides which are neither murder nor innocent, it logically includes some killings involving other types of mitigation, and such is the rule of the common law. For example, if one man kills another intentionally, under circumstances beyond the scope of innocent homicide, the facts may come so close to justification or excuse that the killing will be classed as voluntary manslaughter rather than murder. "It is not always necessary to show that the killing was done in the heat of passion, to reduce the crime to manslaughter;" said the Arkansas court, "for, where the killing was done because the slayer believes that he is in great danger, but the facts do not warrant such a belief, it may be murder or manslaughter according to the circumstances, even though there be no passion."²⁴⁶ To give another illustration, the intentional taking of human life to prevent crime may fall a little short of complete justification or excuse and still be without malice aforethought.²⁴⁷ Here also is the possibility of change by statute, — a matter not to be ignored at any point in criminal law, particularly in the field of manslaughter. For example, some legislative enactments have spoken of voluntary manslaughter in terms only of a killing in "a sudden heat of passion caused by a provocation" and so forth.²⁴⁸ Such restric-

²⁴² *State v. Johnson*, 23 N. C. 354 (1840).

²⁴³ *State v. Vinso*, 171 Mo. 576, 71 S.W. 1034 (1902).

²⁴⁴ *Wheatley v. Commonwealth*, 26 Ky. L. Rep. 436, 81 S.W. 687 (1904).

²⁴⁵ *White v. State*, 44 Tex. Cr. R. 346, 72 S.W. 173 (1902).

²⁴⁶ *Allison v. State*, 74 Ark. 444, 453-4, 86 S.W. 409 (1905). Similar language appears in *Freeman v. State*, 174 Ark. 1035, 1039, 298 S.W. 333 (1927). And see *Deatherage v. State*, 194 Ark. 513, 108 S.W. 2d 904 (1937).

²⁴⁷ *Commonwealth v. Beverly*, 237 Ky. 35, 34 S.W. 2d 941 (1931); *Williams v. State*, 127 Miss. 851, 90 So. 705 (1921).

²⁴⁸ *Ariz. Rev. Code (Off., 1939) sec. 43—2904.* For differently worded statutes which also seem to limit voluntary manslaughter unduly,

tion is probably unintentional, being attributable to the fact that this is by far the most common type of mitigation; but it is very unfortunate.

(2): INVOLUNTARY MANSLAUGHTER

Involuntary manslaughter is a "catch-all" concept. It includes all manslaughter not characterized as voluntary. The trend of the case law, where not hampered by statute, has been to include within "voluntary manslaughter" certain unintentional killings, — that is, it includes all homicides whether intentional or unintentional which are committed with a man-endangering-state-of-mind and are not justified or excused but are perpetrated under circumstances of recognized mitigation. And since manslaughter itself is a "catch-all" concept, including as a matter of common law all homicide not amounting to murder on the one hand and not legally justifiable or excusable on the other, the general outline of involuntary manslaughter is very simple. Every unintentional killing of a human being is involuntary manslaughter if it is neither murder nor voluntary manslaughter nor within the scope of some recognized justification or excuse. Furthermore, any exculpatory factor in case of such a homicide is almost certain to be a matter of excuse rather than of justification. If the killing had been either commanded by the state or authorized by it in some emergency such as a proper case of self-defense, the killing would have been intentional in all probability. Stated the other way, an unintentional killing is seldom one that has been commanded or authorized by the state; and a homicide not commanded or authorized by the state is not justified, in the true sense of the word, although it may perhaps be excused.

Part of the boundary line of this "catch-all" concept having been dealt with in the consideration of malice aforethought and of voluntary manslaughter, it is necessary at this point to take up the factors which determine whether homicide is or is not excusable. Where loss of life has neither been intended nor the result of any other sort of man-endangering-state-of-mind, the killing will be excused if he who caused it was not engaged in any unlawful activity at the time and was free from negligence.²⁴⁹ Homicide is excusable, as far as the common law of crimes is concerned, in some cases in which the slayer was not as fully free from fault as indicated by such a statement. This requires separate attention to killings resulting from (a) an unlawful act and (b) negligence.

see, for example: Cal. Pen. Code (Deering, 1941) sec. 192; Idaho Code (1932) sec. 17—1106; Utah Code (1943) sec. 103-28-5. Compare Colo. Ann. Stats. (1935) sec. 43—2904.

²⁴⁹ *Commonwealth v. Flax*, 331 Pa. 145, 200 Atl. 632 (1938).

Homicide by Unlawful Act. If homicide by one engaged in an unlawful act were regarded as never excusable the law would be simpler than it is, — and more severe. The common law, in spite of statements suggesting such a simple and severe rule,²⁵⁰ recognizes certain exceptions based upon (1) the nature of the unlawful act and (2) the absence of causal connection between the unlawful act and the death. Each of these matters requires attention.

The Nature of the Unlawful Act. It has been common to define manslaughter in terms of "unlawful homicide" or "unlawful killing."²⁵¹ This is entirely proper if sufficient emphasis is placed upon the conjunction of the two words. The homicide without malice aforethought which constitutes manslaughter is one in connection with which there is found not "unlawfulness" and "killing," but "unlawful killing." The word "unlawful" is used in different senses, being broad enough at times to include what is "unpermitted but not necessarily forbidden."²⁵² The phrase "unlawful act" is employed at times in a sense broad enough to include a deed wrongful only in the sense that it will support a civil action for damages.²⁵³ This usage has no place in the common law of manslaughter, although a few statutes have included a part of this field.²⁵⁴ In fact, common law references to homicide resulting from an unlawful act as being utterly beyond the realm of excuse, employ the phrase in a sense narrow enough to exclude a portion of the public offense field. In one case, for example, a man drove his team of mules through a toll gate, urging them forward in an attempt to avoid the payment of the toll. The team became unmanageable and ran over the keeper of the gate, thus causing his death. The driver was tried on the theory that he was guilty of manslaughter if the death was due to his unlawful attempt to pass through the gate without paying, whether the act was done in a careless manner or not. In reversing a conviction the court said: "There mere unlawfulness of the act does not in this class of cases, *per se* render the doer of it liable in criminal law for all the undesigned and improb-

²⁵⁰ For example, see some of the language of the court in *Jarich v. People*, 58 Colo. 175, 179, 143 Pac. 1092, 1094 (1914); *State v. Brown*, S. C. . . ., 32 S.E. 2d 825, 828 (1945).

²⁵¹ *Paramore v. State*, 161 Ga. 166, 178, 129 S.E. 772 (1925); *State v. Pond*, 125 Me. 453, 455, 134 Atl. 572 (1926).

²⁵² Ballentine, James A., *College Law Dictionary*, Rochester, N. Y., The Lawyers Co-Operative Publishing Co., 1931.

²⁵³ *Dunbar v. American T. and T. Co.*, 238 Ill. 456, 485, 87 N.E. 520 (1909). And see the reference to "an unlawful act not criminal" and "means which were unlawful though not criminal." *State v. Hardin*, 144 Iowa 264, 267, 120 N.W. 470 (1909).

²⁵⁴ New York, for example, includes in second degree murder, an unintentional killing "by a person committing or attempting to commit a trespass, or other invasion of a private right, either of the person killed or another, not amounting to a crime." N. Y. Pen. Law (Gilbert, 1943) sec. 1052.

able consequences of it" because the act itself was *malum prohibitum* only.²⁵⁵

Here we have the key to this compartment of the common law. While the boundary line has not yet been clearly marked it has been found necessary to distinguish between two types of public offenses. Sometimes the differentiation has been between "civil offenses"²⁵⁶ or "public torts"²⁵⁷ on the one hand and "true crimes"²⁵⁸ on the other; but the traditional classification is between offenses *mala prohibita* and offenses *mala in se*.²⁵⁹ "Acts *mala in se*," it has been said, "include, in addition to all felonies, all breaches of the public order, injuries to person and property, outrages upon public decency and morals, and breaches of official duty when done wilfully or corruptly. Acts *mala prohibita* include any matter forbidden or commanded by statute, but not otherwise wrong."²⁶⁰ Death resulting from an offense *malum in se* is not excusable, but is manslaughter²⁶¹ (if not murder) in the absence of some special statutory excuse,²⁶² even if no substantial element of human risk seemed to be involved.²⁶³ For example, while accidental death resulting from a lawful boxing match is excusable²⁶⁴ a loss of life will not be less than manslaughter if it occurred under circumstances otherwise the same but in a prize fight in a jurisdiction in which prize fighting is unlawful.²⁶⁵ The reason is that each blow in a forbidden prize fight is an assault and battery and death resulting from assault and battery (*malum in se*) is manslaughter,²⁶⁶ if not murder. Furthermore, since an unlawful attempt to procure an abortion is *malum in se*, a death resulting from such an attempt will not be less than man-

²⁵⁵ *Estell v. State*, 51 N. J. L. 182, 185, 17 Atl. 118 (1889).

²⁵⁶ Legislation, Criminal Law—Reclassification of Certain Offenses as Civil Instead of Criminal (1937) 12 Wis. L. Rev. 365.

²⁵⁷ *May's Law of Crimes*, Sears, Kenneth C. and Weihofen, Henry, Boston, Little, Brown and Co. 4th ed. (1938) sec. 10.

²⁵⁸ Sayre, Francis Bowes, Public Welfare Offenses (1938) 33 Col. L. Rev. 55, 84.

²⁵⁹ *State v. Kellison*, 233 Iowa 1274, 11 N.W. 2d 371 (1943).

²⁶⁰ *Commonwealth v. Adams*, 114 Mass. 323, 324 (1873).

²⁶¹ *State v. Kellison*, 233 Iowa 1274, 11 N.W. 2d 371 (1943).

²⁶² Killing is excused if "in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat provided that no undue advantage is taken nor any dangerous weapon used, and that the killing is not done in a cruel and unusual manner." Okla. Stats. (1941), tit. 21, sec. 731.

²⁶³ *Regina v. Porter*, 12 Cox C. C. 444 (1873); *State v. Weisengoff*, 85 W. Va. 271, 101 S.E. 450 (1919).

²⁶⁴ *Regina v. Young*, 10 Cox C. C. 371 (1866).

²⁶⁵ *People v. Fitzsimmons*, 34 N. Y. Supp. 1102 (1895).

²⁶⁶ *Salter v. State*, 22 Ala. App. 86, 112 So. 538 (1927); *Jackson v. State*, 69 Ga. App. 707, 26 S.E. 2d 485 (1943); *Commonwealth v. Gricus*, 317 Mass. 403, 58 N.E. 2d 241 (1944); *State v. Johnson*, 102 Ind. 247, 1 N.E. 297 (1885). But see the statement in *Flourney v. State*, 124 Tex. Cr. R. 395, 63 S.W. 2d 588 (1933). The victim died, but the issue in the case was between aggravated assault and battery and simple assault and battery.

slaughter²⁶⁷ no matter how much skill was employed.²⁶⁸ Death resulting from an offense *malum prohibitum* is excusable if neither wilful nor the result of criminal negligence.²⁶⁹ The violation of law is not ignored in such a case. It is one of the factors to be considered by the jury in determining whether or not defendant's conduct amounted to criminal negligence.²⁷⁰ The violation of a statute enacted for the safety of persons and property may be negligence *per se*,²⁷¹ but it does not constitute criminal negligence *per se*.²⁷² Such a violation is sometimes made *prima facie* evidence of negligence by statute;²⁷³ but it is still necessary for the jury to determine whether or not, under all of the circumstances of the particular case, it amounted to criminal negligence.²⁷⁴ Even an intentional violation of such a statute does not constitute criminal negligence *per se*,²⁷⁵ although cases can be found holding an intentional violation of the speed law sufficient to constitute such negligence.²⁷⁶ It is generally held that driving an automobile on the highway while intoxicated is a criminally negligent act;²⁷⁷ but it is possible to find authority the other way.²⁷⁸

Leaving aside the problem of criminal negligence, a matter to receive additional attention later, the rule may be summed up in this form: Homicide resulting from an unlawful act *malum prohibitum* may be found to be excusable under all the facts of the particular case; but homicide resulting from an act *malum in se* cannot be less than manslaughter. This invites attention to the causal relation between the unlawful act and the death.

Causal Relation Between Unlawful Act and Death. It has not been uncommon to speak of this branch of involuntary

²⁶⁷ *People v. Rongetti*, 338 Ill. 56, 170 N.E. 14 (1930); *State v. Walters*, 199 Wis. 68, 225 N.W. 167 (1929).

²⁶⁸ *Worthington v. State*, 92 Md. 222, 48 Atl. 335 (1901).

²⁶⁹ *State v. Horton*, 139 N. C. 588, 51 S.E. 945 (1905). In this, one of the leading cases in the manslaughter field, death was caused by one hunting on enclosed land of another without the written permission of the owner as required by statute. The jury by special verdict found that hunting on this land was not dangerous in itself and that defendant was not negligent in firing the fatal shot. The killing was held not manslaughter but excusable homicide.

²⁷⁰ *Minardo v. State*, 204 Ind. 422, 183 N.E. 548 (1932); *Benton v. State*, 124 Neb. 485, 247 N.W. 21 (1933); *State v. Thatcher*, Utah..., 157 P. 2d 258, 261 (1945).

²⁷¹ *City Ice Delivery Co. v. Lecari*, 210 Ala. 69, 98 So. 90 (1924); *Kisling v. Thierman*, 214 Iowa 911, 243 N.W. 552 (1932).

²⁷² *State v. Barnes*, 182 Mich. 179, 148 N.W. 400 (1914); *State v. Cope*, 204 N. C. 28, 167 S.E. 456 (1933).

²⁷³ *People v. Toohey*, 319 Ill. 113, 149 N.E. 795 (1925).

²⁷⁴ *People v. Falkovitch*, 280 Ill. 321, 117 N.E. 398 (1917).

²⁷⁵ *Thompson v. State*, 108 Fla. 370, 146 So. 201 (1933); *Benton v. State*, 124 Neb. 485, 247 N.W. 21 (1933); *State v. Satterfield*, 198 N. C. 682, 153 S.E. 155 (1930).

²⁷⁶ *McClanahan v. State*, 20 Ala. App. 533, 103 So. 717 (1925); *State v. Cope*, 204 N. C. 28, 167 S.E. 456 (1932).

²⁷⁷ *State v. Kellison*, 233 Iowa 1274, 11 N.W. 2d 371 (1943); *State v. Sisneros*, 42 N. M. 500, 82 P. 2d 274 (1938).

²⁷⁸ *Smith v. State*, ... Miss. ..., 20 So. 2d 701 (1945).

manslaughter as homicide committed by one "while committing an unlawful act," or "in the pursuit of an unlawful design."²⁷⁹ To understand the true meaning of such a phrase it is necessary to do more than add by interpretation that it means unlawful in the sense of *malum in se*. For conviction of manslaughter in such a case the state must do more than establish mere coincidence between such an act and the fact of death.²⁸⁰ It must establish the "causal connection" between the violation and the loss of life.²⁸¹ An excellent illustration is provided by an Illinois case.²⁸² A policeman committed a breach of duty by failing to arrest certain gamblers and drunken persons. At the time he was violating his duty in this respect, he accidentally shot and killed a girl. He was convicted of manslaughter on the ground that he caused the death *while* committing an unlawful act. This was reversed because of the absence of any causal connection between the unlawful act and the death. His wilful breach of official duty was an offense *malum in se*; but it had no connection, other than coincidence, with the accidental homicide.

Statutes defining manslaughter (in part) in terms of a killing "in the commission of an unlawful act"²⁸³ or "any offense"²⁸⁴ or a "misdemeanor"²⁸⁵ ordinarily receive the same interpretation.²⁸⁶ Even under such legislation "the commission of a misdemeanor in no way connected with the death is not what is meant by the law."²⁸⁷

The discussion of statutory charges, found under the head of "malice aforethought," need not be repeated here; but a summary can be offered in the light of that discussion. The unlawful act relied upon to make the resulting loss of life manslaughter must not be too serious a crime, for that would bring the homicide within the category of murder. At common law this means the "other offense" should be less than a "dangerous felony." Statutes have sometimes moved this boundary line one way or the other. A number of them make the dividing line between murder and manslaughter, in this area, the line between felony and misdemeanor. Some have moved it in the other direction by specifying the boundary line not in terms of any dangerous felony, but only of arson, burglary, rape, robbery or mayhem. And in the rare instances in which murder

²⁷⁹ *Smith v. State*, 33 Me. 48, 55 (1851).

²⁸⁰ *Kimmel v. State*, 198 Ind. 444, 154 N.E. 16 (1926); *Maxon v. State*, 177 Wis. 379, 187 N.W. 753 (1922).

²⁸¹ *Thompson v. State*, 108 Fla. 370, 146 So. 201 (1933).

²⁸² *People v. Mulcahy*, 318 Ill. 332, 149 N.E. 266 (1925).

²⁸³ Colo. Stats. Ann. (1935) c. 48, sec. 36; Ga. Code (1933) sec. 26—1009; Ill. Crim. Code (Smith-Hurd, 1934) c. 38, sec. 363.

²⁸⁴ N. H. Rev. Laws (1942) c. 455, sec. 8.

²⁸⁵ N. D. Rev. Code (1943) sec. 12—2717.

²⁸⁶ *State v. Schaeffer*, 96 Ohio St. 215, 117 N.E. 220 (1917).

²⁸⁷ *Logan v. State*, 42 Okla. Cr. R. 294, 298, 245 Pac. 657 (1929).

is limited to intentional homicide any unintentional killing resulting from an offense *malum in se* becomes manslaughter.

Homicide by Criminal Negligence. Negligence is any conduct, except conduct intentionally or wantonly disregarding of an interest of others, which falls below the standard established by law for the protection of others against unreasonable risk of harm.²⁸⁸ The standard of conduct to which all except children and insane persons must conform to avoid being negligent is that of a reasonable man under like circumstances.²⁸⁹ And whoever causes harm to another as a result of negligence thereby incurs liability, — but not necessarily criminal guilt. The Missouri court stated a well established principle in the following words: "There is a marked distinction between simple or ordinary negligence, giving one a right of action for damages, and culpable negligence, rendering one guilty of a criminal offense."²⁹⁰ It is "uniformly held," said the Florida court with reference to this distinction, that the kind of negligence required to impose criminal responsibility "must be of a higher degree than that required to establish simple negligence upon a mere civil issue."²⁹¹

The English authorities have long recognized the possibility of manslaughter being established upon a negligence basis.²⁹² And in the absence of some peculiarity in the statutory law,²⁹³ this is uniformly recognized in the United States. On the other hand, also assuming the absence of unusual statutory provisions,²⁹⁴ it is possible to have negligence resulting in death without any crime being committed.²⁹⁵ To establish guilt of manslaughter on this basis it is necessary to prove that the death was caused, not by ordinary negligence, but by negligent con-

²⁸⁸ See *American Law Institute Restatement of the Law of Torts*, St. Paul, American Law Institute Publishers, 1934, sec. 282. The definition used here follows closely the definition used in the *Restatement of Torts*. The word "wantonly" is substituted for "recklessly," because wantonness tends to make the act *malicious* within the usage of the criminal law; whereas recklessness is a factor in criminal negligence.

²⁸⁹ *Id.* at sec. 283.

²⁹⁰ *State v. Baublitz*, 324 Mo. 1199, 1211, 27 S.W. 2d 16 (1930).

²⁹¹ *Cannon v. State*, 91 Fla. 214, 222, 107 So. 360 (1926). See also *State v. Blaine*, 104 N. J. L. 325, 328, 137 Atl. 829 (1927).

²⁹² Blackstone speaks of unintentional homicides caused by lawful acts "without due caution and circumspection." Blackstone, Sir William, *Commentaries on the Law of England*, Oxford, Clarendon Press, 1768, Book 4, p. 192.

²⁹³ Common law offenses are not punishable as such in Ohio. Hence under the Ohio statute of manslaughter which (at that time) provided for the punishment of unintentional homicides only if committed in the perpetration of an unlawful act, it was held impossible to establish manslaughter upon the basis of culpable negligence. *Johnson v. State*, 66 Ohio St. 59, 63 N.E. 607 (1902).

A better result was reached in Indiana by holding that "unlawful act" as used in its statute includes reckless conduct. *Minardo v. State*, 204 Ind. 422, 183 N.E. 548 (1932).

²⁹⁴ See the discussion *infra* under "negligent homicide."

²⁹⁵ *Regina v. Spencer*, 10 Cox C. C. 526 (1867); *State v. Clark*, 196 Iowa 1134, 196 N.W. 82 (1923); *State v. Studebaker*, 334 Mo. 471, 66 S.W. 2d 887 (1933).

duct falling so far below the standard of social acceptability as to be characterized as "criminal,"²⁹⁶ "culpable"²⁹⁷ or "gross"²⁹⁸ negligence. As this involves a field not subject to exact measurement, what it amounts to as a practical matter in the homicide cases is a caution to the jury not to convict of crime, where other elements of culpability are lacking, except where the conduct causing the death represents a rather extreme case of negligence. And, in spite of an unfortunate lack of uniformity in expressing the idea, there is a tendency to speak of the types of behavior amounting to criminal negligence in terms of "reckless conduct" or "recklessness."²⁹⁹

What has been said here, together with the points mentioned in the consideration of malice aforethought, discloses four categories of unintentional killing, other than homicides resulting from an offense *malum in se*. They are killings resulting from —

1. Conduct involving an unreasonable risk of death or great bodily injury to others, this risk being extreme in degree and being accompanied by an awareness of such risk together with a wanton and wilful disregard of consequences;
2. Conduct involving an unreasonable risk of death or great bodily injury to others, this risk being extreme in degree but without the additional factor present in the first;
3. Conduct involving an unreasonable risk of death or great bodily injury to others, this risk not being extreme in degree;
4. Conduct not involving an unreasonable risk of death or great bodily injury to others.

The first of these categories goes beyond negligence in any degree and falls under the label malice aforethought; the second involves reckless conduct and constitutes criminal negligence; the third amounts to ordinary negligence; while the fourth measures up to the required standard of social acceptability and is free from any taint of negligence.

As a matter of common law a killing in category one is murder; in category two is manslaughter; in categories three or four is innocent homicide.

²⁹⁶ *People v. Buzan*, 351 Ill. 610, 616, 184 N.E. 890 (1923); *State v. Sisneros*, 42 N. M. 500, 82 P. 2d 274 (1938).

²⁹⁷ *State v. Cantrell*, ... Minn. ..., 18 N.W. 2d 681 (1945); *Sims v. State*, 149 Miss. 171, 186, 115 So. 217 (1927).

²⁹⁸ *State v. Blaine*, 104 N. J. L. 325, 328, 140 Atl. 566 (1928).

²⁹⁹ *People v. Glasebrook*, 320 Ill. 567, 151 N.E. 489 (1926); *State v. Tomlinson*, 209 Iowa 555, 558, 228 N.W. 80 (1929); *Goodman v. Commonwealth*, 153 Va. 943, 952, 151 S.E. 168 (1930); *Albert v. Commonwealth*, 181 Va. 894, 27 S.E. 2d 177 (1943).

C: NEGLIGENT HOMICIDE

As a matter of the common law of crimes any killing below the grade of manslaughter is innocent homicide. And for the most part this has not been changed by modern statutes. Numerous specific instances of negligent homicides may be found scattered through the various criminal codes, such as death caused by negligently operating a steamboat, railroad train, or automobile; overloading a steamboat; allowing a steam boiler to explode; using firearms; handling explosives; and allowing vicious animals to be at large with knowledge of their propensities. Others might be added such as the case of an intoxicated physician administering to a patient. For the most part these have been expressly declared to be manslaughter.³⁰⁰ They would have been held to be manslaughter either under the common law or under the more general provisions of the code if the careless conduct amounted to criminal negligence; and almost without exception these special provisions are so worded or interpreted as to include this requirement.³⁰¹

Statutory Changes. If none of the statutory provisions went beyond this, the subject could be handled by the addition of a sentence or two under the head of involuntary manslaughter. There are a few states, however, with legislative provisions for the punishment of certain homicides below the grade of manslaughter. This additional crime is generally known as "negligent homicide." Michigan, the leader in this field, enacted a negligent homicide statute in 1921, whereby a lesser penalty than that specified for manslaughter was provided for "any person who, by the operation of any vehicle at an immoderate rate of speed or in a careless, reckless or negligent manner, but not wilfully or wantonly, shall cause the death of another."³⁰² The enactment added: "The crime of negligent homicide shall be deemed to be included within every crime of manslaughter charged to have been committed in the operation of any vehicle, and in any case where a defendant is charged with manslaughter committed in the operation of any vehicle, if the jury shall find the defendant not guilty of the crime of manslaughter

³⁰⁰ See, for example, Ark. Dig. of Stats. (1937) secs. 2984, 2987, 2988, 2989, 2990; Minn. Stats. (Mason's, 1927) secs. 10,080, 10,081, 10,082, 10,083, 10,084, 10,085.

³⁰¹ Professor Moreland concludes that only four states apply the tort standard of care in criminal cases, and his discussion shows that three of the four do so under statutory provisions for "negligent homicide" rather than manslaughter. Oklahoma seems to require only the lack of ordinary care and prudence to establish the "culpable negligence" sufficient for second degree manslaughter under its statutes if death results. But even the Oklahoma cases are not entirely free from doubt on this point. Moreland, Roy, *A Rationale of Criminal Negligence*, Lexington, Kentucky, The University of Kentucky Press, 1944, pp. 10-16.

³⁰² Mich. Stats. Ann. (1935) sec. 28.556.

ter such jury may in its discretion render a verdict of guilty of negligent homicide."³⁰³

"By the enactment of this statute," said the court, "the Legislature obviously intended to create a lesser offense than involuntary manslaughter...where the negligent killing was caused by the operation of a vehicle...Therefore this statute was intended to apply only to cases where the negligence is of a lesser degree than gross negligence."³⁰⁴ The California court has reached a similar result under its statute.³⁰⁵ In such a state one who has caused death on the highway by his negligent driving is guilty of manslaughter if his conduct amounted to criminal negligence, and guilty of this special statutory offense of negligent homicide if his conduct amounted to ordinary negligence. Needless to say, even in such a jurisdiction the death is innocent homicide if it results from driving not tainted by negligence in any degree.

Not in all jurisdictions having this additional crime can guilt of negligent homicide be established by mere proof of ordinary negligence. In most of them, in fact, more is required by the very language of the act itself.³⁰⁶ Back of all such statutes seems to be the feeling of a need for a milder offense than manslaughter due to the reluctance of juries to convict of that offense in the fatal traffic accident cases.³⁰⁷ Hence for such a killing these statutes provide a lesser penalty than for manslaughter, sometimes declaring it to be a "misdemeanor."³⁰⁸ A number of them seem to occupy concurrently a portion of the field of manslaughter merely to authorize the jury to apply the milder label³⁰⁹ and lesser penalty if they so desire in these fatal traffic cases.³¹⁰ In Michigan, on the other hand, negligent homicide is an "included offense" in the ordinary sense, as previously explained.

States having "negligent homicide" statutes are still in the minority. Where such legislation is found it is usually restricted to killings in some specified field, usually the field of traffic accidents; but there are a few exceptions. One plan, as logical as it is unusual, is to carve out of the crime of man-

³⁰³ *Id.* at sec. 28,557.

³⁰⁴ *People v. Campbell*, 237 Mich. 424, 428, 212 N.W. 97, 99 (1927).

³⁰⁵ *People v. Warner*, 27 Cal. App. 2d 190, 80 P. 2d 737 (1938).

³⁰⁶ See, for example, La. Code of Crim. Law (Dart, 1943) sec. 740-32 ("Criminal negligence"); N. H. Laws (1942) C. 118 sec. 12 ("reckless"); N. J. Rev. Stats. (1937) 2: 138-9 ("carelessly and heedlessly in wilful or wanton disregard of the right of others"); N. Y. Pen. Law (Gilbert, 1943) sec. 1053-a ("culpably negligent manner"); Wis. Stats. (1943) sec. 340, 271 ("constituting or amounting to a high degree of negligence").

³⁰⁷ Riesenfeld, Stefan A., *Negligent Homicide, A Study in Statutory Construction*, 25 *Calif. L. Rev.* 1, 7-8, (1936).

³⁰⁸ N. J. Rev. Stats. (1937) sec. 2: 138-9.

³⁰⁹ New York merely calls it "criminal negligence in the operation of a vehicle resulting in death." N. Y. Pen. Law. (Gilbert, 1943) sec. 1053-a.

³¹⁰ Riesenfeld, *op. cit. supra* f.n. 307.

slaughter all of that part of the field in which guilt is grounded upon a negligence basis, and to assign this to the new statutory offense. The result is a three-fold division of criminal homicide, as follows:

1. Murder — homicide with malice aforethought.
2. Manslaughter — just one offense although it may be:
 - a. voluntary — homicide in the sudden heat of passion engendered by adequate provocation; or
 - b. involuntary — unintentional homicide resulting from an unlawful act, *malum in se*, but not so grave as to make the killing murder, or resulting from resistance to lawful arrest by means not calculated to kill or injure.
3. Negligent homicide — homicide which would be excusable except that it results from criminal negligence.

This is the Louisiana plan.³¹¹

In Texas the legislature has made still a different re-grouping of the subdivisions of criminal homicide. The statutes dealing with manslaughter were repealed,³¹² and the subject approached from a point of view supposed to be simplicity itself. The notion apparently was that any homicide, not justifiable or excusable, should be murder if committed intentionally and negligent homicide if committed negligently. No doubt the realization of a possible gap between these two led to the use of the phrase "voluntarily kill," rather than "intentionally kill" in the murder section.³¹³ Not even the distinction between "voluntary" and "involuntary" was retained without exception, because it was provided that a killing resulting from a felony is murder and not negligent homicide.³¹⁴ The next step was to retain the distinction between an unlawful killing with malice aforethought and an unlawful killing in a sudden heat of passion engendered by adequate provocation. In this respect the change was in form only. The penalty for murder under the Texas statute varies anywhere from two years imprisonment to death.³¹⁵ Murder is divided into two kinds, — with malice aforethought and without.³¹⁶ "Voluntary homicide committed without justification or excuse under the immediate influence of a sudden passion arising from an adequate cause" is made murder without malice and the

³¹¹ Louisiana has taken homicide by criminal negligence out of manslaughter and labeled it "negligent homicide." So the subdivision there is (1) murder, (2) manslaughter, and (3) negligent homicide. La. Crim. Stats. Ann. (1943) arts. 740—29—740—32.

³¹² Acts of 1927, 40th Legis. p. 412, c. 274, sec. 3.

³¹³ Tex. Stats. (Vernon, 1936) Pen. Code, art. 1256.

³¹⁴ *Id.* at art. 1241; *Snyder v. State*, 132 Tex. Cr. R. 73, 102 S.W. 2d 424 (1937).

³¹⁵ *Id.* at art. 1257.

³¹⁶ *Id.* at arts. 1257b, 1257c.

punishment therefor cannot exceed imprisonment for five years.³¹⁷

The next step was to divide negligent homicide into two degrees,³¹⁸ and contrary to common usage the first degree is a lesser offense than the second.³¹⁹ One who performs a lawful act with such negligence as to cause the death of another is guilty of negligent homicide of the first degree,³²⁰ while if the act is unlawful the killing is negligent homicide of the second degree.³²¹ The phrase "unlawful act," as used for this purpose, may be either a misdemeanor or an act giving rise to a civil action but not a penal offense.³²² Negligent homicide of the second degree is then divided into two grades, in effect, depending upon whether the "unlawful act" is or is not a misdemeanor.³²³ It is expressly provided that negligence is the want of proper care and caution,³²⁴ and this has been interpreted to require no more than ordinary negligence.³²⁵ The ultimate result has been to divide criminal homicide into two grades of murder, and two degrees of negligent homicide, of which the second degree has two grades, — five subdivisions in all.

2: SUICIDE

It is convenient to consider suicide at this point and, at least in the light of the ancient law, it is not illogical to do so. The word "suicide" is broad enough, in its literal sense, to cover every case of self-killing. If limited to the self-killing of a human being, without other restriction, it would seem to include every instance in which such a one caused his own death within the accepted rules of causation. If the word were so used it might be common to divide suicide into three classes — justifiable, excusable and culpable. If during a catastrophe, for example, two should find themselves in a situation in which both could not survive and one should deliberately abandon his position of momentary protection and plunge to

³¹⁷ *Id.* at arts. 1257b, 1257c.

³¹⁸ *Id.* at art. 1230.

³¹⁹ *Id.* at arts. 1231—1243.

³²⁰ *Id.* at art. 1231.

³²¹ *Id.* at art. 1239.

³²² *Id.* at art. 1240.

³²³ *Id.* at arts. 1242, 1243.

³²⁴ *Id.* at art. 1233.

³²⁵ *Young v. State*, 120 Tex. Cr. R. 39, 41, 47 S.W. 2d 320, 321 (1932).

In affirming a conviction of negligent homicide, caused by a motorist who attempted to pass a school bus while it was discharging passengers, which was a statutory misdemeanor, the court said:

"Negligence in the performance of an act, whether lawful or unlawful, is the gist of the offense of negligent homicide. When a person in the performance of an unlawful act injures another, he is guilty of negligence *per se*, that is, as a matter of law.... appellant was charged with knowledge of the law which forbade him from passing the bus while passengers were being received or discharged. He disobeyed the penal statute. He could reasonably have anticipated injury to the child." *Menefee v. State*, 129 Tex. Cr. R. 375, 87 S.W. (2d) 478 (1935).

destruction for the better safety of the other, this heroic act of self-sacrifice should be classed as justifiable rather than as culpable or even merely excusable. Whereas, if one should cause his own death unintentionally, while doing nothing unlawful and without any culpable carelessness, his self-destruction would merely be excusable. Actually however, we do not refer to the one as "justifiable suicide" and the other as "excusable suicide," because Lord Hale used the word "suicide" as synonymous with "*felo de se*"³²⁶ and such seems to have been the general usage ever since.³²⁷

Suicide at Common Law. "*Felo de se*," or felon of himself is freely spoken of by the early writers as self-murder.³²⁸ Hence one who killed himself before he arrived at the age of discretion or while he was *non compos mentis*, was not a *felo de se*, or suicide.³²⁹ Saving for a moment the consideration of the present law, it may be stated without hesitation that by the early common law suicide was a felony and was punished by ignominious burial and forfeiture of goods and chattels to the king.³³⁰ It was often spoken of as a voluntary act of intentional self-destruction,³³¹ but was not actually limited to this alone. Thus if one by accident killed himself while attempting to murder another,³³² or if a woman took poison with intent to procure a miscarriage, and died as a result,³³³ the wrongdoer in either case was *felo de se*.

It has been ably argued that suicide was murder by the English common law.³³⁴ But whether it is to be regarded as mur-

³²⁶ "*Felo de se* or suicide is, where a man of the age of discretion, and *compos mentis*, voluntarily kills himself by stabbing, poison, or any other way." Hale, Sir Matthew, *The History of the Pleas of the Crown*, London, F. Gyles, 1736, vol. 1, p. 411.

³²⁷ "Suicide... is usually used to indicate the action of a person who is able to weigh and appreciate the thing about to be done." *Hepner v. Department of Labor and Industries*, 141 Wash. 55, 250 Pac. 461 (1926).

"Suicide is the intentional taking of one's own life." N. Y. Pen. Law, (Gilbert, 1943) sec. 2300. "Although suicide is deemed a grave public wrong, yet from the impossibility of reaching the successful perpetrator, no forfeiture is imposed." *Id.* at sec. 2301.

³²⁸ "And first of the murder of a man's self, who is commonly called *felo de se*." Coke, Sir Edward, *Institutes of the Laws of England*, London, Lee and Pakeman, 1648, Third Part, p. 54. See also Blackstone, Sir William, *Commentaries on the Law of England*, Oxford, Clarendon Press, 1768, Book 4, p. 189.

³²⁹ *Ibid.*

³³⁰ "... by an ignominious burial in the highway, with a stake driven through his body... [and] by a forfeiture of all his goods and chattels to the king; hoping that his care for either his own reputation or the welfare of his family would be some motive to restrain him from so desperate and wicked an act." Blackstone, Sir William, *op. cit. supra* f.n. 328, at p. 190.

³³¹ "It must be simply voluntary, and with an intent to kill himself." Hale, Sir Matthew, *op. cit. supra* f.n. 326, at p. 412.

³³² *Id.* at p. 413.

³³³ *Rex v. Russell*, 1 Moody, C. C. 356 (1832).

³³⁴ "It would seem then that whatever may have been the law before Bracton's time and, in whatever light he may have regarded the ordinary case of suicide, and notwithstanding the fact that most of the

der, or as a separate but similar offense, there is no dispute that suicide, as here explained, was a felony. Because of this fact an attempt to commit suicide was a misdemeanor.³³⁵ One who encouraged another to commit suicide was guilty of felony as a principal if he was present at the act which caused the death, and as an accessory before the fact if he was not present when the fatal act was committed.³³⁶ For this reason, if two mutually agreed to commit suicide, and the means employed to produce death was effective only as to one, the survivor was guilty of the murder of the one who died.³³⁷ Thus if two persons encouraged each other to drown themselves, and both plunged into the water by their mutual agreement and encouragement, whereupon one was drowned while the other was saved, the survivor was guilty of the murder of the deceased.³³⁸

Suicide Under Modern Statutes. The present law on the subject of suicide has many points of conflict or uncertainty. Ignominious burial and forfeiture of goods are no longer used as penalties for crime and the present modes of punishment are not adapted to reach one already dead. The problem is emphasized by statutory definitions in terms of punishment. If, for example, the statutory definition of felony is "any crime punishable by death or imprisonment in the state prison," it seems not to include suicide.³³⁹ One court has taken the position that "suicide is none the less criminal because no punishment can be inflicted,"³⁴⁰ and certain others have referred to it as criminal.³⁴¹ Elsewhere, on the other hand, the suicide has been held to be innocent of any crime,³⁴² and this conclusion seems unavoidable in those states which do not have common law crimes and do not have any statute covering the case of suicide.³⁴³

writers on criminal law have treated suicide topically separate from murder, that suicide is murder in English law." Mikell, William E., "Is Suicide Murder?" 3 *Col. L. Rev.* 379, 391 (1903).

But in *Regina v. Burgess*, Leigh & Cave 258 (1862), it was held that an attempt to commit suicide was a misdemeanor but was not an attempt to commit murder within the meaning of 24 and 25 Vict. c. 100.

³³⁵ *Regina v. Doody*, 6 Cox, C. C. 463 (1854); *Regina v. Burgess*, Leigh & Cave, 258 (1862).

³³⁶ *Rex v. Russell*, 1 Moody, C. C. 356 (1832). When the mode of punishment changed and there was no longer any penalty which could be inflicted upon the suicide, the accessory escaped punishment also by reason of the rule that an accessory could not be tried until after the principal had been tried and convicted. *Ibid*; *Regina v. Leddington*, 9 Car. & P. 79 (1839).

³³⁷ *Regina v. Allison*, 8 Car. & P. 418 (1838).

³³⁸ *Rex v. Dyson*, Russ. & R. C. C. 523 (1823).

³³⁹ *Commonwealth v. Mink*, 123 Mass. 422, 429 (1878).

³⁴⁰ *State v. Carney*, 69 N. J. L. 478, 480, 55 Atl. 44 (1903).

³⁴¹ Suicide is "unlawful and criminal as *malum in se*." *Commonwealth v. Mink*, 123 Mass. 422, 428 (1878).

Suicide in Alabama is a crime involving moral turpitude. *Penn Mutual Life Ins. Co. v. Cobbs*, 23 Ala. App. 205, 123 So. 94 (1929).

³⁴² *Grace v. State*, 44 Tex. Cr. R. 193, 69 S.W. 529 (1902).

³⁴³ Since there are no crimes in Ohio unless declared to be so by statute and since there is no statute dealing with suicide, it is no crime in that state. *Blackburn v. State*, 23 Ohio St. 146 (1872).

Whether suicide is a crime or not is far from a purely academic problem. While present penalties are inapplicable to one who is dead, they can be used in the case of one who has tried to kill himself and failed, in the case of one who has unintentionally killed someone else while attempting self-destruction, or in the case of one who has encouraged another to kill himself or has actually assisted in the fatal act. As a matter of common law all of these misdeeds are offenses if suicide is a crime; but if suicide is not a crime it is arguable that no offense is involved in any of them except where actual assistance was given to the fatal act, — provided the killing of another during attempted suicide was not under such circumstances as to amount to malice aforethought or criminal negligence for reasons quite apart from suicidal effort. If, for example, a man should try to destroy himself with a bomb at a time and place where others were in obvious danger, and should kill someone else but not himself, he would clearly be guilty of manslaughter if not of murder. To put the matter in the most extreme form: One who has maliciously caused the death of another is not relieved from guilt of murder by the fact that he was trying to take his own life also.

To inquire further into these problems, what about the man who has attempted to take his own life without success and without causing harm to any other? It was a misdemeanor at common law, but is it under our modern codes? Under a statute providing that "all other offenses of an indictable nature at common law, and not provided for in this or some other act of the legislature, shall be misdemeanors, and be punished accordingly," it was held that an unsuccessful attempt to commit suicide was punishable in New Jersey.³⁴⁴ In Maine, on the other hand, where attempts are made crimes by the statutes only where the acts attempted are punishable, the attempt to commit suicide was held not to be an offense.³⁴⁵

The cases are also not in accord as to the effect of an accidental killing of another during an attempt to commit suicide. This has been held to be at least manslaughter, and perhaps murder, in Massachusetts,³⁴⁶ murder in South Carolina,³⁴⁷ and no crime at all, without additional facts, in Iowa.³⁴⁸

The decisions with reference to aiding and abetting in the suicide of another are equally divergent.

"Whatever may have been the law in England or whatever that law may be now with reference to suicides, and the punishment of persons connected with the suicide, by furnishing

³⁴⁴ *State v. Carney*, 69 N. J. L. 478, 55 Atl. 44 (1903).

³⁴⁵ *May v. Pennell*, 101 Me. 516, 64 Atl. 885 (1906).

³⁴⁶ *Commonwealth v. Mink*, 123 Mass. 422 (1878).

³⁴⁷ *State v. Leveille*, 34 S.C. 120, 13 S.E. 319 (1890).

³⁴⁸ *State v. Campbell*, 217 Iowa 848, 251 N.W. 717 (1934).

the means of other agencies, it does not obtain in Texas. So far as the law is concerned, the suicide is innocent; therefore, the party who furnishes the means to the suicide must also be innocent of violating the law. We have no statute denouncing suicidal acts; nor does our law denounce a punishment against those who furnish a suicide with the means by which the suicide takes his own life."³⁴⁹

The Ohio court takes quite a different stand.

"If the prisoner furnished the poison to the deceased for the purpose and with the intent that she should with it commit suicide, and she accordingly took and used it for that purpose; or if he did not furnish the poison, but was present at the taking thereof by the deceased, participating, by persuasion, force, threats, or otherwise, in the taking thereof, or the introduction of it into her stomach or body; then, in either of the cases supposed, he administered the poison to her, within the meaning of the statute."³⁵⁰

And Illinois has held that one who aids and abets a suicide is guilty of murder as a principal in the first degree.³⁵¹

Actual assistance to the suicide may be carried too far for innocence in any jurisdiction. Texas has gone very far in holding that one who furnishes the means to the suicide is innocent. But even in that state it was held that one who furnished the poison to a suicide, knowing the intention of the other, and at the suicide's request placed the poison in his mouth, with fatal consequences, was guilty of murder.³⁵²

The whole approach to the law of suicide seems to have been unduly influenced by abstractions. Undoubtedly there is a social interest in the life of the individual. Without question one who wilfully takes his own life under circumstances to bring him within the *felo de se* label has caused social harm without justification or excuse. But when a man is in the act of taking his own life there seems to be little advantage in having the law say to him: "You will be punished if you fail."³⁵³ Almost invariably one who has made an unsuccessful attempt to kill himself is in serious need of medical attention,—which usually includes need of the psychiatrist as well as of the surgeon or general practitioner. What is done to him will not tend to deter others because those bent on self-destruction do not expect to be unsuccessful. It is doubtful whether anything is gained by treating such conduct as a crime. In rare

³⁴⁹ *Grace v. State*, 44 Tex. Cr. R. 193, 69 S.W. 529 (1902).

³⁵⁰ *Blackburn v. State*, 23 Ohio St. 146 (1872).

³⁵¹ *Burnett v. People*, 204 Ill. 208, 68 N.E. 505 (1903).

³⁵² *Aven v. State*, 102 Tex. Cr. R. 478, 277 S.W. 1080 (1925).

³⁵³ Larrimore, Wilber, "Suicide and the Law," 17 *Harv. L. Rev.* 331 1904; Larrimore, Wilber, "*Felo De Se*," 47 *Am. L. Rev.* 210 (1913). See also Withers, R. W. "Status of Suicide as a Crime," 19 *Va. Law Reg.* 641 (1914).

instances it is expressly made punishable by statute,³⁵⁴ but in one state, at least, a former statutory provision for punishment of attempted suicide has been repealed.³⁵⁵

The method of dealing with one who has unintentionally killed another in the attempt to take his own life is possibly open to more question. Perhaps the best solution is to dispose of this on the same basis as other accidents and excuse the slayer if the circumstances did not involve such disregard for the safety of others as to constitute at least criminal negligence. Quite a different answer is required for the final point in the criminal law of suicide although even this can be clouded in doubt if approached from the viewpoint of theoretical abstractions. Thus, it is not a crime, generally speaking, to induce another to do what can be accomplished by him without criminal guilt, provided he has reached the age of discretion and is in his right mind at the time. This seems to suggest that wherever suicide itself is not a crime there can be no offense in inducing another to end his life. This position is assailable, even as an abstraction, because few generalizations of the breadth of the one mentioned are entirely free from exception. Moreover, this position assumes that the average suicide is sane at the time which, to state the matter mildly, is something to be established by proof rather than to be taken for granted by assumption.

On the other hand, if this point is approached as a problem of social discipline rather than as a theoretical abstraction, the solution is entirely free from doubt. This, let us hasten to add, has nothing in common with euthenasia, or "mercy killing," a problem entirely beyond the scope of the present chapter. If one man (or any group of men) is ever to be authorized to act upon his own (or their own) determination that the time has come "to put another out of his misery" (which will require the aid of legislation since no such authority is recognized by common law, and as to which we studiously avoid any opinion here), more adequate safeguards and more efficient methods will be required than can be found in the device of attempting to persuade the sufferer to take his own life. Actually, the "mercy killer" resorts to direct action, while the one who has induced another to kill himself has been prompted by baser motives. The latter type of conduct is anti-social in the extreme and should be clearly branded as criminal. No statute should be required to bring this within the field of felonious homicide but a number of states have eliminated any possibility of doubt by legislation declaring that induced

³⁵⁴ N. D. Rev. Code (1943) sec. 12—3302; Wash. Rev. Stats. (Remington, 1931) sec. 2386.

³⁵⁵ New York, Laws 1919, C. 414, repealed sections 2302 and 2303 of the penal law.

self-destruction is manslaughter³⁵⁶ or an offense under some other name³⁵⁷ on the part of the inducer.

3: DEGREES OF CRIMINAL HOMICIDE

Subdivisions of Criminal Homicide. It is often said that manslaughter is not a degree of the crime of murder, but a distinct offense.³⁵⁸ This is beyond question since manslaughter is not murder; but it is commonly recognized as an "included crime."³⁵⁹ While it is possible to find holdings to the effect that a charge of murder will not support a conviction of involuntary manslaughter,³⁶⁰ the better view is that such a charge includes all grades of felonious homicide and will support a conviction of manslaughter whether voluntary or involuntary.³⁶¹ In other words, while manslaughter is not a degree of murder, the two are really different degrees of felonious homicide,³⁶² in the broad sense, although the statutes do not make use of the word "degree" for this purpose. The Nebraska court has not hesitated to speak of first and second degree murder and manslaughter as "degrees" of a single crime of criminal homicide;³⁶³ and this has ample support in the historical development of the field.

What we now know as murder and manslaughter constituted just one offense under the common law of England.³⁶⁴ Prior to ancient statutory changes any offense in this field was punishable by death and by forfeiture of lands and goods; and on the other hand it was within the scope of benefit of clergy whereby the life of the convict might be saved if he qualified.³⁶⁵

³⁵⁶ "Every person who in any manner shall wilfully advise, encourage, abet, or assist another in taking the latter's life shall be guilty of manslaughter in the first degree." Minn. Stats. (Mason's, 1927). Sec. 10,062.

For similar provisions (usually without naming a degree of manslaughter) see the statutes in Nevada, New York, and Washington.

"If any person shall purposely and deliberately procure another to commit self-murder, or assist another in the commission thereof, such person shall be deemed guilty of manslaughter." Oreg. Code (1930) sec. 14-207.

³⁵⁷ "Felony," maximum punishment 10 years. Miss. Code (1942) sec. 2375. "Advising and aiding suicide," punishment not less than 7 years. N. D. Rev. Code (1943) sec. 12-3303. For similar provisions see the statutes of Oklahoma and South Dakota.

³⁵⁸ *Folks v. State* 85 Fla. 238, 247, 95 So. 619 (1923); *State v. Trent*, 122 Oreg. 444, 252 Pac. 975, 259 Pac. 893 (1927).

³⁵⁹ *State v. Johnson*, 215 Iowa 483, 488, 245 N.W. 728 (1932).

³⁶⁰ *Commonwealth v. Mayberry*, 290 Pa. 195, 138 Atl. 686 (1927).

³⁶¹ *People v. Mount*, 93 Cal. App. 81, 269 Pac. 531 (1928); *State v. Baublits*, 324 Mo. 1119, 27 S.W. 2d (1930); *State v. Nortin*, 170 Ore. 296, 133 P. 2d 252 (1943); *State v. Quick*, 168 S. C. 76, 167 S.E. 456 (1932).

³⁶² *Rhea v. Territory*, 3 Okla. Cr. R. 230, 235, 105 Pac. 314 (1909).

³⁶³ *State v. Hutter*, ..., Neb., ... 18 N.W. 2d 303, 208 (1945).

³⁶⁴ Stephen, Sir James Fitzjames, *History of the Criminal Law of England*, London, Macmillan Co., 1883, vo. 3, p. 44.

³⁶⁵ *Ibid.* Nominally only members of the clergy were entitled to benefit of clergy; but the courts extended it to include every man who could read, on the fiction that if he could read he must be a member of the clergy.

A series of statutes, during the period from 1496 to 1547,³⁶⁶ excluded from benefit of clergy certain of the more serious forms of felonious homicide, referring to them as murder committed with malice aforethought.³⁶⁷ The wording of such legislation is quite significant. The killings which were to be punished by death without benefit of clergy were not referred to as *homicide* with malice aforethought, but as *murder* with malice aforethought. This suggests a concept of murder without malice aforethought, and in all probability the lawmakers at that time would have divided the crime of murder into two degrees, based upon this differentiation, had the idea occurred to them. Apparently they not only did not think of this but even overlooked the importance of giving any designation to that part of the field of felonious homicide which they left within benefit of clergy. At least they did not name it. The courts might have resorted to the technique used in speaking of larceny and made use of the phrases "grand murder" and "petit murder" to distinguish the two grades of unlawful killing, — except for the obvious impropriety of referring to any grade of murder as "petit." What they actually did was to reserve the word "murder" for homicide with malice aforethought and invent a new term, "manslaughter," for the other grade.

In some of the states in this country the statutes have made no further subdivision, making provision for the handling of specific cases by considerable latitude in the punishment provided for each of the two. In Illinois, for example, murder may be punished by death, by imprisonment in the penitentiary for life, or by a term of not less than fourteen years; while the penalty for manslaughter is a term of from one to fourteen years.³⁶⁸ Such a plan is probably wiser than any legislative effort to subdivide these offenses into degrees with less latitude in the punishment for each degree; but the tendency in this country has been in the direction of more subdivision. For the most part this extension has been moderate. Most of the states have provided two degrees of murder while leaving manslaughter without such division. Some of these, it must be added, have in effect created two degrees of manslaughter, without speaking in terms of degrees, by providing quite a different penalty for voluntary manslaughter than is specified for involuntary manslaughter. In Utah, for example, voluntary manslaughter is punished by a term of from one to ten years

³⁶⁶ 12 Hen. VII, c. 7 (1496); 4 Hen. VIII, c. 2 (1512); 23 Hen. VIII, c. 1, secs. 3, 4 (1531); 1 Edw. VI, c. 12, sec. 10 (1547).

³⁶⁷ The actual phrasing was (1) "wilful prepensed murders;" (2) "murder upon malice prepensed;" (3) "wilful murder of malice prepensed;" (4) "murder of malice prepensed." See statutes cited in the preceding note.

³⁶⁸ Ill. Ann. Stats. (Smith-Hurd, 1935) c. 38, secs. 358-364.

in the penitentiary, whereas the penalty for involuntary manslaughter is not to exceed one year in jail.³⁶⁹

Other states have made this additional subdivision in form as well as in substance by providing for two degrees of murder and two degrees of manslaughter, as is true in New Hampshire,³⁷⁰ New York,³⁷¹ North Dakota³⁷² and Ohio.³⁷³ Florida reaches a four-fold division by establishing three degrees of murder and leaving manslaughter undivided.³⁷⁴ A few states have carried the process of division even farther. Thus Minnesota has three degrees of murder and two of manslaughter;³⁷⁵ Kansas has two degrees of murder and four of manslaughter;³⁷⁶ Wisconsin seems to hold the present "record" with three degrees of murder and four of manslaughter.³⁷⁷ It may be added as a curiosity that New Mexico at one time had five degrees of murder.³⁷⁸

Murder. Occasionally first degree murder is defined, in part, in terms of "express malice aforethought,"³⁷⁹ although usually some types of implied malice aforethought are included.³⁸⁰ Ordinarily the same result is achieved without the use of these phrases in the definition. The following is a general pattern which has been used in most of the states in the definition of first degree murder:

"All murder which shall be perpetrated by means of poison, or lying in wait, or any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery or burglary, shall be murder in the first degree, . . ."³⁸¹

Statutes making use of this pattern sometimes have certain

³⁶⁹ Utah, Code (1943) sec. 103-28-6. See also, N. C. Gen. Stats. (1943) sec. 14-18.

³⁷⁰ N. H. Rev. Laws (1942) c. 455, secs. 1, 8, 9.

³⁷¹ N. Y. Pen. Law (Gilbert, 1943) secs. 1044-1053.

³⁷² N. D. Rev. Code (1943) secs. 12-2711, 12-2716.

³⁷³ Ohio Gen. Code (Page, 1940) secs. 12,399-12,404-1.

³⁷⁴ Fla. Stats. Ann. (1941) secs. 782.04, 782.07.

³⁷⁵ Minn. Stats. (Mason's, 1927) secs. 10,067-10,068.

³⁷⁶ Kansas Gen. Stats. (1935) secs. 21-401, 21-402, 21-407-21,423.

³⁷⁷ Wis. Stats. (1943) secs. 340.02-340.27. For a discussion of the four degrees of manslaughter see *State v. Scherr*, 243 Wis. 65, 9 N.W. 2d 117 (1943).

³⁷⁸ N. M. Comp. Laws (1884) secs. 687 *et seq.*

³⁷⁹ See, for example, Del. Rev. Code 1935 sec. 5157.

³⁸⁰ The Delaware Code includes murder committed "in perpetrating, or attempting to perpetrate any crime punishable with death." The Wisconsin statute does not use the phrase "express malice aforethought," but provides as follows: "Such killing, when perpetrated from premeditated design to effect the death of the person killed or of any human being, shall be murder in the first degree. . . ." Wis. Stats. (1943) sec. 340.02. And see secs. 340.03-340.08.

³⁸¹ Mich. Stats. Ann. (1935) sec. 28.548. The omitted portion deals with the penalty. This formula, variously worded, and with or without various additions, is found in the statutes of Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Idaho, Iowa, Kansas, Maryland, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Virginia and West Virginia.

variations in the wording and frequently have important additions. The most common additions are found in the first part or in the last part. To the clause "perpetrated by means of poison" some of the statutes add "imprisonment, starving, torture,"³⁸² or some one or two of these three. To the list of felonies in the last part there are various additions, including "mayhem,"³⁸³ "sodomy,"³⁸⁴ "larceny,"³⁸⁵ "injury to person or property by means of any explosive compound,"³⁸⁶ and sometimes the sweeping provision "or other felony."³⁸⁷ The addition of the word "purposely" in such a manner as to apply to all parts of the section is not unknown,³⁸⁸ but is relatively rare.³⁸⁹

Some first degree murder statutes are drafted along entirely different lines,³⁹⁰ but as the statute quoted is in its general form the rather common plan, it is entitled to special attention. The form of the statute might seem to suggest four different kinds of first degree murder, but it hardly requires a second glance to appreciate that murder by "lying in wait" is only a specific illustration of a "wilful, deliberate and premeditated" murder. This leaves three distinct groups of homicides which are murder in the first degree according to the provisions of this statute. It might be rephrased in this form:

(1) All murder which is perpetrated by means of poison is murder in the first degree.

(2) All murder which is perpetrated by means of lying in

³⁸² N. C. Gen. Stats. (1943) sec. 14-17. Virginia adds "imprisonment, starving." New Hampshire adds "starving, torture." "Torture" is added in California, Colorado, Idaho, Montana, Nebraska, North Dakota. "Starving" is added in West Virginia.

³⁸³ Iowa Code (1939) sec. 12911. This is also found in Arizona, California, Colorado, Idaho, Maryland, Missouri, Montana and North Dakota.

³⁸⁴ N. J. Rev. Stats. (1937) sec. 2.138-2. Also found in Maryland and North Dakota.

³⁸⁵ Ark. Dig. of Stats. (1937) sec. 2969.

³⁸⁶ Conn. Gen. Stats. (Rev. of 1930) sec. 6043.

³⁸⁷ Kan. Rev. Stats. (1935) sec. 21-401. This is also found in North Carolina. New Mexico simplifies the statement by omitting the names of any felonies and substituting "any felony." N. M. Stats. (1941) sec. 41-2404.

³⁸⁸ See, for example, Ohio Code (Page, 1939) sec. 12400. *Robbins v. State*, 8 Ohio St. 131 (1857). But see sec. 12401 in which murder "by obstructing or injuring a railroad" is made first degree murder and the word "maliciously" is used but "purposely" is not. See also sec. 12402.

³⁸⁹ Usually this word is not found in the statute at all; in a few states it is added to the clause referring to murder by deliberate and premeditated malice, but not to other parts of the statute. For example, the Oregon statute reads: "If any person shall purposely and of deliberate and premeditated malice, or in the commission or attempt to commit any rape...." Ore. Comp. Laws (1940) sec. 3.23-401 (italics added). It is not necessary to show a killing done purposely or with deliberate and premeditated malice if it is committed in the perpetration of rape, arson, robbery or burglary. *State v. Dorland*, 161 Ore. 403, 89 P. 2d 595 (1939).

³⁹⁰ See, for example, Del. Rev. Code (1935) sec. 5157; N. Y. Pen. Law (McKenney, 1944) sec. 1044; Wis. Stats. (1943) sec. 340.02.

wait, or any other kind of wilful, deliberate and premeditated killing is murder in the first degree.

(3) All murder which is committed in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, or burglary, is murder in the first degree.

Such a statute, let it be emphasized, makes no attempt to define murder. "It has no application until a murder has been established."³⁹¹ If the homicide meets the requirements of murder in general, and is shown to have been committed in any of these ways, then the statute applies and makes the killing murder in the first degree. If the death would not otherwise be murder at all this statute does not make it first degree murder, because it speaks of "all murder" so perpetrated — not "all homicide."³⁹² By such legislation "murder, as limited by the common law, has been divided into two classes" but the "boundaries between murder and manslaughter remain unchanged."³⁹³ This is peculiarly important in cases of death by poison. Homicide, effected by means of poison, might be committed with malice aforethought or it might be committed without malice aforethought but under circumstances amounting to criminal negligence, or it might be committed without either malice aforethought or such want of care as to be denominated criminal negligence. In the latter event it would be no crime at all, but homicide by misadventure. If the killing by poison was without malice aforethought but under circumstances amounting to criminal negligence, it is manslaughter at common law and hence does not come within the terms of this statute at all — but remains manslaughter.³⁹⁴ All homicide, however, which is committed with malice aforethought, and by means of poison, is murder in the first degree under this statute.³⁹⁵ The same is true, moreover, if the killing is by some other means specified at this point of the particular statute, — such as "torture."³⁹⁶

"Lying in wait," as the phrase is used in the homicide cases, means "hiding in ambush or concealment."³⁹⁷ It is not to be

³⁹¹ *People v. Austin*, 221 Mich. 635, 192 N.W. 590 (1923).

³⁹² *State v. Shock*, 68 Mo. 552, 559 (1878); *Pharr v. State*, 7 Tex. Ct. App. 472, 477 (1879). The Alabama statute uses the word "homicide" in place of the word "murder." Ala. Code (1940), tit. 14, sec. 314. This would produce atrocious results if it were literally applied in the cases of death by poison.

³⁹³ *State v. Johnson*, 8 Iowa 525, 529, 74 Am. Dec. 321 (1859).

Statutes in some states have changed the boundaries between murder and manslaughter. See *Davis v. State*, 110 Tex. Cr. R. 605, 607-8, 10 S.W. (2d) 116 (1928); *State v. Cooley*, 165 Wash. 638, 5 Pac. (2d) 1005 (1931).

³⁹⁴ *State v. Phinney*, 13 Idaho 307, 313, 89 Pac. 634, 12 L.R.A.N.S. 935, 12 Ann. Cas. 1079 (1907); *People v. Austin*, 221 Mich. 635, 644, 192 N.W. 590 (1923).

³⁹⁵ *State v. Bertoch*, 112 Iowa 195, 83 N.W. 967 (1900).

³⁹⁶ *People v. Duggan*, 61 Cal. App. 2d 379, 143 P. 2d 88 (1943).

³⁹⁷ *State v. Tyler*, 122 Iowa 125, 131, 97 N.W. 983 (1904).

taken too literally. One may be "lying in wait" in this sense while standing erect.³⁹⁸ The words refer, not to the position of the body, but to the "purpose of taking the person attacked unawares" and necessarily imply "malice, premeditation, deliberation, and the wilful intent."³⁹⁹ As previously suggested, this is merely a specific illustration of a wilful, deliberate and premeditated murder, and it could be omitted from the statute without changing the substance of the provisions.

If murder is committed by means of poison,⁴⁰⁰ or while perpetrating or attempting to perpetrate any of the felonies named in the statute,⁴⁰¹ it is first degree murder even in the absence of an actual intent to kill. This actual intent is essential, however, to constitute a "wilful, deliberate and premeditated" murder.⁴⁰² Accordingly it has been held that one who unlawfully chokes another with intent to cause great injury but not to kill, is guilty of second degree murder if death unintentionally results.⁴⁰³ It is not essential, however, for the intent to kill to be directed against the person whose life is actually destroyed.

An additional requirement of this particular clause is that this intent be formed by a mind free from undue excitement. "Deliberation means that the act is done in a cool state of blood."⁴⁰⁴ Insult by mere words, for example, is insufficient to reduce a killing from murder to manslaughter; but it may arouse the passion of the person insulted to such an extent that if he kills the speaker intentionally under the sudden excitement engendered by these words, the homicide will not be *deliberate* and hence not murder in the first degree.⁴⁰⁵ Furthermore, while voluntary intoxication does not excuse crime,⁴⁰⁶ it is possible for one to be so excited by drink as to be incapable of *deliberate* action,⁴⁰⁷ and a homicide committed by one in such a condition is not a "wilful, deliberate and premedi-

³⁹⁸ *Ibid.*

³⁹⁹ *Ibid.*

⁴⁰⁰ *State v. Robinson*, 126 Iowa 69, 101 N.W. 634 (1904).

⁴⁰¹ *Burton v. United States*, 151 F. 2d 17 (C.C.A., D.C., 1945); *State v. Best*, 44 Wyo. 383, 12 P. 2d 1110 (1932).

⁴⁰² *State v. Johnson*, 211 Iowa 874, 879, 234 N.W. 263 (1931); *State v. Johnson*, 215 Iowa 483, 245 N.W. 728 (1932); *State v. Benson*, 183 N. C. 795, 798, 111 S.E. 869 (1922); *Commonwealth v. Robinson*, 305 Pa. 302, 157 Atl. 689 (1931).

⁴⁰³ *Commonwealth v. Marshall*, 287 Pa. 512, 135 Atl. 301 (1926).

⁴⁰⁴ *State v. Benson*, 183 N. C. 795, 798, 111 S.E. 869 (1922); *State v. Bowser*, 214 N. C. 249, 253, 199 S.E. 31 (1938).

⁴⁰⁵ *Watson v. State*, 82 Ala. 10, 12 So. 455 (1886); *State v. Robinett*, 312 Mo. 635, 279 S.W. 696 (1926); *State v. Jackson*, 344 Mo. 1055, 130 S.W. 2d 595 (1939).

⁴⁰⁶ *Abbott v. Commonwealth*, 234 Ky. 423, 28 S.W. (2d) 486 (1930); *Perry v. State*, 116 Tex. Cr. A. 226, 33 S.W. (2d) 1072 (1930).

⁴⁰⁷ *Hopt v. People*, 104 U. S. 631, 26 L. Ed. 873 (1881); *People v. Burkhart*, 211 Cal. 726, 297 Pac. 11 (1931); *State v. Johnson*, 40 Conn. 136, 143-4 (1873); *Aszman v. State*, 123 Ind. 347, 24 N.E. 123, 8 L.R.A. 33 (1889); *O'Grady v. State*, 36 Neb. 320, 321-2, 54 N.W. 556 (1893); *Pigman v. State*, 14 Ohio St. 555, 556 (1846). But see *Commonwealth v. Lehman*, 309 Pa. 486, 164 Atl. 526 (1932).

tated murder," unless the intent to kill was formed before the mind was thus affected.⁴⁰⁸

Even more is required by a proper interpretation of this clause of the statute, although this element has been overlooked at times. "Premeditation means 'thought of beforehand' for some length of time, however short."⁴⁰⁹ One who has in mind how completely the element of time disappeared from the concept of malice aforethought need not be too surprised at the treatment sometimes accorded the word "premeditated." Those who first employed this word in this type of first degree murder statute undoubtedly had in mind a malicious scheme thought out well in advance of the fatal act itself. And unless we are willing to ignore the plain meaning of words we are forced to recognize that a fatal act might be intentional and yet entirely too hasty to be deliberate and premeditated. The notion that a fully formed intent is always deliberate and premeditated, no matter how short the time between the first thought of the matter and the execution of the plan, is preposterous. And yet some of the courts have taken just such a position. The leading case upon this point is *Commonwealth v. Drum*,⁴¹⁰ in which the Pennsylvania court said: "Therefore, if an intention to kill exists, it is wilful; if this intention be accompanied by such circumstances as evidence a mind fully conscious of its purpose and design, it is deliberate; and if sufficient time be afforded to enable the mind fully to frame the design to kill; and to select the instrument, or frame the plan to carry this design into execution, it is premeditated. The law fixes upon no length of time as necessary to form the intention to kill, but leaves the existence of a fully formed intent as a fact to be determined by the jury, from all the facts and circumstances in evidence." In line with this suggestion it has been held that one may be guilty of murder in the first degree although the intent to commit such homicide is "formed by the accused immediately before the act is actually committed,"⁴¹¹ or "at the very moment the fatal shot was fired."⁴¹² Another court has said: "The act may follow the intent as rapidly as thought may pass through the mind, and if the intent [to kill] be followed by an act which results in the taking of human life with malice aforethought, it is murder in the first degree."⁴¹³

⁴⁰⁸ *People v. Bartz*, 342 Ill. 56, 173 N.E. 779 (1930). And see *People v. Crumble*, 286 N. Y. 24, 35 N.E. 2d 634 (1941); *State v. Kelly*, 216 N. C. 627, 6 S.E. 2d 533 (1939).

⁴⁰⁹ *State v. Benson*, 183 N. C. 795, 798, 111 S.E. 869 (1922); *State v. Bowser*, 214 N. C. 249, 253, 199 S.E. 31 (1938).

⁴¹⁰ 58 Pa. St. 9, 16 (1868).

⁴¹¹ *Wooten v. State*, 104 Fla. 597, 140 So. 474 (1932).

⁴¹² *State v. Hall*, 54 Nev. 213, 13 Pac. (2d) 624 (1932).

⁴¹³ *People v. Weeks*, 104 Cal. App. 708, 712, 286 Pac. 514 (1930). See also *Maestas v. People*, 91 Colo. 36, 12 Pac. (2d) 227 (1932).

The sound interpretation of such a statute is that a killing is deliberate and premeditated if, and only if, it results from real and substantial reflection.⁴¹⁴ It is not sufficient that the idea be fully formed and acted upon; it must be pondered over and weighed in the mind. It is true the law does not attempt to set a period of time for this requirement in terms of hours, or minutes or even seconds; but premeditation takes "some appreciable time."⁴¹⁵ It is not essential, however, for the deliberation and premeditation to take place *after* the intent is formed; such careful consideration may precede the intent. If one has pondered over the possibility of taking another's life and has reflected upon this matter coolly and fully before a decision is reached, he may truly be said to have killed "wilfully, deliberately and premeditatedly," although after his intent was fully formed he carried it into effect as rapidly as thought can be translated into action.⁴¹⁶ But the same intent, suddenly formed without preliminary consideration, and executed with such speed, would result in action properly characterized as *hasty* rather than *deliberate* and *premeditated*.

In other words, if the killing is not by poison (or some other special means if specified by the particular statute, such as "torture"), and is not committed by one who is perpetrating or attempting to perpetrate one of the felonies enumerated in the statute, there are three basic requirements for murder in the first degree, in addition to the requirement that the homicide must be murder within the rules of the common law. The first of these is that the homicide be intentional; the second is that the intent to kill must be formed by a mind that is cool rather than one that is unreasonably inflamed or excited; and the third is that the thought of taking the victim's life must have been reflected upon for some appreciable length of time

⁴¹⁴ *Bostic v. United States*, 94 F. 2d 636 (C.C.A., D.C., 1937); *People v. Guadagnino*, 333 N. Y. 344, 135 N.E. 594 (1922); *State v. Clayton*, 83 N.J.L. 673, 83 Atl. 173 (1912); *State v. Arata*, 56 Wash. 185, 125 Pac. 227 (1909).

In affirming a conviction of first degree murder the District Court of Appeal, Second District, Division 3, California said: "It is not a legal requirement that premeditation, sufficient to constitute the element of premeditation in murder in the first degree, should exist for any given length of time, or for an appreciable time.... Such premeditation may be instantaneous." *People v. Hashaway*, Cal. App. ..., 155 P. 2d 101, 110 (1945).

The supreme court of California, in denying a petition for a hearing of this case expressly withheld approval of the above statement. *People v. Hashaway*, Cal. ..., 155 P. 2d 823 (1945).

⁴¹⁵ *State v. Zdanowicz*, 69 N.J.L. 619, 627, 55 Atl. 743, 746 (1903).

Some of the statutes define murder (in part) in terms of a premeditated design to effect death. And where this word is used in the general murder statute (as distinguished from first degree murder) it is sometimes expressly provided that such design may be formed instantly before the killing. See, for example, N. D. Rev. Code (1943) secs. 12-2708, 12-2709.

⁴¹⁶ *People v. Russo*, 133 Cal. App. 468, 24 P. 2d 580 (1933).

before it was carried into effect, although not necessarily after the fatal decision was made.

The remaining type of homicide made murder in the first degree by such a statute, is any murder committed in the perpetration of, or in the attempt to perpetrate, any arson,⁴¹⁷ rape,⁴¹⁸ robbery,⁴¹⁹ or burglary.⁴²⁰ In discussing the general subject of malice aforethought it was pointed out that homicide resulting from the commission of a dangerous felony, such as one of these, is murder at common law. Many cases there cited were in fact first degree murder cases. It is not necessary to repeat them here. This reference, however, suggests a matter entitled to attention. While homicide by poison might not be first degree murder under the statute, because for example it was the result of an innocent accident; and while a wilful, deliberate and premeditated homicide might be justifiable, as the act of the officer in executing the sentence of death; any homicide resulting from one of these felonies is first degree murder under the statute, because it is murder as a matter of the common law regardless of the attending circumstances. Such is the proper interpretation of the typical first degree murder statute. In Missouri the language of the statute reaches this result with peculiar precision:

⁴¹⁷ Defendant set fire to a store he had leased, in order to defraud the insurance company. Persons in an adjoining building were killed in the fire. This was held to be murder even if there was no intent to cause death. *People v. Goldvarg*, 346 Ill. 398, 178 N.E. 892 (1931).

Glover committed arson by wilfully setting fire to a building. Glover had no intent to harm any person, and left before the fire was actually under way. Later an alarm was turned in by a passerby and one of the firemen was killed in the effort to extinguish the fire. Glover was held guilty of murder in the first degree. *State v. Glover*, 330 Mo. 729, 50 S.W. 2d 1049 (1932).

⁴¹⁸ *Commonwealth v. Osman*, 284 Mass. 421, 188 N.E. 226 (1934); *State v. Beale*, 104 W. Va. 617, 141 S.E. 7, 401 (1927).

⁴¹⁹ *State v. Rossi*, 131 Conn. 39, 42 A. 2d 354 (1945); *Swartz v. State*, 118 Neb. 591, 225 N.W. 766 (1929); *State v. Compo*, 108 N.J.L. 499, 158 Atl. 541 (1931); *State v. Sterling*, 200 N. C. 18, 156 S.E. 96 (1930); *Commonwealth v. Crow*, 303 Pa. 91, 154 Atl. 152 (1931); *McDonald v. State*, 54 Okla. Cr. R. 161, 15 P. 2d 1092 (1932).

One who shoots and kills a policeman while the officer is attempting to arrest him as he is actually engaged in the crime of robbery, is guilty of murder in the first degree. *Williams v. State*, 183 Ark. 870, 39 S.W. 2d 295 (1931); *Williams v. State*, 186 Ark. 738, 55 S.W. 2d 928 (1933).

One who has a pistol in his hand in furtherance of an attempt to rob, and who causes death by the discharge of the pistol is guilty of murder in the first degree, even though the discharge was not intended, but was the result of accident. *People v. Lytton*, 257 N. Y. 310, 178 N.E. 290 (1931).

Several persons conspired to rob a store, arming themselves with pistols and a sawed-off shotgun for this purpose. All but one entered the store while that one was stationed outside with the shotgun. As policemen approached, those who entered the store fled while the one stationed on the outside shot and killed a policeman. Held all of the conspirators are guilty of murder in the first degree. *Woodruff v. State*, 164 Tenn. 530, 51 S.W. 2d 843 (1932).

⁴²⁰ A burglar is guilty of murder in the first degree if his confederate in the burglary shoots and kills a policeman during the perpetration of the crime. *People v. Green*, 217 Cal. 176, 17 Pat. 2d 730 (1932).

"Every *murder* which shall be committed by means of poison, or by lying in wait, or by any other kind of wilful, 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."⁴²¹

In every case in which the prosecution seeks to establish guilt of first degree murder on the ground that it was committed in the perpetration of, or attempt to perpetrate, such a felony, the guilt of this other felony or attempted felony must be clearly shown. Thus if the charge is murder in the first degree on the ground that it was committed by defendant while he was perpetrating a robbery, this degree of murder is not established if it is shown that defendant was so intoxicated at the time that his intellect was prostrated to such an extent as to be incapable of forming an intent to steal. If he could not — and therefore did not — have an intent to steal, he was not guilty of committing or attempting to commit robbery and hence does not come under this clause of the statute.⁴²²

While the New York statute differs substantially from the typical first degree murder act,⁴²³ one of the nicest cases on this point is to be found in that state. Under the New York law a child under sixteen who commits an act that would be a crime not punishable by death or life imprisonment if committed by an adult, is not guilty of a crime but of juvenile delinquency.⁴²⁴ Under this statute it was held that a boy of fifteen could not be convicted of murder in the first degree on proof that he killed a man while the boy was committing robbery, without proof of a deliberate and premeditated killing. As the penalty for murder in the first degree is death under the New York statute,⁴²⁵ a boy under sixteen can be guilty of that crime. But as the penalty for robbery is neither death nor life imprisonment,⁴²⁶ one under sixteen who does in New York what would constitute robbery if done by an older person, is not guilty of robbery, which is a felony, but of juvenile delinquency only. Hence, as the homicide was not committed by one who was "engaged in the commission of, or in an attempt to commit a felony,"⁴²⁷ it is not first degree murder unless it can be shown to come under the clause of "a deliberate and premeditated

⁴²¹ Mo. Rev. Stats. (1939) sec. 4376. Italics added.

⁴²² *People v. Koerber*, 244 N. Y. 147, 155 N.E. 79 (1926).

⁴²³ "The killing of a human being, unless it is excusable or justifiable, is murder in the first degree when committed....

2...without a design to effect death, by a person engaged in the commission of, or in an attempt to commit, a felony...." N. Y. Pen. Law (McKinney, 1944) sec. 1044.

⁴²⁴ *Ibid.* sec. 2186.

⁴²⁵ *Ibid.* sec. 1045.

⁴²⁶ *Ibid.* sec. 2125.

⁴²⁷ *Ibid.* sec. 1044.

design to effect the death of the person killed, or of another."⁴²⁸

Wrongs which do not constitute murder at common law are sometimes included in the murder statutes, especially if a third degree of murder is added.⁴²⁹ The more common plan, however, is to divide common law murder into two degrees, and after setting forth in detail just what kinds of murder shall be of the first degree, to add that all other murder shall be of the second degree.⁴³⁰ Under such statutes murder in the second degree is common law murder without any of the aggravating circumstances which are sufficient to raise it to the first degree.⁴³¹

Manslaughter. Conjecture might lead to the belief that in the few states in which manslaughter is divided into degrees the first degree will be assigned to voluntary manslaughter while involuntary manslaughter is declared to be in the second degree. This, however, is not the fact. Alabama started with this plan⁴³² but has since added a section providing for manslaughter in the first degree in one type of involuntary killing.⁴³³ New Hampshire places voluntary manslaughter and certain aggravated types of involuntary manslaughter in the first degree and all other manslaughter in the second.⁴³⁴ Ohio places manslaughter in general in the first degree, and unlawful killing in violation of their traffic law in the second.⁴³⁵ It happens that in several of the states using degrees of manslaughter, the statutory definition of murder has been enlarged to include intentional killings amounting to voluntary manslaughter at common law. And the actual division is by declaring certain aggravated types of manslaughter to be of the first degree⁴³⁶ and then either declaring all other manslaughter

⁴²⁸ *People v. Roper*, 259 N. Y. 170, 181 N.E. 88 (1932). See also *People v. Porter*, 54 N. Y. S. 2d 3 (N. Y. Co. Ct., 1945).

Several persons conspired to commit arson. During the carrying out of the unlawful plan one of the conspirators was burned to death by accident. It was held that the accidental death would not support a conviction of murder of the first degree since the accidental death was not in furtherance of the conspiracy, but utterly opposed to it. *People v. Ferlin*, 203 Cal. 587, 257 Pac. 857 (1928). This, however, seems to ignore the fact that the commission of one of the felonies specified in the statute (arson) caused the death.

⁴²⁹ See, for example, Minn. Stats. (Mason, 1927) sec. 10071. If liquor sold unlawfully causes death when drunk the seller is guilty of murder in the third degree.

⁴³⁰ See, for example, Ariz. Code (1939) sec. 43—2902; Cal. Pen. Code (Deering, 1941) sec. 189; Colo. Stats. Ann. (1936) v. 2, c. 48 sec. 32; Conn. Gen. Stats. (Rev. of 1930) sec. 6043; Del. Rev. Code (1935) sec. 5158; Idaho Comp. Stats. (1932) sec. 17—1103; Iowa Code (1939) sec. 12912; Mich. Comp. Laws (1929) sec. 16709.

⁴³¹ *Commonwealth v. McLaughlin*, 293 Pa. 218, 221, 142 Atl. 213 (1928).

⁴³² Ala. Code (1940) tit. 14, sec. 320.

⁴³³ *Id.* at tit. 14, sec. 321.

⁴³⁴ N. H. Rev. Laws (1942) c. 455, secs. 8 and 9.

⁴³⁵ Ohio Gen. Code (Page, 1939) secs. 12404, 12404-1, 12550.

⁴³⁶ Minn. Stats. (Mason, 1927) secs. 10074-10076. See also the statutes of New York, Oklahoma, South Dakota and Wisconsin.

to be of the second degree,⁴³⁷ or specifying the lesser types and assigning them to the second⁴³⁸ or lower degrees.⁴³⁹ In Kansas the division is on quite a different basis. First degree manslaughter includes killings that were not manslaughter at common law (including some types of common law murder) and the rest of the field of manslaughter according to its statutory provisions is divided among three other degrees.⁴⁴⁰

Negligent Homicide. In the few states having "negligent homicide" as a separate offense this constitutes still a different degree or grade of criminal homicide, particularly where it does not require more than ordinary negligence, or where it is used as a part of a legislative plan by which the crime of manslaughter is eliminated or narrowed in scope. As this statutory offense was considered in another connection only this reminder is needed here.

⁴³⁷ Okla. Stats. (1941) tit. 21, sec. 716; S. D. (Comp. Laws, 1929) secs. 4024, 4024A.

⁴³⁸ N. Y. Pen. Code (Gilbert, 1943) sec. 1052.

⁴³⁹ Wis. Stats. (1939), sec. 340-18 *et seq.*

⁴⁴⁰ Kan. Gen. Stats. (1935) secs. 41—407 *et seq.*