THE SECOND DEGREE MURDER DOCTRINE IN NEBRASKA

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INTRODUCTION

The most volatile debate in Nebraska criminal law is whether malice is an essential element of second degree murder.1 A majority of the Nebraska Supreme Court has ruled that malice is required both in charging suspects2 and in instructions to the jury.3 An equally vocal minority has insisted that the majority is plainly wrong, that the legislature has defined second degree murder without requiring an el-

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The Nebraska Supreme Court has ruled that omission of malice in a jury instruction in the information or in an adjudgment of guilt may be raised as plain error on direct appeal or in post conviction relief. Barfoot, 248 Neb. at 338, 534 N.W.2d at 574; Plant, 248 Neb. at 55-58, 532 N.W.2d at 622; Ladig, 246 Neb. at 544, 519 N.W.2d at 563; Manzer, 246 Neb. at 538, 519 N.W.2d at 559; Myers, 244 Neb. at 907-08, 510 N.W.2d at 62.
ement of malice,\(^4\) and that there is no unbroken chain of cases mandating the presence of that element.\(^5\) It is the charge to this writer to reach a "dispassionate" conclusion as to whether malice must be an element of second degree murder in Nebraska.

Several questions come to mind at the outset:
1) Did the Nebraska Legislature unequivocally alter the definition of murder in the second degree so as to eliminate the element of malice?
2) Did the majority of the supreme court persist, by oversight or stubbornness, in its pre-amendment analysis which includes malice as an element of the crime?
3) Is the majority's reasoning structurally and logically essential to the integrity of a coherent and constitutional scheme relating to homicide cases?
4) Is the minority's analysis the more correct?

The general conclusion is that the majority has not made a persuasive case for its position, while the minority has. This Article will examine the statutory law in Nebraska, exhaustively review the opinions of the majority and minority and assess them in light of guiding principles of federal constitutional criminal procedure.

THE STATUTORY DEFINITIONS OF HOMICIDE

The logical place to begin is with the statutory definitions of the classes of crimes of homicide. The reader must remember that the

\(^4\) *Grimes*, 246 Neb. at 486, 519 N.W.2d at 517-18 (Wright, J., dissenting). When Justice Boslaugh retired from the court, Justice Connolly came to the court, aligning himself with Justice Wright on the second degree murder statute issue. Justice Gerrard, a newcomer (sworn in on July 20, 1995), has also aligned himself with the minority.

As a private practitioner, Justice Gerrard was counsel for the appellant in *Manzer*, 246 Neb. at 536, 519 N.W.2d at 558, decided July 29, 1994. His brief, which did not mention any aspect of the malice issue, was filed on December 17, 1993, nearly one month before the decision date in *Myers*, January 14, 1994.


First degree murder:
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 of the Nebraska Revised Statutes.

Second degree murder:
(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.

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Although Nebraska did not adopt the Model Penal Code, it did serve as a “blueprint” for the Nebraska Legislature which inserted “its own language to reduce the possibility of confusion.” Luedtke, 11 CREIGHTON L. REV. at 78-79. Luedtke noted that one of the bills offered prior to the 1977 session — L.B. 329, 83d Leg. 1st Sess. (1973) — was “a recodification of the Nebraska Criminal Code based on an application of the recently enacted Hawaii Penal Code.” Id. at 81. Hawaii Revised Statute section 707-701.5 declares that a person commits the offense of murder in the second degree “if the person intentionally or knowingly causes the death of another person.” HAW. REV. STAT. § 707-701.5 (1993). The other working document was L.B. 8, introduced by the Judiciary Committee. 1 NEB. LEGIS. J., 83d Leg., 1st Sess. 43 (1973). Section 19(1) defined second degree murder as causing “the death of a person intentionally or without premeditation.” L.B. 8, § 19(1), 85th Leg., 1st Sess., 1977 Neb. Laws 88, 97 (codified at NEB. REV. STAT. § 28-304).

7. NEB. REV. STAT. § 28-303 (Reissue 1995). A Class I felony is punishable by death, and a Class IA felony is punishable by life imprisonment. NEB. REV. STAT. § 28-104 (Reissue 1995). In a first degree murder case, the statutes set out the procedure taken before sentencing someone to death, including the determination of aggravating and mitigating circumstances. NEB. REV. STAT. §§ 29-2520, -2521, -2522, -2523, -2524 (Reissue 1995).

8. NEB. REV. STAT. § 28-304 (Reissue 1995). For Class IB felony the maximum sentence is life imprisonment, and the minimum sentence is twenty years imprisonment. NEB. REV. STAT. § 28-104 (Reissue 1995).
Manslaughter:
(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.\(^9\)

Prior to the amendments, second degree murder was defined as: “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. . . .”\(^10\)

The previous manslaughter definition contained the same elements as the current manslaughter statute.\(^11\)

COMMON LAW ANTECEDENTS

a. General Themes

At common law, the crime of murder was “the unlawful killing of another human being with ‘malice aforethought.'”\(^12\) The commentaries to the Model Penal Code discuss four elements which have converged in the definition of “malice aforethought.” 1) intent to kill; 2) “intent to cause grievous bodily harm;” 3) depraved-heart murder; and 4) killing of a person when one was intending to commit a felony.\(^13\)

The commentaries explain that “most American jurisdictions maintained a law of murder built around” the common-law classifica-
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14. However, there was a significant departure from the common law which was the division of the crime of murder into degrees. This reform was designed to limit the death penalty, previously mandatorily applicable to all common law murders, to those which were the most heinous.

In America, murder came to be almost exclusively a statutory crime. LaFave and Scott's authoritative treatise on criminal law notes that the division of murder into degrees was legislative, not judicial. These authors assert that the majority of states which separate the crime into degrees "include the following two murder situations in the category of first degree murder":

(1) Intent-to-kill murder where there exists (in addition to the intent to kill) the elements of premeditation and deliberation, and (2) felony murder where the felony in question is one of five or six listed felonies, generally including rape, robbery, kidnapping, arson and burglary.

Several species of homicide are found in second degree murder statutes, the treatise writers claim. These are: 1) murder where there is an intent to kill, but without the additional elements of premeditation and deliberation; 2) murder where there is intent to do serious bodily injury, whether the intent is premeditated or deliberated; 3) murder which is said to be "depraved heart" killing; and 4) murder which is felony-murder, but not in pursuance of a crime listed in the first degree category. The authors caution that the statutes of particular states "must be consulted as to the degree of murder as well as referred to as to the scope of murder."

It is clear, at least, that whatever consistency could be said to have existed about the crime of homicide at common law, American statutory law is so diverse that each state has virtually developed unique definitions of the crimes and of the elements required for prov-
There is no "usual," much less uniform, definition of the crime of second degree murder in the United States.

Nebraska is one of the states whose definition of the crimes relating to homicide has changed over the years. At the time of statehood, 1867, Nebraska adopted two classifications of killing offenses: murder and manslaughter. By 1873, the State had added a provision criminalizing second degree murder. The law remained essentially the same for more than 100 years.

b. The Evolution of The Nebraska Rule

Before the 1977 amendment to the statute, in case after case, the Nebraska Supreme Court followed the language of the 1873 statute and concluded that purpose to kill and malice were material elements in the proof of second degree murder.

The most significant exposition of the doctrine of murder during that period before the 1977 amendment is found in State v. Hutter, in which Justice Carter focused on the necessity for a consistent rule of law on the subject. Trial courts, he mused, are continually deciding questions of criminal law and procedure from which defendants do not appeal. Justice Carter found that "[t]he result is that such rulings lack uniformity throughout the various judicial districts of the state. And oftentimes criminals escape conviction through incorrect rulings of the trial court."
Justice Carter repeated what other decisions had noted, that is, that at common law there were no degrees of murder or manslaughter. At common law, he wrote,

[M]urder is the unlawful killing of a person with malice aforethought, either express or implied, and manslaughter is the unlawful killing of another without malice express or implied. Manslaughter differs from murder in the want of malice, a condition of blood or mind at the time of the act. This distinction is the only one that the accumulated wisdom of the common law deemed advisable to make.

The division of murder into degrees was a recognition that, while the same general definition applied to every such killing, some murders deserve less punishment. As the California Supreme Court had said (in a case quoted and approved by the Nebraska Supreme Court), the legislature "did not attempt to define the crime of murder anew, but only to draw certain lines of distinction by reference to which the jury might determine ... whether the crime deserved the extreme penalty of the law or a less severe punishment."

Justice Carter observed that the legislature carved out different degrees of homicide from the common law definitions of murder and manslaughter. "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."

He then cited Nebraska authority, notably *Anderson v. State* in which the court had stated:

The finding as to the higher degree merely applies to the atrocity of the crime; a verdict in either degree is for murder. But it may be said that the jury having found that the crime was premeditated, and that therefore the punishment should be death, that the court cannot review this finding and render a new judgment based upon the evidence. ... If, therefore, the jury find [sic] a party guilty of a grade of murder higher than is warranted by the evidence, the court, while sustaining the conviction of murder, may reduce the grade to conform to the proof.

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31. *Id.*
32. *Id.* at 802, 18 N.W.2d at 206-07.
33. *Id.* at 802, 18 N.W.2d at 207 (citing *People v. Keefer*, 3 P. 818, 820 (Cal. 1884)).
35. *Hutter*, 145 Neb. at 802-03, 18 N.W.2d at 207.
36. 26 Neb. 387, 41 N.W. 951 (1889).
37. *Hutter*, 145 Neb. at 803, 18 N.W.2d at 207 (citing *Anderson*, 26 Neb. at 391, 41 N.W. at 953).
Justice Carter stressed, again, that "a criminal homicide is but one offense and that the determination of the degree goes to the punishment," taking care to catalogue from other jurisdictions confirming this principle.\(^{38}\)

The Carter analysis is important because it reiterates instruction from that school of thinking maintaining that the crime of murder, by its nature, involves malice.\(^{39}\) Whether Justice Carter's argument that malice is inherent in any murder, and thus must be charged and instructed on, survives the modern redefinition of the crimes, reflecting the philosophical bent of the Model Penal Code, is the real question which must be answered.\(^{40}\)

**The Modern Division of the Nebraska Supreme Court**

How has the Nebraska Supreme Court most recently divided on the question of whether malice is an essential element of second degree murder?

On a number of occasions throughout the 1980's, and into the 1990's, the court held that malice is an essential ingredient in the crime of second degree murder.\(^{41}\) In that same period of time, the

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40. See 1 *American Law Institute*, supra note 12, § 210.1 to 210.2 (discussing the common law and early statutory homicide crimes replaced by the state adaptations of the Model Penal Code which were discarded). See also Remington, *The Future of the Substantive Criminal Law Codification Movement — Theoretical and Practical Concerns*, 19 Rutgers L.J. 867, 876 (1988) (discussing a study of Wisconsin's failure to revise its second degree murder statute and the consequent state of appellate decisions necessary to unravel the meaning of the law).


In *Lowe*, decided in early June, 1995, the majority openly criticized the district court judge writing that "[t]he district court opined gratuitously that this court has been
court was faced with at least five cases involving the issue, eliciting opinions from four justices who ignored or did not consider relevant the malice doctrine.\textsuperscript{42}

Two cases help illustrate the emerging and sharp divisions on the Nebraska Supreme Court. The first case is more significant because it is the predicate for later vigorous dissent both in terms of its disregard of malice as an element of second degree murder in Nebraska and for its analysis of federal due process doctrine.\textsuperscript{43} The second case demonstrated the court's persistence in asserting that malice, although removed from the statutory definition fifteen years earlier, was an essential element of the crime.\textsuperscript{44} The results of the two cases, of course, are incompatible.

**The Cave Opinion**

In May 1992, in *State v. Cave*,\textsuperscript{45} Justice C. Thomas White wrote that “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.”\textsuperscript{46}

Justice White noted “that whether a state's homicide laws violate due process depends a great deal upon the manner in which a state defines the crime charged.”\textsuperscript{47} Clearly, up to this point, the court had not exhaustively focused on the unique elements of second degree murder, stressing, rather, the distinctions between first degree or generic murder, and manslaughter.\textsuperscript{48}

in error the past 11 years when it has read a scienter requirement in the statutory definition of the crime of second degree murder.” *Lowe*, 248 Neb. at 219, 533 N.W.2d at 102. The court suggested that the lower court was “ignorant of" the general rule of interpretation and chastized the judge, asserting, "[F]ailure to follow precedent can be a violation of the judge's sworn duty. . . . This court is bound to act, and will when we deem it appropriate, when a judge continues to ignore decisions of this court." *Id.* at 219-20, 533 N.W.2d at 102.


\textsuperscript{43.} *See generally* *State v. Cave*, 240 Neb. 783, 484 N.W.2d 458 (1992).

\textsuperscript{44.} *See generally* *State v. Franklin*, 241 Neb. 579, 489 N.W.2d 552 (1992).

\textsuperscript{45.} 240 Neb. 783, 484 N.W.2d 458 (1992).

\textsuperscript{46.} *Cave*, 240 Neb. at 789, 484 N.W.2d at 464.

\textsuperscript{47.} *Id.*

\textsuperscript{48.} *Id.* at 787-92, 484 N.W.2d at 463-66.
Justice White addressed the defendant's appellate contention that "the Due Process Clause of the Fourteenth Amendment requires that the prosecution prove beyond a reasonable doubt the absence of heat of passion in order to obtain a conviction for Second Degree Murder." The defendant relied heavily, Justice White noted, on Mullaney v. Wilbur. The opinion distinguished Mullaney, however, stating that it involved a homicide "under a statute defining the crime as the unlawful killing of another with 'malice aforethought.'"

Justice White reasoned:

Despite the fact that malice aforethought was an essential element of the offense, the trial court instructed the jury that it could presume the existence of malice aforethought from proof that the killing was intentional and unlawful unless the defendant proved by a preponderance of the evidence that he acted in the heat of passion. The Supreme Court held that this instruction violated the defendant's due process rights by shifting to him the burden of disproving an essential element of the crime.

More applicable to this case, Justice White thought, was Patterson v. New York which applied Mullaney to a statute not unlike Nebraska's. He explained that Patterson involved a defendant who shot and killed his ex-wife's former fiancee after finding them together. New York law defined second degree murder as "intentionally causing the death of another." The state law, Justice White wrote, "provides for an affirmative defense based upon evidence that the defendant 'acted under the influence of extreme emotional disturbance.'"

In addition to first and second degree murder, New York punishes "the crime of manslaughter, which is defined as the intentional killing of another 'under circumstances which do not constitute murder because [the defendant] acts under the influence of extreme emotional disturbance.'"

The New York trial court instructed the jury, according to Justice White, "that if it found beyond a reasonable doubt that the defendant had intentionally killed the victim, but he proved by a preponderance of the evidence that he had done so under the influence of extreme emotional disturbance, it had to find him guilty of manslaughter,

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49. Id. at 787, 484 N.W.2d at 463.
51. Cave, 240 Neb. at 787-88, 484 N.W.2d at 463.
52. Id. at 788, 484 N.W.2d at 463.
54. Cave, 240 Neb. at 788, 484 N.W.2d at 463.
55. Id. (citing N.Y. PENAL LAW § 125.25(1) (McKinney 1987)).
56. Id. (citing N.Y. PENAL LAW § 125.25(1) (McKinney 1987)).
57. Id. (citing N.Y. PENAL LAW § 125.20(2) (McKinney 1987)).
rather than murder." The defendant was found guilty of murder and appealed, arguing that the New York scheme was functionally the same as the one found constitutionally lacking in *Mullaney*.

The United State Supreme Court rejected that claim, stating: 

We cannot conclude that Patterson’s conviction under the New York law deprived him of due process of law. The crime of murder is defined by the statute . . . as causing the death of another person with intent to do so. The death, the intent to kill, and causation are the facts that the State is required to prove beyond a reasonable doubt if a person is to be convicted of murder. No further facts are either presumed or inferred in order to constitute the crime. . . .

It seems to us that the State satisfied the mandate of *In re Winship* . . . that it prove beyond a reasonable doubt "every fact necessary to constitute the crime with which [Patterson was] charged."

Justice White then addressed the nature of manslaughter, which he reasoned, “developed at common law in recognition of the fact that some intentional killings are committed under extenuating circumstances which mitigate, though they do not justify or excuse, the killing.” He cited the Nebraska case of *State v. Pettit* for the proposition that “intentional killings which would otherwise constitute murder are reduced to voluntary manslaughter” if done “in the heat of passion as a result of severe provocation.”

Justice White went on to say that just because “two people argue before one intentionally kills the other does not necessarily convert the crime from murder to manslaughter.” The Nebraska statute's appropriate interpretation allows that “a sudden quarrel is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self-control.” Whether that quality of provocation was present is the question which must be resolved, the *Pettit* court held.

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58. *Id.*
59. *Id.* at 788, 484 N.W.2d at 463-64.
60. *Id.* at 788-89, 484 N.W.2d at 464 (citing Patterson v. New York, 432 U.S. 197, 205-06 (1977)).
63. *Cave*, 240 Neb. at 790, 484 N.W.2d at 464-65 (citing *Pettit*, 233 Neb. at 449-50 (citing CHARLES E. TORCIA, WHARTON’S CRIMINAL LAW, § 153 (14th ed. 1979))).
64. *Id.* at 790, 484 N.W.2d at 465.
65. *Id.* (citing *Pettit*, 233 Neb. at 449, 454, 484 N.W.2d at 898, 901).
66. *Id.* (citing *Pettit*, 233 Neb. at 454, 484 N.W.2d at 901).
THE "FRANKLIN" DECLARATION

Just four months later, in September of 1992, the Nebraska Supreme Court, in an opinion by Justice Grant, ruled that to support a second degree murder conviction, "the defendant must intend to kill. We have always so held." He then quoted from an earlier decision ruling that the essential elements of the crime of murder in the second degree are "that the murder must be done purposely and maliciously."

Justice Grant emphasized that the defendant's interpretation of the crime was the correct one and the prosecutor's "insistence that the state is not required to prove intent to kill is in error." The appellant-defendant's brief in Franklin stressed that the supreme court "in every case dealing with second degree murder has held that the essential elements of [the crime] are that the killing be done purposely and maliciously." This assertion was not accurate.

THE MYERS DOCTRINE

In State v. Myers, decided in January of 1994, the Nebraska Supreme Court revisited the issue. Justice Fahrnbruch, writing for the majority, was not unmindful of the statutory change in 1977, noting specifically the language of both versions of the second degree

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68. Franklin, 241 Neb. at 585, 489 N.W.2d at 556 (citing Dean, 237 Neb. at 73, 464 N.W.2d at 788).
69. Id. at 585, 489 N.W.2d at 557.
72. 244 Neb. 905, 510 N.W.2d 58 (1994).
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murder law. However, he wrote, "this court has continued to require malice as an element of second degree murder."  

Justice Fahrnbruch then recited a line of cases, beginning with *State v. Rowe,* which held that malice is an essential element of the crime. He asserted that the trial judge has a duty "to instruct the jury on the pertinent law . . . whether requested to do so or not," concluding that instructions which omit an essential element "are prejudicially erroneous" and plain error. He added that by leaving out the malice element, "the instruction in effect became one for the crime of intentional manslaughter," which had been defined in the 1989 case of *State v. Pettit.*

However, neither the court in *Myers* nor the authorities cited in that opinion, answered the questions raised by prosecutors, news media and dissenters as to how the court could take the role of the legislators and "amend" the specific language of a statute enacted as recently as 1977.

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73. *Myers,* 244 Neb. at 908, 510 N.W.2d at 63 (noting that the 1977 statute defined second degree murder as a killing done "purposely and maliciously" and comparing it with the current code which provides that "[a] person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation.").

The Nebraska Constitution prohibits one branch of government from encroaching on the duties and prerogatives of others: "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 hereinafter expressly directed or permitted." NEB. CONST. art. II, § 1. See *State v. Marsh,* 108 Neb. 267, 271, 187 N.W. 810, 812 (1922) (stating that "it is not the province of the court to alter by construction an act of the legislature which is free from ambiguity and clear and explicit in its terms, upon the theory that the legislature made a mistake and did not intend to do that which its language clearly imports."). See also *Lincoln Dairy Co. v. Finigan,* 170 Neb. 777, 781, 104 N.W.2d 810, 812 (1960); *State ex rel. Randall v. Hall,* 125 Neb. 236, 240, 249 N.W. 756, 758-59 (1933) (per curiam). See generally F. Cahill, Jr., "The Separation of Powers in Nebraska," 18 NEB. L. BULL. 367, 371 (1939).

74. *Myers,* 244 Neb. at 908, 510 N.W.2d at 63.

75. 214 Neb. 685, 335 N.W.2d 309 (1983) (per curiam) (discussing the initial second degree murder case appealed after the January 1, 1979 statutory amendment).

76. *Myers,* 244 Neb. at 908, 510 N.W.2d at 63 (citing *Franklin,* 241 Neb. at 585, 489 N.W.2d at 556; *Dean,* 237 Neb. at 73, 464 N.W.2d at 788).

77. *Id.* at 909, 510 N.W.2d at 63.

78. *Id.* (citing *Pettit,* 233 Neb. 436, 444-45, 445 N.W.2d 890, 896 (1989)).

79. Further evidence that the court was altering the statute was that the briefs for Appellant and Appellee in *Myers* failed to mention the second degree murder issue.

It was not until the brief on the Motion for Rehearing that the Attorney General argued that the legislature declares what the law is; that the legislative power cannot be delegated to the judiciary; that courts have no power to define crime differently from the statutory definition; and that courts must construe penal statutes strictly. The State argued that the holding in *State v. Rowe,* 214 Neb. 685, 335 N.W.2d 309 (1983) was incorrect and "[i]ts repetition does not make it correct." See Brief for Appellee in Support of Motion for Rehearing at 12, State v. *Myers,* 244 Neb. 905, 510 N.W.2d 58 (1994) (No. 92-1195).
Following Myers, the court handed down opinion after opinion ruling that malice was an essential element of the crime of second degree murder.\textsuperscript{80} To complicate matters, however, within four months of the Myers opinion, the court, in an opinion by Justice Boslaugh, overruled Pettit.\textsuperscript{81}

In July of that year, the Court decided \textit{State v. Grimes}.\textsuperscript{82} Until this time, no “pro-malice” majority had conducted an exhaustive analysis of the legal arguments supporting its position.\textsuperscript{83}

The \textit{per curiam} majority repeated the axiom that malice was an essential ingredient of the crime of second degree murder and cited cases back to Rowe, adding, “[t]his has been the law in this state since 1983.”\textsuperscript{84} The majority struck out at the State, charging that the State’s assertion that only in Myers had malice been added as an element of the crime “shows ignorance of, or the disregard for, 11 years of consistent holdings by this court.”\textsuperscript{85} It stressed that without malice, in its view “the homicide statutes would not make sense.”\textsuperscript{86}

Justice Wright’s dissent focused on the decision in Cave and the United States Supreme Court holding in Patterson.\textsuperscript{87} He argued that Patterson stood for the proposition that Nebraska’s second degree murder statute without the malice element is not a violation of federally protected due process of law.\textsuperscript{88}

Justice Wright, who had joined the court in February of that year, declared that the majority was wrong here as it had been in Myers “and in the cases on which Myers relies for the proposition that malice is an element of second degree murder.”\textsuperscript{89} He also pointed to the overruling of Pettit by Jones and concluded that “what distinguishes sec-

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\item \textsuperscript{80} Barfoot, 248 Neb. at 338, 534 N.W.2d at 574; Lowe, 248 Neb. at 219-20, 533 N.W.2d at 102; Plant, 248 Neb. at 56-57, 532 N.W.2d at 622-23; Eggers, 247 Neb. at 991, 531 N.W.2d at 233; Wilson, 247 Neb. at 949, 530 N.W.2d at 927; Williams, 247 Neb. at 939, 531 N.W.2d 228; Secret, 246 Neb. at 1011, 524 N.W.2d at 557; Dean, 237 Neb. at 73, 484 N.W.2d at 788; Manzer, 246 Neb. at 538, 519 N.W.2d at 559; Grimes, 246 Neb. at 485-86, 519 N.W.2d at 516-17.
\item \textsuperscript{81} State v. Jones, 245 Neb. 821, 830, 515 N.W.2d 654, 659 (1994).
\item \textsuperscript{82} 246 Neb. 473, 519 N.W.2d 507 (1994) (per curiam).
\item \textsuperscript{83} The \textit{pre-Myers} opinions typically restated the rule that malice was an essential element of the crime of second degree murder. \textit{See}, e.g., \textit{Dean}, 237 Neb. at 73, 464 N.W.2d at 788 (discussing the essential elements for second degree murder in a single paragraph); \textit{State v. Trevino}, 230 Neb. 494, 507, 432 N.W.2d 503, 514 (1988) (discussing the entire second degree murder issue in only two paragraphs).
\item \textsuperscript{84} Grimes, 246 Neb. at 483, 519 N.W.2d at 515.
\item \textsuperscript{85} \textit{Id.} at 484, 519 N.W.2d at 516.
\item \textsuperscript{86} \textit{Id.}
\item \textsuperscript{87} Grimes, 246 Neb. at 489-93, 519 N.W.2d at 519-21 (Wright, J., dissenting).
\item \textsuperscript{88} \textit{Id.} at 491, 519 N.W.2d at 519 (Wright, J., dissenting).
\item \textsuperscript{89} \textit{Id.} at 486, 519 N.W.2d at 517 (Wright, J., dissenting).
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ond degree murder from manslaughter is the element of intent,” adding that, in his opinion, malice is not an element of either crime.90

THE COURT DIVISION SOLIDIFIES

a. State v. Ryan

At the beginning of 1996 both the majority and dissenting justices finally wrote exhaustive opinions stating their positions on the malice issue. Let us see how the sides have refined their cases.

In State v. Ryan,91 the four-person per curiam majority of the Nebraska Supreme Court held that malice continues to be an element of

90. Id. at 489, 519 N.W.2d at 518 (Wright, J., dissenting).

The complicated propositions of law unfolded by both the majority and dissent in the second degree murder cases had, for the most part, not been urged by the defendant-appellants or by the Attorney General. Where the arguments were presented, they were superficial at best, and not instructive on the issues most importantly stressed by the “sides” in the court.

In the Myers case, for example, the appellant made no mention of the malice issue. See generally Brief for Appellant, State v. Myers, 244 Neb. 905, 510 N.W.2d 58 (1994) (No. S-92-1195). The State stressed the doctrine that failure to object in a timely fashion to an instruction waives further complaint about it. Further, the Attorney General submitted, a defendant who loses at trial must show prejudice from the refusal of the court to instruct the jury in the manner urged by the loser. Brief for Appellee at 12-14, State v. Myers, 244 Neb. 905, 510 N.W.2d 58 (1994) (No. S-92-1195). The State's arguments did not, however, involve the absence of malice, but rather involved the issue of what crimes are predicate offenses for a charge of use of a firearm in the commission of a felony. See generally Brief for Appellee at 14-48, Myers (No. S-92-1195).

Needless to say, after the surprise decision by the court, the Attorney General emphasized the separation of powers argument. Brief for Appellee in Support for Motion for Rehearing at 3-14, Myers (No. S-92-1195). Counsel argued no federal constitutional principles and the brief was generally a series of undeveloped headnotes strung together by a series of citations. See generally Brief for Appellee in Support of Motion of Rehearing, Myers (No. S-92-1195).

The State did note that a number of Nebraska cases continued, even after the adoption of the new criminal code, to hold that malice is an element of murder in the second degree. Id. at 8-13, Myers (No. S-92-1195). It said, “The holding in Rowe was incorrect. Its repetition does not make it correct. Consequently, it is time for this time worn cycle to be corrected.” Id. at 12, Myers No. S-92-1195).

The briefs in State v. Grimes, 246 Neb. 473, 519 N.W.2d 507 (1994) (per curiam), also illustrate the point clearly that counsel provided little guidance, much less sophisticated analysis, to the court. The appellant argued that the trial court commited plain error by failing to instruct the jury that, before the defendant could be convicted of second degree murder the prosecution must prove beyond a reasonable doubt that Grimes had killed the victim maliciously. Brief for Appellant at 24-34, State v. Grimes, 246 Neb. 473, 519 N.W.2d 507 (1994) (No. S-93-0668).

The argument stressed that, under Nebraska law, four elements were required to be proved by the state: 1) the death; 2) malice; 3) the intent to kill; and 4) causation. Brief for Appellant at 24, Grimes (No. S-93-0668). Under the Winship doctrine the state had to prove each of these beyond a reasonable doubt. Id. at 24, Grimes (No. S-93-0668). It added that the failure of the trial judge to instruct on the issue of malice violated the due process rights of the defendant. Id. at 24, Grimes (No. S-93-0668). Moreover, that
second degree murder, notwithstanding its omission from the language of the statute defining the crime. The Ryan majority opinion is as complete an explanation of the court's rationale to be found in the cases. A fair reading of the majority makes it evident that the court's decision not to include malice in the second degree murder definition in 1977. See id. at 29-30, Grimes (No. S-93-0668). The State in its brief in chief disregarded the central issue involved in this debate. Instead, the argument was made that since no jury instructions were included in the transcript, and the defendant had not objected during trial to the allegedly offending charge, the matter was not reviewable. Brief for Appellee at 34-35, State v. Grimes, 246 Neb. 473, 519 N.W.2d 507 (1994) (No. S-93-0668).

The brief suggested tersely how the court could reconcile the manslaughter and second degree murder definitions constitutionally. Brief for Appellee at 32-35, Grimes (No. S-93-0668). Thus harmonized, the instructions which were given would constitute harmless error. Id., Grimes (No. S-93-0668).

The defendant filed a reply brief which cited the Myers opinion and concluded that the district court had committed plain error by failing to instruct properly on malice. Reply Brief for Appellant at 3-6, State v. Grimes, 246 Neb. 473, 519 N.W.2d 507 (1994) (No. S-93-0668). In a somewhat extraordinary step, the defendant noted that a supplemental transcript containing the instructions had been requested from the clerk of the court. Reply Brief for Appellant at 4, Grimes (No. S-93-0668).

The State filed a supplemental brief which stressed the doctrine that all crimes are statutory in Nebraska and that omission of a word must be assumed to be intentional and for a purpose. Brief for Appellee in Support of Motion for Rehearing at 6-9, State v. Grimes, 246 Neb. 473, 519 N.W.2d 507 (1994) (No. S-93-0668). Courts, the brief argued, cannot supply an omission, especially where it was plainly intended. Brief for Appellee in Support of Motion for Rehearing at 8-9, Grimes (No. S-93-0668).
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has not simply “overlooked” the language of the Nebraska penal code and decided willy-nilly to continue to include malice as an element of the crime of second degree murder.92

A jury had convicted the defendant, Dennis Ryan, of second degree murder and sentenced him to life imprisonment.93 The defendant then appeared before the Nebraska Supreme Court on appeal from a post-conviction proceeding in the District Court of Richardson County.94 In his third post-conviction relief motion, the defendant focused solely on the second degree murder jury instruction, claiming that it did not correctly inform the panel of the elements necessary to convict one of that crime.95

The court went to great and elaborate lengths to justify its continued inclusion of the element of malice as a requirement for a second degree murder conviction. The Ryan majority addressed six issues which are indispensable to understanding its logic in retaining the malice element and allowing defendants to raise the issue long after one would normally have exhausted the ability to turn to the appellate courts for relief.

First, the court stressed that the United States Supreme Court has sanctioned the practice of judicial placement of words in a statute where those words have been eliminated by legislatures or never were included.96 The court emphasized that legislative silence should not

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92. State v. Ryan, 249 Neb. 218, 233, 543 N.W.2d 128, 135 (1996) citing State v. Salyers, 239 Neb. 1002, 480 N.W.2d 173 (1992). The Ryan majority recognized that “it is a fundamental principle of statutory construction” that “it is not for the courts to supply missing words” to a statute. See id. (quoting Salyers, 239 Neb. at 1006-07, 480 N.W.2d at 176-77). It added that the United States Supreme Court has sanctioned placing words in a statute as if it has been so amended by the legislature in order to make clear that which is indefinite. Id. (citing Winters v. New York, 333 U.S. 507, 514-15 (1948)). A statute susceptible of two constructions, “under one of which the statute is unconstitutional or of doubtful validity,” should be construed to result in its validity. Id. (citations omitted).

The Winters case dealt with an interpretation by the New York Court of Appeals of a statute dealing with obscenity. The New York court did not, however, add any new element to the crime under consideration, but rather explained what conduct the statute controlling obscene prints and articles banned. Winters, 333 U.S. at 512-13.

93. State v. Ryan, 249 Neb. 218, 220-21, 543 N.W.2d 128, 133-34 (1996). He filed a direct appeal, but did not assign as error the instruction on the material elements of second degree murder. Ryan, 249 Neb. at 222, 543 N.W.2d at 134. His conviction was affirmed. Ryan, 249 Neb. at 222, 543 N.W.2d at 134 (citing State v. Ryan, 226 Neb. 59, 409 N.W.2d 579 (1987)). In 1990, he filed a second amended petition for postconviction relief, in which the instruction error was not assigned. This was denied by the district court and not appealed to the supreme court. Ryan, 249 Neb. at 222, 543 N.W.2d at 134. The next postconviction relief motion was filed on September 8, 1994, assigning the instruction as error. The district court denied the motion and the case was appealed to the Nebraska Supreme Court. Id. at 222-23, 543 N.W.2d at 134-35.

94. Id. at 220, 543 N.W.2d at 133.
95. Id. at 222, 543 N.W.2d at 134-35.
96. Id. at 223, 543 N.W.2d at 135 (citing Winters, 333 U.S. at 514-15).
be construed as eliminating from the definition of a crime an element absolutely essential to the nature of the crime itself. Historically in Nebraska — and in some other jurisdictions in the nation — "murder" included the taking of a life with malice.

Second, the Nebraska Supreme Court, citing City of Jacksonville v. Papachristou, noted that, under national constitutional doctrine,

97. Id. at 225, 543 N.W.2d at 136.
98. Id. at 224, 543 N.W.2d at 135. The court observed that Nebraska followed the commonly held view in America that malice is an essential element of murder in the second degree. Id. (citing 40 C.J.S. Homicide §§ 64, 65 (1991)). A close examination of the authorities cited therein demonstrates that the C.J.S. conclusion is misleading at best. See State v. Edwards, 452 So. 2d 503, 505 (Ala. 1983) (referring to malice as a "rather elusive concept," but noting that the murder definition of malice is "intent to take human life without legal excuse, justification or mitigation, and it may be presumed from the use of a deadly weapon." etc.) (citations omitted); State v. Childs, 553 P.2d 1192, 1195-96 (Ariz. 1976) (involving a first degree murder case that deals with the appropriate instruction on express or implied malice); State v. Atwood, 669 P.2d 204, 207 (Idaho Ct. App. 1983) (noting the statutory definition of second degree murder in Idaho includes the killing, intent, and malice); State v. Harper, 365 S.E.2d 69, 71 n.3 (W. Va. 1987) (quoting earlier state cases defining second degree murder as "the unlawful killing of another with malice.").

One of the predicate cases states, "It is clear that our murder statute is not designed to cover all the essential elements of murder, particularly second degree murder, since it concludes after identifying those acts which are considered first degree murder, 'all other murder is murder of the second degree.'" State v. Starkey, 244 S.E.2d 219, 223 (W. Va. 1978), overruled by State v. Gothrie, 461 S.E.2d 163 (W. Va. 1995). The court in Starkey also stated that "murder in the second degree is the unlawful killing of another with malice." Starkey, 244 S.E.2d at 223 (citations omitted). In King v. Commonwealth, 368 S.E.2d 560, 565, 563 n.1 (Va. Ct. App. 1988), the court asserted that Virginia's murder statutes codify the common law. In State v. Martin, 702 S.W.2d 560, 563, 563 n.1 (Tenn. 1985), overruled by State v. Brown, 836 S.W.2d 530 (Tenn. 1992), the Tennessee Supreme Court relied on specific statutory language in Tennessee's code at sections 39-2-201, -202, and -211 for the rule that malice is an essential element of both murder in the first and second degrees. In Commonwealth v. Begin, 474 N.E.2d 1120, 1124 (Mass. 1985), the Massachusetts Supreme Court stated that an intent to kill is not a necessary element of murder in the second degree under state law. However, the Massachusetts statute defining murder makes malice an element of both first and second degree murder. MASS. GEN. LAWS ANN. ch. 265, § 1 (West 1990). The New Mexico Supreme Court, in State v. Hamilton, 557 P.2d 1095, 1099 (N.M. 1976), cited a statute defining murder as "the unlawful killing of one human being by another with malice aforethought, either express or implied." That statute, however, was amended in 1980 removing malice from the definition. See N.M. STAT. ANN. § 30-2-1 (Michie 1994). See State v. Garcia, 837 P.2d 862 (N.M. 1992) (considering this amended statute). See also Leo M. Romero, "A Critique of the Willful, Deliberate, and Premeditated Formula for Distinguishing Between First and Second Degree Murder in New Mexico," 18 N.M. L. REV. 73 (1988); Stephanie M. Griffin, Note, "Whether the Elements of Deliberation and Premeditation Adequately Distinguish First Degree Murder from Second Degree Murder: State v. Garcia," 24 N.M. L. REV. 437 (1994).

99. 405 U.S. 156 (1972). In Jacksonville, the United States Supreme Court declared unconstitutional a vagrancy ordinance which outlawed status as a "vagabond," "habitual loafer," and "night walker." Jacksonville, 405 U.S. at 156-57, 171. The Supreme Court ruled that the ordinance was vague because it failed to give a "person of ordinary intelligence fair notice that his contemplated conduct is forbidden" and "encourage[d] arbitrary and erratic arrests and convictions." Id. at 162 (internal quotations omitted). The Court held that the ordinance "makes criminal activities which by
a statute is unconstitutional if it is overbroad or vague.\textsuperscript{100} The court explained that, standing alone and without the judicial insertion of the malice element, the continuing silence of section 28-304(1) of the Nebraska Revised Statutes (Nebraska's second degree murder statute) on the matter of malice "would result in the absurd consequences of an overbroad murder statute making certain legal acts illegal."\textsuperscript{101}

The court then gave four examples of how this statute applies to situations in which a person is justified in causing another's death intentionally.

1. When a law enforcement officer shoots a suspect in the line of duty;
2. When a Corrections Department employee carries out an order to execute a capital punishment;
3. When a prosecutor persuades a court to sentence a defendant convicted of murder to the death penalty; and
4. When the Board of Pardons acts so as to carry out a death penalty.\textsuperscript{102}

The court reasoned that if malice is not added into the law, the people in the above situations would be in violation of the law.\textsuperscript{103} The court further explained that those who commit legal acts would be required to defend themselves through the affirmative defense of justification under Nebraska law.\textsuperscript{104} This would necessarily shift the burden of proving every element of the crime for which the individual was

\begin{align*}
\text{modern standards are normally innocent.} \quad & \text{Id. at 163.} \quad \text{The Court also condemned the local law because it was overbroad and the "list of crimes is so all-inclusive and generalized...[that] those convicted may be punished for no more than vindicating affronts to police authority..." Id. at 165-67.} \quad \text{See Grayned v. City of Rockford, 408 U.S. 104 (1972).} \\
\text{A decade later, the United States Supreme Court seemed to back away from the broad condemnation of vagueness found in Jacksonville.} \quad & \text{See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982) (holding that a "scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice...").} \quad \text{See also Casbah, Inc. v. Thone, 512 F. Supp. 474, 484 (D. Neb. 1980) (holding that an act is done knowingly if it is done voluntarily and intentionally, and not because of mistake, accident or innocent reason), aff'd in part, rev'd in part, 651 F.2d 551 (8th Cir. 1981).} \\
\text{100.} \quad & \text{Ryan, 249 Neb. at 226, 543 N.W.2d at 136-37 (citing City of Jacksonville v. Papachristou, 405 U.S. 156 (1972)).} \\
\text{101.} \quad & \text{Id. at 226, 543 N.W.2d at 137.} \quad \text{See Morissette v. United States, 342 U.S. 246 (1952) (holding that "the mere omission from [a federal statute] of any mention of intent will not be construed as eliminating that element from the crimes denounced."); People v. McNeese, 892 P.2d 304, 311 (Colo. 1995) (stating that "[l]egislative silence on the element of intent in a criminal statute is generally not construed as an indication that no mental state is required.").} \\
\text{102.} \quad & \text{Ryan, 249 Neb. at 226-27, 543 N.W.2d at 137.} \\
\text{103.} \quad & \text{Id.} \\
\text{104.} \quad & \text{Id.}
\end{align*}
charged to the defendant. Moreover, the court reasoned, the defendant in such a case would have to forego the presumption of innocence and produce evidence that the causing of death was legal.

Third, the Nebraska Supreme Court stated that in cases where a set of jury instructions omits the essential language that, to convict a person of second degree murder the death must have been caused maliciously, such omission would violate the Due Process Clause of the Fourteenth Amendment. According to the court, two decisions, Sandstrom v. Montana and Francis v. Franklin, compel this result. Francis involved a Georgia defendant charged with "malice murder" when, in an escape attempt, a stolen gun he held went off and killed the victim. The defendant claimed that the killing was an accident.

The Georgia trial court gave the jury this instruction:

... The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted. A person will not be presumed to act with criminal intention but the trier of facts... may find criminal intention upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.

The trial court noted that the state had the obligation to prove every element of the crime beyond a reasonable doubt.

In an opinion by Justice Brennan, the United States Supreme Court held that the instruction, considered in the context of the jury charge as a whole, violated the Fourteenth Amendment which requires the state to prove every element of the crime. He reasoned

105. Id. See Grimes, 246 Neb. at 484-85, 519 N.W.2d at 516 (stating that "defining second degree murder without malice" might "unconstitutionally shift the burden of proof to the defendant.").
106. Ryan, 249 Neb. at 228, 543 N.W.2d at 138. See Francis v. Franklin, 471 U.S. 307, 326 (1985) (finding that the Due Process Clause of the Fourteenth Amendment prohibits using jury instructions to shift the burden of proof to a criminal defendant on the question of intent); Sandstrom v. Montana, 442 U.S. 510, 520-24 (1979) (stating that a jury instruction which shifts the burden to the defendant "conflicts with the overriding presumption of innocence with which the law endows the accused. . . ." (citations omitted)).
110. Id. at 311.
111. Id. at 311-12.
112. Id. at 317.
113. Id. at 326 (citing Sandstrom, 442 U.S. at 520-24).
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that the instruction created a mandatory presumption, which provides that if the prosecution proves certain predicate facts, the jurors must infer the presumed fact.\textsuperscript{114} Justice Brennan concluded that a reasonable jury could have understood the first two sentences of the quoted instruction as creating a mandatory presumption that shifted the burden of persuasion on intent once the prosecution proved the predicate acts.\textsuperscript{115} Therefore, this instruction violated the Due Process Clause because it relieved the prosecutor of the burden of proof on an element of the crime.\textsuperscript{116} 

Sandstrom, quoted at length by the Nebraska Supreme Court majority in \textit{Ryan}, reached the same conclusion as \textit{Francis}.\textsuperscript{117}

Fourth, the Nebraska Supreme Court stated that such an instruction is plain error and prejudicial and that any conviction without valid instructions is constitutionally invalid under abundant state precedent.\textsuperscript{118}

Normally, modern appellate courts are careful to avoid deciding any criminal procedure claim which is procedurally defaulted.\textsuperscript{119} This means that the defendant must raise and preserve the issue at the very earliest possible opportunity or have it considered waived.\textsuperscript{120}

\textsuperscript{114} \textit{Id.} at 314.  
\textsuperscript{115} \textit{Id.} at 315.  
\textsuperscript{116} \textit{Id.}  
\textsuperscript{117} \textit{Ryan}, 249 Neb. at 230-32, 543 N.W.2d at 139 (citing \textit{Sandstrom}, 442 U.S. at 524 (holding the instruction unconstitutional because the jury may have interpreted it as a "burden-shifting presumption" or a "conclusive presumption" which "would have deprived defendant of his right to the due process of law").)  
\textsuperscript{118} \textit{Ryan}, 249 Neb. at 228-29, 543 N.W.2d at 138.  

In Nebraska, "plain error" is error "plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process." \textit{State v. Williams}, 247 Neb. 878, 882, 530 N.W.2d 904, 908 (1995) (citations omitted).

A matter is said, in the context of criminal law, to be prejudicial if, but for its presence, the result of the proceeding would have been different. \textit{See, e.g., Strickland v. Washington}, 466 U.S. 668, 694 (1984) (stating that ineffective assistance of counsel is considered prejudicial if a reasonable probability exists that "but for counsel's unprofessional errors, the results of the proceeding would have been different."); \textit{State v. Williams}, 224 Neb. 114, 120-25, 396 N.W.2d 114, 118-21 (1986) (discussing how ineffective assistance of counsel can be prejudicial).

\textsuperscript{119} \textit{Ryan}, 249 Neb. at 229, 543 N.W.2d at 138. "The State contends that Ryan's motion must be overruled because it is procedurally barred due to his prior direct appeal and his previous unsuccessful motion for postconviction relief which he did not appeal . . . [but] the omission of malice as a material element to the crime of second degree murder is plain error and prejudicial." \textit{Id.} Therefore, the appeal cannot be barred.  

Whitebread and Slobogin state that "[v]irtually every state prohibits defendants from raising a claim on appeal or other post-conviction proceedings if it was not raised when the error occurred or within a certain time after trial." \textbf{CHARLES WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE,} § 33.03 (3d ed. 1993).

\textsuperscript{120} In Nebraska, the party claiming error must assign and discuss in his brief the prejudicial error that has occurred. \textbf{NEB. CT. R. OF PROC. 9D(1)(d) (1996).} \textit{See State v.
This doctrine is at the heart of efforts to limit federal habeas corpus in
and has been a cornerstone of Nebraska law for decades. In the Ryan case, how-
however, the Nebraska Supreme Court noted that an appellate court must accept jurisdic-
tion when the sentence imposed "is invalid due to plain error." A conviction in such a case is
void ab initio, the court emphasized. A void judgment may be at-
tacked at any time in any proceeding, notwithstanding the general
procedural default doctrine.

Fifth, while modern appellate practice stresses the doctrine of
"harmless error," the error here was not harmless. The error analysis
in the Ryan case was a variation of the Francis-Sandstrom analysis discussed above, leading the court to rule that the error must be corrected. Two significant matters appeared in this analysis. The
first matter was the court's emphasis that the question of intent may
never be ruled on as a matter of law and "must always be submitted to
the jury."

The second matter was the distinction the majority made between
the Ryan litigation and the United States Supreme Court opinion in

Vermuele, 241 Neb. 923, 925, 492 N.W.2d 24, 27 (1992) (stating that "[t]o be considered
by an appellate court, an error must be assigned and discussed in the brief of one claim-
ing that prejudicial error has occurred.") (citation omitted).
121. See, e.g., Shaffer v. State, 124 Neb. 7, 8, 244 N.W. 921, 922 (1932) (requiring
both assignment of error and argument before supreme court would consider issue); State v. Lindsay, 246 Neb. 101, 106, 517 N.W.2d 102, 106 (1994) (repea-
ting established rule that appellant must assign error and discuss it in the appellate brief before it may be considered). See generally Russell Jones, Comment, Finality over Fairness: The
122. Ryan, 249 Neb. at 229, 543 N.W.2d at 138; Williams, 247 Neb. at 935, 531 N.W.2d at 226.
123. Ryan, 249 Neb. at 229, 543 N.W.2d at 138 (citations omitted).
124. Id. at 230, 543 N.W.2d at 138 (citations omitted).
125. Id. at 233, 543 N.W.2d at 140. The Nebraska doctrine on harmless error is that
on review of an entire trial proceeding, the appellate court will not grant relief if the
mistake did not materially influence a jury in reaching a verdict adverse to the substan-
tive rights of a defendant. State v. Salamon, 241 Neb. 878, 891-92, 491 N.W.2d 690, 698
(1992) (citations omitted). "[A] conviction will not be set aside in the absence of a show-
ing that the error prejudiced the defendant." State v. Chapman, 234 Neb. 369, 373, 451
N.W.2d 263, 267 (1990) (citation omitted). The rule is a century old and one statement
of it is found at section 29-2308 of the Nebraska Revised Statutes. See McVey v. State,
(Reissue 1995) ("No judgment shall be set aside . . . for error as to any matter of plead-
ing or procedure if the appellate court, after an examination of the entire cause, consid-
ers that no substantial miscarriage of justice has actually occurred."). The burden is on
the defendant to show that the error was prejudicial or otherwise adversely affected his
or her substantial rights.
126. Ryan, 249 Neb. at 237, 543 N.W.2d at 142. The court reversed the postconvic-
tion relief judgment and remanded the case "with direction to vacate [the] postconvic-
tion relief judgment and grant Ryan a new trial." Id.
127. Ryan, 249 Neb. at 231, 543 N.W.2d at 139 (citations omitted).
Rose v. Clark,128 decided a year after Francis.129 In Ryan, the court repeated, the jury was not instructed that the prosecution had to prove beyond a reasonable doubt that the defendant had acted with malice.130 The court also observed that “[t]he fact the reviewing court may view the evidence of intent as overwhelming is simply irrelevant” to the application of the constitutional doctrine.131

The Ryan record, it explained, “conclusively shows” that the jury convicted him of second degree murder without having to find that the State proved all the elements of the crime beyond a reasonable doubt.132 This deprived the defendant “of a constitutional right so basic to a fair trial that the infraction can never be treated as harmless error.”133

Sixth and finally, the court addressed the affirmative defense of insanity claimed by the defendant.134 Here the court turned to Mullaney v. Wilbur135 and Patterson v. New York.136 A defendant, the court reasoned, “may be required to prove by a preponderance of the evidence an affirmative defense,” but not “to assume the burden of disproving the existence of an essential element of a crime.”137 The absence of malice is not an affirmative defense in Nebraska.138

According to the court, the State “may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense.”139 Thus, the State “may not constitutionally rely upon the affirmative defense of insanity as a means of addressing the material element of malice” in a second degree murder trial.140 Such reliance would “relieve . . . the State from proving beyond a reasonable doubt the defendant’s guilt of each and every essential element of the crime, particularly malice,” the court concluded.141

The newest justice on the Nebraska Supreme Court, Justice Ger-rard, dissented in Ryan, explaining virtually every point which had

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129. Ryan, 249 Neb. at 232-33, 543 N.W.2d at 140.
130. Id. at 233, 543 N.W.2d at 140.
132. Ryan, 249 Neb. at 233, 543 N.W.2d at 140.
133. Id. See Johnson, 460 U.S. at 81; Chapman v. California, 386 U.S. 18, 23 n.8 (1967).
134. Ryan, 249 Neb. at 234, 543 N.W.2d at 140-41.
137. Ryan, 249 Neb. at 235, 543 N.W.2d at 141.
138. Id. at 236, 543 N.W.2d at 141.
139. Id.
140. Id. at 236, 543 N.W.2d at 142.
141. Id.
been made by Justices Wright and Connolly in each of the previous dissents. The reasoning the dissenters have advanced follows.

At the core, the Nebraska Legislature knew what it was doing when it revised the criminal code in 1977 and it fully intended to remove malice as an element of second degree murder. Since all crimes in Nebraska are statutory, the action of the Nebraska Legislature is dispositive of the matter. A court may not supply language absent from the definition of a statutory crime, particularly where, as here, the language was intentionally altered by the elected lawmakers.

It would, moreover, be wrong to suggest that the legislature was silent on the issue of the presence of malice in the definition, for it is clear that the legislature acted affirmatively, first in 1969 and again in 1971 in enacting justification statutes. The net effect of this statutory change was to alter the self-defense and other justifications “for the use of deadly force from common law defenses to statutorily defined affirmative defenses.” Therefore, Justice Gerrard reasoned, the legislative action does not produce the absurd consequences which the majority attached to the elimination of malice from the second degree murder definition.

142. Id. at 241, 543 N.W.2d at 144. See supra note 4. Justice Wright dissented in State v. Grimes, 246 Neb. 473, 519 N.W.2d 507 (1994) and State v. Williams, 247 Neb. 931, 531 N.W.2d 222 (1995), cert. denied, 116 S. Ct. 563 (1996) disagreeing with the Myers decision. Wright stated that all crimes in Nebraska are statutory and that the legislative history reveals that “malice” was intentionally omitted when the statute was amended. Grimes, 246 Neb. at 487-88, 519 N.W.2d at 517-18 (Wright, J., dissenting). Wright further stated the Rowe court relied on State v. Clermont, 204 Neb. 611, 284 N.W.2d 412 (1979), which was decided before the statute was amended and the Myers court relied on State v. Pettit, 233 Neb. 436, 445 N.W.2d 890 (1989), which was later overruled by State v. Jones, 245 Neb. 821, 515 N.W.2d 654 (1994). Grimes, 246 Neb. at 487-89, 519 N.W.2d at 517-18.

Justice Connolly dissented in State v. Ryan, in which he concluded that the removal of “malice” in 1978 was deliberate. Ryan, 249 Neb. at 258, 543 N.W.2d at 153-54 (Connolly, J., dissenting). Connolly stated that although a court cannot legislate, the Nebraska Supreme Court has continued to do it. Connolly concluded that if “malice” was an essential element to all laws proscribing intentional or knowing conduct, the result would be absurd. Id. at 259, 543 N.W.2d at 154 (Connolly, J., dissenting).

143. See supra note 6.

144. Grimes, 246 Neb. at 486, 519 N.W.2d at 517 (Wright, J., dissenting) (citations omitted).

145. See infra note 213.


The Criminal Code of 1867, first codified statutes that intended to justify or excuse the use of deadly force in certain circumstances. The Statutes of Nebraska, Criminal Code, ch. IV, §§ 28-36 (1867).

147. Ryan, 249 Neb. at 244, 543 N.W.2d at 146 (Gerrard, J., dissenting) (citing Neb. Rev. Stat. § 28-1416(1) (Reissue 1995)).

148. Id. at 246-49, 543 N.W.2d at 147-49 (Gerrard, J., dissenting).
He observed that, contrary to the position of the majority, requiring a defendant to raise the issue of justification or excuse does not unconstitutionally shift the burden from the state to prove each element of a crime beyond a reasonable doubt to the defendant to prove otherwise.\(^{149}\)

The nature of the affirmative defense doctrine, as adopted by Nebraska in the 1970's, Justice Gerrard explained, requires merely that "the defendant has the initial burden of going forward with the evidence of the defense" of justification or excuse.\(^{150}\) When there is sufficient evidence — which need not be more than a "scintilla of evidence" — to raise the defense, the State must then disprove the defense beyond a reasonable doubt.\(^{151}\)

The defense burden may be met either by the defense's own witnesses or by the "State's case in chief without the necessity of the defendant presenting [any] evidence."\(^{152}\) Moreover, he wrote, a defendant is not obligated "to plead and give notice of such an affirmative defense of justification or self defense."\(^{153}\)

Justice Gerrard indicated that he was influenced by the Washington Supreme Court's opinion in *State v. McCullum*,\(^ {154}\) and concluded that "Nebraska law intended to treat an accused who intentionally, but without premeditation, killed another as one guilty of second degree murder unless and until the accused raised the issue of just cause or excuse."

\(^{149}\) *Id.* at 250, 543 N.W.2d at 149 (Gerrard, J., dissenting). See *Patterson v. New York*, 432 U.S. 197, 210 (stating that the Court declined to adopt the position "that a state must prove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused.").

Justice Gerrard stressed that the justification and homicide statutes must be read together "and construed to determine the intent of the Legislature so that different provisions of our criminal code are consistent, harmonious, and sensible." *Ryan*, 249 Neb. at 247, 543 N.W.2d at 147 (Gerrard, J., dissenting). He observed that in the case of an officer's intentional taking the life of another, without premeditation, the justification statute (NEB. REV. STAT. § 28-1408 (public duty exception)) would require the prosecutor to prove the officer was acting outside the scope and duties of his or her office, or of a judgment or order of a court. *Id.* at 247, 543 N.W.2d at 147-48 (Gerrard, J., dissenting).

"Clearly ... officers ... do not need malice inserted into the second degree statute to protect them in carrying out their public function." *Id.* at 247, 543 N.W.2d at 148 (Gerrard, J., dissenting).

\(^{150}\) *Id.* at 244, 543 N.W.2d at 146 (Gerrard, J., dissenting).

\(^{151}\) *Id.* See *State v. Stahl*, 240 Neb. 501, 510, 482 N.W.2d 829, 837 (1992) (stating that “[t]he defendant need only adduce ‘more than a scintilla’ of evidence to satisfy this initial burden.”).

\(^{152}\) *Ryan*, 249 Neb. at 244, 543 N.W.2d at 146 (Gerrard, J., dissenting).

\(^{153}\) *Id.* (Gerrard, J., dissenting) (citation omitted). On the other hand, a defendant electing to plead "not responsible by reason of insanity" in Nebraska must submit notice of intention to rely upon the insanity defense to the county attorney and with the court not later that sixty days before trial. NEB. REV. STAT. § 29-2203 (Reissue 1995).

\(^{154}\) 656 P.2d 1064 (Wash. 1983).

\(^{155}\) *Ryan*, 249 Neb. at 246, 543 N.W.2d at 147 (Gerrard, J., dissenting).
Taking aim at the majority’s assertion that law enforcement officers, prison officials and even the Board of Pardons would be at risk for conviction under the second degree murder statute, Justice Gerrard rejected the logic.\(^{166}\) The mere fact that one is an officer, he wrote, “raises the issue of justification for the use of deadly force” under Nebraska’s statute.\(^{157}\) He explained that the way the statute works, merely because one is an officer, requires the state to prove that the officer was acting outside his duties or outside a valid judgment or order of a competent court.\(^{158}\)

Justice Gerrard also explored the question of whether the shifting of burdens of proof from the state to the defendant in a criminal case can ever be constitutional in light of \textit{In re Winship}\(^{159}\) and \textit{Mullaney v. Wilbur}.\(^{160}\) He concluded that here the issue was the burden of production, which may be placed on the defendant.\(^{161}\) The state always bears the burden of persuasion under the “beyond a reasonable doubt” standard.\(^{162}\)

The United States Supreme Court in \textit{Francis v. Franklin}\(^{163}\) had counseled that “mandatory presumptions must be measured against the standards of \textit{Winship}.”\(^{164}\) Justice Gerrard stated that in \textit{Francis} the Supreme Court reasoned that due process would be violated if the state were relieved of the burden of persuasion on any element of a crime.\(^{165}\) Defendants may be required to raise affirmative defenses without there being a violation of their rights under the Constitution.\(^{166}\)

In this case, however, Justice Gerrard stressed, Ryan had never raised the issue of justification and excuse.\(^{167}\) He did choose to raise the defense of insanity, asserting that his mind was under the control of his father and the cult to which they belonged.\(^{168}\) Under Nebraska

\(^{156}\) 'Id. at 247, 543 N.W.2d at 147-48 (Gerrard, J., dissenting).
\(^{157}\) Id. at 247, 543 N.W.2d at 147 (Gerrard, J., dissenting).
\(^{158}\) Id. at 247, 543 N.W.2d at 147-48 (Gerrard, J., dissenting).
\(^{161}\) Ryan, 249 Neb. at 251-52, 543 N.W.2d at 150 (Gerrard, J., dissenting).
\(^{162}\) Id. at 245, 543 N.W.2d at 146-47 (Gerrard, J., dissenting).
\(^{164}\) Ryan, 249 Neb. at 252-53, 543 N.W.2d at 150 (Gerrard, J., dissenting) (citing \textit{Francis}, 471 U.S. at 314).
\(^{165}\) 'Ryan, 249 Neb. at 252-53, 543 N.W.2d at 150 (Gerrard, J., dissenting) (citing \textit{Francis}, 471 U.S. at 314).
\(^{166}\) Id. at 252, 543 N.W.2d at 150 (Gerrard, J., dissenting).
\(^{167}\) Id. at 253, 543 N.W.2d at 151 (Gerrard, J., dissenting).
\(^{168}\) Id. (Gerrard, J., dissenting).
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law, Ryan had the burden of proving his insanity. Moreover, the jury was properly instructed on that issue.

A defendant, Justice Gerrard reasoned, cannot claim that he did not understand the nature of his act (the crux of the insanity defense) and at the same time claim that he understood his act was justified under the circumstances.

b. State v. White

Two weeks later, in State v. White, the court again divided. White was a post-conviction relief appeal following conviction of the crimes of second degree murder, use of a firearm to commit the murder, and theft of an automobile. The defendant argued that the jury instructions as a whole did not sufficiently inform the jury that malice is an element of second degree murder.

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169. Id. (Gerrard, J., dissenting).

The burden is on the defendant to prove the defense of “not responsible by reason of insanity” by a preponderance of the evidence. NEB. REV. STAT. § 29-2203 (Reissue 1995). The United States Supreme Court has ruled that such burden-shifting schemes do not violate the Due Process Clause of the Fifth or Fourteenth Amendments. Leland v. Oregon, 343 U.S. 790, 800-01 (1952). See State v. Hankins, 232 Neb. 608, 637, 441 N.W.2d 854, 876 (1989) and State v. Ryan, 233 Neb. 74, 107-09, 444 N.W.2d 610, 633 (1989) for examples of Nebraska Supreme Court cases relying on Leland and Patterson in sustaining the constitutionality of NEB. REV. STAT. § 29-2203.

Courts ruling on other “affirmative defenses” have required defendants to bear the burden of proof: Martin v. Ohio, 480 U.S. 228, 231, 236 (1987) (holding that it does not violate the Due Process Clause to place the burden of proving self-defense on a defendant charged with aggravated murder); United States v. Dominguez-Mestas, 687 F. Supp. 1429, 1433, 1436 (S.D. Cal. 1988) (stating that “placing the burden of proving [duress] on the defendant” is not a violation of due process), aff'd, 929 F.2d 1379 (9th Cir. 1991); People v. Crawford, 372 N.W.2d 550, 552-53 (Mich. Ct. App. 1985) (holding that the defendant did not meet burden of proving entrapment).

170. Ryan, 249 Neb. at 253, 543 N.W.2d at 151 (Gerrard, J., dissenting).

171. Id. at 253-54, 543 N.W.2d at 151 (Gerrard, J., dissenting).


The court attempted to comply with the ruling in Michigan v. Long, 463 U.S. 1032 (1983), which dictates that when

a state court decision fairly appears to rest primarily on federal law, or to be intertwined with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. . . . If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review that decision.

Long, 463 U.S. at 1040-41. In White, the Nebraska Court quoted specific provisions of the Nebraska Constitution (Article I, section 3 and Article I, section 11, due process and fair trial, respectively), and indicated that citation of United States Supreme Court decisions was for guidance only. White, 249 Neb. at 387-89, 543 N.W.2d at 750-51.

173. White, 249 Neb. at 382, 543 N.W.2d at 728.

174. Id. at 382-83, 543 N.W.2d at 728.
One of the instructions had advised the jury that “malice is that condition of the mind shown by ‘intentionally doing a wrongful act without just cause or excuse’ — a ‘willful or corrupt intention of the mind.’”175 Then, in a single-step instruction, the panel was told to consider, first, whether the defendant was guilty of first degree murder and, if not, whether he was guilty of the second degree charge.176

Note that, according to the charge, the material elements the state had to prove in order to get a second degree murder conviction were: 1) causation; 2) intention (without premeditation); and 3) that the defendant did not act in self defense.177

The Nebraska Supreme Court held that “the fact that malice was included as an element of first degree murder does not overcome the deficiency in defining second degree murder.”178 The court explained that, absent evidence to the contrary, there is a presumption that a jury follows the instructions.179 The court stated that “under that presumption, the jury would have understood that once it determined that White was not guilty of first degree murder, it was no longer concerned with the matter of malice.”180

The court also rejected the State's assertion that the jurors had found the equivalent of the element of malice when the jury rejected the claim of self-defense by the defendant.181 The State argued that “self-defense and malice are mutually exclusive terms, the absence of one implies the existence of the other.”182 The court ruled, however, that the absence of self-defense may coexist with the absence of malice, since, to assert self-defense successfully, “one must have

175. Id. at 383, 543 N.W.2d at 728.
176. Id. at 383-84, 543 N.W.2d at 728. The instruction read as follows:
The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict [White] of murder in the first degree are:
1) That [he] did unlawfully kill Patricia Cool;
2) That [he] did so purposely and with deliberate and premeditated malice;

5) That [he] did not act in self defense...

The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict [White] of the crime of murder in the second degree are:
1) That [he] caused the death...
2) That [he] did so intentionally but without premeditation;
3) That [he] did not act in self defense.

Id.
177. White, 249 Neb. at 383, 543 N.W.2d at 728.
178. Id. at 384, 543 N.W.2d at 728.
179. Id. at 384, 543 N.W.2d at 728 (citing Schluter v. State, 151 Neb. 284, 295, 37 N.W.2d 396, 402 (1949); Webber v. City of Scottsbluff, 150 Neb. 446, 450, 35 N.W.2d 110, 113 (1948)).
180. White, 249 Neb. at 384, 543 N.W.2d at 728-29.
181. Id. at 384-87, 543 N.W.2d at 729-30.
182. Id. at 385, 543 N.W.2d at 729.
both a reasonable and good faith belief in the necessity of using deadly force."\textsuperscript{183}

The court observed "that malice, like intent, concerns the state of mind of the slayer."\textsuperscript{184} The court noted that malice is "a condition of the mind which is manifested by intentionally doing a wrongful act without just cause or excuse."\textsuperscript{185} The court stated:

Since one who acts in self-defense does so with a protective intent rather than a criminal intent devoid of justification or excuse, such person does not act with malice and cannot be convicted of second degree murder.\textsuperscript{186}

The court added that murder in the second degree in Nebraska can be distinguished from murder in the first degree "only in the absence of the requirement of deliberation and premeditation."\textsuperscript{187} In both offenses, the court held, the state must prove "that the defendant acted with malice."\textsuperscript{188}

Justices Gerrard, Wright, and Connolly dissented, noting the growing number of dissents on the issue of malice as an element in second degree murder.\textsuperscript{189} The dissent added that the majority had departed "from a part of its previous rationale," because the trial court had not instructed the jury on malice as an element of the crime, and this amounted to a structural error, and therefore, was not "amenable to a harmless error analysis."\textsuperscript{190} The dissent criticized the majority
for developing a new concept of "protective intent," not found in Nebraska's justification statutes and basing the harmless error analysis wholly on the constitution of the state.191

Justice Gerrard honed in on the problem of whether the absence of self-defense and the absence of malice may coexist, as the majority had asserted.192 He, too, analyzed the Thompson doctrine, concluding that a mistaken subjective belief by an actor in the necessity of his conduct, though not objectively so, is murder when it results in the intentional killing of another when not justified under the state statute.193 Justice Gerrard stated that "[a]n intentional killing is either justified, as defined by statute, or it is murder, as defined by statute."194 "[t]here are no in-between crimes, nor are there any subjective, in-between justifications for an intentional killing."195

Justice Gerrard concluded that an "unreasonable, albeit subjective, good faith belief in the necessity of using deadly force does not negate the existence of 'malice,' as that term is defined, in Nebraska."196 He concluded that because the jury was instructed according to this analysis, such instruction was not error.197

jury has not been instructed as to a material element of a crime, there is no verdict within the meaning of [the fair trial clause of the state constitution]." White, 249 Neb. at 389, 543 N.W.2d at 731.

The dissent in White questioned the result reached by the majority, if it was based on the reasoning in Sullivan. That case, the dissent urged, "must be read in the context of a 'deficient reasonable-doubt instruction,'" and the instruction in the Sullivan case "is quite different from the . . . error of erecting a presumption regarding an element of the offense." White, 249 Neb. at 394, 543 N.W.2d at 733-34 (Gerrard, J., dissenting) (quoting Sullivan, 508 U.S. at 280). It concluded that White "clearly falls into the 'trial error' category of cases and is amenable to a harmless error analysis" under Sullivan and Rose v. Clark, 478 U.S. 570, 576-77 (1986). Id. at 394, 543 N.W.2d at 734.

191. White, 249 Neb. at 390, 543 N.W.2d at 732 (Gerrard, J., dissenting). Justice Gerrard wrote.

There are times when a killer claims a subjective honest belief that his actions were necessary for his safety . . . even though, on an objective appraisal by a judge or jury, the circumstances are found to be otherwise. In Nebraska, such a mistaken belief that results in the intentional killing of another human being is not justified by statute and, under the law of this state, is murder.

Id. at 392-93, 543 N.W.2d at 733 (Gerrard, J., dissenting).

Justice Gerrard emphasized that "there are no in-between crimes, nor are there any subjective, in-between justifications for an intentional killing." Id. at 393, 543 N.W.2d at 733 (Gerrard, J., dissenting). See supra notes 185-87.

192. White, 249 Neb. at 392, 543 N.W.2d at 733 (Gerrard, J., dissenting).

193. Id. at 392-93, 543 N.W.2d at 733 (Gerrard, J., dissenting).


195. White, 249 Neb. at 393, 543 N.W.2d at 733 (Gerrard, J., dissenting).

196. Id. (Gerrard, J., dissenting).

197. Id. (Gerrard, J., dissenting).
Second Degree Murder

**The Federal Constitutional Sources and Nebraska's Rule**

If the United States Constitution as definitively interpreted by the United States Supreme Court outlaws a state practice — even one found in the bedrock law of the jurisdiction — the state conduct is prohibited.198

If the homicide scheme in Nebraska is prohibited by the Due Process Clause because it eliminates malice as an element of second degree murder, two solutions are possible. Either the state supreme court could declare the second degree murder law unconstitutional, or the court could save the statute by declaring that the element of malice continues to remain a part of the law, though eliminated from it by statute.

Let us begin by examining the bedrock due process principles set out in the seminal case of *In re Winship*.199 *Winship* was a juvenile matter in which a 12-year-old boy was found to have entered a locker and stolen $112 from a woman's purse.200 Justice Brennan, writing for the majority of the United States Supreme Court, stated that "[t]he requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from the early years of our Nation."201 He added that the "beyond a reasonable doubt" standard is accepted "virtually unanimously" in common law nations.202 While this acceptance "may not conclusively establish it as a requirement of due process, such adherence does reflect a profound judgment

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198. Under the Supremacy Clause of the Constitution, the "Judges in every State shall be bound" by the Constitution, the laws of the United States made in pursuance to it and valid treaties. U.S. Const. art. VI, cl. 2. In 1816, the Supreme Court held that state acts are restricted by the supreme law of the land. *See generally* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 323-62 (1816). Criminal case judgments have likewise been subject to federal constitutional circumscriptions. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 319-21 (1821). Of course, states are free to grant individuals more rights than those guaranteed by the Federal Constitution, so long as the greater rights are products of state law. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 84-85 (1980). *See generally* John E. Nowak & Ronald D. Rotunda, *Constitutional Law*, §§ 1.5; 1.6 (5th ed. 1995).

The Supreme Court also held that the Fourteenth Amendment was no barrier to a state's ability to enact legislation regulating the local economy. *Olsen v. Nebraska*, 313 U.S. 236, 240-43 (1941). The Nebraska Supreme Court hastened to decide *Boomer v. Olsen*, 143 Neb. 579, 587, 10 N.W.2d 507, 511-12 (1943) declaring the same legislation unconstitutional under state constitutional limitations.

Finally in *White*, the majority declared that its decision concerning the appellant's rights rested on state, not federal, constitutional law. *White*, 249 Neb. at 387, 543 N.W.2d at 730.

202. *Id.*
about the way in which law should be enforced and justice administered.”

He then listed older cases demonstrating this standard of proof, which he declared was “a prime instrument for reducing the risk of convictions resting on factual error.” Justice Brennan stated:

Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. Winship states only general principles and makes no attempt to declare what facts are essential components of any charge which may be brought under the statutes of a given state.

The Nebraska Supreme Court majority has erected a doctrine of the necessity of malice as a component of second degree murder on the foundation of Winship. For example, the majority in Ryan noted that cases such as Morissette v. United States, leave no room for elimination of the element notwithstanding the statutory removal of the language nearly 20 years ago.

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205. Winship, 397 U.S. at 364.


207. Ryan, 249 Neb. at 223-26, 543 N.W.2d at 135-36. No provision of the United States Constitution requires Nebraska to include malice as an essential element of the crime of second degree murder. The court majority in Ryan stated that without the element of malice or mens rea, the second degree murder statute is of “doubtful validity and perhaps unconstitutional.” Ryan, 249 Neb. at 223, 543 N.W.2d at 135. It is true that old Nebraska cases, interpreting the pre-1977 statute, held that malice is a necessary element of the crime. However, the majority’s reliance on authorities collected in 40 C.J.S. Homicide §§ 64, 65, is misplaced, since they have been distinguished, replaced by statute or otherwise are inapplicable.

The Ryan majority cited Morissette for the proposition that legislative silence should not be construed as eliminating malice as an element of second degree murder. Id. at 225, 543 N.W.2d at 136. Morissette stands only for the proposition that “intent was so inherent on the idea of the offense that it required no statutory affirmation.” See Morissette, 342 U.S. at 252. Wrongdoing must be conscious, Justice Jackson acknowledged. Id. at 252. He noted that courts have devised working formulas for instructing juries around terms such as “felonious intent,” “criminal intent,” “malice aforethought,” “guilty knowledge,” “fraudulent intent,” “willfulness,” “scienter,” to denote guilty knowledge or mens rea. Id. See LAFAVIE & SCOTT, supra note 12, § 3.5, at 302 (noting that the meaning of “intent” has “always been rather obscure.”). LaFave and Scott conclude that the modern view of mens rea is that some form of mental state is a prerequisite to guilt. Id. at § 3.5(e).

Moreover, the Morissette decision was written some years before the creation of the Model Penal Code, whose authors took stock of the confusion in the old terms and con-
The majority in *Morissette* examined the process by which the states codified the common law and concluded that, even if the states were silent on the issue of intent, "that omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation."\(^{208}\) The *Morissette* Court then observed that the states' adherence to the notion "that wrongdoing must be conscious to be criminal" is manifested "by the variety, disparity and confusion of their definitions of the requisite but elusive mental element."\(^{209}\) The omission by Congress of any of these definitions was not, the Court concluded, a rejection of the inherent necessity of intent to prove a crime.\(^ {210}\)

Congressional silence as to mental elements in an Act merely adopting into federal statutory law a concept of crime already so well defined in common law and statutory interpretation by the states may warrant quite contrary inferences than the same silence in creating an offense new to general law, for whose definition the courts have no guidance except the act.\(^ {211}\)

The Nebraska Supreme Court majority has misapplied the admonition in *Morissette*, which is only that intent, for due process purposes, must be present in a crime such as homicide.\(^ {212}\) The *Morissette* admonition is against removing intent from a crime of this nature, not to restoring verbiage deliberately removed in an attempt to modernize the criminal code.\(^ {213}\) Thus, the 1977 Nebraska amendment fully com-


\(^{209}\) *Morissette*, 342 U.S. at 252.

\(^{210}\) Id. at 261-62.

\(^{211}\) Id. at 262.

\(^{212}\) See supra note 208 and accompanying text.

\(^{213}\) The Ryan dissent emphasizes this point, stating:

Thus it is clear that the Legislature, in the 1977 revision of the criminal code, contrary to the majority's assertion, was not silent as to whether malice remained an element of second degree murder. By removing malice from the statutory text of only the second degree murder statute, the Legislature acted affirmatively with the intention of changing only the second degree murder statute and eliminating malice as an element of that particular crime.

Ryan, 249 Neb. at 243-44, 543 N.W.2d at 146 (Gerrard, J., dissenting).

The court in *State v. Grimes* noted that the legislature provided:

Section 19 (§ 28-304) is comparable to Section 28-402 or second degree murder.

It differs from the present section, which requires the killing to be purposely
ports with the due process guidance of *Morissette* and does not need, for its validity, to have a judicial restoration of a concept which is redundant at best and confusing at worst.\(^{214}\)

With regard to the second core issue, it is clear that the Nebraska Legislature had created a process under which a defendant in a criminal case could raise justification or excuse as an affirmative defense.\(^{215}\) This statutory scheme was enacted in 1972 and reformed three years later, that is, before the enactment of the penal code in 1977.\(^{216}\)

This justification and excuse scheme simply does not produce the absurd consequences which the *Ryan* majority fears.\(^{217}\) The source of the fear is the presumption that shifting the burden of production on a defense to a crime is a violation of the *In re Winship* doctrine that the state must prove all elements of a crime beyond a reasonable doubt, and may not shift the burden to the defendant.\(^{218}\)

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\(^{214}\) The American Law Institute notes that the homicide model does not rely on the common law vocabulary to distinguish among the offenses found within it, but rather adopts new culpability concepts. 1 AMERICAN LAW INSTITUTE, *supra* note 12, § 210, at 1. It also indicated that language employing the words "purposely, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life" is a more satisfactory means of stating the culpability required for murder than the old language of "malice aforethought." 1 AMERICAN LAW INSTITUTE, *supra* note 12, at art. 2102. See *State v. Bright*, 238 Neb. 348, 351, 470 N.W.2d 181, 183 (1991) (stating that "in the context of a statute such as § 28-706 [criminal non-support of a minor child], 'intentionally' means willfully or purposely, and not accidentally or involuntarily.").

\(^{215}\) *See supra* notes 146-47 and accompanying text.

\(^{216}\) *Id.*

\(^{217}\) The majority wrote

> law enforcement officials forced to kill in the line of duty cause the death of another person intentionally. . . .

If malice is not read into § 28-304(1), individuals who commit legal acts, though punishable under the statute, would have to defend themselves through an affirmative defense of justification. . . . This results in a shifting of the State's burden of proving every element of the crime charged in a criminal case.

*Ryan*, 249 Neb. at 226-27, 543 N.W.2d at 137 (citation omitted).

But Justice Gerrard disposed of this concern by calling attention to the fact that the justification and excuse statute erased the common law defenses and enacted statutory affirmative defenses. *Id.* at 244, 543 N.W.2d at 146 (Gerrard, J., dissenting). Nebraska case law, Justice Gerrard noted, makes it clear that the nature of an affirmative defense "is such that the defendant has the initial burden of going forward" with some evidence of the defense and the state must disprove it "beyond a reasonable doubt." *Id.* at 244, 543 N.W.2d at 146 (Gerrard, J., dissenting).

\(^{218}\) *Winship*, 397 U.S. at 361.
In fairness to the Nebraska majority, the difficulty in determining the Winship requirements results from two subsequent United States Supreme Court cases cited by Justice White in State v. Cave.219 These two cases, Mullaney v. Wilbur220 and Patterson v. New York,221 gave conflicting signals as to the status of the burden doctrine.222 This conflict has led one scholar to write,

There should be no difference in constitutional terms between a legislature saying that a crime involves elements a, b, and c, with the defendant having to bear the burden of proving c, and an alternative scheme in which the crime is defined by elements a and b alone, with the defendant given a defense of c that the defense must prove. Any formalistic rule must prove unsatisfactory.223

This same scholar avers that "[n]othing on the face of the Constitution indicates which elements of an offense are mandatory."224 Furthermore, the Model Penal Code was conceived to move away from the confusing common law vocabulary used for generations to distinguish among offenses.225 It substituted culpability concepts.226 In the Model Penal Code, the scholars note that these new concepts "provide a more satisfactory means of stating the culpability required for murder than did the older language of 'malice aforethought' and its derivatives."227

To understand the fundamental Winship requirements in modern terms, one must resort to a primer on burden of proof rules in criminal cases. The burden has two components, that of production and that of persuasion.228 The former relates to providing sufficient evidence to place a given fact in issue.229 It is, the authorities agree, normally

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219. Cave, 240 Neb. at 788-89, 484 N.W.2d at 463-64.
222. Cave, 240 Neb. at 787-89, 484 N.W.2d at 463-64. See Mullaney v. Wilbur, 421 U.S. 684, 703-04 (1975) (holding that a jury instruction that proof of malice could be inferred from intent violated the defendant's due process rights by shifting the burden of disproving an essential element of the crime); and Patterson v. New York, 432 U.S. 197, 198, 216 (1977) (holding that the New York Legislature's decision to require the defendant to prove the affirmative defense of extreme emotional disturbance does not violate due process).
225. 1 AMERICAN LAW INSTITUTE, supra note 12, § 210, at 1.
226. Id.
227. Id. at 2.
229. Id. See 1 LAFAVE & SCOTT, supra note 12, § 1.8; McCormick, Evidence, §§ 336-37 (3d ed. 1984).
borne by the "party who first pleaded the existence of a fact not yet in
issue, but it can shift. . ."230

The burden of persuasion, on the other hand, requires its bearer
to convince the fact finder "that a fact in issue should be decided a
certain way."231 Due process principles require the prosecution to per-
suade on all elements of the charged violation.232 Patterson requires
that shifting of the persuasion burden must withstand scrutiny under
the due process clause.233 The Supreme Court has also required trial
courts to instruct juries on all elements which prosecutors must prove
beyond a reasonable doubt.234

McMillan v. Pennsylvania235 held that "in determining what facts
must be proved beyond a reasonable doubt the state legislature's defi-
nition of the elements of the offense is usually dispositive."236 McMil-
lan does not foreclose any inquiry into the validity of a statutory
definition of crime, or of the procedures to convict a defendant of
crime.

The Court in McMillan repeats, however, language from both Pat-
terson and Speiser v. Randall,237 which in no uncertain terms con-
cedes to the state the power to govern the definition and processes of
crimes and convictions.238 This is a legislative function and the judici-
ary should not interfere unless the enactment "offends some principle
of justice so rooted in the traditions and conscience of our people as to
be ranked as fundamental."239

As if to emphasize this "hands off" approach to legislative choices
regarding the elements and procedures of crimes the Court added,
"We reject the view that anything in the Due Process Clause bars
States from making changes in their criminal law that have the effect
of making it easier for the prosecution to obtain convictions."240

The end result is that the state has the constitutional power to
allocate the burden of proof to the defendant on certain exculpatory or
mitigating matters.241 This is evident in affirmative defense issues
such as insanity, justification or excuse. The Nebraska minority rec-
ognized this development while acknowledging that the burden of pro-

230. Id. Project, 79 Geo. L.J. at 1076 n.2096.
231. Id.
232. Id.
233. Patterson, 432 U.S. at 210-11.
238. McMillan, 477 U.S. at 85.
239. Id. (citing Speiser v. Randall, 357 U.S. 513, 523 (1958)).
240. Id. at 89 n.5.
241. Id. at 84.
duction on the defendant is small and the evidence necessary to raise an affirmative defense may, in fact, have been presented in the state's case-in-chief.\textsuperscript{242}

CONCLUSION

For more than a hundred years, murder in the second degree in Nebraska was a crime which required proof of malice. The legislature changed that in 1977 as part of a massive re-examination of the criminal code. The Nebraska Supreme Court has insisted that malice must continue to be an element of the crime because without it due process of law would be violated and the criminal code would not make sense.

The court was never consistent after the 1977 amendment in insisting upon the inclusion of malice in the crime and only recently grappled with the justifications — other than historical — for its inclusion. At the same time, a vocal minority has argued that the legislature is the governmental body charged with defining crimes in Nebraska and that due process does not require adherence to an outdated doctrine.

While the Supreme Court of the United States, in fashioning some of the contours of due process of law, has addressed the question of the duty of a prosecutor to prove all elements of a crime beyond a reasonable doubt, it has neither ruled that malice must be a requirement of homicide nor that the state may not shift the burden of production on certain affirmative defenses to crimes.

However, the United States Supreme Court has not made the job of state courts an easy one. The two leading cases have confounded courts and scholars.\textsuperscript{243} It is not altogether clear what the due process

\textsuperscript{242} Ryan, 249 Neb. at 244, 543 N.W.2d at 146 (Gerrard, J., dissenting).

\textsuperscript{243} See supra notes 220-43 and accompanying text.

definition of "intent" is. Moreover, there continues to be debate about the outer limits of the rules concerning shifting burdens of proof.

It is clear that the intellectual debate between the majority and minority on the Nebraska Supreme Court has been much more sophisticated and honest than the demagoguery from certain critics of the court and many who control or comment in the media. Complex criminal procedure matters are often opportunities for political posturing. It is always easy to accuse a court which must wade through dunes of thick jurisprudence to reach unpopular opinions of failing to do its job.

The Nebraska majority has chosen a wrong path. It can retrace its juridical steps and reach a correct conclusion in future second degree murder cases.

244. See supra note 207 and accompanying text.

Nebraska's criminal code of 1977 is not the only code which has elicited conflict surrounding its meaning and interpretation. For example, one commentator criticized the Colorado criminal code for its approach to revision by stating that the code "fits together awkwardly and . . . leaves unanswered important questions concerning the elements of criminal offenses. This is especially so with regard to its mens rea provisions." Marianne Wesson, Mens Rea and the Colorado Criminal Code, 52 U. COLO. L. Rev. 167, 210 (1981).

245. See supra notes 110-17 and accompanying text. See also Erica Mendelson Eisinger, Note, After Sandstrom: The Constitutionality of Presumptions that Shift the Burden of Production, 1981 Wisc. L. Rev. 519, 522 (1981) (stating that "the status of presumptions that shift the burden of production to the defendant is unclear.").

In 1992, the Supreme Court decided Medina v. California, 505 U.S. 437, 445 (1992) sanctioning the placing of the burden of proving incompetency to stand trial on the defendant. Justice Kennedy relied on Patterson, noting that the court should only ask whether the challenged provision "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Id. (citations omitted).

246. Justice David Lanphier of the Court was targeted in August, 1996, by a group called Citizens for Responsible Judges seeking his ouster under the Nebraska Merit Plan retention vote. His participation in the "malice" majority was one of the two reasons given for seeking his removal. In September, a Political Action Committee called, "Nebraskans for an Impartial Judiciary" was formed to urge Lanphier's retention on the Court. Nebraskans for an Impartial Judiciary, OMAHA WORLD-HERALD, Oct. 3, 1996, at 20.