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## Public Law: Criminal Law

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## CRIMINAL LAW

Roger Stetter\*

## MISDEMEANOR - MANSLAUGHTER

In *State v. Chavers*,<sup>1</sup> defendant appealed his conviction of battery-plus-death type manslaughter<sup>2</sup> based on the trial court's refusal to grant his motion for a directed verdict of acquittal. Testimony by the state's witnesses, female dates of defendant and his accomplice, indicated that defendant and his accomplice lured their intoxicated victim from a bar to a deserted area in order to rob him. Defendant went back to his car, where the dates were waiting, to get his tire-iron because, according to defendant's testimony, decedent had pulled a knife on his friend. Shortly afterwards, the girls went back to the area where the men were, saw decedent lying on the ground unconscious, and heard defendant's friend say that he had hit decedent with his fist. Defendant took decedent's wallet, and the party then carried him to a deserted truck and left him on the floorboard to "sober up," not without, however, first removing his watch and shoes. Two days later decedent was found dead in the truck where defendant and friend had left him, the coroner assigning the cause of death as a heart attack, which he testified could have been triggered by a blow to the jaw in view of decedent's pre-existing severe heart condition. There was no evidence that defendant had used the tire-iron.

On these facts, defendant, though he personally did not lay a hand on decedent and may have been absent when his friend struck him, could be convicted as a principal because he was concerned in the commission of the crime.<sup>3</sup> Robbery of decedent, of which there was ample evidence of preconcert between defendant and the actual killer, was the predicate for battery which resulted in death. Defendant, chargeable as principal to battery, was therefore liable with the actor for the fatal consequences.<sup>4</sup>

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1. 294 So. 2d 489 (La. 1974).

2. "Manslaughter is . . . (2) A homicide committed, without any intent to cause death or great bodily harm. (a) When the offender is engaged in the perpetration or attempted perpetration of any felony not enumerated in Articles 30 or 30.1, or of any intentional misdemeanor directly affecting the person. . . ." (Emphasis added.) LA. R.S. 14:31(2)(a) (1950), as amended by La. Acts 1973, No. 127 § 1. An intentional misdemeanor directly affecting the person is limited to such offenses as assault, battery and false imprisonment. See *id.*, comment 2(a).

3. LA. R.S. 14:24 (1950).

4. The rationale used by the court to sustain defendant's conviction for man-

Defendant argued he did not know decedent had a weak heart, but the court correctly rejected this argument. In a homicide where defendant directly brings about the fatal result,<sup>5</sup> probability or foreseeability of consequence has no bearing on the issue of proximate cause.<sup>6</sup> The defendant must take his victim as he is, and if, unknown to defendant, he has a weak heart,<sup>7</sup> or will bleed to death from a slight laceration of the lip,<sup>8</sup> or is intoxicated,<sup>9</sup> or has already been inflicted

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slaughter is based on the vicarious liability of a co-conspirator for acts done in furtherance of the common plan, here the common enterprise to commit a robbery. *State v. Chavers*, 294 So. 2d 489, 492 (La. 1974); see LA. R.S. 15:455 (1950). Defendant was not formally charged with a conspiracy, but only as a principal under article 31(2)(a), and was tried on an amended bill of information which did not include Bobby Ray Simpson, the actual killer of decedent. See Record at 73, *State v. Chavers*, (No. 54234, filed December 12, 1973, Supreme Court of Louisiana, New Orleans, Louisiana). In these circumstances, Louisiana jurisprudence does not sanction the defendant's conviction on a theory of vicarious liability. See *State v. Skinner*, 251 La. 300, 322, 204 So. 2d 370, 377 (Sanders, J., dissenting). It would have been better for the court to couch its rationale for defendant's conviction in terms of the liability of an accomplice for all ensuing consequences.

5. If the fatal result is brought about by an intervening cause, which can be labeled a "coincidence," defendant is not legally responsible for the result unless the coincidence was reasonably foreseeable. See, e.g., *People v. Rockwell*, 39 Mich. 503 (1878) (horse jumped on victim after defendant knocked victim to ground, resulting in death; held, no liability); W. LAFAVE & A. SCOTT, CRIMINAL LAW § 35 (1972).

6. See Focht, *Proximate Cause in the Law of Homicide*, 12 SO. CAL. L. REV. 19 (1938). Occasional loose dicta imply a probability-of-consequence requirement for unlawful act involuntary manslaughter; however, particular results can be justified on narrower grounds. See, e.g., *Commonwealth v. Couch*, 106 S.W. 830 (Ky. Ct. App. 1908) where defendant discharged a pistol on a public highway and frightened a pregnant woman who suffered a miscarriage and died. Reversing a manslaughter conviction, the court stated, "[I]n each. . . case it. . . must appear that death was the natural and probable consequence of the unlawful act complained of," but a holding of lack of proximate cause may be justified for consequences too remote and extraordinary. *Id.* at 831. Courts do, however, find consequences proximate which would be regarded as remote were a less vicious individual on trial. See Comment, 31 MICH. L. REV. 659, 675-80 (1933). Compare *Potter v. State*, 70 N.E. 129 (Ind. 1904) (defendant carried pistol in violation of statute, which accidentally discharged in friendly scuffle; resulting death held not proximate consequence of unlawful act) with *Gore's Case*, 77 Eng. Rep. 853 (1611) (defendant wife mixed rat poison with husband's medicine intending to kill him; husband recovered but complained to druggist who took fatal dose to vindicate purity of his product; defendant held liable for murder of druggist).

Liability for constructive homicide is further limited by the notion of "res gestae," i.e., the requirement that there be a logical relationship between the unlawful act and the killing. One must differentiate this requirement from the proximate cause inquiry. See *People v. Mulcahy*, 149 N.E. 266 (Ill. 1925) (manslaughter conviction reversed where defendant police officer accidentally shot hat-check girl in cabaret while illegal game of stud poker was in progress; defendant's unlawful act in failing to arrest gamblers had absolutely no connection with the killing).

7. *Baker v. State*, 11 So. 492 (Fla. 1892).

8. *State v. Frazier*, 98 S.W.2d 707, 713 (Mo. 1936).

9. *Commonwealth v. McAfee*, 108 Mass. 458 (1871).

with a wound which will cause imminent death,<sup>10</sup> it will make no difference in the eyes of the law. If defendant's act or culpable omission contributed materially to decedent's death and the jury is satisfied that death would not have occurred when it did but for defendant's act, this satisfies the requirement of legal causation.

Perhaps this is a salutary rule. Take, for example, the case of a man who with murderous intent fires a loaded gun at another, missing him, but the victim dies of fright due to a weak heart. The fact that death, in the matter it took place, was unforeseeable does not exonerate the defendant or even mitigate his crime.<sup>11</sup> Perhaps analogous reasoning supports a conviction for murder where, although the death was brought about accidentally and without any intent to kill or to inflict great bodily harm, defendant was engaged in a dangerous felony which itself carried a homicidal risk.

Yet the rule does seem harsh that one is guilty of manslaughter who merely intended a battery or assault under circumstances where the actor had no reason to believe that his conduct could produce a more serious result, if the consequence is in fact fatal. Deliberately scaring another by threatening to beat him up would be manslaughter if the victim, unknown to defendant, had a weak heart and died of fright.<sup>12</sup> What is this if not a form of absolute criminal liability? Concededly, however, the problem is not with the rules of proximate cause but with the statutory definition of the crime.

In assessing the reasonableness of the misdemeanor-manslaughter portion of article 31 it should be noted that it is narrower than the fairly typical involuntary manslaughter statute which defines the crime to include any accidental killing of a human being in the commission of an "unlawful act."<sup>13</sup> Whereas "unlawful act" is

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10. *State v. Matthews*, 38 La. Ann. 795, 796 (1886).

11. Although no case directly on point could be found, many analogous cases support this conclusion. *See, e.g., Parrish v. State*, 97 So. 2d 356 (Fla. App. 1957) (conviction of second degree murder upheld where defendant, armed with bayonet, chased his former wife in his car, and she, fearing for her life, disregarded a stop sign and was killed in a collision with another automobile); *Stephenson v. State*, 179 N.E. 633 (Ind. 1932) (conviction of intent-to-kill murder upheld where kidnap victim subjected to sexual perversion and beatings swallowed poison); *State v. Knight*, 115 A. 569 (N.J. App. 1921) (defendant's conviction of attempted rape-murder upheld where victim died of shock and fright before actual penetration).

12. *See* LA. R.S. 14:31 (1950), as amended by La. Acts 1973, No. 127 § 1, comment 2(a); *Regina v. Dugal* [1878] 4 QUE. L.R. 350, 359. *Cf. Ex parte Heigho*, 110 P. 1029 (Idaho 1910) (defendant chargeable with manslaughter where spectator, not person assaulted, died of shock).

13. *See, e.g., N.M. STATS. § 40A-2-3.B* (1963). Some state statutes set out the penalty for manslaughter without defining it, and the courts simply take up the common law definition. *See, e.g., MD. CODE ANN. art. 27, § 387* (Repl. Vol. 1971); *MASS.*

conceptually broader than the category "any intentional misdemeanor directly affecting the person," apart from prosecutions for battery-plus-death manslaughter, the broader crime is chiefly used to prosecute motor manslaughter,<sup>14</sup> the courts also usually requiring proof of criminal negligence despite the wording of such statutes.<sup>15</sup>

Although prevailing law would sustain the instant defendant's conviction for manslaughter or involuntary manslaughter since battery is an unlawful act, there is an enlightened trend afoot to eliminate the entire category of unlawful act type manslaughter and focus instead on the key issue of creation of homicidal risk.<sup>16</sup> For example,

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ANN. LAW ch. 265, § 13 (Supp. 1973). Still other states which follow the common law of manslaughter mark it off as a residual category of unjustifiable killings which are not murder. *See, e.g.*, FLA. STAT. ANN. § 782.07 (Supp. 1974); MO. STAT. ANN. § 559.070 (Vernon's 1953).

14. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 79 (1972). "Unlawful act" manslaughter could not be invoked today to punish a chance killing which results from such unlawful conduct as hunting at prohibited times, *State v. Horton*, 51 S.E. 945 (N.C. 1905); selling moonshine whiskey, *People v. Pavlic*, 199 N.W. 373 (Mich. 1924); or carrying a concealed weapon, *Holder v. State*, 277 S.W. 900 (Tenn. 1925).

15. Occasionally, courts have upheld manslaughter convictions based on violations of traffic regulations without proof of criminal negligence. *See, e.g.*, *State v. Kotapish*, 171 Ohio St. 344, 171 N.E.2d 505 (1960). However, it is dangerous to hazard any generalizations in this area without consulting the jurisprudence under the particular unlawful act type statute. *See, e.g.*, *People v. Stuart*, 47 Cal. 2d 167, 302 P.2d 5 (1956) (druggist prepared misbranded drug, a strict liability misdemeanor, as a result of which child died of poisoning; unlawful act involuntary manslaughter conviction reversed; unlawful act for manslaughter must be dangerous and done with gross negligence); *State v. Hayes*, 77 N.M. 225, 421 P.2d 439 (1966). *See generally* ILL. ANN. STAT. ch. 38, § 9-3, committee comment (Smith-Hurd 1972); MD. CODE ANN. art. 27, § 388 (Supp. 1973).

16. Eleven states have recently amended their penal law to eliminate the category of unlawful act involuntary manslaughter and have in nearly all cases substituted the standard of recklessness. *See* CONN. GEN. STAT. ANN. § 53a-56 (1972) & accompanying comment; ILL. ANN. STAT. ch. 38, § 9-3 (Smith-Hurd 1972); KY. REV. STAT. ANN. chs. 434A.1-040, -050 (Supp. 1974); MONT. CRIM. CODE OF 1973, §§ 94-5-101 -104 (Allen Smith 1973) (eliminates entirely the category of involuntary manslaughter; all homicide is either "deliberate homicide" which includes enumerated dangerous felony-murder, "mitigated deliberate homicide" which is a refined type of voluntary manslaughter or "negligent homicide" which requires a "gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation"); N.H. REV. STAT. ANN. ch. 630:2 (Supp. 1973); N.Y. PENAL LAW § 125.15 (McKinney 1967); ORE. REV. STAT. ch. 163.125 (Supp. 1973); PA. STAT. ANN. tit. 18, ch. 25, § 2504 (Purdon 1973); TEX. CODES ANN. § 19.05 (Vernon's 1974); UTAH CODE ANN. tit. 76-5-205 (Allen Smith Supp. 1973); WIS. STAT. ANN. § 940.06(2) (1958). In addition to the foregoing, *see* MINN. STAT. ANN. § 609.20(2)(1964) and accompanying Advisory Committee Comment, amended to meet the criticism of misdemeanor-manslaughter doctrine by requiring that crime of manslaughter in the first degree entail foreseeable risk of death or great harm.

Although present federal criminal law retains the concept of unlawful act involun-

if the offender commits a battery on an elderly person or a child which results in death, it would be manslaughter if the jury found that he "recklessly" caused the death of another person. The requirement that the defendant's death-causing conduct must entail a foreseeable risk of death or great bodily harm would then form part of the statutory definition of the crime of manslaughter, thus screening out those cases, such as the present one, which are inappropriate for manslaughter liability.<sup>17</sup>

The crude formula of misdemeanor-manslaughter which is based on the irrational idea that since defendant is already doing something bad, other than creating homicidal risk, it should be easier to convict him of a more serious crime,<sup>18</sup> does not perform this necessary screening function and should be improved upon by an amendment to the Louisiana Criminal Code. Most appropriate in this regard is Justice Frankfurter's comment that, "[e]ven though a person be the immediate occasion of another's death, he is not a deodand to be forfeited like a thing in the medieval law."<sup>19</sup>

#### INCITING TO RIOT

In *State v. Douglas*,<sup>20</sup> the defendant, then NAACP state president, was the final speaker at a rally in Baton Rouge which was

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tary manslaughter, 18 U.S.C.A. § 1112(a) (1969), the proposed Federal Criminal Code will, if enacted, substitute the standard of recklessness. See STAFF OF SENATE COMM. ON THE JUDICIARY, SUBCOM. ON CRIMINAL LAWS AND PROCEDURES, 93d CONG., 1ST SESS., BILL TO REVISE TITLE 18 OF THE UNITED STATES CODE (Comm. Print. Nov. 10, 1972).

The American Law Institute advocates complete elimination of unlawful act manslaughter. Under the draft formulation, manslaughter liability depends on recklessness which requires that the offender be aware of a substantial risk of causing death. Absent such awareness, he can be prosecuted for negligent homicide. See MODEL PENAL CODE § 201.3(1)(a), Comment (Tent. Draft No. 9, 1959). The comment states that battery which fortuitously results in death should not be manslaughter absent a finding of recklessness because it "serves no proper purpose of the penal law and is abusive in itself."

For scholarly criticism of unlawful act manslaughter see R. MORELAND, *THE LAW OF HOMICIDE* 240-45 (1952).

17. It is not easier to swallow defendant's conviction for battery-plus-death manslaughter in this case, merely because he could have been found guilty of robbery. Indeed, an overzealous prosecutor could still prosecute him for robbery, although his present manslaughter conviction is based on the "bad man" theory of manslaughter liability. Cf. *State v. Didier*, 262 La. 364, 263 So. 2d 322 (1972).

18. *But cf. Regina v. Cunningham*, [1957] 41 Crim. App. 155 (equation by trial judge of reckless endangerment of life with wickedness arising from contemporaneous theft necessitated reversal).

19. *Leland v. Oregon*, 343 U.S. 790, 803 (1952) (Frankfurter, J., dissenting).

20. 278 So. 2d 485 (La. 1973). A previous federal lawsuit brought by Douglas and Jerry Johnson against the District Attorney to enjoin him from continuing the instant

organized to protest alleged police brutality and racism in connection with the shooting deaths of two black youths. The rally was held shortly after the funeral of one of the deceased youths. Numerous incidents of racial violence—all the victims were white, all the assailants black—followed shortly in the wake of defendant's speech, and later that evening firebombings occurred throughout the city. On the basis of these events defendant was indicted under the more aggravated penalty provision of the crime of inciting to riot,<sup>21</sup> *viz* where as a result of the offender's wilfully inciting to riot there is any serious bodily injury or any property damage in excess of five thousand dollars.<sup>22</sup> But after a four-day trial the jury returned a responsive verdict for the misdemeanor of inciting to riot which only requires that the offender "endeavor" to incite a riot. Since there were several incidents of serious bodily injury following defendant's remarks, it was unnecessary for the prosecution to prove property damage in excess of five thousand dollars, and it is therefore reasonable to infer that the jury was unconvinced that such incidents were attributable to defendant's speech at the rally. This was a sensible responsive verdict since "[a]t no time during the trial did the prosecution present any evidence which connected the incidents of violence with the defendant's speech; nor did the evidence presented show that any of the persons responsible for the acts of violence had heard or were motivated by the defendant's speech."<sup>23</sup>

The successful ground of defendant's appeal was the trial court's denial of his motion for a directed verdict of acquittal, made at the close of the state's evidence, alleging that the state had failed to prove the essential element of wilfulness in the crime of inciting to riot. As stated crisply in Justice Barham's majority opinion, "For speech to constitute this conduct of inciting to riot, it must be a wilful, intentional 'endeavor' to gain as an immediate result, and specifically from that speech, the participation of three or more persons in combination to do violence."<sup>24</sup> The necessity of proving wilfulness, *i.e.*, specific intent, as an essential element could be inferred from use of the word "endeavor" in the statutory definition of the crime, as well as

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prosecution and to have the Louisiana Anti-Riot statute, LA. R.S. 14:329.1-.8 (Supp. 1969), declared void for vagueness and first amendment overbreadth was entirely unsuccessful, the three-judge court holding that the virgin statute could be applied conformably with the first amendment. See *Douglas v. Pitcher*, 319 F. Supp. 706 (E.D. La. 1970).

21. "Inciting to riot is the endeavor by any person to incite or procure any other person to create or participate in a riot." LA. R.S. 14:329.2 (Supp. 1969).

22. LA. R.S. 14:329.7(B) (Supp. 1969).

23. 278 So. 2d at 491.

24. *Id.* at 487.

specific use of the term "wilful" in the accompanying penalty provision.<sup>25</sup> The second part of the Barham formulation, stating the proscribed object of the offender's "endeavor," is taken from the statutory definition of "riot."<sup>26</sup> The immediacy requirement, although not supplied by statutory definition of the crime, is required by the first amendment protection given to abstract advocacy of violence as distinguished from advocacy of imminent lawless action.<sup>27</sup>

Apropos the crucial issue whether the state had offered any evidence at trial to prove wilfulness, the state, in oral argument before the Louisiana supreme court, made the rather foolish blunder of conceding that defendant's own speech could not constitute an "endeavor" to incite a riot because it could not reasonably be construed as an exhortation to violence. In other words, the state was content to adhere to its theory advanced at trial that the evidence of defendant's wilful intention to incite a riot could be supplied by his "adoption" of the preceding speaker's highly inflammatory remarks,<sup>28</sup> although the state's own witnesses lent no evidentiary support to this theory. Uncontroverted testimony showed that defendant did not know the preceding speaker, had no idea that he was to speak on the

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25. LA. R.S. 14:329.2, .7(B) (Supp. 1969).

26. "A riot is a public disturbance involving an assemblage of three or more persons acting together or in concert which by tumultuous and violent conduct, or the imminent threat of tumultuous and violent conduct, results in injury or damage to persons or property or creates a clear and present danger of injury or damage to persons or property." LA. R.S. 14:329.1 (Supp. 1969).

27. See *Hess v. Indiana*, 414 U.S. 105 (1973); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Yates v. United States*, 354 U.S. 298 (1957). Cf. *Watts v. United States*, 394 U.S. 705 (1969); *Bond v. Floyd*, 385 U.S. 116 (1966). Note that there is nothing in the statutory definition of the offense, inciting to riot, requiring that the "endeavor" to incite a riot in fact entail a clear and present danger of harm to person or property, as required by *Brandenburg*. The omission, however, is not fatal so long as courts recognize and apply the limitation in concrete cases. See *In re Shead*, 302 F. Supp. 560 (N.D. Cal. 1969), *aff'd on other grounds, sub nom. United States v. Carter*, 417 F.2d 384 (9th Cir. 1969) (rejecting facial overbreadth attack on federal anti-riot statute, holding that overt acts committed for purpose of inciting a riot must constitute clear and present danger when read in light of statutory definition of riot). But see Comment, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 393 (1970).

28. The preceding speaker, Jerry Johnson, told the crowd, "We are going to bomb, march, fight, prowl, we are going to burn this Capitol," and concluded, "I don't know what you are going to do, but I am going to fill my coke bottle with gas." *State v. Douglas*, 278 So. 2d 485, 495 (La. 1973). Johnson was found guilty of a misdemeanor violation of R.S. 14:329.2 and placed on probation for one year. His application for supervisory writs was denied by the Louisiana supreme court, as was his petition to the Supreme Court of the United States for a writ of certiorari. *State v. Johnson, writ denied*, 281 So. 2d 736 (La. 1973); *Johnson v. Louisiana, cert. denied*, 94 S.Ct. 918 (1974).

same platform that afternoon, and, according to the state's witnesses, was busy trying to keep people from walking on the flower beds while he spoke.<sup>29</sup>

Possibly, defendant's own speech was enough to convict him.<sup>30</sup> Although some of the things he said ("violence begets violence") cannot be reasonably construed as an exhortation to violence, defendant told the highly emotionally charged crowd, "no longer are we going to take this old thing about turning the other cheek. We're going to take an eye for an eye" and concluded his speech by urging the crowd "and now I'm telling you—do your thing."<sup>31</sup> Although defendant, by his remarks, did not commit the common law crime of solicitation, *i.e.*, counseling another person to commit a felony or a misdemeanor,<sup>32</sup> the United States Supreme Court has never restricted the state's power to punish incitement to riot to the common law test for solicitation.<sup>33</sup> Any other rule would elevate form over

29. *State v. Douglas*, 278 So. 2d 485, 491 (La. 1973).

30. The statement in the text is necessarily qualified due to the considerable uncertainty marking the boundaries between advocacy of violence as distinguished from incitement. See Note, 83 HARV. L. REV. 844 (1970). It is conceivable that the United States Supreme Court would rule that defendant was engaged in "teaching" the moral necessity for a resort to violence, rather than preparing the group for imminent lawless action, given the court's recent predilection for viewing the record in a light most favorable to the petitioner who stands convicted on the basis of speech. See, *e.g.*, *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (Rehnquist, J., dissenting).

31. See *State v. Douglas*, 278 So. 2d 485, 487 n.2 (La. 1973) (complete transcription of Douglas' speech).

32. See Curran, *Solicitation: A Substantive Crime*, 17 MINN. L. REV. 499 (1933). In Louisiana, the crime is limited to the inciting and procuring of felonies, and the name "inciting to felony" is accordingly used as more descriptive of the offense than "solicitation." See Comment to LA. R.S. 14:28 (1950), *as amended by La. Acts 1968*, No. 647 § 1.

33. See *Schenck v. United States*, 249 U.S. 47, 52 (1919): "The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress [and the states] has a right to prevent." (Emphasis added.) The Court has never taken up the views of Judge Learned Hand who championed an objective criterion, based on the nature of the words used, to test a conviction for speech. See *Masses Pub. Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917). Without defining the nature of the forbidden advocacy, probably an impossible task, see *e.g.*, *Gitlow v. New York*, 268 U.S. 652, 673 (1923) (Holmes, J., dissenting), *Commonwealth v. Hayes*, 205 Pa. Super. 338, 341, 209 A.2d 38, 39 (1965), the Court has ruled that such advocacy must be directed to inciting imminent lawless action and must also be likely to have the desired effect. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

Note that the Court in *Brandenburg* has severely contracted the states' traditional power to punish the crime of solicitation. At common law and by the great weight of precedent in this country, one commits the crime of solicitation when he importunes another to commit a felony, although nothing further be done and although the words had no effect on the person solicited. See *People v. Burt*, 45 Cal. 2d 311, 288 P.2d 503

substance, enabling the speaker to intentionally instigate persons to riot yet escape punishment by the artful choice of words.

The state in this case may have played down the significance of the defendant's own speech due to a possible misapprehension of constitutional safeguards for protected speech. Still, the defendant's speech was in evidence, and the state's opinion in oral argument that it would not support a conviction should not determine the legal validity of the jury verdict. However, a more persuasive reason for reversing defendant's conviction exists since it is impossible to tell from the jury's verdict if they based conviction on the prosecution's totally unsubstantiated theory that defendant adopted the preceding speaker's remarks, an unconstitutional ground of conviction.<sup>34</sup> Since defendant's conviction may have rested on an unconstitutional ground, it was proper to reverse.<sup>35</sup>

#### SELF-DEFENSE: NECESSITY FOR KILLING?

*State v. Patterson*<sup>36</sup> involved a killing precipitated by an exchange of harsh words between decedent (victim) and defendant. The victim initiated the exchange and the evidence indicated that defen-

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(Cal. Sup. Ct. 1955); *King v. Higgins*, 102 Eng. Rep. 269 (K.B. 1801); Annot., 51 A.L.R.2d 953 (1957). Furthermore, the crime of solicitation did not require that defendant make a personal proposal to a defined person or that the solicitation be made in secret. See *Queen v. Most*, [1881] 7 Q.B.D. 244 (newspaper broadcast). Accord, *State v. Schleifer*, 121 A. 805 (Conn. 1923) (public platform).

It is assumed that the Court in *Brandenburg* did not intend to fasten the requirement of clear and present danger on a prosecution for soliciting such crimes as arson and murder, at least where the solicitation is made in private by one individual to another. But the common law crime of solicitation is broader, including, for example, public speech or newspaper broadcasts urging criminal conduct. Yet the Court has not explained why "going public" should confer greater immunity on the speaker. Cf. *United States v. Spock*, 416 F.2d 165, 184 (1st Cir. 1969) (Coffin, J., dissenting in part).

34. See, e.g., *Thompson v. City of Louisville*, 362 U.S. 199 (1960) (petitioner's conviction for loitering and disturbing the peace violated due process where charges were totally devoid of evidentiary support). Cf. *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969) (rev'g Spock's conviction for conspiracy where he joined bifarious undertaking having both legal and illegal aims and government had not proved he shared illegal aims).

35. See, e.g., *Street v. New York*, 394 U.S. 576, 578 (1969) (defendant's conviction under flag-desecration statute rev'd because it may have been based on his words "we don't need no damn flag," constitutionally protected speech, rather than his deed of burning a flag).

36. 295 So. 2d 792 (La. 1974). The detailed recitation of the evidence which appears in the text is from the transcript of testimony taken before Judge Edwin R. Hughes of the Twenty-Eighth Judicial District Court, found in Record, *State v. Patterson*, (No. 54290, filed January 4, 1974, Supreme Court of Louisiana, New Orleans, Louisiana) [hereinafter cited as Transcript].

dant had been drinking.<sup>37</sup> Victim pursued defendant with his drawn pocket knife,<sup>38</sup> but the evidence was conflicting as to whether victim then temporarily abandoned the chase (chase number one), came back to his car and told witness he was "just playing," only to resume his pursuit (chase number two) five or ten minutes later;<sup>39</sup> or whether, as defendant testified, there was but one continuous pursuit culminating in the fatal shooting.<sup>40</sup> After victim drew his pocket knife and chased defendant, defendant either ran,<sup>41</sup> trotted,<sup>42</sup> or walked<sup>43</sup> to his car where he opened the trunk, took out his shotgun and killed victim. One state's witness testified that defendant was trying to get his keys out of his pocket while running away from victim and got his key in the trunk just in time.<sup>44</sup> Defendant testified the key was already in the trunk.<sup>45</sup> Two state's witnesses testified that victim advanced on defendant with the knife after defendant held the shotgun on him,<sup>46</sup> but one testified that victim, as he came up between two cars, told defendant not to go over to his trunk.<sup>47</sup> Two state's witnesses testified that defendant told victim to get back before he shot him,<sup>48</sup> although defendant couldn't remember if he had done so.<sup>49</sup> After the shooting occurred, defendant was heard to say, "son of a bitch don't pull no knife on me."<sup>50</sup> Defendant testified that he was

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37. The amount of defendant's drinking was not substantial, as an intoxometer test showed he did not have enough alcohol in his blood to arrest him for drunk driving, had he been driving. See Transcript at 62-63. After decedent (victim) called defendant an "old son of a bitch" and accused him of getting drunk, defendant replied, "it ain't none of your damn business," and victim said "Boy, you don't talk to me like that." Defendant then asked victim "Well how big do boys grow in your town?" Transcript at 142. A different verbal account was that victim said to defendant, "Well I haven't seen you in a long time." Defendant then asked him, "How big do boys get in your town?" Victim replied, "I'll show you," took his knife out of his pocket and chased defendant with it. *Id.* at 82.

38. The evidence that victim's knife was open is fairly consistent. However, one state's witness testified he saw what looked like a knife in victim's hand and it looked like he was trying to open it. Transcript at 99 (testimony of Leo Bell).

39. *Id.* at 83 (testimony of Larry Thomas).

40. *Id.* at 138, 144 (testimony of Howard Patterson).

41. *Id.* at 84 (testimony of Larry Thomas).

42. *Id.* at 145 (testimony of Howard Patterson).

43. *Id.* at 98 (testimony of Leo Bell).

44. *Id.* at 84, 88 (testimony of Larry Thomas).

45. *Id.* at 138 (testimony of Howard Patterson).

46. *Id.* at 84, 119-20 (testimony of Larry Thomas, Tommy Buckner).

47. *Id.* at 98 (testimony of Leo Bell).

48. *Id.* at 89, 118 (testimony of Larry Thomas, Tommy Buckner).

49. *Id.* at 139 (testimony of Howard Patterson).

50. *Id.* at 74 (testimony of Rosie Bell). A different version is that defendant said, "nobody going to pull no knife on me." *Id.* at 86 (testimony of Larry Thomas).

afraid victim could cut him.<sup>51</sup> Asked if he thought about running down the road and getting out of the way, he said he did not know.<sup>52</sup> The fatal shooting occurred in front of a skating rink at an unenclosed place where many other people were present.<sup>53</sup>

Surprisingly, the Louisiana supreme court reversed defendant's conviction for manslaughter because, it claimed, there was "not one shred of evidence" that the killing was not justifiable self-defense.<sup>54</sup> This reassuring phrase is belied by the record, unless one assumes the court has, *sub silentio*, turned the law of self-defense on its ear. One possible resolution of the sharply conflicting evidence in this case is that defendant remained at the skating rink for five or ten minutes after he was out of danger; then, during a second pursuit by the victim, had enough time to walk to his car, take out his keys, open his trunk, retrieve his shotgun and kill his assailant. Although many people were present, defendant neither requested the assistance of anyone nor tried to get away.<sup>55</sup> Even if one adopts the majority's one-sided version of the facts,<sup>56</sup> the failure of the defendant to retreat if he could have done so with complete safety to himself was one of the factors for the jury to consider in reaching its verdict.<sup>57</sup> By his own account, defendant had a cool head,<sup>58</sup> and his statement after the shooting bears all the indicia of a senseless and unnecessary killing. It is just the sort of case in which the law should not give one an automatic license to kill.

*Patterson* is the modern court's first tough encounter (the trial judge sentenced defendant to 18 years hard labor) with article 20's requirement that a killing must reasonably appear to be "necessary" in order for defendant to successfully plead self-defense.<sup>59</sup> In the past,

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51. *Id.* at 140, 142 (testimony of Howard Patterson).

52. *Id.* at 144 (testimony of Howard Patterson).

53. *See, e.g., id.* at 87-88 (testimony of Larry Thomas).

54. 295 So. 2d at 794.

55. *See, e.g.* Transcript at 143-44 (testimony of Howard Patterson).

56. Compare the dissenting opinion of Sanders, C.J., 295 So. 2d at 795 (an accurate reflection of the record) with the majority opinion, 295 So. 2d at 792.

57. *See* LA. R.S. 14:20 (1950), comment (1); 295 So. 2d at 795 (Sanders, C.J., dissenting).

58. *See* Transcript at 142 (testimony of Howard Patterson).

59. If the plea of self-defense is not sustained, the killing although intentional will be manslaughter, assuming the jury can find sufficient provocation to deprive an average person of his self control and cool reflection. *See* LA. R.S. 14:31 (1) (1950), as amended by La. Acts 1973, No. 127 § 1. Since manslaughter is a responsive verdict to murder, (LA. CODE CRIM. P. art. 814), the trial judge must charge the law applicable to manslaughter when the defendant is indicted for murder. LA. CODE CRIM. P. art. 803. The defendant in the case under discussion was tried only for manslaughter and the jury was instructed that its only alternatives were guilty or not guilty. (*See* Record,

when specific rules of retreat applicable to this branch of the law were required, the court had considerable control over a jury's verdict of manslaughter (and a judge's broad sentencing discretion) by insisting on overly-technical precision in the trial court's instructions regarding the defense of self-defense. Thus, in *State v. Thompson*<sup>60</sup> defendant's manslaughter conviction (20 years) was reversed because the trial judge declined to give defendant's special charge to the effect that if defendant was placed in great danger of bodily harm and no retreat was possible, then not only was he not obliged to retreat but he might pursue his adversary and kill him if necessary to protect himself from danger. The conviction was reversed though the trial judge broadly covered the point in his general charge to the jury.<sup>61</sup>

Since our present law eschews specific rules as to the duty to retreat, leaving the determination of whether the killing was "necessary" to the jury under the most general instructions,<sup>62</sup> there is no room left for appellate judges to reverse convictions on technicalities. Just two years ago, the court found no error in the trial court's failure to give a "Thompson" instruction on the right of defendant to "pursue her adversary" where the victim was shot in the back, and the defense of self-defense was rejected by the jury.<sup>63</sup> The court said the trial court's general charge covering the two key requirements of self-defense—"a reasonable belief of danger" and "necessity for the killing"—was the most proper charge because "[a]ny and all circumstances surrounding the death are to be considered by the jury before concluding that these two requirements are met."<sup>64</sup>

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*supra* note 36, at 28) since negligent homicide is no longer a responsive verdict to murder or manslaughter. LA. CODE CRIM. P. art. 814. Arguably, the defendant in the instant case would only have been found guilty of negligent homicide if the jury had before it that option. Since R.S. 14:32 provides that the maximum authorized punishment for negligent homicide is five years, the court perhaps would then not have been moved by compassion to reverse the unduly harsh sentence.

60. 45 La. Ann. 969, 13 So. 392 (1893). *See also* *State v. West*, 45 La. Ann. 14, 12 So. 7 (1893).

61. 45 La. Ann. at 971-73, 13 So. at 393-94.

62. *See* note 57 *supra* and accompanying text.

63. *State v. Bailey*, 261 La. 831, 261 So. 2d 583 (1972).

64. *Id.* at 840-43, 261 So. 2d at 586-87. In the instant case, the trial judge's instruction on retreat conformed to this standard. He charged, "Note carefully that the statute does not require retreat specifically. This omission in the law was deliberate because the possibility of avoiding the necessity of killing by retreat is only one of the many factors you should consider in determining if the defendant had a reasonable belief that killing was necessary. Some of the other factors are the excitement and confusion of the occasion, the possibility of avoiding the necessity of killing by use of less force or violence and the defendant's knowledge of his assailant's character — if he had any knowledge." Record, *supra* note 36, at 32.

As one court said, "the advocates of no-retreat say the manly thing is to hold one's ground, and hence society should not demand what smacks of cowardice. Adherents of the retreat rule reply it is better that the assailed shall retreat than that the life of another be needlessly spent."<sup>65</sup> In Louisiana, the philosophy of no-retreat has been rejected in the requirement that a killing must be "necessary" in order to be justified. However, in recognition of the fact that "[d]etached reflection cannot be demanded in the presence of an uplifted knife,"<sup>66</sup> it has wisely been decided to confide the complex issue of retreat in the jury without a legal mandate on the point. That is where the supreme court should have left it in this case.

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65. *State v. Abbott*, 36 N.J. 63, 69, 174 A.2d 881, 884 (1961).

66. The quote is from Justice Holmes in *Brown v. United States*, 256 U.S. 335, 343 (1921). It is cited with approval in LA. R.S. 14:20 (1950), comment (1).