MALICE IN WONDERLAND

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In this state all public offenses are statutory; no act is criminal unless the legislature has in express terms declared it to be so. . . . 1

INTRODUCTION

In State v. Myers,2 the Nebraska Supreme Court expanded its power to include the drafting and enforcement of common law crimes.3 In Myers, the jury convicted the defendant, Myers, of second degree murder.4 His charge, jury instructions, and conviction were all in the language of section 28-304 of the Nebraska Revised Statutes as enacted by the Nebraska Legislature.5 Section 28-304 provides "[a] person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation."6 On appeal, neither Myers nor the State of Nebraska took any exception to this statute under which he was charged and under which the jury was instructed.7 Yet, a majority of the Nebraska Supreme Court ignored the errors assigned by the parties and instead resolved the case on the ground that "plain error" infected the proceedings before the state trial court.8 The "error" was that Myers' jury had been instructed in the language of the statute defining the crime of second degree murder exactly as enacted by the Nebraska Legislature over a decade before.9

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2. 244 Neb. 905, 510 N.W.2d 58 (1994).
4. Myers, 244 Neb. at 907, 510 N.W.2d at 62.
5. Id. at 908, 510 N.W.2d at 63 (citing Neb. Rev. Stat. § 28-304 (Reissue 1989)).
7. Myers, 244 Neb. at 907, 510 N.W.2d at 62.
8. Id. at 908-09, 510 N.W.2d at 62-63.
9. See id. at 908-09, 510 N.W.2d at 63.
In the wake of Myers, the Nebraska Supreme Court invented a new crime — the common law crime of second degree murder. This new offense differs from its legislatively-created counterpart because it contains the additional element of “malice.”\textsuperscript{10} In 1977, the Nebraska Legislature specifically repealed that element from the statutory definition of second degree murder.\textsuperscript{11}

This new, common law offense engendered a deep and acrimonious split among the justices of the Nebraska Supreme Court.\textsuperscript{12} Its retroactive application by the Nebraska Supreme Court has caused approximately 130 previously-convicted killers to be eligible to seek new trials.\textsuperscript{13} Of those 130, courts have resentenced thirty — twelve of which were discharged.\textsuperscript{14}

WHAT HAPPENED?

The following time line shows the chronology of events:

1977 The Nebraska Legislature passes a bill repealing the element of “malice” from Nebraska's prior statutory definition of second degree murder.\textsuperscript{15}

1979 The bill goes into effect thus amending the second degree murder statute.\textsuperscript{16}

\textsuperscript{10} Id. at 908, 510 N.W.2d at 63.
\textsuperscript{11} Compare NEB. REV. STAT. § 28-402 (Reissue 1975) (amended 1979) (defining second degree murder as killing “purposely and maliciously, but without deliberation and premeditation”) with L.B. 38, § 19, 85th Leg., 1st Sess., 1977 Laws of Nebraska 88, 97 (defining second degree murder as causing death intentionally, but without premeditation).
\textsuperscript{12} See State v. Ryan, 249 Neb. 218, 241-60, 543 N.W.2d 128, 144-54 (1996) (per curiam) (Gerrard, J., Connolly, J., and Wright, J., dissenting). Justice John M. Gerrard stated that “[i]t is obvious that the Legislature, in revising the Nebraska Criminal Code in 1977, intended to remove malice . . . as an element of second degree murder.” Ryan, 249 Neb. at 241, 543 N.W.2d at 144 (per curiam) (Gerrard, J., dissenting). Justice William C. Connolly added that “[t]he majority’s tortuous reasoning has created a Jabberwocky decision in which rules are subject to change without notice to the parties or the trial court. This should not be.” Id. at 259, 543 N.W.2d at 154 (per curiam) (Connolly, J., dissenting). Justice John Flavel Wright concluded that “[i]t is my belief that justice is not well served by the majority’s opinion.” Id. at 260, 543 N.W.2d at 154 (per curiam) (Wright, J., dissenting).
\textsuperscript{13} See State v. Williams, 247 Neb. 931, 936-41, 531 N.W.2d 222, 227-29, cert. denied, 116 S. Ct. 563 (1995) (per curiam) (overturning Williams’ second degree murder charge because the jury instructions did not include malice); Memorandum from Ronald Riethmuller, Department of Correctional Services Records Administrator, to the Attorney General’s Office (March 5, 1996) (on file with the CREIGHTON LAW REVIEW).
\textsuperscript{14} Memorandum from Ronald Riethmuller, Department of Correctional Services Records Administrator, to the Attorney General’s Office (March 5, 1996) (on file with the CREIGHTON LAW REVIEW).
\textsuperscript{15} L.B. 38, § 19, 85th Leg., 1st Sess., 1977 Laws of Nebraska 97.
\textsuperscript{16} Compare NEB. REV. STAT. § 28-402 (Reissue 1975) (amended 1979) (including malice in its definition of second degree murder) with NEB. REV. STAT. § 28-304 (Reissue 1979) (excluding malice from the second degree murder statute).
1989 In *State v. Pettit*, the Nebraska Supreme Court creates an “intentional” form of manslaughter.

1994 In *Myers*, on direct appeal, the Nebraska Supreme Court finds that jury instructions on second degree murder using the language of section 28-304 of the Nebraska Revised Statutes create “plain error.” The court requires “malice” as an additional element.

1994 In *State v. Jones*, the court overrules *Pettit*.

1994 In another direct appeal, *State v. Manzer*, the court applies the *Myers* logic to vacate a guilty plea to an indictment for second degree murder because the indictment did not include “malice” as an element of the crime.

1995 In *Williams*, the court applies *Myers* retroactively thus allowing defendants to raise the *Myers* theory in successive post conviction proceedings years after conviction and sentencing. The court also finds that defense attorneys who did not object to the absence of the element of “malice” in jury instructions on second degree murder have provided ineffective assistance to their clients.

By adding an element to the crime of second degree murder, the Nebraska Supreme Court ignored long-standing precedent concerning statutory construction. It also usurped the authority of the legislative branch, ignoring the constitutional mandate of separation of powers and depriving the citizens of Nebraska of their right to a republican form of government under the United States Constitution.

### STATUTORY CONSTRUCTION

It is a fundamental principle of law that all crimes in Nebraska are statutory. *Myers* raises the question: From this time forward in

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19. *Myers*, 244 Neb. at 908-09, 510 N.W.2d at 63.
20. *Id.*
23. 246 Neb. 536, 519 N.W.2d 558 (1994).
26. *Id.*
the State of Nebraska, is the definition of crime to be legislative or judicial in origin?

Prior to the adoption of the present criminal code in 1977, murder in the second degree was described as "purposely and maliciously, but without deliberation and premeditation, killing another."28 The present code, as adopted in 1977, states that "[a] person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation."29

The Nebraska Legislature's Judiciary Committee summary of the amendment at the time it was proposed noted that "[i]t differs from the present section, which requires the killing to be purposely and maliciously, whereas the new code requires that the cause of death of a person need only be done intentionally."30

It is a fundamental rule of statutory construction that courts may not add into a statute words omitted by the legislature.31 It is not within the court's province to read a meaning not warranted by the statutory language.32 "[O]mission of a word in an amendment of a statute will be assumed to be intentional and for a purpose. Where it is apparent that a substantive portion of a statute has been omitted from an amendment thereof courts have no authority to supply the omission. That would be judicial legislation."33

A second fundamental rule of statutory construction is that the legislature, in enacting a statute, knows the preexisting law, and in amending the statute, intentionally means to change it.34

A third fundamental rule of statutory construction is that where the statute's language is plain and unambiguous, the court has no authority to change the language.35

29. NEB. REV. STAT. § 28-304 (Reissue 1995).
32. Ledwith, 156 Neb. at 120, 54 N.W.2d at 419 (citations omitted). See also State v. Quandt, 234 Neb. 402, 405, 451 N.W.2d 272, 275 (1990) (per curiam) (citations omitted); Wessel v. Lincoln, 145 Neb. 357, 360, 16 N.W.2d 476, 479 (1944).
33. Ledwith, 156 Neb. at 121, 54 N.W.2d at 419 (citations omitted). See also Pirie v. Chicago Title & Trust Co., 182 U.S. 438, 448 (1901); Ex parte Hoese, 204 N.W. 174, 175 (S.D. 1925).
34. State v. Suhr, 207 Neb. 553, 561, 300 N.W.2d 25, 29 (1980); Ledwith, 156 Neb. at 121, 54 N.W.2d at 419 (citations omitted). See also Ex parte Hoese, 204 N.W. at 175.
A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language.  

These rules apply with equal, if not more, force where the statute is penal. Because a penalty statute should be strictly construed, courts must not interpolate conditions the legislature omitted or extend the statutory language used by implication. Courts must presume that the legislature intentionally drafted the statute as it did.

Criminal statutes should be strictly construed to ensure that defendants receive fair warning of what constitutes criminal conduct and to guarantee that the legislature, instead of the courts, defines criminal behavior. In criminal trials, courts must instruct the jury on each material element that the state must prove beyond a reasonable doubt in order to convict the defendant of the specific crime charged.

The key words for second degree murder in section 28-304 of the Nebraska Revised Statutes are "intentionally" and "without premeditation." "In the context of a criminal statute, 'intentionally' means willfully or purposely, and not accidentally or involuntarily." 


37. See Bachus, 179 Neb. at 4, 136 N.W.2d at 192; Misle v. Miller, 176 Neb. 113, 117, 125 N.W.2d 512, 515 (1963); Johnson Fruit Co. v. Story, 171 Neb. 310, 313, 106 N.W.2d 182, 185 (1960).

38. See supra note 36 and accompanying text.

39. Id.


42. See Neb. Rev. Stat. § 28-304 (Reissue 1995). Section 28-304 provides "a person commits murder in the second degree if he causes death of a person intentionally, but without premeditation." Id. (emphasis added).

meditation" means "a design formed to do something before it is done." Thus, when the words of section 28-304 are given their plain and ordinary meaning "in the context of the object sought to be accomplished, the evils and mischiefs sought to remedied, and the purpose sought to be served," they sufficiently inform and describe a criminal homicide.

The majority in Myers suggested that the reinsertion of the legislatively deleted element of malice was necessary to preserve the statute's constitutionality. But even such a noble purpose did not justify the judicial rewrite of the law. An "amendment may not be substituted for construction, and ... a court may not exercise legislative functions to save the law from conflict with constitutional limitation."

Section 28-304 of the Nebraska Revised Statutes is not ambiguous. It is as clear as statutory language can be made. If this clear language, as amended by the Nebraska Legislature in 1977, was unconstitutional, it was the responsibility of the Nebraska Supreme Court to so declare. It did not. Instead, the majority re-wrote the statute to conform with its own image of second degree murder.

SEPARATION OF POWERS

Article II, section 1 of the Nebraska Constitution prohibits each of the three branches of government from exercising any authority granted to one of the other branches unless the constitution has expressly allowed it. Article III, section 1, vests the power to make laws in the legislative branch. The constitution does not permit the judicial branch to exercise that power. This is a principle which

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44. NEB. REV. STAT. § 28-302 (Reissue 1995).
45. Quandt, 234 Neb. at 405, 451 N.W.2d at 275 (citations omitted); State v. Deets, 234 Neb. 307, 308, 450 N.W.2d 696, 697 (1990) (per curiam) (citation omitted); In re Richter, 226 Neb. 874, 875, 415 N.W.2d 476, 477 (1987) (citation omitted).
46. See State v. Myers, 244 Neb. 905, 909, 510 N.W.2d 58, 63 (1994) (stating that "by omitting the element of malice ... the instruction in effect became one for the crime of intentional manslaughter ... ").
47. Yu Cong Eng v. Trinidad, 271 U.S. 500, 518 (1926). See also Herrington, 206 Neb. at 523, 294 N.W.2d at 334; Bachus, 179 Neb. at 3-4, 136 N.W.2d at 192. Cf. Houston v. Hill, 482 U.S. 451 (1987) (stating that where the challenged state law is plain and unambiguous, "[a] federal court may not properly ask a state court if it would care in effect to rewrite a statute [to remedy a constitutional defect.
49. See supra notes 10-11 and accompanying text.
50. NEB. CONST. art. II, § 1. See infra notes 51-63 and accompanying text.
51. NEB. CONST. art. II, § 1 (stating that "the legislative authority of the state shall be vested in a Legislature consisting of one chamber.").
52. Kinnan v. State, 86 Neb. 234, 236, 125 N.W. 594, 594 (1910) (stating that "it is not within the powers of the judicial branch of the government to place rules upon the books, or enact laws to define or punish crime."). See also State v. Douglas, 222 Neb.
each justice of the Nebraska Supreme Court has solemnly sworn to support.\textsuperscript{53}

Under Nebraska's constitution, it is the function of the legislature, not the Nebraska courts, to define the elements of a criminal offense.\textsuperscript{54} By inserting an additional element of "malice" into the crime of second degree murder, the Nebraska Supreme Court encroached upon the powers vested solely in the legislative branch of Nebraska government.\textsuperscript{55}

The separation of powers clause of the Nebraska Constitution provides:

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as [otherwise] expressly directed or permitted.\textsuperscript{56}

This language "prohibits one branch of government from encroaching on the duties and prerogatives of the others or from improperly delegating its own duties and prerogatives."\textsuperscript{57}

Except as otherwise restricted by the constitution, the legislature's function is to state what the law is by the enactment of stat-

\begin{footnotes}
\textsuperscript{53} NEB. CONST. art. XV, § 1. "[J]udicial officers . . . before they enter upon their official duties shall take and subscribe the following oath, or affirmation. 'I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of Nebraska, and will faithfully discharge the duties . . . according to the best of my ability. . . .'" Id.
\textsuperscript{54} See supra note 27 and accompanying text.
\textsuperscript{55} See supra note 51 and accompanying text.
\textsuperscript{56} NEB. CONST. art. II, § 1.
\end{footnotes}
The legislature cannot delegate legislative power to the courts.59

"Legislatures have plenary power to define the terms of criminal offenses."60 The Nebraska Legislature, by enacting the criminal code of 1977, defined the crime of second degree murder and deleted the words "purposely and maliciously" from its previous statutory definition.61 A court has no power to define the elements of a crime differently than the statute.62 Yet, a majority of the Nebraska Supreme Court in Myers, without any basis drawn from the language of the statute, rewrote the second degree murder statute to include a repealed "malice" element in contravention of appropriate constitutional theory and practice.63

As with the United States Constitution, the drafters of Nebraska's constitution placed limitations upon the powers of each branch of the government.64 It is the role of the Nebraska Supreme Court to see that those constitutional restraints are honored by members of the legislative and executive branches of Nebraska government.65 The question then becomes: Who maintains the Nebraska Supreme Court's powers within its state constitutional limitations?


60. United States v. Schnell, 982 F.2d 216, 221 (7th Cir. 1992) (citation omitted). See also Chicago Burlington & Quincy Ry. Co. v. United States, 220 U.S. 559, 578 (1911) (stating that "[t]he power of the legislature to declare [a criminal] offense, and to exclude the elements of knowledge and due diligence, cannot, we think, be questioned.") (citations omitted).

61. See supra note 11 and accompanying text.


63. See supra notes 60-62 and accompanying text.

64. See supra notes 56 and accompanying text.

65. See Searle, 118 Neb. at 841, 226 N.W. at 466. The court in Searle stated: As the Constitutions of the respective states are the supreme law within their respective jurisdictions and are limitations of power, it is necessary that authority exist somewhere to determine whether or not the limitations have been
In creating the common law offense of second degree murder, a majority of the Nebraska Supreme Court not only created a criminal offense not known to Nebraska statutes, but actively engaged in the retroactive enforcement of that common law offense reaching back over a decade and a half. In so doing, the Nebraska Supreme Court violated the separation of powers clause of the Nebraska Constitution.

GUARANTEE CLAUSE

For the checks-and-balances system of constitutional government to work, the judicial branch must be content to be the neutral arbiter of disputes between the executive branch, the legislative branch, and the people. If the judicial branch, being the final arbiter of constitutional questions, attempts to legislate or govern, our constitutional system collapses.

Unfortunately, the flaw we witness here in Nebraska arises, in part, from a well-intentioned effort to preserve and enhance the neutrality of our state judiciary by isolating it from the pressures of public opinion. Nebraska judges are not elected, and once appointed, they do not routinely face opposition for retention.

Once insulated from public control, a judiciary, particularly the highest court of a state, which chooses to seize and exercise a power clearly vested by the citizens of that state in another branch of government, is without a master. The checks-and-balances which are intended to protect all citizens from an arbitrary exercise of governmental power dissolve.

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exceeded. From the early history of this country and after much clash of opinion and sometimes bitter argument, the doctrine is now firmly established that this delicate duty devolves upon the judiciary.  

Id. at 841, 226 N.W. at 466.

66. See Searle, 118 Neb. at 841, 226 N.W. at 466.

67. Id. The court in Searle stated:

The division of governmental powers into executive, legislative and judicial in this country is a subject familiar, not only to lawyers and students, but is a part of the common knowledge of the citizen. It represents, probably, the most important principle of government declaring and guaranteeing the liberties of the people, and has been so considered, at least, since the famous declaration of Montesquieu that — "There can be no liberty * * * if the power of judging be not separated from the legislative and executive powers. * * * Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would be the legislator: Were it joined to the executive power, the judge might behave with all the violence of an oppressor."

Id.

68. Neb. Const. art. V, § 21. See Robert D. Miewald and Peter J. Longo, The Nebraska State Constitution 108 (1993) (explaining that judges are appointed to office and the election component of the process only is to determine a judge's right to continue in the office — the retention rate is very high).
The Guarantee Clause of the United States Constitution provides that "the United States shall guarantee to every State in this Union a Republican Form of Government. . . ." 69 This clause prohibits states from adopting any nonrepublican forms of government. 70

The admission of the State of Nebraska into the Union was predicated upon Nebraska's chosen form of government conforming with the Guarantee Clause. 71 As the Nebraska Supreme Court itself has noted:

The preamble to the act of congress [sic] of February 9, 1867 (14 U.S. Statutes at Large, Ch. 36, p. 391), which provided for the admission of the state of Nebraska to the Union recites: "... whereas it appears that the said people have adopted a constitution which, upon due examination, is found . . . to be republican in its form of government. . . ." 72

While a "republican form of government" may have certain variations, such as Nebraska's selection of a one-house legislative body, widespread agreement exists among scholars and jurists about the core meaning of republican government. "[T]he distinguishing feature of [a republican form of government] is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies. . . ." 73 In Nebraska, the judicial branch of state government, created to be insulated from the people, has usurped a power — the power to define criminal behavior. The citizens of Nebraska specifically reserved this power in their state constitution to be used exclusively by their elected representatives in the legislative branch of state government. 74

"Since at least the eighteenth century, political thinkers have stressed that a republican government is one in which the people control their rulers." 75 A necessary corollary of this fundamental principle is that state governmental entities must comply with the structures of their state constitutions and laws. 76 Otherwise, the

71. See infra note 72 and accompanying text.
74. NEB. CONST. art. II, § 1; NEB. CONST. art. III, § 1.
guarantee of a government in which the people govern could be voided by the failure or refusal of state officials to follow the direction of the people as expressed in their respective state constitutions.

If the legislative or executive branches of state government violate the state constitution, the principal safeguard and remedy is found in the state courts. However, "[i]f a state court has clearly misread or refused to enforce the state constitution or laws, the parties involved have not received the protection due them under the state law, and therefore, the guarantee clause has been violated." The incapacity of . . . the judiciary to execute a power which is essentially and merely a legislative power . . . [and] the separation and independence of distinct departments of government, is fundamental to the very existence of constitutional government as established in the United States.

If a state's highest court is the source of the violation of a republican form of government, rather than the remedy for it, then the citizens' only recourse is to the Federal Constitution itself.

The Nebraska Legislature cannot re-repeal the element of malice from its definition of the crime of second degree murder. From the standpoint of the legislature, "malice" is gone. Here its absence is simply being ignored by the judicial branch of state government. Under such circumstances, the violation of the separation of powers doctrine which is inherent in the republican form of government is a violation of the Guarantee Clause.

JABBERWOCKY

In State v. Ryan, the three dissenting justices each wrote separate opinions, in which the other two joined, frankly voicing their reaction to the majority's application of the Myers doctrine. Justice John M. Gerrard stated that "this court, as an institution, need concern it-

77. See supra note 65 and accompanying text.
79. Tyson v. Washington County, 78 Neb. 211, 215, 110 N.W. 634, 636 (1907) (quotations omitted). "There can be no liberty . . . if the power of judging be not separated from the legislative and executive powers. . . ." Tyson, 78 Neb. at 216, 110 N.W. at 636 (quotations omitted).
80. See Van Sickle v. Shanahan, 511 P.2d 223, 235-244 (Kan. 1973). Cf. State v. Lehtola, 198 N.W.2d 354, 356 (Wis. 1972) (noting that transfer of a substantial power from one governmental branch to another branch, or a transfer of a power which is essential to the "separation of power" doctrine, is a violation of Article IV, Section 4, of the United States Constitution).
self with avoiding absurd consequences in second degree murder cases that we are called upon to decide." Justice William C. Connolly opined that "[the majority's] reasoning is nonsensical. . . . As one can see, the majority opinion poses the potential danger of leading to similar absurd results in other areas of our penal law. The majority's tortuous reasoning has created a Jabberwocky decision in which rules are subject to change without notice to the parties or the trial court." Justice John Flavel Wright added that "I cannot agree with any of the reasoning used by the majority to justify its conclusion that malice is an element of second degree murder. It is my belief that justice is not well served by the majority's opinion."

What would lead three justices of the Nebraska Supreme Court to describe a majority opinion as "Jabberwocky"?

First, it must be understood that "Jabberwocky" is a poem by Lewis Carroll which makes no sense. The poem was not intended to make sense, but to be humorous. The Nebraska Supreme Court's "Malice in Wonderland" decisions creating the common-law crime of second degree murder also make no sense, but lack the redeeming humor of the Lewis Carroll poem.

Second, it must be noted that the Nebraska Supreme Court has given a variety of reasons for its creation of the new common-law crime, none of which can withstand the least amount of inquiry or analysis. In Myers, the court acknowledged that the Legislature changed the definition of second degree murder in 1977, but stated that "this court has continued to require malice as an element of second degree murder." Contrary to the court's assertion in Myers, it had not required malice as an element of second degree murder in cases where the crime was committed after the effective date of the amendment to the statute. Those cases where malice was mentioned merely contained erroneous recitations of language from cases concerning crimes com-

83. Ryan, 249 Neb. at 258, 543 N.W.2d at 153 (Gerrard, J., dissenting).
84. Id. at 259, 543 N.W.2d at 154 (Connolly, J., dissenting).
85. Id. at 259-60, 543 N.W.2d at 154 (Wright, J., dissenting).
87. State v. Myers, 244 Neb. 905, 908, 510 N.W.2d 58, 63 (1994).
88. State v. Cave, 240 Neb. 783, 789, 484 N.W.2d 458, 464 (1992) (failing to mention malice in stating that "[i]n order to convict a person of second degree murder, the State is required to prove all three elements — the death, the intent to kill, and causation — beyond a reasonable doubt."); State v. Williams, 226 Neb. 647, 648-49, 413 N.W.2d 907, 908 (1987) (stating only that "NEB. REV. STAT. § 28-304 (Reissue 1985) provides in part that "[a] person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation. The state of mind required for second degree murder may be inferred from the evidence of the criminal act."). See also State v. Hardin, 212 Neb. 774, 779, 326 N.W.2d 38, 41 (1982) (per curiam).
mitted before the statutory change. In no such pre-Myers case was the element of "malice" raised as an issue. The State of Nebraska did not raise the issue and no defense attorney raised the issue. For that reason, it was only through the judicial declaration of "plain error" in Myers, that the Nebraska Supreme Court created the new common-law crime of second degree murder.

The Nebraska Supreme Court has also alleged that the element of malice is necessary to distinguish second degree murder from "intentional" manslaughter. That rationale lost any validity when the court overruled State v. Pettit later in 1994, holding that the distinction between manslaughter and second degree murder was not the presence of malice but the presence of an intention to kill.

The Nebraska Supreme Court later changed the rationale for the common-law crime of second degree murder, alleging that without the element of "malice," the definition of second degree murder would violate a defendant's presumption of innocence by requiring the defendant to adduce evidence to justify the killing; would tend to criminalize legal conduct, such as a policeman's killing of another in the line of duty; and would be vague and overbroad in violation of the Due Process Clause of the United States Constitution.

This belated rationale ignores the fact that justification is a defense specifically available to a defendant under Nebraska law. It also ignores the fact that the United States Supreme Court has already reviewed a "malice-less" second degree murder statute much like Nebraska's, and found it to suffer from no constitutional infirmity under the Due Process Clause.

CONCLUSION

The Nebraska Supreme Court's decision to create a common-law crime, and to give retroactive application to the creation of that crime, ignoring basic principles of statutory construction, separation of powers, and the right of the people of Nebraska to elect the men and women who write the state's statutes.

89. See, e.g., State v. Rowe, 214 Neb. 685, 689-90, 335 N.W.2d 309, 312-13 (1983) (per curiam) (citing State v. Clermont, 204 Neb. 611, 615-16, 284 N.W.2d 412, 415 (1979)).
90. Myers, 244 Neb. at 909, 510 N.W.2d at 63.
93. Ryan, 249 Neb. at 228-29, 543 N.W.2d at 138, 154 (1996); id. at 259, 543 N.W.2d at 154 (Connolly, J., dissenting).
94. NEB. REV. STAT. § 28-1416 (Reissue 1995).