INTENT AS AN ELEMENT OF VOLUNTARY MANSLAUGHTER: STATE v. PETTIT

INTRODUCTION

Under Nebraska law, second degree murder consists of intentionally causing the death of a human being without premeditation.\(^1\) Voluntary manslaughter consists of intentionally, without malice, causing the death of a human being under adequate provocation.\(^2\)

In September of 1989, the Nebraska Supreme Court held in State v. Pettit\(^3\) that the crime of voluntary manslaughter must include intent as an element.\(^4\) The court in Pettit also defined malice negatively, stating that “without malice” did not mean “without intent.”\(^5\)

The Pettit decision reversed State v. Batiste,\(^6\) a March, 1989, decision of the Nebraska Supreme Court which held that malice and intent were synonymous.\(^7\) Under Batiste, the crime of manslaughter did not encompass intentional killings. This was because manslaughter is characterized by an absence of malice,\(^8\) and malice, under Batiste, was synonymous with intent.\(^9\) Therefore, a killing without malice was also a killing without intent.\(^10\)

This Note will demonstrate that Pettit is a sound decision because it corrects separation of powers and due process violations exemplified in Batiste and because it is in keeping with the legislative intent behind the existing Nebraska homicide statutes. Support for Pettit will be demonstrated by exploring the history of manslaughter at common law,\(^11\) by chronicling the history of manslaughter jurisprudence in Nebraska,\(^12\) and by exploring the progression of cases which led up to Batiste.\(^13\)

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2. Neb. Rev. Stat. § 28-305(1) (Reissue 1989). The statute provides: “A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act.” Id.
4. Id. at 460, 445 N.W.2d at 905.
5. Id. at 450-51, 445 N.W.2d at 899.
7. Id. at 488, 437 N.W.2d at 130.
8. Id.
9. Id.
10. Id.
11. See infra notes 46-65 and accompanying text.
12. See infra notes 68-126 and accompanying text.
13. See infra notes 130-86 and accompanying text.
FACTS AND HOLDING

In *State v. Pettit*, the defendant, Sylvester Frank Pettit, was arrested and charged with manslaughter after he had shot and killed his wife. Pettit testified at trial that he and his wife had quarrelled about his desire to commit suicide prior to the shooting. Pettit asserted, however, that he never intentionally aimed his rifle at his wife, never pointed the gun at her with the thought of hurting her, never had his finger on the rifle trigger, and never intended to shoot his wife. According to Pettit, the rifle discharged accidentally when he arose from a bed.

Evidence presented by the state tended to cast doubt on Pettit’s version of the facts. The prosecution’s case included evidence that the rifle in question was not susceptible to accidental discharge through “shocks” or “jolts” to the weapon, that the safety on the rifle was properly functioning, and that the trigger required the application of three and one-half to three and three-quarters pounds of pressure before it released the hammer. Other evidence indicated that the victim had had her arms raised when the bullet entered her body, that her body was perpendicular to the trajectory of the bullet, and that the rifle muzzle was at least fifteen inches from her when the rifle discharged.

The trial court had instructed the jury that to find the defendant guilty, it must be convinced beyond a reasonable doubt that Frank Pettit “killed Pandora Pettit [and that] he did so without malice, either upon a sudden quarrel, or unintentionally, while he was in the commission of some unlawful act.” Pursuant to the unlawful act clause of the statute, the court instructed the jury that “[a]n assault in the third degree is, under the Nebraska Criminal Code, an unlawful act within the meaning of the manslaughter statute. ‘Assault in the Third Degree’ is committed by threatening another person in a menacing manner.” Pursuant to the sudden-quarrel clause of the manslaughter statute, the court did not instruct the jury that intent to kill was a necessary element or that accident was a valid defense.

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15. *Id.* at 440-41, 445 N.W.2d at 893-94.
16. *Id.* at 440, 445 N.W.2d at 893.
17. *Id.* at 442, 445 N.W.2d at 894-95.
18. *Id.* at 440, 445 N.W.2d at 894.
19. *See infra* notes 20 & 21 and accompanying text.
21. *Id.* at 442-43, 445 N.W.2d at 895.
22. *Id.* at 444, 445 N.W.2d at 895-96 (quoting from the trial court jury instructions).
23. *Id.* at 445, 445 N.W.2d at 896 (quoting from the trial court jury instructions).
24. *Id.*
The jury convicted Pettit of manslaughter under the Nebraska manslaughter statute. However, the verdict of the jury was general because it did not specify whether it found Pettit guilty of voluntary or involuntary manslaughter. In addition, the facts of the case were equivocal and susceptible of either interpretation of manslaughter, thus the facts did not indicate the form of manslaughter underlying Pettit's conviction.

On appeal to the Nebraska Supreme Court, Pettit argued that the trial court had erred in refusing to instruct the jury on accident and intent in connection with sudden quarrel manslaughter. The supreme court agreed with the defendant and, overruling State v. Batiste, held that intent is an element of sudden quarrel manslaughter and that the jury should have been so instructed. Nevertheless, if the verdict had indicated that Pettit had been convicted of involuntary manslaughter, the failure to instruct the jury that intent was an element of voluntary manslaughter would have been harmless er-


26. Pettit, 233 Neb. at 465, 445 N.W.2d at 907. The failure of the verdict to indicate which theory of manslaughter a conviction is based upon is a recurring theme in the cases discussed throughout this Note. One might conclude that using special verdicts would remedy the situation. However, the use of special verdicts in criminal trials is fraught with difficulty. See United States v. Spock, 416 F.2d 165, 183 (1st Cir. 1969), wherein the United States Court of Appeals for the First Circuit noted that special verdicts might have a catechizing effect and lead a jury, step by step, to convict when, in the absence of a special verdict, it might have acquitted. The First Circuit refused to uphold any conviction where a special verdict was used, reasoning that in such a situation, judicial pressure on the jury would always be present to some extent. Id. at 183 n.41 1/2. Other courts have allowed only limited use of special verdicts in criminal trials. See United States v. Ruggiero, 726 F.2d 913, 927-28 (2d Cir. 1984) (approving use of jury interrogatories in complex trials under the Racketeer Influenced and Corrupt Organizations Act); and United States v. O'Lonee, 544 F.2d 385, 392 (9th Cir. 1976) (holding that a conviction would stand unless there is some indication that the use of a special verdict brought judicial pressure to bear on the jury).

27. See supra notes 16-18, 20-21 and accompanying text. Evidence of the heated quarrel between Pettit and his wife supported an intentional killing under adequate provocation; evidence that the victim's arms were raised at the time the bullet entered her body supported an inadvertent killing while Pettit threatened her. See Pettit, 233 Neb. at 442-43, 445 N.W.2d at 894-95.

28. Brief for Appellant at 1, Pettit (No. 88-492). The defendant also made four other arguments: (1) that the district court should have granted his motion for a directed verdict at the conclusion of the evidence; (2) that the state should not have been allowed to amend its information before trial; (3) that certain of the evidence of the state should not have been admitted on relevancy grounds; and (4) that Pettit's sentence was excessive. Id. at 1-2. In arguing that reversible error occurred in connection with the jury instructions, the defendant argued that sudden quarrel manslaughter requires intent. Id. at 12. However, in arguing that the defendant's sentence was excessive, the defendant argued that intent is not an element of manslaughter. Id. at 37.


30. Pettit, 233 Neb. at 460, 445 N.W.2d at 905.
However, because the verdict of the jury did not indicate the theory of manslaughter under which the defendant was convicted, the court could not say beyond a reasonable doubt that the error was harmless. Therefore, the court reversed the judgment and remanded the case for a new trial.

In support of its interpretation of the Nebraska manslaughter statute, the Pettit majority laid a painstaking foundation. First, the court cited precedent from the United States Supreme Court and federal circuit courts. These federal cases held that statutes describing crimes which at common law required intent will not be construed to eliminate that element unless there is an express legislative purpose to that effect and the result is not violative of due process. The court then engaged in an extended discussion of the common-law background of manslaughter, which background provided that voluntary manslaughter required an intent to kill. Next, the court discussed how other jurisdictions treated manslaughter statutes in accordance with common-law principles. The final element of the majority's position was a discussion of primarily pre-1977 Nebraska case law which had interpreted the Nebraska manslaughter statute in accordance with the common-law.

31. Id. at 465, 445 N.W.2d at 907-08.
32. Id. at 465, 445 N.W.2d at 907.
33. Id. at 465-66, 445 N.W.2d at 908. Although remanded for a new trial, the Blaine County Attorney decided not to retry the case and the matter was dismissed. Letter from John O. Sennett to Veronica Bowen (July 2, 1990) (discussing history of Pettit on remand) (copy on file at Creighton Law Review).
34. See infra notes 35 & 37 and accompanying text. The majority's effort to demonstrate support for its position is probably an attempt to preserve the legitimacy of the court in the public eye. Although it is not unheard of for a court to violate the stare decisis doctrine, courts must do so rarely and for sound reasons. Such requirements are especially important when the court overrules recent precedent. Justice Powell captured the sentiment when he said: "The stability of judicial decision, and with it respect for the authority of this Court, are not served by the precipitous overruling of multiple precedents." Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 559 (1985) (Powell, J., dissenting).
35. Pettit, 233 Neb. at 445-48, 445 N.W.2d at 897-98. The majority in Pettit found Morissette v. United States, 342 U.S. 246 (1952), especially persuasive, as well as United States v. United States Gypsum Co., 438 U.S. 422 (1978); United States v. Wulff, 788 F.2d 1121 (8th Cir. 1985); United States v. O'Brien, 886 F.2d 850 (10th Cir. 1989); United States v. Anton, 683 F.2d 1011 (7th Cir. 1982); and Holdridge v. United States, 282 F.2d 302 (8th Cir. 1960). See infra notes 263-64 and accompanying text for a discussion of these cases.
36. Pettit, 233 Neb. at 445-48, 445 N.W.2d at 897-98. See infra notes 263-64 and accompanying text.
38. Id. at 457-60, 445 N.W.2d at 903-04. The court examined the interpretation of manslaughter statutes in California, New Mexico, Wyoming, and Idaho. Id. See infra note 285 for more discussion of the statutes from these jurisdictions.
MANSLAUGHTER

Judge Fahrnbruch, in a dissenting opinion, argued that the Nebraska manslaughter statute cannot be interpreted with reference to other jurisdictions because the Nebraska statute is not bifurcated like the statutes of other jurisdictions. That is, the Nebraska statute does not separately denote and define the crimes of involuntary and voluntary manslaughter.

Judge Fahrnbruch relied on Nebraska case law and homicide statutes for his contention that Nebraska had eliminated the common-law distinctions between voluntary and involuntary manslaughter. Interpreting Nebraska case law, the dissent reasoned that malice and intent are identical in Nebraska. Because malice distinguishes manslaughter from murder, and because malice and intent are synonomous under Batiste, the dissent concluded that manslaughter cannot have intent as one of its elements.

BACKGROUND

THE COMMON-LAW

There are no common-law crimes in Nebraska. However, if a crime originating in the common-law is not defined in a statute or is unclear, reference may be made to the common-law. As recognized in State v. Hutter, the Nebraska murder and manslaughter statutes are attempts to codify the common-law concepts of those crimes.
Therefore, reference to the common-law is appropriate.50

In the early seventeenth century, the common-law recognized two types of criminal homicide: murder and manslaughter.51 The requirement of malice, defined as an intent to kill coupled with spite, hatred, or ill-will, distinguished murder from manslaughter.52 Manslaughter was held to arise "from the sudden heat of the passions, murder from the wickedness of the heart."53

The common-law, unlike most current statutes, made no distinctions between different degrees of murder.54 Thus, a killing committed with premeditated malice and a killing committed with malice but no premeditation were both murder.55 This failure of the common-law to distinguish between the two types of murder probably rested on the fact that the penalty for either was the same — death.56

Manslaughter under the common-law was a catch-all classification, constituting any unlawful killing done without malice.57 However, because manslaughter could be either intentional or unintentional, the distinction between voluntary and involuntary manslaughter evolved.58 Voluntary manslaughter encompassed homicides which were committed intentionally, without malice, and in a sudden rage of passion brought on by adequate provocation.59

50. See supra notes 46-49 and accompanying text.
53. 2 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND § 223(b), at 2390 (W. Jones ed. 1916).
55. W. LAFAVE & A. SCOTT, supra note 52, § 7.1(a), at 182.
57. R. PERKINS & R. BOYCE, CRIMINAL LAW ch. 2 § 1(c), at 83 (3d ed. 1982). Any killing which is not excusable or justifiable is "unlawful." Id.
58. Excuse is an affirmative defense to criminal conduct which tends to negate the mens rea (criminal intent) element of the offense. S. KADISH & S. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES ch. 3 § B(2)(d), at 327 (5th ed. 1989). Some examples of excuse are legal insanity, duress, and compulsion. Id. Justification, sometimes called "necessity," is also an affirmative defense which may be raised if one believed that action was necessary to avert harm to oneself, one's property, or another person. MODEL PENAL CODE § 3.02(1) (1985). Self-defense is an example of justification. Id.
59. R. PERKINS & R. BOYCE, supra note 57, ch.2 § 1(c)(1), at 83. However, this was a mere factual distinction because the punishment for both voluntary and involuntary manslaughter was the same at common-law. Id. Modern statutes in the United States, however, often provide different punishments for the two crimes, with involuntary manslaughter being punished less severely. LAFAVE & SCOTT, supra note 52 § 7.9, at 251. See, e.g., 18 U.S.C. § 1112 (1988) (establishing a maximum of ten years imprisonment for voluntary manslaughter and a maximum of three years imprisonment and a $1000 fine for involuntary manslaughter).
60. R. PERKINS & R. BOYCE, supra note 57, ch. 2 § 1(c)(1), at 84. Adequate provocation is usually a matter of fact to be decided by the jury. Id. at 86. However, certain provocations, such as mere words, are usually held to be inadequate as a matter of law. Id. at 93.
Such an intentional killing would, under other circumstances, be considered murder. However, the presence of adequate provocation negated or excused the actor’s malice, requiring the crime to be reduced to manslaughter. Malice and adequate provocation were held to be mutually exclusive concepts, such that the presence of the one excluded the presence of the other.

Involuntary manslaughter covered a much different type of killing. Involuntary manslaughter constituted unintentional or inadvertant killings which occurred while the actor was committing an unlawful act or was grossly negligent. A wholly accidental killing is not criminal; therefore, the justification for punishing accidental killings under involuntary manslaughter rests on the culpability inherent in committing the unlawful act or gross negligence.

Thus, voluntary and involuntary manslaughter were two very different crimes under the common-law. The only similarity was that they were both part of a catch-all category of homicides which, although not punished as murder, could not be completely excused or

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60. See supra notes 52-53 and accompanying text.
61. R. Perkins & R. Boyce, supra note 57, ch. 2 § 1(c)(1), at 85.
62. See, e.g., Barrett v. Commonwealth, 231 Va. 102, 106, 341 S.E.2d 190, 192 (1986) (holding that, “[m]alice and heat of passion are mutually exclusive; malice excludes passion, and passion presupposes the absence of malice.”).
63. See infra notes 64-65 and accompanying text.
64. R. Perkins & R. Boyce, supra note 57, ch. 2 § 1(b), 105 n.1. Initially any unlawful act, whether a dangerous felony, a non-dangerous felony, or a misdemeanor qualified as an “unlawful act” sufficient to fit within the scope of involuntary manslaughter. G. Fletcher, Rethinking Criminal Law, § 4.4, at 281-85 (1978). However, beginning in 1762 with the publication of Foster’s Discourse on Homicide, a rule of “felony murder” evolved. Under this rule, if an inadvertant killing was done while the slayer was committing a felony, the killing was punishable as murder, not manslaughter. Although originally any felony crime would suffice, gradually only certain enumerated dangerous or violent felonies such as rape and robbery were held to come within the scope of the felony murder rule. G. Fletcher, supra at 283. Most late 19th century state penal codes in the United States included codifications of the felony murder rule. Id.

Nebraska has a felony murder rule under which an inadvertant killing accomplished while the slayer was committing first-degree sexual assault, arson, kidnapping, robbery, hijacking, or burglary is punishable as first-degree murder. Neb. Rev. Stat. § 28-303(2) (Reissue 1989).

When involuntary manslaughter is premised on negligence, the degree of negligence required varies from one jurisdiction to another. W. LaFave & A. Scott, supra note 52, § 7.12, at 277-78. In some states, ordinary negligence will suffice, in others the negligence must be gross, and in still others the requisite negligence is described as “criminal.” See Cowan v. State, 140 Neb. 837, 843, 2 N.W.2d 111, 114-15 (1942) (holding that the standard is “criminal negligence”); State v. Hedges, 8 Wis. 2d 652, —, 113 P.2d 530, 536 (1941) (holding that ordinary negligence will support a manslaughter conviction). See also Model Penal Code § 210.4 comment 1 (1985) (requiring gross negligence). See generally G. Fletcher, supra at § 4.3.1, at 262-63.

65. G. Fletcher, supra note 64, § 4.3.1, at 262-64.
66. See supra notes 56-64 and accompanying text.
Intent as an Element of Voluntary Manslaughter

In 1866, the legislative assembly of the Territory of Nebraska adopted a criminal code which contained a single-category murder statute, and three statutes describing the crimes of voluntary and involuntary manslaughter. These early statutes were attempts to codify the common-law. The murder statute, not yet divided into degrees, described an unlawful killing with malice aforethought. The manslaughter statutes described voluntary and involuntary manslaughter as unlawful killings without malice or deliberation, the former committed intentionally upon a sudden heat of passion brought on by adequate provocation, the latter committed unintentionally while in the commission of an unlawful act. These early manslaughter statutes also sought to pin down the definitions of "adequate provocation" and "heat of passion."

In 1873, Nebraska adopted a new criminal code, containing homi-
MANSLAUGHTER definitions which remained substantially unchanged until 1977. The 1873 statutes implemented new distinctions between first-degree and second-degree murder, changed some of the punishment directions, and consolidated the manslaughter statutes into one statute. Nothing substantive in the law of manslaughter had changed and, with one exception, the case law interpreting the manslaughter statute between 1873 and 1977 was consistent with legislative intent. These cases held that the sudden quarrel clause of the statute represented voluntary manslaughter as known at common law and that the unlawful act clause represented involuntary manslaughter.

The case that provides the one exception to the history of consistent interpretation of the manslaughter statute is Bohannan v. State. Bohannan involved a homicide, the facts of which are not recited by the court in the opinion. However, oblique reference is


75. Gen. Stat. ch. 58, §§ 3-5 (1873). Section 3 provided:
If any person shall purposely, and of deliberate and premeditated malice, or in the perpetration, or attempt to perpetrate any rape, arson, robbery, or burglary, or by administering poison, or causing the same to be done, kill another; or, if any person, by wilful and corrupt perjury, or by subornation of the same, shall purposely procure the conviction and execution of any innocent person; every person so offending shall be deemed guilty of murder in the first degree, and, upon conviction thereof, shall suffer death.

Gen. Stat. ch. 58, § 3 (1873). Section 4 provided:
If any person shall purposely and maliciously, but without deliberation and premeditation, kill another; every such person shall be deemed guilty of murder in the second degree; and on conviction thereof, shall be imprisoned in the penitentiary not less than ten years, or during life, in the discretion of the court.

Gen. Stat. ch. 58, § 4 (1873). Section 5 provided:
If any person shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, every such person shall be deemed guilty of manslaughter; and, upon conviction thereof, shall be imprisoned in the penitentiary, not more than ten years, nor less than one year.


Although the 1873 statute used the term "sudden quarrel," without elaboration, that phrase has never been interpreted literally. See, e.g., State v. Vosler, 216 Neb. 461, 465, 345 N.W.2d 806, 809 (1984) (holding that the meaning of "sudden quarrel" is not restricted to an exchange of angry words); Boche v. State, 84 Neb. 845, 854, 122 N.W. 72, 75 (1909) (holding that "sudden quarrel" means intentionally in a heat of passion brought on by adequate provocation).

76. See infra notes 78-107 and accompanying text.
77. See infra notes 78-107 and accompanying text.
78. 15 Neb. 209, 18 N.W. 129 (1884).
79. See Bohannan v. State, 15 Neb. 209, 18 N.W. 129.
made to a shooting and a quarrel. On appeal, Bohannan assigned as error the following instruction given by the court to the jury: "Man-slaughter is the unlawful killing of another without malice, either express or implied, which may be either involuntary, upon a sudden heat of passion, or inadvertently, upon commission of some unlawful act." The Nebraska Supreme Court approved of this instruction as a correct definition of manslaughter under the statute. However, this statement by the supreme court was dictum, and therefore not binding precedent, because the case was reversed on other grounds.

With the exception of Bohannan, the interpretation of the Nebraska manslaughter statute remained consistent until 1977. However, because Nebraska never bifurcated voluntary and involuntary manslaughter into separate subsections, a close reading of the cases and careful consideration of the facts as a whole is required to see the consistency.

The case of Ford v. State typifies the close attention to detail required to understand cases interpreting the Nebraska manslaughter statute. Ford was convicted of manslaughter for pointing a gun he believed to be unloaded at the victim and pulling the trigger. The gun discharged, killing the victim. Ford sought a new trial because of newly discovered evidence which proved the killing to have been accidental. The court refused to reverse on these grounds, stating that the evidence was cumulative and would only supplement the other evidence supporting an accident theory. Because of the verdict, the court concluded that the jury must have believed "that the shooting was unintentional; otherwise [the jury] would have found the defendant guilty of either murder in the first or second degree." Given the facts of the case, including the absence of adequate provocation, it is clear that Ford was prosecuted and convicted under the unlawful act manslaughter theory. Therefore, the holding of

80. Id. at 214, 18 N.W. at 131.
81. Id. at 215, 18 N.W. at 131 (emphasis added).
82. Id.
83. Id. The error upon which Bohannan's conviction was reversed involved an issue presented in his plea in abatement. Id.
84. See infra notes 86-107 and accompanying text.
85. See infra notes 86-107 and accompanying text.
86. 71 Neb. 246, 98 N.W. 807 (1904).
87. See infra notes 88-95 and accompanying text.
88. Ford, 71 Neb. at 246-47, 98 N.W. at 808.
89. Id. at 248, 98 N.W. at 808.
90. Id. at 250-51, 98 N.W. at 809.
91. Id. at 251, 98 N.W. at 809.
92. Id.
93. Id. at 247-48, 98 N.W. at 808. The shooting was unintentional and occurred
the court that a finding of intent would require conviction of murder, not manslaughter, is only meant to apply to a comparison between unlawful act manslaughter and murder.\textsuperscript{94} In addition to supporting a conviction for murder, a finding of intent would have supported a conviction for sudden quarrel manslaughter if there had also been evidence of adequate provocation.\textsuperscript{95}

The case of 	extit{Boche v. State}\textsuperscript{96} provides unmistakably clear definitions of the two crimes contained in the Nebraska manslaughter statute.\textsuperscript{97} Although the facts of the case are not recited by the 	extit{Boche} court, the case did involve a homicide and the opinion does make oblique reference to a shooting and a quarrel.\textsuperscript{98} In 	extit{Boche}, the court first acknowledged that the statute described two classes of manslaughter and stated:

> In the first class of cases referred to in the statute [the sudden quarrel manslaughter cases] the homicide must have been intentional, but in a sudden heat of passion or heat of blood caused by reasonable provocation and without malice; in the latter clause [describing unlawful act manslaughter] the killing must have been unintentional, but caused while the slayer was committing some act prohibited by law and other than rape, arson, robbery, or burglary.\textsuperscript{99}

The case of 	extit{State v. Worley}\textsuperscript{100} provides a more recent example of an interpretation of the Nebraska manslaughter statute prior to 1977.\textsuperscript{101} In 	extit{Worley}, the defendant had shot and killed the victim, but the facts were equivocal and susceptible of either a voluntary or involuntary manslaughter interpretation.\textsuperscript{102} The trial court instructed the jury on the elements of both kinds of manslaughter, but again the verdict failed to indicate the theory upon which the manslaugh-

\begin{itemize}
  \item \textsuperscript{94} See Ford, 71 Neb. at 248-49, 98 N.W. at 808-09.
  \item \textsuperscript{95} Id. at 251, 98 N.W. at 809.
  \item \textsuperscript{96} 84 Neb. 845, 122 N.W. 72 (1909).
  \item \textsuperscript{97} See infra note 99 and accompanying text.
  \item \textsuperscript{98} Boche, 84 Neb. at 854, 122 N.W. at 75.
  \item \textsuperscript{99} Id. If the defendant had been committing rape, burglary, arson, or robbery when the killing took place, he would be guilty of felony murder, rather than manslaughter. See supra note 64.
  \item \textsuperscript{100} 178 Neb. 232, 132 N.W.2d 764 (1965).
  \item \textsuperscript{101} See infra notes 102-07 and accompanying text.
  \item \textsuperscript{102} Worley, 178 Neb. at 233-34, 132 N.W.2d at 766. The defendant told two stories of the incident. In one version his gun accidentally went off and killed the deceased. In another version, the defendant claimed to have been in another room when the deceased was shot. Additionally, there was evidence that the defendant quarrelled with the deceased shortly before the shooting occurred because the deceased had been gone too long with the defendant's girlfriend. Id.
\end{itemize}
The supreme court held that there was sufficient evidence, if believed, to support both theories. After discussing the evidence supporting voluntary manslaughter, the court discussed evidence supporting involuntary manslaughter and made the following statement: “To come within the provisions of the manslaughter statute, the killing must not have been intentional or with a design to affect death.” Because the statement appears in the context of a discussion of involuntary manslaughter, it apparently applies only to involuntary manslaughter. However, failure to read the case as a whole or failure to read the statement in context can lead to the conclusion that intent is not required for manslaughter under either clause of the statute.

The Definition of “Malice”

Other cases important to an understanding of Pettit are those defining “malice.” Because the Nebraska legislature did not provide a definition of malice, it was left to the courts to define this element with reference to the common-law. In Milton v. State, the court defined malice as “[t]he doing of a wrongful act intentionally without just cause or excuse.”

However, the Milton definition of malice was denounced as inadequate and incomplete in Carr v. State. In Carr, the court held that malice “should be defined as a wicked and mischievous purpose which characterizes the perpetration of a wrongful or injurious act intentionally committed without lawful excuse.”

After Carr and until 1977, the Carr definition of malice remained substantially unchanged. Typically, malice was regarded as an in-

103. Id. at 235-36, 132 N.W.2d at 766-67.
104. Id. at 236, 132 N.W.2d at 767.
105. Id. (emphasis added).
106. Id. at 236, 132 N.W.2d at 767. This is the conclusion arrived at by the majority in State v. Pettit, 233 Neb. 436, 456-57, 445 N.W.2d 890, 902-03 (1989).
107. Contra Pettit, 233 Neb. at 472-73, 445 N.W.2d at 912 (Fahrnbruch, J., dissenting) (taking the statement in Worley out of context and arriving at the incorrect conclusion that neither clause of the manslaughter statute requires intent).
108. See infra notes 110-26 and accompanying text.
109. See supra notes 110-26 and accompanying text. If a term is not defined by statute, the courts must define it. If the term originated out of the common-law, reference to the common-law definition may be made. See supra notes 45-47 and accompanying text.
110. 6 Neb. 136 (1877). The facts of the cases defining “malice” are unimportant except in the fact that they all involve homicides of one kind or another. For that reason, the facts of Milton, Carr v. State, and State v. Rowe are not discussed in this Note.
111. Id. at 143.
112. 23 Neb. 749, 37 N.W. 630 (1888).
113. Id. at 756, 37 N.W. at 633.
114. See infra notes 115-26 and accompanying text.
tent to kill without just cause or excuse, coupled with some maleficent mental state such as "corruption," "willfulness," or "wickedness." Occasionally, a case is found which expresses malice as simply an intent to kill without just cause or excuse. The two cases of *State v. Rowe* demonstrate that this was meant as a shorthand expression for the full definition and not meant to define malice and intent as equivalent.

Paul J. Rowe was convicted of second-degree murder in the death of his wife. After being convicted, Rowe appealed to the Nebraska Supreme Court. In the court's decision on Rowe's first appeal, it defined malice as "the intentional doing of a wrongful act without just cause or excuse." The first appeal resulted in reversal of Rowe's conviction and a remand for a new trial.

After being convicted again in the second trial, Rowe again appealed. On this second appeal, the supreme court defined malice as "that condition of mind which is manifested by intentionally doing a wrongful act without just cause or excuse. . . . Malice means 'any willful or corrupt intention of the mind.'" There was no discussion of the discrepancy between the two definitions of malice in the second opinion. Therefore, it can be assumed that the court viewed the definitions as identical.

Prior to 1977 the interpretation of the Nebraska manslaughter statute was in accord with the common-law conception of manslaughter. The cases held that the statute encompassed both voluntary and involuntary manslaughter and that the former required an intentional killing, without malice, which was committed under adequate provocation. Equally well-established and unchanging was the court's definition of malice: "a wicked and mischievous purpose which characterizes the perpetration of a wrongful or injurious act

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115. See, e.g., *Sall v. State*, 157 Neb. 688, 695, 61 N.W.2d 256, 260-61 (1953) (holding that malice is defined as any willful or corrupt intention of the mind); *Housh v. State*, 43 Neb. 163, 167-68, 61 N.W. 571, 572 (1895) (holding that malice is defined as any willful or corrupt intention of the mind).
118. *Rowe*, 210 Neb. at 420-21, 315 N.W.2d at 253.
120. *Rowe*, 210 Neb. at 425, 315 N.W.2d at 255.
121. Id. at 425, 315 N.W.2d at 255.
122. Id. at 421, 315 N.W.2d at 253. The reversal was unrelated to the definition of malice.
123. *Rowe*, 214 Neb. at 686, 335 N.W.2d at 311.
124. *Rowe*, 214 Neb. at 689-90, 335 N.W.2d at 313.
127. *See supra* notes 68-107 and accompanying text.
128. *See supra* notes 68-107 and accompanying text.
intentionally committed without lawful excuse.”

NEBRASKA STATUTES AND CASE LAW AFTER 1977

In 1977, a mass revision of the Nebraska criminal code took place and new homicide statutes were enacted. The statutes for first-degree murder and manslaughter remained virtually unchanged from their 1873 counterparts, but notable change was wrought in the second-degree murder statute. Specifically, malice was eliminated as a required element of second-degree murder. The impetus for this change is not entirely clear because legislative history on the statute is inconclusive. However, the statutes discussed in United States Supreme Court cases of Mullaney v. Wilbur and Patterson v. New York provide a useful comparison because both of these cases dealt with malice provisions in the second-degree murder statutes of other jurisdictions.

In Mullaney, the Supreme Court struck down a Maine murder statute which provided that malice was an essential element of the crime, but allowed malice to be implied if the prosecution could show

129. Carr, 23 Neb. at 756, 37 N.W. at 633. See also supra notes 110-26 and accompanying text.
A person commits murder in the first degree if he kills another person (1) purposely and with deliberate and premeditated malice, or (2) in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary, or (3) by administering poison or causing the same to be done; or if by willful and corrupt perjury or subornation of the same he purposely procures the conviction and execution of any innocent person. The determination of whether murder in the first degree shall be punished as a Class I or Class IA felony shall be made pursuant to sections 29-2520 to 29-2524.


Section 28-304 provides: “(1) A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation. (2) Murder in the second degree is a Class IB felony.” Neb. Rev. Stat. § 28-304 (Reissue 1989).

Section 28-305 provides: “(1) A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act. (2) Manslaughter is a Class III felony.” Neb. Rev. Stat. § 28-305 (Reissue 1989).

133. Nebraska Criminal Code Revision: Hearing on L.B. 8 Before the Judiciary Committee, Neb. Unicameral, 83rd Legislature, 2d Sess. 2-3 (1973) (testimony of Clarence Meyer). Of the homicide statutes, only the first-degree murder statute is discussed in the legislative history and even then, only oblique reference to its death-penalty provision is made. Id.
136. See infra 137-44 and accompanying text.
that the killing was intentional and unlawful. Before *Mullaney*, many states had allowed malice to be implied because it was a difficult element to define and even more difficult to prove. The statute involved in *Mullaney* was held to be unconstitutional because it did not require the prosecution to prove beyond a reasonable doubt every essential element of the crime; thus the statute violated the due process clause of the fourteenth amendment.

In *Patterson*, a New York second-degree murder statute was examined. The statute provided that second-degree murder consisted of an intentional killing. A subsection of the statute provided that it was an affirmative defense to second-degree murder if the defendant could prove that he acted under extreme emotional disturbance. If the affirmative defense were proved, the offense would be reduced to manslaughter. The Court held that forcing the defendant to prove the presence of an affirmative defense, and therefore not requiring the state to disprove its presence, was not by itself violative of due process.

The statute discussed in *Patterson* is similar to the 1977 revision of the Nebraska second-degree murder statute. However, regardless of the change in the second-degree murder statute, interpretation of the manslaughter statute should not have been affected because the manslaughter statute remained unchanged.

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138. See, e.g., *State v. Hutter*, 145 Neb. 798, 802, 18 N.W.2d 203, 206 (1945) (holding that "murder is the unlawful killing of a person with malice aforethought, either express or implied").
140. See infra 141-44 and accompanying text.
141. N.Y. PEnAL L AW § 125.25 (McKinney 1975). The relevant provisions are as follows:

A person is guilty of murder in the second degree when:
1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:
   (a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse. . . .

Id.
142. Id.
144. Id. at 206-07.
146. Compare NEB. REV. STAT. § 28-305 (Reissue 1989) supra note 130 with NEB. REV. STAT. § 28-403 (Reissue 1956). Section 28-403 provides:

Whoever shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, shall be deemed guilty of manslaughter; and upon conviction thereof shall be imprisoned in the penitentiary not more than ten years nor less than one year.
The Court's Adaptation to the 1977 Revision

Following the 1977 revision of the second-degree murder statute, the Nebraska Supreme Court began holding that manslaughter no longer required intent under either clause of the manslaughter statute and that malice and intent were synonymous.\(^{147}\) These two developments were an effort by the court to remedy a perceived problem with the revision.\(^{148}\) Seemingly, the court reasoned that if malice was the distinguishing element between second-degree murder and manslaughter, and second-degree murder no longer required malice, the basis for rationally distinguishing between the two crimes was eroded.\(^{149}\)

The first solution of the court to this dilemma was to continue to supply malice judicially as an element to the crime of second-degree murder even though that element had been expressly eliminated by the legislature.\(^{150}\) A typical example of this tactic can be found in *State v. Rowe*.\(^{151}\) In *Rowe*, the defendant was convicted of second-degree murder in his second trial for a killing which had occurred in 1980—three years after the second-degree murder statute revision.\(^{152}\) In *Rowe*, the court stated that the elements of second-degree murder are that the killing be done intentionally, without premeditation, and maliciously.\(^{153}\) Through judicial fiat, malice appears in the definition of second-degree murder without the court acknowledging that that element is no longer authorized by the statute.\(^{154}\)

Another case which demonstrates the judicial addition of malice to second degree murder is *Clermont v. State*.\(^{155}\) In *Clermont* the defendant had been found guilty of second-degree murder in the January 3, 1978, death of his stepson.\(^{156}\) Although the date of the offense indicates that the revised second-degree murder statute was applicable to the case, the court nonetheless defined second-degree murder as a purposeful and malicious killing.\(^{157}\)
Another attempted solution to the second-degree murder versus manslaughter problem was to define manslaughter so that it no longer required intent, as the court did in *State v. Drew.* The defendant, Drew, had been charged with second-degree murder, but was convicted of manslaughter on facts which are susceptible of either a voluntary or involuntary manslaughter interpretation. Drew and the victim were engaged in a scuffle when Drew pulled a gun from her pocket, allegedly intending only to strike the victim in the head with the gun. However, the gun discharged and killed the victim. Drew requested but was refused an instruction at trial that accident was a defense to a charge of voluntary manslaughter. Moreover, no instruction was given that intent was an element of voluntary manslaughter. The verdict of the jury did not indicate the theory of manslaughter upon which the conviction rested.

The court held that the refusal of Drew's proposed instruction was not error. Interpreting the Nebraska manslaughter statute, the court stated:

The threatening use of a firearm is an unlawful assault sufficient to convict one of manslaughter, when defined as causing the death of another unintentionally while in the commission of an unlawful act. Section 28-305(1). Similarly, the accidental discharge of a gun, the use of which was not justified under the circumstances, is not a defense to manslaughter when the killing occurred upon a sudden quarrel.

In *State v. Rincker,* the defendant had been charged with first-
degree murder, but was convicted of manslaughter.\textsuperscript{168} As with \textit{Drew}, the facts are susceptible of either a voluntary or an involuntary manslaughter interpretation.\textsuperscript{169} Rincker had stabbed the victim to death after he found his wife with the victim and another man on a bed at the victim's home.\textsuperscript{170} Although the adultery could have been viewed as adequate provocation and the killing intentional, there was also evidence that the victim may have initiated an attack on Rincker.\textsuperscript{171} If the jury had believed that the victim initiated the attack, Rincker's act would have been an unjustified use of deadly force without an intention to kill, and thus, involuntary manslaughter.\textsuperscript{172} As in \textit{Drew}, the verdict of the jury in \textit{Rincker} did not indicate upon which theory the conviction was based.\textsuperscript{173}

On appeal, Rincker assigned as error the instruction given by the trial court defining manslaughter, when neither the prosecution nor the defense had requested such an instruction.\textsuperscript{174} Under Nebraska law, if there is evidence presented in a first-degree murder trial which, if believed, supports conviction on second-degree murder or manslaughter, but not first-degree murder, the court is under a duty to instruct the jury on the lesser offenses.\textsuperscript{175} In discussing whether

\begin{itemize}
\item \textsuperscript{168} \textit{Id.} at 523, 423 N.W.2d at 436.
\item \textsuperscript{169} \textit{See infra} notes 170-72 and accompanying text.
\item \textsuperscript{170} \textit{Rincker}, 228 Neb. at 526-27, 423 N.W.2d at 438. Although Rincker's wife was clothed, both of the men on the bed with her were naked. \textit{Id}.
\item \textsuperscript{171} \textit{Id.} at 527, 423 N.W.2d at 438. One of the earliest and most widely recognized provocations to be deemed adequate for the definition of manslaughter was for a husband to catch his wife in the act of adultery. R. \textsc{Perkins} & R. \textsc{Boyce}, \textit{supra} note 57, ch. 2, § 1, at 96.
\item \textsuperscript{172} There are several reasons why Rincker's act would probably be viewed as an unlawful assault rather than a justified use of force. For one, there is no indication that the victim was armed in any way. This means that the degree of force Rincker used in defense probably exceeded the degree of force threatened—an impermissible result. In addition, the statute governing use of force in self-protection, Nebr. Rev. Stat. § 28-1409 (Reissue 1989), indicates that (1) Rincker was under a duty to retreat because he was not in his own dwelling or place of business (see Nebr. Rev. Stat. § 28-1409(4)(b)(i)); (2) Rincker had to have believed that he was in immediate danger of suffering death or serious bodily injury (see Nebr. Rev. Stat. § 28-1409(4)); and, (3) use of deadly force is not justified against the owner/occupier of property where the intruder knows the owner is using force to protect his property (see Nebr. Rev. Stat. § 28-1409(3)).
\item \textsuperscript{173} \textit{Rincker}, 228 Neb. at 523, 423 N.W.2d at 436. The opinion simply states that the jury "found him guilty of manslaughter, a violation of Nebr. Rev. Stat. § 28-305 (Reissue 1985) . . . ." \textit{Rincker}, 228 Neb. at 523, 423 N.W.2d at 438.
\item \textsuperscript{174} \textit{Id.} at 534, 423 N.W.2d at 442.
\item \textsuperscript{175} Nebr. Rev. Stat. § 29-2027 (Reissue 1985). The statute is interpreted to require the trial court in a prosecution for first-degree murder to instruct the jury on second-degree murder and manslaughter if there is evidence which, if believed, supports one of the lesser charges but not the greater. This duty applies even if neither party requests the court to so instruct the jury. State v. Archbold, 217 Neb. 345, 550, 330 N.W.2d 500, 504 (1984).
\end{itemize}
there was sufficient evidence, if believed, to support a verdict on manslaughter, the court stated:

The jury could well have concluded from the evidence that Rincker's wife was lying on the bed between the victim and [the other man] and that Rincker reacted to that scene without any prior intention to kill the victim. That alone required the trial court to instruct the jury concerning manslaughter.

While it is true that Rincker has no prior criminal record and has a history of good and responsible conduct, the fact remains that he, albeit unintentionally, took a life.

The manslaughter was an unintentional act; bringing the knife to the scene was an intentional act. 176

Finally, in 1989, State v. Batiste 177 solidified the new interpretation of manslaughter and officially defined malice as synonymous with intent. 178 Batiste had intentionally strangled another woman to death and was convicted of first-degree murder. 179 On appeal, Batiste argued that the evidence adduced at trial was only sufficient to prove her guilty of voluntary manslaughter, not murder in the first degree. 180 Batiste alleged that while the killing was intentional, it was done under adequate provocation: Batiste was confronting the victim about an affair with Batiste's husband. 181

There is no question in Batiste, as in some other cases discussed in this section, that the Batiste pronouncement on manslaughter applied to the crime of voluntary and not involuntary manslaughter. 182 The facts demonstrated that the defendant acted intentionally in killing the victim and the manslaughter issue raised by the defendant involved only voluntary manslaughter. 183

In Batiste, the court first set out the three elements of sudden quarrel manslaughter: "(1) the killing of another, (2) upon a sudden

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176. Rincker, 228 Neb. at 534-35, 423 N.W.2d at 442-43 (emphasis added).
177. 231 Neb. 481, 437 N.W.2d 125 (1989).
178. See infra notes 184-86 and accompanying text.
179. Batiste, 231 Neb. at 483, 437 N.W.2d at 127.
180. Id. at 486, 437 N.W.2d at 129.
181. Id. at 486-87, 437 N.W.2d at 129-30.
182. See supra note 181 and infra note 183 and accompanying text.
183. Batiste, 231 Neb. at 490, 437 N.W.2d at 131-32. Medical testimony established that, in order to strangle someone to death, continuous pressure must be applied to the victim's neck for perhaps ten to thirteen minutes. The pathologist who testified for the state established that the injuries present on the victim's neck were quite extensive, indicating a great deal of pressure had been applied. Id. at 490, 437 N.W.2d at 131-32.
The court then defined malice as "[t]hat condition of mind which is manifested by the intentional doing of a wrongful act without just cause or excuse." Observing that "malice" and "intent" are synonymous under this definition of malice, the court delivered the following statement: "If the facts of a killing establish beyond a reasonable doubt that the killing is done intentionally without legal cause or excuse, then there is malice, and the degree of killing is greater than manslaughter because malice is involved."

ANALYSIS

The decision of State v. Pettit is a curious change in Nebraska manslaughter jurisprudence. Although the Pettit position is not untenable or improper, it is a four-to-three reversal of a completely contrary unanimous decision which had been handed down only six months earlier. In order to understand the reason for the abrupt change, it is necessary to understand the position in State v. Batiste. The Batiste holding is essentially the position taken by Judge Fahrnbruch in his dissent in Pettit.

THE BATISTE POSITION

Elements of the Position

The Batiste case was the progeny of a series of cases which began to spring up in the wake of the 1977 revision of the second-degree murder statute. These cases attempted to rationally distinguish between second-degree murder and voluntary manslaughter under the new statute. Through these cases, the court developed three tools

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184. Id. at 488, 437 N.W.2d at 130.
185. Id.
186. Id. See also PROPOSED NEBRASKA CRIMINAL JURY INSTRUCTIONS, A WORKING MANUSCRIPT 78-81 (1989). This proposed revision was published in May of 1989 and reflects the effect Batiste had on criminal jury instructions for homicides.
188. See infra note 189 and accompanying text.
190. See infra notes 195-268 and accompanying text.
191. Compare Batiste, 231 Neb. at 488, 437 N.W.2d at 130 with Pettit, 233 Neb. at 466-76, 445 N.W.2d at 908-14 (Fahrnbruch, J., dissenting).
192. See supra notes 130-76 and accompanying text.
193. See supra notes 130-76 and accompanying text.
to combat the perceived problem of how to make this distinction. The first development of the court was to judicially supply malice as an element of second-degree murder in spite of its absence as an element in the statute. The second development was to define malice as synonymous with intent. The third development was to eliminate intent as an element of voluntary manslaughter.

The first judicial solution—continuing to supply malice as an element of second-degree murder—was carried out in a covert fashion. Although this solution is present in cases such as State v. Clermont and State v. Rowe, the court includes malice in its definition of second-degree murder without acknowledging that the statute does not require malice. Furthermore, the court fails to provide any rationale as to why the court thinks malice is necessary.

It was not until Judge Fahrnbruch's dissent in Pettit that any rationale was given for judicially supplying malice as an element of second-degree murder. It seems odd that Pettit should contain any discussion of second-degree murder because the defendant was charged, tried, and convicted only of manslaughter. However, Judge Fahrnbruch states in Pettit that the court continued to supply malice as an element of second-degree murder because it was thought to be necessary to distinguish those intentional killings by law enforcement officers and others which were legally permissible under specified circumstances.

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194. See infra notes 195-97 and accompanying text.
196. See, e.g., Batiste, 231 Neb. at 488, 437 N.W.2d at 130 (1989) (holding malice and intent to be synonymous).
198. See infra note 201 and accompanying text.
199. 204 Neb. 611, 284 N.W.2d 412 (1979).
201. Clermont, 204 Neb. at 615-16, 284 N.W.2d at 415; Rowe, 214 Neb. at 689, 335 N.W.2d at 312-13. In Clermont, the court simply states that “[t]he essential elements in the crime of murder in the second degree are that the killing be done purposely and maliciously.” The court then discusses what malice entails. Clermont, at 615-16, 284 N.W.2d at 415. In Rowe, the court actually quotes the statute word-for-word, but then goes on to cite the above passage from Clermont without acknowledging the difference between the two. Rowe, 214 Neb. at 689, 335 N.W.2d at 312. Like the Clermont decision, the Rowe decision then turns to a discussion of malice. Id. at 689-90, 335 N.W.2d at 313.
202. See supra note 201.
203. Pettit, 233 Neb. at 474-75, 445 N.W.2d at 913 (Fahrnbruch, J., dissenting).
204. Id. at 441, 444, 445 N.W.2d at 894, 896.
205. Id. at 474-75, 445 N.W.2d at 913 (Fahrnbruch, J., dissenting).
The second judicial solution which the Batiste line of cases created was the adulteration of the definition of "malice." The definition of "malice" was not provided by the legislature and, as such, it was properly within the province of the court to define that term. Until 1977, however, the definition had always been intent, plus some maleficient state of mind, without excuse or justification. After 1977, culminating in Batiste, the definition was reduced to this simple equation: intent without excuse or justification.

Because malice was within the province of the court to define, there is nothing wrong per se with changing the definition. Defining malice as synonymous with intent was insidious, however, because of the effect this definition had on the interpretation of the manslaughter statute. Manslaughter of either variety is still described by the statute as a killing "without malice." If malice is to be synonymous with intent, then a killing without malice must also be a killing without intent.

This brings the analysis of the Batiste position to its third tenet: that the crime of manslaughter under either clause of the manslaughter statute does not require intent; or, as Judge Fahrnbruch posits in his dissent in Pettit, voluntary manslaughter as it was known at common-law no longer exists in Nebraska.

Although the Batiste position developed only after 1977, in his dissent in Pettit, Judge Fahrnbruch attempts to make it seem as though it was a long-standing interpretation of the Nebraska manslaughter statute. As support for this proposition, Judge Fahrnbruch cites to Bohannan v. State. As discussed earlier, although Bohannan did comport with Batiste in stating that intent was not an element of voluntary manslaughter, this statement was dicta and not binding. Furthermore, cases subsequent to Bohannan belie the as-
sertion that the Bohannan interpretation was the customary one. 219

Judge Fahrnbruch also points to the fact that the 1873 statutes combined what had been several manslaughter statutes into one. 220 Judge Fahrnbruch interprets this to mean that the legislature, in 1873, intended to create only one type of manslaughter in Nebraska. 221 This is refuted by the fact that the statute retained the "sudden quarrel" language as well as by subsequent interpretations of the statute. 222

Once one understands the elements of the Batiste position, it becomes necessary to examine why that position was not well reasoned. 223 Taken together, the three judicial solutions contained in Batiste, in addition to lacking historical support prior to 1977, posed serious constitutional problems. 224

Separation of Powers Violations

Both the practice of judicially supplying malice as an element of second-degree murder and the judicial abolition of the crime of voluntary manslaughter violate the constitutional doctrine of separation of powers. 225 This doctrine provides that it is the province of the legislature to make law, the duty of the executive to enforce law, and the obligation of the judiciary to interpret law. 226 There will be overlapping of these areas of responsibility, particularly when a statute is ambiguous or when legislative intent is unclear. 227 However, when ambiguity is not present, the doctrine mandates that no one branch may usurp the power of any other branch. 228

Judicially supplying malice in second-degree murder violates separation of powers because it amounts to judicial legislation: in ig-

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219. See supra notes 86-107 and accompanying text.
221. Pettit, 233 Neb. at 470, 445 N.W.2d at 910 (Fahrnbruch, J., dissenting).
222. See, e.g., State v. Hutter, 145 Neb. 798, 18 N.W.2d 203 (1945) (holding that the statute codified manslaughter as known at common law); Boche v. State, 84 Neb. 845, 122 N.W. 72 (1909) (holding that the statute encompassed both voluntary and involuntary manslaughter). See also supra notes 86-107 and accompanying text.
223. See infra notes 226-68 and accompanying text.
224. See infra notes 226-68 and accompanying text.
225. See infra notes 226-56 and accompanying text.
227. Id. at 18. In applying the law, judges necessarily are engaged in creating the law to some extent. Id. However, the judicial lawmaker power must be strictly "interstitial": judges are only authorized to fill in the narrow gaps between statutes and constitutional provisions. N. MacCormick, Legal Reasoning and Legal Theory 187-88 (1978).
noring the law made by the legislature, the judiciary created a different law.\textsuperscript{229} The reasons why the Nebraska Unicameral decided to eliminate malice as an element of second-degree murder are unclear, but it is undeniable that it did purposely and deliberately eliminate malice.\textsuperscript{230} As such, the Nebraska judiciary was not free to ignore the change and legislate its own law.\textsuperscript{231}

The reason underlying the violation of separation of powers does not matter;\textsuperscript{232} however, to the extent that the apparent reason put forward was the product of faulty reasoning, it is discussed here.\textsuperscript{233} In his dissent in \textit{Pettit}, Judge Fahrnbruch states briefly that the court continued to supply malice as an element of second-degree murder to distinguish those intentional killings by law enforcement officers and others which were legally permissible under specified circumstances.\textsuperscript{234} This implies that except for the judicially supplied element of malice, these otherwise permissible killings would result in convictions for second-degree murder.\textsuperscript{235}

This reasoning is faulty because Nebraska sets out a series of statutes outlining situations under which the use of deadly force is justified.\textsuperscript{236} The situations posited by Judge Fahrnbruch fit neatly

\begin{footnotes}

\textsuperscript{229} Compare NEB. REV. STAT. § 28-304 (Reissue 1989) supra note 130 with Rowe, 214 Neb. at 689, 335 N.W.2d at 312 (1983).

\textsuperscript{230} See supra note 133 and accompanying text. Compare NEB. REV. STAT. § 28-304 (Reissue 1989) supra note 130 with NEB. REV. STAT. § 28-402 (Reissue 1956). Section 28-402 provides:

\begin{quote}
Whoever shall purposely and maliciously, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree; and upon conviction thereof shall be imprisoned in the penitentiary not less than ten years, or during life.
\end{quote}

NEB. REV. STAT. § 28-402 (Reissue 1956).

\textsuperscript{231} See, e.g., Kinnan v. State, 86 Neb. 234, 236, 125 N.W. 594, 594 (1910) (holding that "[i]t is not within the powers of the judicial branch of government to place rules upon the books, or enact laws to define or punish crime. Those matters are wholly within the province of the Legislature . . . ").

\textsuperscript{232} INS v. Chada, 462 U.S. 919, 951 (1983) (holding that even seemingly good reasons do not justify violating the doctrine of separation of powers). See P. McGuigan & R. Rader, supra note 226 at 8 (quoting Daniel Webster: "Good intentions will always be pleaded for every assumption of authority. It is hardly too strong to say that the Constitution was made to guard the people against the dangers of good intentions. There are men in all ages who mean to govern well, but they mean to govern. They promise to be good masters, but they mean to be masters.").

\textsuperscript{233} See infra notes 234-36 and accompanying text.

\textsuperscript{234} Pettit, 233 Neb. at 475-76, 445 N.W.2d at 913 (Fahrnbruch, J., dissenting).

\textsuperscript{235} Id.

\end{footnotes}
into the exceptions provided in these justification statues. Therefore, contrary to Judge Fahrnbruch's argument, such killings would not result in convictions for second-degree murder because the defense of justification is available. Aside from this faulty reasoning, however, the primary reason that the practice of judicially supplying malice was untenable was because it violated the doctrine of separation of powers.

The judicial abolition of the crime of voluntary manslaughter also violates the doctrine of separation of powers. It does so by defying the clear legislative intent in the manslaughter statute. The 1873 homicide statutes in the Nebraska criminal code were intended to codify the common-law as accurately as possible. If this was the intent in the 1873 statutes, then that intent with regard to the manslaughter statute cannot be held to have changed because the manslaughter statute today is identical in all important respects to the 1873 statute.

The Nebraska judiciary has recognized that the codification of the common law was the underlying intent of the Nebraska manslaughter statute in several decisions. In State v. Hutter, the court gave an express acknowledgment of legislative intent to codify common-law murder and manslaughter. In other cases before 1977, the acknowledgment is tacitly evidenced by interpretations that are consistent with the common-law principles of manslaughter. The pre-1977 cases always interpreted the Nebraska manslaughter

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237. See supra notes 172 & 236.
238. See supra note 57 (discussing justification as an affirmative defense).
239. See supra notes 226-32 and accompanying text.
240. See infra notes 242-56 and accompanying text.
241. See infra notes 242, 246-47 and accompanying text.
242. Morgan v. State, 51 Neb. 672, 693, 71 N.W. 788, 794 (1897), (establishing that the 1873 Nebraska Criminal Code was adopted from Ohio's then-existing code). See Sutcliffe v. State, 18 Ohio 469, 476 (1849) (establishing that the Ohio manslaughter statute, adopted by Nebraska, was meant to embody the common law concept of that crime).
243. Compare GEN. STAT. ch. 58, § 5 (1873) supra note 75 with NEB. REV. STAT. § 28-305 (Reissue 1989) supra note 130.
244. See infra notes 245-50 and accompanying text.
245. 145 Neb. 798, 18 N.W.2d 203 (1945).
246. Hutter, 145 Neb. at 801-02, 18 N.W.2d at 207. The court in Hutter held that: The different degrees of homicide as defined by our statute are all carved out of murder and manslaughter as known to the common law. No new offense has been created, and no homicide which was not criminal at common law is made so by statute, but it is divided into degrees and the punishment graded to meet the circumstances of the particular case.
247. See, e.g., Boche v. State, 84 Neb. 845, 122 N.W. 72 (1909) (holding that the Nebraska manslaughter statute encompasses both voluntary and involuntary manslaughter with the former requiring intent and the latter not requiring intent).
statute to encompass both voluntary manslaughter (in the sudden quarrel clause), and involuntary manslaughter (in the unlawful act clause). 248 Voluntary manslaughter was held to encompass any unlawful, intentional killing done without malice while the slayer was under the influence of adequate provocation. 249 Involuntary manslaughter was held to encompass any unlawful, unintentional killing done without malice while the slayer was committing an unlawful act. 250

These interpretations were consistent with the common-law history of manslaughter and, thus, with the legislative intent. 251 The Batiste position disregards the legislative intent by holding that neither clause of the Nebraska manslaughter statute requires an intent to kill. 252 Voluntary manslaughter as it was previously known in Nebraska was thus destroyed. 253 This development violates the doctrine of separation of powers in the same way as did judicially supplying malice to second-degree murder. 254 The action amounts to an usurping of legislative power to make laws. 255

However, separation-of-powers problems aside, if the word of a judge is sufficient to change a statute, then the Batiste position would have been tenable in spite of the fact that it changed the common-law concept of manslaughter. 256 The fact that the word of a judge cannot change a statute is what forms the basis for the second infirmity with the Batiste proposition that manslaughter no longer requires intent. 257

Due Process Violations

The Nebraska manslaughter statute reads as follows:

A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of

248. See supra notes 86-107 and accompanying text.
249. See, e.g., Boche, 84 Neb. at 854, 122 N.W. at 75 (1909).
250. See, e.g., id.
251. See supra notes 45-65, 245-47 and accompanying text.
252. Batiste, 231 Neb. at 488, 437 N.W.2d at 130.
253. Id. Voluntary manslaughter was to be described by the sudden-quarrel clause of the manslaughter statute. If, by judicial fiat, the court held that the clause no longer required intent, then voluntary manslaughter is no longer described in that clause. Nor can it be said that the crime of voluntary manslaughter exists within the second-degree murder statute. The second-degree murder statute does not apply to a killing done under adequate provocation—an essential element of voluntary manslaughter. Thus, after the Batiste opinion, voluntary manslaughter no longer existed in Nebraska. Id.
254. See supra notes 226-36 and accompanying text.
255. Compare Boche, 84 Neb. at 854, 122 N.W. at 75 with Batiste, 231 Neb. at 488, 437 N.W.2d at 130.
256. See Batiste, 231 Neb. 488-89, 437 N.W.2d at 130-31.
257. See infra notes 258-70 and accompanying text.
another unintentionally while in the commission of an unlawful act.\textsuperscript{258}

Although the supreme court held that the above statute did not require intent and that voluntary manslaughter no longer existed in Nebraska, it could not eradicate the clause in the statute which referred to killing another "upon a sudden quarrel."\textsuperscript{259} The result was that an unintentional killing done while the slayer was engaged in a sudden quarrel was punishable as manslaughter, even if the slayer was not culpable in any way by simultaneously committing an unlawful act or exhibiting gross negligence.\textsuperscript{260}

The interpretation of the manslaughter statute in \textit{Batiste} poses serious due process problems.\textsuperscript{261} As the \textit{Pettit} majority noted, the United States Supreme Court and the federal courts of appeal have held that the due process clauses of the fifth and fourteenth amendments would be violated if a statute were passed which allowed for serious criminal sanctions without requiring culpable intent.\textsuperscript{262}

Several federal courts have held that intent must be inferred when interpreting a statute which does not expressly contain that element unless: (1) the crime seems to involve matters of policy, (2) the standard of conduct imposed is reasonable and can reasonably and properly be expected of persons, (3) the penalty imposed is relatively slight, (4) conviction will not gravely besmirch the defendant's reputation, (5) the crime did not originate out of the common-law, and (6) legislative purpose comports with an inference of no intent.\textsuperscript{263} Those statutes which do not meet the above criteria and do not require intent violate due process.\textsuperscript{264}

\textsuperscript{258} \textsc{Neb. Rev. Stat.} § 28-305 (Reissue 1989) (emphasis supplied).

\textsuperscript{259} \textit{See supra} note 258 and accompanying text.

\textsuperscript{260} \textit{See, e.g.,} Brief for Appellant at 12, \textit{State v. Pettit}, 233 Neb. 436, 445 N.W.2d 890 (1989) (No. 88-492). For example, consider the following situation. A and B were arguing and B begins to back out of the room. Unnoticed by B or A, some third person has inadvertently left a loaded gun on the floor. B trips over the gun and it goes off, killing A. The combined effect of \textit{Batiste} and the statute would require a jury to convict B of manslaughter, notwithstanding the fact that there was no culpability on B's part. \textit{Id.} at 12-13.

\textsuperscript{261} \textit{See infra} notes 262-68 and accompanying text.

\textsuperscript{262} \textit{Pettit}, 233 Neb. at 445-48, 445 N.W.2d at 897-98.

\textsuperscript{263} \textit{Holdridge} v. \textit{United States}, 282 F.2d 302, 310 (8th Cir. 1960). \textit{See, e.g.,} Morissette v. \textit{United States}, 342 U.S. 246 (1952) (holding that codification of crimes taken over from the common-law will be interpreted to require intent unless Congress expressly provides to the contrary); \textit{United States v. Wulff}, 758 F.2d 1121 (6th Cir. 1985) (noting that requiring intent in criminal statutes is the rule, not the exception in Anglo-American jurisprudence); \textit{United States v. O'Brien}, 686 F.2d 850 (10th Cir. 1982) (noting that the general rule that criminal statutes should be interpreted to require intent is especially necessary when the crime is a felony); \textit{United States v. Anton}, 683 F.2d 1011 (7th Cir. 1982) (explaining that when severe sanctions or imprisonment are the punishment for an offense, strict liability generally will be inappropriate).

\textsuperscript{264} \textit{See Holdridge}, 282 F.2d at 310 (8th Cir. 1960). However, there are recognized
The *Batiste* interpretation of the Nebraska manslaughter statute clearly violates the above constitutional standards. It would allow for conviction of a crime which did not require intent when the conviction gravely besmirches the defendant's reputation, the penalty is great, the crime is one taken over from common-law, and the interpretation does not comport with legislative intent.

It is likely that when the court handed down *Batiste*, it overlooked the fact that it could not eradicate the "sudden quarrel" language from the manslaughter statute. Perhaps what compelled the court to reverse *Batiste* in part was its realization of the unconstitutional implications of *Batiste*. The decision of *State v. Pettit* represents an attempt by the court to correct its past transgressions.

**THE PETTIT POSITION**

The position taken by the majority in *Pettit* is in a sense an attempt to return to the beginnings of manslaughter jurisprudence in Nebraska. The court carefully lays the foundation for overruling the *Batiste* position regarding the voluntary manslaughter intent requirement.

**Addressing Due Process Considerations**

One of the first things the *Pettit* court examines in its opinion is the due process considerations implicit in construing a statute not to require intent. The due process considerations implicated are those discussed under the *Batiste* analysis. Namely, there is a strong presumption in favor of reading an intent requirement into a statute, even if the statute is silent on that issue. This is particularly true if the crime is serious or was taken from the common-

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exceptions to this rule. For example, crimes of negligence like involuntary manslaughter do not require intent, yet convictions often carry grave consequences. Morissette, 342 U.S. at 251 n.8. In such instances culpability is still present because the defendant omitted to do that which he was under a reasonable duty to do. G. Fletcher, Re-Thinking Criminal Law, § 4.3.1 at 262-64 (1978).

265. See supra note 264 and accompanying text.
266. Compare Holdridge, 282 F.2d at 310 with Brief for Appellant at 12.
267. *Batiste*, 231 Neb. at 488, 437 N.W.2d at 130. That this is likely is shown by the fact that the court in *Batiste* never discussed what the sudden-quarrel language now meant, it only stated that voluntary manslaughter no longer existed. *Id.*
268. See, e.g., Brief for Appellant at 11-24.
270. *Id.*
271. See infra notes 272-319 and accompanying text.
273. See supra notes 263-64 and accompanying text.
274. See supra notes 263-64 and accompanying text.
Although the court lays this foundation of due process analysis, it fails to take the discussion to its logical conclusion. The court in Pettit does not apply the principles of the due process analysis to the Batiste decision to point out its error. Instead, the opinion progresses to a discussion of learned treatises and precedent from the courts of other states. Although Pettit is a welcome decision in light of the fact that it corrects an unconstitutional interpretation of the law, it is to be criticized for not making more clear the fact that the interpretation was unconstitutional.

Separation of Powers

The remainder of the Pettit opinion is devoted to establishing the legislative intent for the Nebraska manslaughter statute and justifying that interpretation. By identifying the legislative intent and then deciding Pettit in accordance with that intent, Pettit rectifies the separation of powers problems created by Batiste.

This process of discerning the legislative purpose behind the Nebraska manslaughter statute begins with the court looking to manslaughter decisions from courts of other states. By comparing the Pettit position with interpretations by other states of manslaughter statutes similar to the Nebraska statute, the court demonstrates support for its position in the national legal community. The dissent argued that comparing interpretations of statutes from other jurisdictions is not persuasive because all of the other statutes are different from the Nebraska statute. All the statutes from other states specifically denote and define voluntary and involuntary manslaughter, while the Nebraska statute does not.

275. See supra notes 264-66 and accompanying text.
277. See id.
278. Id. at 457-60, 445 N.W.2d at 903-04.
279. See supra notes 276-78 and accompanying text.
281. See infra notes 282-319 and accompanying text.
283. Id. The court examined interpretation of manslaughter statutes in California, New Mexico, Wyoming, and Idaho. Id.
284. Id. at 474, 445 N.W.2d at 912 (Fahrnbruch, J., dissenting).
285. Id. The California manslaughter statute has three numbered subsections: 1) voluntary, 2) involuntary, and 3) in the driving of a vehicle. CAL. PENAL CODE § 192 (West 1970). The New Mexico manslaughter statute has two lettered subsections: A) voluntary and B) involuntary. N.M. STAT. ANN. § 30-2-3 (Supp. 1984). The Wyoming statute, as it appeared between 1957 and 1977, was almost identical to the Nebraska statute in that it did not contain any subdivisions, but did contain the words "voluntary" and "involuntary." WYO. STAT. § 6-5-58 (1957). The newest statute has two lettered subsections: i) voluntary and ii) involuntary. WYO. STAT. § 6-2-105 (1988). The
The discrepancy pointed out by the dissent is not persuasive. Although the Nebraska manslaughter statute would benefit from a bifurcation of the concepts of involuntary and voluntary manslaughter, the fact that they are not so bifurcated does not alter their meaning. There is clear legislative intent supporting the proposition that the statute was meant to encompass both concepts of manslaughter as known at common-law. The case law before 1977 supports this argument. As long as the statutes from other states used by the majority for analysis are supported by the same legislative intent as that supporting the Nebraska statute and as long as they all use similar language, profitable comparison may be made of them.

The next step the court in Pettit takes in establishing legislative intent is to analyze Nebraska case law. All the cases decided prior to 1977, with the exception of Bohannan v. State, support the proposition that the sudden quarrel clause of the statute encompasses voluntary manslaughter and requires intent. Great care must be taken in analyzing cases such as Ford v. State and State v. Worley. To understand Worley and Ford, it is essential to read the cases as a whole and not to take any statements out of context. In Pettit, the court applied these principles in arriving at the well-founded conclusion that neither of these cases abrogates the common-law. Although most of the case law prior to the 1977 revision of the second-degree murder statute supports the Pettit position, the court

Idaho statute provides three numbered subdivisions: 1) voluntary, 2) involuntary, and 3) vehicular. Idaho Code § 18-4006 (1987). The point of Judge Fahrnbruch's argument is that, unlike the above statutes, the Nebraska manslaughter statute is neither bifurcated nor labeled "voluntary" and "involuntary." Pettit, 233 Neb. at 474, 445 N.W.2d at 912 (Fahrnbruch, J., dissenting).

286. See infra notes 287-91 and accompanying text.
287. See, e.g., Pettit, 233 Neb. 436, 465, 445 N.W.2d 890, 907-08 (1989) (stating that because of the statute and the general jury verdict, it was impossible to tell upon which theory of manslaughter the defendant’s conviction rested).
288. See, e.g., Hutter, 145 Neb. 798, 801-02, 18 N.W.2d 203, 207 (1945) (holding that the unbifurcated manslaughter statute encompassed the two kinds of manslaughter known at common-law); Boche, 84 Neb. 845, 854, 122 N.W. 72, 75 (1909) (holding that the unbifurcated manslaughter statute encompassed the two kinds of manslaughter known at common-law). See also supra note 242 (discussing Morgan and Sutcliffe cases).

289. See, e.g., Boche, 84 Neb. 845, 854, 122 N.W. 72, 75 (1909); Hutter, 145 Neb. 798, 801-02, 18 N.W.2d 203, 207 (1945). See also supra note 242 (discussing Morgan and Sutcliffe cases).

290. See supra notes 68-107 and accompanying text.
292. Pettit, 233 Neb. at 451-57, 445 N.W.2d at 900-03.
293. See supra notes 68-107 and accompanying text.
294. 71 Neb. 246, 96 N.W. 807 (1904).
296. Pettit, 233 Neb. at 456-57, 445 N.W.2d at 902-03.
had trouble finding supportive case law subsequent to 1977. This statement in the case of State v. Drew, for example, contains the statement that "accidental discharge of a gun, the use of which was not justified under the circumstances, is not a defense to manslaughter when the killing occurred upon a sudden quarrel." This statement indicates that accident is not a defense to voluntary manslaughter. However, at common-law, accident would at least negate the element of intent, thereby defeating the prima facie case for voluntary manslaughter. The implication of the Drew statement is that intent is no longer an element of voluntary manslaughter.

The Pettit majority tries to interpret Drew in accordance with common-law concepts of manslaughter. The Pettit court does this by characterizing Drew as a decision involving involuntary manslaughter. However, this ignores the fact that the circumstances of the killing were susceptible of either a voluntary or an involuntary manslaughter interpretation, and that the verdict did not indicate upon which interpretation the conviction rested. Furthermore, if it was so evident that the conviction rested on an involuntary manslaughter theory as the Pettit majority tries to maintain, there would have been no need in Drew for the court to discuss voluntary manslaughter. The conclusion seems inevitable that the Pettit majority's characterization of Drew is incorrect. Although the majority

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297. See infra notes 298-319 and accompanying text.
299. Id. at 688, 344 N.W.2d at 925.
300. See id.
301. Brief for Appellant at 14-15. One of the elements of voluntary manslaughter is an intention to kill. If a defendant can prove that the killing was accidental, that would negate the element of intent and, therefore, the prosecution would have failed to prove a prima facie case of voluntary manslaughter. Id.
302. See Drew, 216 Neb. at 688, 344 N.W.2d at 925. Again, if accident is not a defense, then intent must not have been an element in the first place. However, in Pettit the court indicates that an accident instruction will not always be required when accident is an issue. If the trial court gives an instruction that intent is an element and adequately defines what "intent" or "intentional" means in relation to the case, then a separate instruction explaining the effect of accident is not required. The distinction is that while accident will provide a defense to a crime which requires intent, the trial court need not always give an accident instruction. Pettit, 233 Neb. at 464-65, 445 N.W.2d at 907.

Although the Drew opinion does not indicate whether an intent instruction was given, a transcript from the trial shows that no intent instruction was given regarding the manslaughter charge. Id. at 473, 445 N.W.2d at 912 (Fahrbrech, J., dissenting).
303. See infra notes 304-08 and accompanying text.
304. Pettit, 233 Neb. at 455-56, 445 N.W.2d at 902.
305. Drew, 216 Neb. at 685-86, 344 N.W.2d at 924.
306. Id. at 687-88, 344 N.W.2d at 925. Recall that in Drew the court discussed accident in connection with both voluntary and involuntary manslaughter. Id.
makes a valiant effort to reconcile *Drew* with the common-law concept of voluntary manslaughter, the fact remains that it is not in accord with the pre-1977 cases.\(^{308}\)

In its treatment of *State v. Rincker*,\(^ {309}\) the *Pettit* majority makes a similar attempt to reconcile *Rincker* with the common-law.\(^ {310}\) The court selected only the following passage from *Rincker*: "Rincker reacted to that scene without any prior intention to kill the victim."\(^ {311}\) The *Pettit* majority made a convincing argument here by emphasizing the words "without any prior intention" in the above passage.\(^ {312}\) The court emphasized that Rincker was being prosecuted for first-degree murder.\(^ {313}\) The *Pettit* majority reasoned that the statement "without any prior intention" was meant to point out that Rincker acted without *premeditation*, not that Rincker acted without intent.\(^ {314}\)

However, this argument ignores the other passages in the *Rincker* decision stating that Rincker "unintentionally took a life" and that "the manslaughter was an unintentional act."\(^ {315}\) As noted earlier, the facts of *Rincker* were equivocal and could have supported either theory of manslaughter.\(^ {316}\) Moreover, the verdict was a general one, not indicating upon which theory of manslaughter the conviction was based.\(^ {317}\) This means that the *Rincker* court could not have known whether Rincker had been convicted on an involuntary or a voluntary manslaughter theory.\(^ {318}\) Therefore, the statements in *Rincker* tend to support the proposition that the court believed that neither of the clauses of the manslaughter statute required intent.\(^ {319}\)

Although the *Pettit* majority makes plausible attempts to reconcile *Drew* and *Rincker* with common-law concepts, the court found *Batiste* to be a formidable challenge.\(^ {320}\) *Batiste* was explicit and une-
quivocal, rendering it impossible to reconcile by appealing to the case as a whole or by playing semantic games. In order to remedy previous errors in manslaughter jurisprudence, the *Pettit* majority had no choice other than to overrule *Batiste*.

In addition to correcting due process problems, *Pettit* is commendable for its correction of the separation of powers problems that inhered in the abolishment of voluntary manslaughter. However, *Pettit* incompletely corrects the separation of powers problems which were the legacy of *Batiste*. *Pettit* does nothing to address the problem posed by judicially supplying malice as an element of second-degree murder. Moreover, the decision is unclear as to whether this problem will in fact be rectified if a more suitable case for resolving the issue is presented.

It is not surprising that *Pettit* does not discuss the elements of second-degree murder because Frank Pettit was arrested, tried, and convicted only of manslaughter. However, it is curious that *Pettit* does not discuss the *Batiste* definition of malice, which is left intact. The only discussion of malice in *Pettit* is negative: the majority holds that “without malice” does not mean “without intent.” A simple explanation for this omission is that manslaughter involves the concept of “without malice,” and not the concept of “malice,” therefore making it unnecessary for the court to discuss malice.

However, it is suspicious that *Pettit* takes such pains to overrule *Batiste* only to the extent of its manslaughter holding. Similarly it is curious that the court made the incomprehensible statement that, “without malice does not mean without intent,” when it would have

321. *See Batiste*, 231 Neb. 481, 437 N.W.2d 125 (1989). *Batiste* did not contain the ambiguities present in *Drew* or *Rincker*. *Batiste* had been convicted of first-degree murder, so there was no uncertainty regarding the verdict. *Id.* at 483, 437 N.W.2d at 127. Moreover, because *Batiste* raised only the issue of voluntary manslaughter on appeal, there is no question that the court discussed this form of manslaughter and not involuntary manslaughter. *Id.* at 486, 437 N.W.2d at 129. Finally, the *Batiste* court left no question that intent is not an element of voluntary manslaughter. *Id.* at 488, 437 N.W.2d at 130.

322. *Pettit*, 233 Neb. at 461, 445 N.W.2d at 905.

323. *See supra* note 322 and accompanying text.

324. *See infra* notes 325-26 and accompanying text.


326. *See id.*

327. *Pettit*, 233 Neb. at 441, 444, 445 N.W.2d at 894, 896.

328. *Id.* at 461, 445 N.W.2d at 905. *Pettit* only overrules *Batiste* to the extent that *Batiste* held that intent was not an element of voluntary manslaughter. *Id.*

329. *Id.* at 450, 445 N.W.2d at 899.


331. *Pettit*, 233 Neb. at 461, 445 N.W.2d at 905. The *Pettit* court only “disapprove[d] of the language in *Batiste* to the effect that an intentional killing is not an element of voluntary manslaughter described in § 28-305(1).” *Id.*
been much easier and more comprehensible to have expressed the notion in a positive fashion.\textsuperscript{332} If the court deliberately preserved its \textit{Batiste} definition of malice with some idea of using it again in the future, such a move would be inconsistent with \textit{Pettit}.\textsuperscript{333} If "without malice" does not mean "without intent," as \textit{Pettit} holds, then "malice" cannot continue to be defined as synonymous with "intent," as was mandated by \textit{Batiste}.\textsuperscript{334}

The reason the \textit{Pettit} court did not define malice or address it as an element of second-degree murder may have been that second-degree murder was not an issue in \textit{Pettit}.\textsuperscript{335} When an appropriate case arises before the Nebraska Supreme Court, it is hoped that the court will strike down this strand of the \textit{Batiste} decision as well.\textsuperscript{336}

\textbf{APPLICATION OF \textit{PETTIT} AND THE SECOND-DEGREE MURDER STATUTE}

The \textit{Pettit} position on manslaughter and the second-degree murder statute as written, without any judicial modification, are both workable and rational.\textsuperscript{337} The initial reaction of the court to the 1977 second-degree murder statute revision seems to have been this analysis: Malice is always what distinguished murder from manslaughter and now malice is not an element of murder; how are we to make a rational distinction between the two?\textsuperscript{338} This analysis is faulty, however, because the court fails to realize that malice and adequate provocation are really opposite sides of the same element.\textsuperscript{339} If a person acts under adequate provocation, he is held incapable of forming a malicious intent.\textsuperscript{340} Likewise, if one acts with malice, he cannot be

\begin{itemize}
  \item \textsuperscript{332} \textit{See Pettit}, 233 Neb. at 450, 445 N.W.2d at 899.
  \item \textsuperscript{333} \textit{See infra} note 334 and accompanying text.
  \item \textsuperscript{334} \textit{Pettit}, 233 Neb. at 450, 445 N.W.2d at 899. In \textit{Batiste}, the court defined malice and intent as being synonymous. In \textit{Pettit}, the court stated that "without malice" does not mean "without intent," however it failed to explicitly overrule the \textit{Batiste} malice-intent definitions. This leaves the interpretation of the homicide statutes inconsistent because the \textit{Batiste} definition of malice will remain applicable to first and second-degree murder charges, while the \textit{Pettit} definition of without malice will be applicable to charges of manslaughter. The inconsistencies will be most obvious when a trial court instructs a jury where the defendant is charged in the alternative with both murder and manslaughter. The murder instruction would require that if the jury found intent, it must also find malice. The manslaughter instruction would require a finding of intent with an absence of malice. \textit{See Proposed Nebraska Criminal Jury Instructions, A Working Manuscript} 78-81 (1989).
  \item \textsuperscript{335} \textit{See Pettit}, 233 Neb. at 440-41, 445 N.W.2d at 893-94.
  \item \textsuperscript{336} \textit{See supra} note 334 and accompanying text.
  \item \textsuperscript{337} \textit{See infra} notes 338-57 and accompanying text.
  \item \textsuperscript{338} \textit{See, e.g., Pettit}, 233 Neb. at 474-75, 445 N.W.2d at 913 (Fahrnbruch, J., dissenting).
  \item \textsuperscript{339} \textit{See infra} note 340 and accompanying text.
  \item \textsuperscript{340} \textit{See, e.g., Barrett v. Commonwealth}, 231 Va. 102, 106, 341 S.E.2d 190, 192 (1986) (holding that "[m]alice and heat of passion are mutually exclusive; malice excludes passion, and passion presupposes the absence of malice.").
\end{itemize}
under the influence of adequate provocation.\footnote{341} Because malice and adequate provocation are two sides of the same element, and because the manslaughter statute still provided for adequate provocation as an element of voluntary manslaughter, there remained a rational basis upon which to draw the line between murder and manslaughter.\footnote{342}

The \textit{Pettit} position on manslaughter is the position taken by the Nebraska judiciary in all of its cases between 1873 and 1977.\footnote{343} This position remains true to the common-law concept of voluntary manslaughter by describing the crime as an intentional killing, without malice, done while the slayer was under the influence of adequate provocation.\footnote{344} In a prosecution such as in \textit{Pettit}, where the defendant is charged only with manslaughter, the court should instruct on each of the above elements, with proper definitions of each.\footnote{345}

Similarly, the second-degree murder statute, as written, is workable.\footnote{346} In a prosecution where the defendant is charged only with second-degree murder, the state must prove beyond a reasonable doubt that the killing was intentional and that it was done without premeditation.\footnote{347} If the state meets this burden, then in the absence of an affirmative defense, the state would be entitled to a guilty verdict.\footnote{348} This result would be constitutional under \textit{Mullaney v. Wilbur}\footnote{349} and \textit{Patterson v. New York}\footnote{350} because those cases stand for the propositions that (1) the prosecution must bear the burden of proving each of the essential elements of a crime beyond a reasonable doubt,\footnote{351} and (2) the prosecution does not have to shoulder the burden of disproving, as part of its prima facie case, the absence of any

\begin{itemize}
\item\footnote{341} \textit{Id.}
\item\footnote{342} \textit{Pettit}, 233 Neb. at 460, 445 N.W.2d at 905.
\item\footnote{343} \textit{See supra} notes 68-107 and accompanying text.
\item\footnote{344} \textit{Pettit}, 233 Neb. at 460, 445 N.W.2d at 905.
\item\footnote{345} \textit{Id.} Because of the unbifurcated status of the manslaughter statute, it will probably also be necessary for the judge to instruct on involuntary manslaughter if the State has not specifically limited its charging document to voluntary manslaughter (i.e. if the charging document merely alleges a violation of NEB. REV. STAT. § 28-305, the trial court will have to instruct on both forms of manslaughter). \textit{See Neb. Rev. Stat.} § 28-305 (Reissue 1989) \textit{supra} note 130.
\item\footnote{346} \textit{See infra} notes 347-57 and accompanying text.
\item\footnote{347} NEB. REV. STAT. § 28-304 (Reissue 1989). The statute mandates that "[a] person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation." \textit{Id.} \textit{See supra} note 130.
\item\footnote{348} \textit{Proposed Nebraska Criminal Jury Instructions, A Working Manuscript} 79-80 (1989). Once the state has proved a prima facie case, a guilty verdict is mandated in the absence of an affirmative defense or a reasonable doubt as to one of the elements of the crime. \textit{Id.}
\item\footnote{349} 421 U.S.684 (1975).
\item\footnote{350} 432 U.S. 197 (1977).
\item\footnote{351} \textit{Mullaney}, 421 U.S. at 703-04.
\end{itemize}
affirmative defenses.\textsuperscript{352} Neither of those principles would be violated by the above application of the second-degree murder statute.\textsuperscript{353}

If, however, the defendant in a prosecution for second-degree murder brought forward evidence that he had acted under adequate provocation, then the judge would be under a duty to instruct on manslaughter in the manner discussed above.\textsuperscript{354} This would mean that the state, if it wanted to convict the defendant of second-degree murder, would then have to prove the absence of adequate provocation beyond a reasonable doubt.\textsuperscript{355} As discussed above, placing the burden of production for the issue of adequate provocation on the defendant meets constitutional standards.\textsuperscript{356}

In a prosecution where the defendant is charged with both second-degree murder and manslaughter in alternative counts in the information, the prosecution is put in the ungainly position of having to prove both the presence and the absence of adequate provocation.\textsuperscript{357} However, prosecutors can prevent this from happening by careful consideration of the case and investigation of the facts before trial. If there is convincing evidence of adequate provocation, the prosecutor would be well advised to charge the defendant only with manslaughter. Likewise, if there appears to be no provocation or inadequate provocation,\textsuperscript{358} the prosecutor would be wise to charge the defendant only with second-degree murder.

Although there are subtleties in defining and proving the elements of second-degree murder and manslaughter, the definitions as given and intended by the legislature are workable.

\begin{itemize}
\item \textsuperscript{352} Patterson, 432 U.S. at 206-07.
\item \textsuperscript{353} See supra notes 351-52 and accompanying text.
\item \textsuperscript{354} Neb. Rev. Stat. § 29-2027 (Reissue 1989). The statute is interpreted to require the judge to instruct on manslaughter any time there is any evidence introduced which, if believed, would support a conviction on manslaughter and not on murder. State v. Archbold, 217 Neb. 345, 350, 350 N.W.2d 500, 504 (1984). This is the same statute which was at work in Rincker. See supra note 175 and accompanying text.
\item \textsuperscript{355} S. Kadish and S. Schulhofer, Criminal Law and Its Processes, ch. 1, § B, at 51 (5th ed. 1989). Adequate provocation acts like an affirmative defense except that its proof would result in mitigation, not exoneration. Id. at ch. 5, § B, at 446.
\item \textsuperscript{356} Patterson, 432 U.S. at 206-07.
\item \textsuperscript{357} Nebraska Judiciary Committee, Committee Meeting Notes of February 12, 1990, at 48. The state would not ordinarily have to prove the absence of adequate provocation in second-degree murder. However, by introducing evidence of that element in proving voluntary manslaughter, it is as if the state were raising an affirmative defense for the defendant which the state must then rebut. Id.
\item \textsuperscript{358} See supra note 59 and accompanying text. While the question of adequate provocation is almost always for the jury to resolve, certain cases present a question of law which the judge may determine. Words, for example, are almost always held to be inadequate provocation as a matter of law. R. Perkins & R. Boyce, Criminal Law ch. 2, § 1(c)(1), at 84, 93 (3d ed. 1982).
\end{itemize}
CONCLUSION

An old folk saying holds that the best-laid plans of mice and men do often go astray. The members of the Nebraska Unicameral must have felt this sentiment keenly as it watched its second-degree murder and manslaughter statutes being adulterated by the Nebraska judiciary. The legislature is often criticized as being inefficient or inept. However, before the judiciary concludes that a statute enacted by the legislature is uninformed or irrational, the courts should examine the statute carefully to determine if it can be interpreted in a way which is rational and constitutional. That is, after all, the role of the judicial branch of government.359

In the line of cases which included State v. Drew360 and State v. Rincker,361 and culminated in State v. Batiste,362 the Nebraska Supreme Court seems to have disregarded legislative intent for reasons upon which one can only speculate.363 Perhaps the court believed that the legislature had committed inadvertent error. Perhaps the court was simply frustrated by the failure of the legislature to follow the modernization trend initiated by the Model Penal Code. In any case, the aberrant decisions were unconstitutional for both due process and separation of powers reasons, and it was prudent of the court to correct itself in Pettit.

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363. See supra notes 226-56 and accompanying text.