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by scientific, mechanical, and cultural advancements and the increasing complexity of modern civilization make matters which were not considered subjects for the exercise of the police power in the past proper subjects today. *In the final analysis, the social philosophy of the courts determine the question of what is a proper subject for police power.*⁶⁷

GARY W. MELSHER

Charging Lesser Included Offenses in Ohio

For the purpose of clarifying earlier decisions of this court, which undoubtedly have left the state of the law in more or less confusion, this case was admitted in the hope that a further study of the law would lead to a simplification of its status and a reconciliation of those early decisions, which have been largely responsible for the present uncertainty of the law; all with a view to conserve the legal rights of both the state and the accused.¹

This quotation is taken from a 1921 case² in which the Supreme Court of Ohio purported to decide when a trial court should charge lesser included offenses in a criminal case. Still, over the years, judges, attorneys, and law students alike have found that it is not easy to apply the generalizations expressed in that case.³ Decisions on the question are frequently illogical or inequitable.⁴ The problem is, in fact, more difficult to simplify than the 1921 supreme court suggests, for it involves at various times the right to a jury trial, the weaknesses of the jury system, and both the theoretical and practical aspects of the fight to preserve the rights of both the people and the accused. The cases in which Ohio judges charged or refused to charge lesser included offenses were examined to set forth and analyze their distinguishing factors. A necessary preliminary to such a discussion, however, is an explanation of the basis for the lesser included offense doctrine.

WHAT ARE LESSER INCLUDED OFFENSES?

Statutory Authorization

The statutory authority which gives rise to the problem of charging lesser included offenses is Ohio Revised Code section 2945.74. This statute, in essence, allows a jury to find the accused guilty of an attempt to commit an offense, a lesser offense, or an inferior degree of crime than that charged in the indictment.⁵ Thus, a decision under this statute does not come within the common-law rule which requires the verdict to respond to specific counts in the indictment.⁶ The purpose of such a statute is to allow the jury to rescue a prosecutor by convicting of a lesser included offense when the prosecutor fails to prove all the elements of

67. *Id.* § 9.14, at 288. (Emphasis added).

the crime charged in the indictment. The constitutionality of the statute is well established.⁷

All crimes in Ohio are statutory,⁸ each consisting of particular elements set out in strictly construed statutes.⁹ The test established in Ohio for the determination of what is a lesser included offense is:

if all the elements of a separate offense are present with others in an offense charged in an indictment, such separate offense is a lesser included offense; or, where all the elements of an offense are included among the elements of a charged offense, the former is a lesser included offense.¹⁰

Thus, if one can eliminate certain specific elements from an indictment and still have sufficient allegations to set forth another complete crime, the residue is a lesser included offense. The minor offense is necessarily an elementary part of the combination of acts which make up the more serious crime. When the same statute creates two different crimes,¹¹

1. *Bandy v. State*, 102 Ohio St. 384, 386, 131 N.E. 499 (1921).

2. *Bandy v. State*, 102 Ohio St. 384, 131 N.E. 499 (1921).

3. In 1927, an Ohio court of appeals questioned "whether a verdict of guilty of murder in the second degree could be sustained in a case where all the evidence showed beyond a reasonable doubt that the homicide was committed purposely and maliciously, and with a deliberate and premeditated purpose on the part of the defendant to kill." *Rudner v. State*, 27 Ohio App. 59, 63, 160 N.E. 718, 719 (1927). Approximately the same question was asked twenty-one years later in *State v. Gordon*, 92 N.E.2d 305, 310 (Ohio C.P. 1948); *rev'd in part on other grounds*, *State v. Abbott*, 152 Ohio St. 228, 89 N.E.2d 147 (1949). The Supreme Court of Ohio has never ruled directly whether or not lesser crimes are included in indictments for first degree murder which are not predicated on a charge of deliberate and premeditated murder. *State ex. Kelly v. Frick*, 14 Ohio L. Abs. 355 (Ct. App. 1933). See text at note 28 *infra*.

4. See text at notes 82, 84, 108, and 112 *infra*.

5. The statute reads: "The jury may find the defendant not guilty of the offense charged, but guilty of an attempt to commit it if such attempt is an offense at law. When the indictment or information charges an offense, including different degrees, or if other offenses are included within the offense charged, the jury may find the defendant not guilty of the degree charged but guilty of an inferior degree thereof or lesser included offense . . ." OHIO REV. CODE § 2945.74 (OHIO GEN. CODE § 13448-2). Analogous to former OHIO GEN. CODE § 13692, and R.S. OHIO § 7316. FED. R. CRIM. P. 31(c) is a similar statute in the federal system. "A perusal of English criminal statutes reveals that many contain a section enumerating alternative verdicts, e.g., Larceny Act, 1916, 6 & 7 GEO. 5, c.50, § 44; Criminal Law Amendment Act, 1885, 48 & 49 VICT., c.69, § 9; Punishment of Incest Act, 1908, 8 EDW. 7, c.45, § 4." Note, *Submission of Lesser Crimes*, 56 COLUM. L. REV. 888 n. 3 (1956).

6. *Morehead v. State*, 34 Ohio St. 212 (1877). See 10 HALSBURY'S LAWS OF ENGLAND § 791 (3d ed. 1955).

7. *Brown v. State*, 2 Ohio C.C.R. (n.s.) 409 (Cir. Ct. 1903); *Donaldson v. State*, 10 Ohio C.C.R. 613 (Cir. Ct. 1895).

8. *State v. Dowell*, 108 Ohio App. 6, 155 N.E.2d 482 (1958).

9. OHIO REV. CODE § 1.11.

10. *State v. Kuchmak*, 159 Ohio St. 363, 366, 112 N.E.2d 371, 373 (1953); *accord*, *State v. Hreno*, 162 Ohio St. 193, 122 N.E.2d 681 (1954); *State v. Arnold*, 176 N.E.2d 861 (Ohio Ct. App. 1960); *State v. Taylor*, 104 Ohio App. 422, 148 N.E.2d 507 (1957).

11. *Barber v. State*, 39 Ohio St. 660 (1884); *Heller v. State*, 23 Ohio St. 582 (1873).

or provides identical penalties for two crimes,¹² one crime will not be included within the other.

Case Law Application

The test recited in Ohio was used as early as 1553 in a case reported in Plowden, 101.¹³ Finding that John Vane Salisbury had killed a man without malice, the jury returned a verdict of guilty of manslaughter under an indictment for murder. In justifying such a verdict, the court reasoned that

when the substance of the fact and the manner of the fact are put in issue together, if the jurors find the substance [killing] and not the manner [malice], yet judgment shall be given according to the substance.¹⁴

Similar reasoning is given for the holding that manslaughter is definitely included within the crime of murder, either first or second degree, in Ohio.¹⁵

In applying the test to other offenses, some writers would say that the Ohio courts diverge from the implication which a narrow interpretation of the test would give; that every element of the lesser offense must be an element of the greater by comparison to their statutory definitions.¹⁶ They would allege that the Ohio rule actually has become part of the "cognate"¹⁷ or related offense theory. This thesis requires crimes merely to be of the same general class or character. It allows a convic-

12. *State v. Kuchmak*, 159 Ohio St. 363, 112 N.E.2d 371 (1953).

13. *Birch v. State*, 1 Ohio Dec. Reprint 453 n.1 (District Ct. 1852).

14. *Id.* at 454 n.1; *accord*, *Mackalley's Case*, 9 Co. Rep. 61b, 77 Eng. Rep. 824 (K.B. 1611). "By the last years of the reign of Elizabeth I it had been settled that both in appeals of murder and indictments for murder the jury was entitled to return a verdict of manslaughter if it found that murder was not established but that manslaughter was." Snelling, *The Alternative Verdict of Manslaughter*, 32 AUSTL. L.J. 137 (1958).

15. *Freeman v. State*, 119 Ohio St. 250, 163 N.E. 202 (1928); *State v. Taylor*, 104 Ohio App. 422, 148 N.E.2d 507 (1957); *State v. Landrum*, 96 Ohio App. 333, 113 N.E.2d 705, *appeal dismissed*, 160 Ohio St. 358, 116 N.E.2d 208 (1953); *State v. Colley*, 78 Ohio App. 425, 65 N.E.2d 159 (1946); *State v. Noble*, 1 Ohio Dec. Reprint 1 (C.P. 1840). In *Wroe v. State*, the defendant contended he could not be convicted of manslaughter under an indictment for second degree murder because the indictment did not contain the word "unlawful." The court showed the folly of this assertion with the following language: "It is admitted that the indictment contains a good charge of murder in the second degree. To constitute murder of this degree, it is essential that the homicide be committed 'purposely and maliciously;' and, if so committed, it is necessarily unlawful. Otherwise, a person could be guilty of murder in the second degree, and yet the homicide, of which he was guilty, be lawful." 20 Ohio St. 460, 469 (1870).

16. Note, *Submission of Lesser Crimes*, 56 COLUM. L. REV. 888 (1956); Comment, *Circumstances In Which a Criminal Court Must Charge The Jury As To The Lesser Degrees of, and Crimes Included In, The Crime Charged In The Indictment*, 25 FORDHAM L. REV. 111 (1956); Comment, *Jury Instructions on Lesser Included Offenses*, 57 NW. U.L. REV. 62 (1962).

17. For a lengthy discussion of "cognate" offenses see Comment, *Jury Instructions On Lesser Included Offenses*, *supra* note 16.

tion for a lesser offense when allegations in the indictment, in factual form, charge all the elements of the lesser crime, even though some of those facts are unessential to the higher or basic crime presented in the indictment.¹⁸ A review of the Ohio statutes and decisions will reveal, however, that if the Ohio courts interpreted the statutes liberally, they would not be in error by stating that the lesser offenses are included in the statutory definitions.¹⁹ The courts have emphatically declared:

A typical example of included offenses may be found in the offense of murder in the first-degree, in which second-degree murder, manslaughter, assault and battery, and assault are comprehended. *All the elements of each are included in the offense of murder in the first-degree.*²⁰

While assault and battery is not mentioned as an inferior degree under the homicide statutes,²¹ the charge of second-degree murder can include within its terms the offenses of manslaughter, assault and battery, and assault.²²

18. Classes of crime are mentioned in *State v. Kuchmak*, 93 Ohio App. 289, 113 N.E. 643 (1952), *rev'd in part on other grounds*, *State v. Kuchmak*, 159 Ohio St. 363, 112 N.E.2d 371 (1953), and *State v. Labus*, 102 Ohio St. 26, 130 N.E. 161 (1921). These cases, however, primarily advocate the "included elements" test. See text at note 10 *supra*.

19. The examples given by two writers as to why the statutory definition test would not apply are inapplicable in Ohio. One example is: attempted murder by mailing poison could not include assault. Comment, *Circumstances In Which A Criminal Court Must Charge The Jury As to the Lesser Degree of, And Crimes Included In, The Crime Charged In The Indictment*, 25 FORDHAM L. REV. 111, 112 (1956). The answer in Ohio is that this is true under the Ohio statutes. By analogy, this result is reached from the decision in *State v. Dean*, where the court holds: "Even if it were in evidence that defendant had given the deceased such rat poison or any other poison accidentally, such fact would not have justified a charge on lesser offenses, since, in effect, the introduction of such evidence would still be a denial of willful intent to murder and not an admission of any lesser offense, there being no claim that the accidental administration of poison occurred in connection with some unlawful act." 94 Ohio App. 540, 543, 116 N.E.2d 767, 769 (1953). Thus, manslaughter is not a lesser included offense under murder by poison as there is no unlawful act involved in accidental poisoning. By analogy, there is also no assaulting, striking, wounding or threatening of another in an attempted poisoning, so logically and by statutory definition, assault and battery is not a lesser included offense within attempted poisoning.

The other purported distinction between "cognate" and statutorily included offenses is illustrated as follows: "Hence, if the indictment charges the crime of robbery, which by statute, may be committed by putting in fear, the jury, under the 'cognate theory,' may convict of assault and battery *if the indictment alleges physical violence was used.*" Comment, *Jury Instructions On Lesser Included Offenses*, 57 NW. U.L. 62, 63 (1962). (Emphasis added.) This quotation again, although a true statement, makes no distinction whatsoever. For it is equally true under the statutory definitions theory that assault and battery is included within robbery if the indictment alleges that physical violence was used. There can be no conviction of assault and battery under either theory if the robbery indictment alleges only that the victim was put in fear, although under both theories, assault alone would be a lesser included offense under the robbery indictment.

20. *State v. Kuchmak*, 93 Ohio App. 289, 291, 113 N.E.2d 643, 644 (1952), *rev'd in part on other grounds*, 159 Ohio St. 363, 112 N.E.2d 371 (1953). (Emphasis added.); *State v. Champion*, 109 Ohio St. 281, 142 N.E. 141 (1924); *State v. Labus*, 102 Ohio St. 26, 130 N.E. 161 (1921); *Marts v. State*, 26 Ohio St. 162 (1875); *accord*, *State v. Taylor*, 104 Ohio App. 422, 148 N.E.2d 507 (1957).

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

22. *State v. Ellis*, 105 N.E.2d 65 (Ohio Ct. App. 1951), *appeal dismissed*, 158 Ohio St.

Murder

There is some dispute as to whether second-degree murder and manslaughter are lesser included offenses under the crime of first-degree murder while in the perpetration of one of the listed felonies.²³ In 1923, Judge Kinkead of the Common Pleas Court of Franklin County unequivocally stated that murder while in perpetration of a felony "neither literally embraces lesser degrees nor warrants any verdict except guilty or not guilty."²⁴ In rejecting manslaughter, the Judge argued that the manslaughter statute, General Code section 12404 (Ohio Revised Code section 2901.06), expressly excludes the wrongful act committed while murdering in the perpetration of a felony from consideration as the unlawful act necessary to convict for manslaughter.²⁵ But this idea has been rejected in a long line of cases expressly holding that manslaughter is a lesser included offense under Ohio's "felony-murder rule."²⁶ It is reasoned that the word "purposely" in the murder statute applies to murder while in the perpetration of a felony, making intention to kill an essential element. The felony committed is in fact held to be the unlawful act sustaining manslaughter, if an unintentional killing occurs while perpetrating the felony.

Judge Kinkead's contention that murder while in the perpetration of a felony does not embrace second-degree murder as a lesser included offense cannot be challenged strongly by precedent. The argument is that there are two distinct classes of murder in the first-degree, only one of which requires express deliberation and premeditated malice. The second class is committed without express malice, and is made first-degree murder merely because it is perpetrated while committing a felony, there being great probability that life will be taken in carrying out such a crime. Second-degree murder, however, is murder purposely and mali-

489, 110 N.E.2d 129 (1953); *State v. Cochrane*, 151 Ohio St. 128, 84 N.E.2d 742 (1949); *State v. Yingling*, 44 N.E.2d 361 (Ohio Ct. App. 1942); *State v. Powell*, 1 Ohio Dec. Reprint 38 (C.P. 1844).

23. The Ohio murder statute reads: "No person shall purposely, and either of deliberate and premeditated malice, or by means of poison, or in perpetrating or attempting to perpetrate rape, arson, robbery, or burglary, kill another." OHIO REV. CODE § 2901.01. (Emphasis added.) The second class of murder differs from common-law felony-murder in that Ohio requires intent to kill as a prerequisite to conviction in both types of murder.

24. *Ohio v. Pierce*, 24 Ohio N.P. (n.s.) 413, 427 (C.P. 1921).

25. *Id.* at 432. The manslaughter statute provides: "No person shall unlawfully kill another. Whoever violates this section, except in the manner described in sections 2901.01 to 2901.05, inclusive, of the Revised Code, is guilty of manslaughter. . . ." OHIO REV. CODE § 2901.06. (Emphasis added.)

26. *State v. Muskus*, 158 Ohio St. 276, 109 N.E.2d 15 (1952); *State v. Farmer*, 156 Ohio St. 214, 102 N.E.2d 11 (1951); *State v. Bednarik*, 123 N.E.2d 31 (Ohio Ct. App. 1954), *aff'd on rehearing*, 126 N.E.2d 823 (1955); *State v. Colley*, 78 Ohio App. 425, 65 N.E.2d 159 (1946); *Turk v. State*, 48 Ohio App. 489 (1934), 194 N.E. 425, *aff'd*, 129 Ohio St. 245, 194 N.E. 453 (1935) (per curiam). See note 19 *supra* for a discussion on special situation in poison cases.

ciously committed.²⁷ While it is said that malice may be implied in Ohio's "felony-murder" from the heinousness of the crime, an indictment for murder while in perpetration of a felony does not charge the element of express malice, which is required to convict for second-degree murder. The defendant is either guilty or not guilty of murder in the first-degree while committing a felony. This writer agrees with Judge Kinkead's conclusions. Ordinarily, it is logically impossible to find second-degree murder under an indictment which charges only murder while perpetrating a felony. The courts in Ohio have admitted that logically, second-degree murder is not included under the statutory definition Ohio's "felony-murder."²⁸ In the cases where the courts have allowed such a conviction, it has been based on the allegation that Section 13692, General Code (2945.74 Revised Code) "vests the jury with a discretion that a court may not control."²⁹ It will be seen later that this notion is false.³⁰ Concerning lesser included offenses, the jury in fact is controlled by the judge.³¹ A verdict of second degree murder should be allowed only when murder while in the perpetration of a felony is involved, when there is a question of whether or not a felony was in progress at the moment the killing took place,³² or when the indictment charges both types of first-degree murder.³³

Robbery

Examining other offenses, it has been held that armed robbery includes robbery and assault and battery.³⁴ Robbery embraces assault

27. OHIO REV. CODE § 2901.05.

28. Cowdrey v. State, 11 Ohio App. 291 (1919); Blair v. State, 5 Ohio C.C.R. 496 (1891). Cf., Dresback v. State, 38 Ohio St. 365 (1882); State v. Dean, 94 Ohio App. 540, 116 N.E.2d 767 (1953); Lutes v. State, 37 Ohio App. 353, 174 N.E. 745 (1930).

29. Cowdrey v. State, *supra* note 28, at 293; *accord*, Lindsey v. State, 69 Ohio St. 215, 69 N.E. 126 (1903); Adams v. State, 29 Ohio St. 412 (1876); Robbins v. State, 8 Ohio St. 131 (1857); Thomas v. Cowdrey, 13 Ohio App. 59 (1920). The Lindsey, Adams, and Robbins cases, however, were decided in light of a statute which allowed the jury full power to decide the degree of murder without restriction by the judge. Bandy v. State, 102 Ohio St. 384, 397, 131 N.E. 499, 502 (1921) contains a good discussion of the old statutes and cases.

30. See text at notes 54-59 *infra*.

31. *Ibid.*

32. State v. Muskus, 158 Ohio St. 276, 109 N.E.2d 15 (1952); State v. Bednarik, 123 N.E.2d 31 (Ohio Ct. App. 1954), *aff'd on rehearing*, 126 N.E.2d 823 (Ohio Ct. App. 1955); State v. Colley, 78 Ohio App. 425, 65 N.E.2d 159 (1946).

33. State *ex Kelly* v. Frick, 14 Ohio L. Abs. 355 (Ct. App. 1933); Selvaggio v. State, 19 Ohio C.C.R. (n.s.) 88 (Cir. Ct.), *aff'd*, 86 Ohio St. 366, 99 N.E. 1132 (1912) (memorandum decision); State v. Pierce, 24 Ohio N.P. (n.s.) 413 (C.P. 1923). It may be argued that the court in Baus v. Alvis, 140 N.E.2d 93 (Ohio C.P. 1956), was incorrect in upholding a conviction of second-degree murder as a lesser included offense under § 2901.03 Ohio Revised Code (the statute on first-degree murder for killing a guard) which omits the words "purposely and maliciously kill another." This situation is distinguished from Ohio's "felony-murder," however, as the statute directly prohibits killing a guard, whereas the "felony-murder" statute punishes for murder as a collateral result of committing another act.

34. State v. Curtis, 149 Ohio St. 153, 78 N.E.2d 46 (1948); State v. Fouts, 79 Ohio App.

with intent to rob, assault and battery, assault alone,³⁵ and pick-pocketing.³⁶ Robbery does not include embezzlement,³⁷ and pick-pocketing does not include petit larceny, assault and battery, or assault.³⁸

Assault and Battery

The crimes of shooting, cutting, or assault with intent to kill or wound are all aggravated assaults and thus include lesser grades of assault.³⁹ Cutting with intent to kill and cutting with intent to wound, however, are created by the same statute,⁴⁰ require different intents, are punished with equal severity, and are thus not inferior degrees to each other.⁴¹ There can be no conviction for battery without an assault, but assault is included within an indictment for battery.⁴² Assault with intent to maim is a form of aggravated assault and battery, but biting with intent to disfigure is of the same degree as biting with intent to maim.⁴³ Assault with intent to maim or disfigure is not a lesser included offense within assault with intent to kill.⁴⁴

Intentionally Pointing Firearms

The offenses of intentionally and without malice pointing or aiming a firearm at or toward a person, and of intentionally and without malice discharging a firearm so pointed or aimed. . . . (Section 3773.04, Revised Code), are lesser included offenses of the offense of maliciously shooting at another person with intent to kill, wound or maim as defined in . . . (Section 2901.23, Revised Code).⁴⁵

255, 72 N.E.2d 286, *cert. denied*, 331 U.S. 853 (1947); *State v. Tucker*, 76 Ohio App. 112, 62 N.E.2d 379 (1945).

35. *Hanson v. State*, 43 Ohio 376, 1 N.E. 136 (1885); *Howard v. State*, 25 Ohio St. 399 (1874); *Ross v. State*, 35 Ohio App. 539, 172 N.E. 618 (1930).

36. *Sydell v. State*, 17 Ohio App. 418 (1923); *Brown v. State*, 2 Ohio C.C.R. (n.s.) 409 (Cir. Ct. 1903).

37. *Sydell v. State*, *supra* note 36.

38. *State v. Whitten*, 82 Ohio St. 174, 92 N.E. 79 (1910).

39. *Windle v. State*, 102 Ohio St. 439, 132 N.E. 22 (1921); *State v. McCoy*, 88 Ohio St. 447, 103 N.E. 136 (1913); *Heller v. State*, 23 Ohio St. 582 (1873); *White v. State*, 13 Ohio St. 569 (1862); *State v. Quatman*, 96 Ohio App. 517, 122 N.E.2d 670 (1954).

40. *State v. Meadows*, 105 Ohio App. 86, 148 N.E.2d 345 (1957). The statute reads: "No person shall maliciously shoot, stab, cut, or shoot at another person with intent to kill, wound, or maim such person." OHIO REV. CODE § 2901.23.

41. *Barber v. State*, 39 Ohio St. 660 (1884); *Bailey v. State*, 9 Ohio Dec. Reprint 164 (Dist. Ct. 1884) (memorandum decision).

42. *Harrington v. State*, 4 Ohio Dec. Reprint 402 (Dist. Ct. 1879); *State v. Finch*, 2 Ohio Dec. Reprint 431 (C.P. 1860).

43. *State v. Johnson*, 58 Ohio St. 417, 51 N.E. 40 (1898).

44. *State v. Kuchmak*, 159 Ohio St. 363, 112 N.E.2d 371 (1953).

45. *State v. Hreno*, 162 Ohio St. 193, 122 N.E.2d 681 (1954); *accord*, *State v. Arnold*, 176 N.E.2d 861 (Ohio Ct. App. 1960). *Contra*, *State v. Fleming*, 102 Ohio App. 244, 142 N.E.2d 546 (1957). The court in the latter case distinguishes the two offenses as being in different classes because § 2901.23, Revised Code, is an offense listed under offenses relating to persons and § 3773.04, Revised Code, is listed under disorderly conduct. This distinction is

Intentionally pointing and aiming a firearm is not, however, a superior offense to assault, as the former is without the malice necessary for assault.⁴⁶

An accused may argue that the possibility of being convicted of offenses not actually in the indictment denies him his constitutional right to know the nature of the accusation against him, and consequently hampers his preparation for trial. In Ohio, however, this objection was disposed of in 1840.⁴⁷ It can also be noted that Ohio has eliminated the common-law distinction preventing convictions for misdemeanors under indictments for felonies.⁴⁸ It does not matter if the penalty of the lesser included offense is much lower, as long as it is lower.

LESSER INCLUDED OFFENSES

General Rule

In 1911, Jesse Van Zandt was indicted for first-degree murder when his wife was found choked, bound, and gagged with her head and shoulders on a burning gas stove. The evidence, although not direct, strongly indicated that the defendant was guilty of this revolting crime. Acting under the judge's charge on a lesser degree of homicide, the jury returned a verdict of manslaughter.⁴⁹ It was this kind of decision, one where the jury in finding a lesser included offense obviously commuted the sentence of an accused who had in all likelihood committed first-degree murder, which led the court in *Bandy v. State*⁵⁰ to announce the rule often called the "sufficient"⁵¹ or "independent evidence test."⁵²

invalid as it ignores the fact that § 3773.04 states that the offense is for pointing or firing a firearm at a person and thus is an offense relating to persons.

46. *State v. Moherman*, 62 Ohio App. 258, 23 N.E.2d 651 (1939). It has been held that a charge of manslaughter in the deaths of four children due to fire does not incorporate the offenses of mistreating, neglecting, or abandoning children. *State v. Ross*, 176 N.E.2d 746 (Ohio C.P. 1961). Nor are there lesser offenses under an indictment for kidnapping and killing. *State v. Anthoulis*, 62 Ohio App. 113, 23 N.E.2d 312 (1939). The offense of first-degree murder by lynching does not involve the crime of riot. *Watha v. State*, 14 Ohio C.C.R. (n.s.) 145 (Cir. Ct. 1911). And incest is not comprehended within rape. *State v. Labus*, 102 Ohio St. 26, 130 N.E. 161 (1921). Murder in the perpetration of rape includes second-degree murder, and manslaughter. *Hoppe v. State*, 29 Ohio App. 467, 163 N.E. 715, *appeal dismissed*, 119 Ohio St. 651, 166 N.E. 200 (1928) (per curiam). Rape includes assault. *Snyder v. State*, 92 Ohio St. 107, 110 N.E. 644 (1915).

47. *State v. Noble*, 1 Ohio Dec. Reprint 1 (C.P. 1840).

48. *Stewart v. State*, 5 Ohio 241 (1831).

49. *Van Zandt v. State*, 13 Ohio C.C.R. (n.s.) 526 (Cir. Ct. 1911).

50. *Bandy v. State*, 102 Ohio St. 384, 131 N.E. 499 (1921). See note 1 *supra* and accompanying text.

51. Note, *Submission of Lesser Crimes*, 56 COLUM. L. REV. 888 (1956); Comment, *Circumstances In Which Criminal Court Must Charge The Jury As to the Lesser Degrees of, And Crimes Included In, The Crime Charged in the Indictments*, 25 FORDHAM L. REV. 111 (1956).

52. Comment, *Jury Instructions on Lesser Included Offenses*, 57 NW. U.L. REV. 62 (1962).

Bandy was indicted for first-degree murder in perpetration of a robbery. His defense was an alibi, and no evidence was offered to dispute the circumstances or reduce the degree of crime. After being convicted of first-degree murder, Bandy appealed on the grounds that the trial judge erred in not charging the jury on lesser degrees of homicide. Affirming the judgment, the supreme court held that the defendant could be found guilty of only first-degree murder as charged, or must be acquitted. While murder in the first-degree may include lesser offenses,

where there is no evidence from which a reasonable inference can be drawn of any other degree than murder in the first degree, it is not only not error for the court to refuse to charge upon such lesser degrees, but would be error for the court to so charge. . . .⁵³

Thus, under the general rule in Ohio, independent evidence sufficient to support a conviction of a lesser included offense must be presented during a criminal trial before the judge can charge such lesser included offenses.⁵⁴ "Sec. 2945.74, R.C., does not require, in the face of no evidence, that instructions be given as to all included offenses."⁵⁵ Reasons given for the rule include prevention of a "manifest mockery of the rights of the state and of the cause of justice;"⁵⁶ obstructing an "additional loop-hole in the law, another legal labyrinth through which atrocious crimes would be converted into police court offenses The jury is not a pardoning board;"⁵⁷ and the hindering of the jury speculation and compromise to avert prejudice to both the state and the accused.⁵⁸ It should be noted that in Ohio the judge in his charge tells the jury which issues they are to try.⁵⁹ Thus, the jury cannot return a verdict on a lesser included offense unless the judge charges the lesser crime.

The rule in Ohio seems to prevail throughout the United States.⁶⁰ It was pronounced for use within federal jurisdiction in *Sparf v. United States*,⁶¹ a case which is relied on strongly as precedent in *Bandy*. In pass-

53. *Bandy v. State*, 102 Ohio St. 384, 402-03, 131 N.E. 499, 504 (1921).

54. *State v. Patterson*, 172 Ohio St. 319, 175 N.E. 2d 741 (1961); *State v. Champion*, 109 Ohio St. 281, 142 N.E. 141 (1924); *State v. Schaeffer*, 96 Ohio St. 215, 117 N.E. 220 (1917); *State v. McKinney*, 77 Ohio App. 309, 64 N.E.2d 129 (1945); *Zarbo v. State*, 18 Ohio L. Abs. 145 (Ct. App. 1934).

55. *State v. Allen*, 133 N.E.2d 167, 170 (Ohio Ct. App. 1956).

56. *State v. Schaeffer*, 96 Ohio St. 215, 225, 117 N.E. 220, 223-24 (1917).

57. *State v. Champion*, 109 Ohio St. 281, 287, 142 N.E. 141, 143 (1924).

58. *State v. Patterson*, 172 Ohio St. 319, 175 N.E.2d 741 (1961).

59. *State v. McCoy*, 88 Ohio St. 447, 103 N.E. 136 (1913).

60. Annot., 21 A.L.R. 603 (1922); Annot., 27 A.L.R. 1097 (1923); Annot., 102 A.L.R. 1019 (1936).

61. 156 U.S. 51 (1895). The *Bandy* case relies heavily on *Sparf*, a lengthy decision in which Justice Harlan states in his majority opinion: "Congress did not intend to invest juries in criminal cases with power arbitrarily to disregard the evidence and the principle of law applicable to the case on trial. The only object of that section [Federal section similar to § 2945.74 Ohio Revised Code] was to enable the jury, in case the defendant was not shown to be guilty of the particular crime charged, and if the evidence permitted them to do so, to find

ing judgment on the merits or deficiencies of the rule, though, it is imperative that the cases in which the rule has been applied, either to preclude a charge or to allow one, be examined.

CHARGING LESSER INCLUDED OFFENSES IN HOMICIDE CASES

Distinguishing Factors in Refusal to Charge

Most cases sustained in this category by appellate courts are reviewed after a trial judge refuses to charge lesser included offenses, and the accused alleges this fact as error upon his conviction of the major crime in the indictment. This writer found only four homicide cases⁶² in Ohio where the trial judge charged and the appellate court found the charge erroneous. Furthermore, in only one⁶³ of those appeals did the court grant a new trial to the defendant. In the other three cases, the defendant was found guilty of the higher degree of crime charged in the indictment. The courts justifiably refused to grant new trials because the jury had not even considered the lesser issue. A new trial cannot be granted because of "a misdirection of the jury unless the accused was or may have been prejudiced thereby."⁶⁴ Since the jury found the accused guilty of a higher offense, the erroneous charge, although unnecessary and superfluous, was not prejudicial. Although there are no Ohio cases involving the alternative situation, *i.e.*, where the court erroneously fails to instruct on a particular lesser offense but there are one or more degrees of crime charged which the jury never reached, a similar decision would be likely.⁶⁵

Type and Severity of Homicide

It is more than coincidence that in the great majority of cases examined, in which courts did not charge, the crimes stated in indictments were brutal murders — atrocities which outrage a community. About one-fourth of these murders were cold-blooded killings of policemen who

him guilty of a lesser offense necessarily included in the one charged, or of attempting to commit the one charged." *Id.* at 63; *accord*, *Davis v. United States*, 165 U.S. 373 (1897); *Charfetz v. United States*, 288 F.2d 133 (D.C. Cir. 1960); *Goodall v. United States*, 80 F.2d 397 (D.C. Cir. 1950). Much of the *Sparf* opinion involves a long historical discussion of whether or not the jury should be the judge of both the law and the fact. The two dissenting judges base their holding that the judge must always charge lesser included offenses on the notion that the jury is judge of both law and fact. This idea is both beyond the scope of this note and inapplicable in Ohio, as the jury in Ohio receives all matters of law from the judge. OHIO REV. CODE § 2945.11.

62. *Dresback v. State*, 38 Ohio St. 365 (1882); *State v. Landrum*, 96 Ohio App. 333, 113 N.E.2d 705, *appeal dismissed*, 160 Ohio St. 358, 116 N.E.2d 208 (1953) (Mem.); *Zarbo v. State*, 18 Ohio L. Abs. 145 (Ct. App. 1934); *Head v. State*, 2 Ohio L. Abs. 678 (Ct. App. 1924) (Epitomized opinion); *Murray v. State*, 23 Ohio C.C.R. (n.s.) 508 (Cir. Ct. 1912).

63. *Dresback v. State*, *supra* note 62.

64. OHIO REV. CODE § 2945.83 (D). See *State v. Harris*, 32 Ohio L. Abs. 221 (Ct. App. 1940).

65. Note, *Submission of Lesser Crimes*, 56 COLUM. L. REV. 888, 901 (1956).

were acting in the line of duty.⁶⁶ One case involved a kidnapping and killing,⁶⁷ another a killing by one of the infamous Dillinger gang.⁶⁸ In *State v. Hahn*,⁶⁹ a woman duped, defrauded, and then fed arsenic to five male companions, and in *Licavoli v. State*,⁷⁰ the defendant was indicted in 1935 for four gangland slayings. *State v. Hagert*,⁷¹ involved the murder of one twelve year old twin brother when he resisted a sodomy attempt by the accused, who then killed the other twin so he could not identify him. The defendant in *State v. Stain*⁷² was indicted for raping a seventy-five year old hunchback, who died from the mental and physical shock of such savage indignities. The judge trying the celebrated case of *State v. Sheppard*⁷³ refused to charge assault and battery as a lesser included offense. In these cases, it truly would be "error highly prejudicial to the state"⁷⁴ to submit lesser included offenses to the jury when there is no evidence supporting such offenses. "The jury is not a pardoning board."⁷⁵

Proximate Cause

A distinguishable factor in almost every case in which the courts have refused to charge assault and battery as a lesser included offense is proximate cause. For if there is no question of proximate cause of death it is "absurd for the court to charge upon the question of assault and battery, because that issue was in no way raised in the case."⁷⁶ When there is no doubt that the wounds attributed to the actions of the accused were the direct, proximate, or one of the direct causes of the death, usually the only factual issue for the jury is whether the accused committed the crime.⁷⁷

66. *Glasscock v. State*, 125 Ohio St. 75, 180 N.E. 539 (1932); *Lyon v. State*, 116 Ohio St. 265, 155 N.E. 800 (1927); *State v. Harris*, 32 Ohio L. Abs. 221 (Ct. App. 1940); *State v. Brown*, 22 Ohio L. Abs. 114 (Ct. App. 1936); *Makley v. State*, 49 Ohio App. 359, 197 N.E. 339 (1934); *Caparra v. State*, 3 Ohio L. Abs. 371 (Ct. App. 1924); *Head v. State*, 2 Ohio L. Abs. 678 (Ct. App. 1924).

67. *State v. Anthonis*, 62 Ohio App. 113, 23 N.E.2d 312 (1939).

68. *Makley v. State*, 49 Ohio App. 359, 197 N.E. 339 (1934).

69. 59 Ohio App. 178, 17 N.E.2d 392, *appeal dismissed*, 133 Ohio St. 440, 14 N.E.2d 354 (per curiam), *appeal dismissed*, 305 U.S. 557 (1938) (per curiam).

70. 34 N.E.2d 450 (Ohio Ct. App. 1935).

71. 58 N.E.2d 399 (Ohio Ct. App.), *rev'd on other grounds*, 144 Ohio St. 316, 58 N.E.2d 764 (1944).

72. 84 Ohio App. 229, 82 N.E.2d 109 (1948).

73. 100 Ohio App. 345, 128 N.E.2d 471 (1955), *aff'd*, 165 Ohio St. 293, 135 N.E.2d 340, *cert. denied*, 352 U.S. 910 (1956).

74. *State v. Hagert*, 58 N.E.2d 399, 404 (Ohio Ct. App.), *rev'd on other grounds*, 144 Ohio St. 316, 58 N.E.2d 764 (1944).

75. *State v. Champion*, 109 Ohio St. 281, 287, 142 N.E. 141, 143 (1924).

76. *State v. Schaeffer*, 96 Ohio St. 215, 224, 117 N.E. 220, 223 (1917); *accord*, *Lyon v. State*, 116 Ohio St. 265, 155 N.E. 800 (1927); *Bell v. State*, 7 Ohio App. 185 (1917).

77. *State v. Sheppard*, 100 Ohio App. 345, 128 N.E.2d 471 (1955), *aff'd*, 165 Ohio St. 293, 135 N.E.2d 340, *cert. denied*, 352 U.S. 910 (1956); *State v. Ellis*, 105 N.E.2d 65 (Ohio Ct. App. 1951); *Kidd v. State*, 15 Ohio L. Abs. 488 (Ct. App. 1933); *Layne v. State*, 10 Ohio L. Abs. 58 (Ct. App. 1931). Most of the questions in this class of cases involve assault and

Defenses — Alibi and General Denial

The cases illustrate that the type of defense presented by the accused is often a distinguishing factor when the general rule is relied upon to justify a refusal to charge. In the *Bandy*⁷⁸ case, the defense was an alibi, with no evidence being offered to dispute the circumstances of the crime. The defendant in *Lutes v. State*⁷⁹ alleged he was elsewhere when a police officer was killed upon discovering a robbery in progress. A defendant indicted for traffic manslaughter perpetrated while intoxicated claimed he never hit the deceased.⁸⁰ The accused in *State v. Dean*⁸¹ flatly denied that she had poisoned the deceased. In all of the foregoing cases, where the defendants denied all presence or knowledge of the crimes, the judges refused to charge lesser included offenses on the theory that since no evidence was presented to rebutt the state's case, the verdict must be either guilty as charged if it is found that they were involved in the crime, or complete acquittal if the defense presented is successful.

It is generally agreed that in basing their refusal to charge lesser included offenses on the failure of the accused to contradict the state's evidence, the courts' reasoning is theoretically unsound.⁸² "At all times the burden is upon the State to prove beyond a reasonable doubt each and every element of the crime charged."⁸³ These judges have ignored the fact that the jury may refuse to believe all or part of the state's evidence, and can also challenge the defendant's complete denial. A situation may then result where one of the state's elements of proof is eliminated and a conviction of lesser included offense is legally justifiable.

Application of the general rule, in effect, usurps the accused's right to a jury trial of all possible factual issues.⁸⁴ This writer disagrees with the Ohio Supreme Court's approval in the *Bandy* case of the lower court's statement that "it is not important to the status of this case to express an

battery as a lesser included offense under manslaughter. If the original charge is murder, there may be other factual issues and lesser included offenses for the jury to consider.

78. *Bandy v. State*, 102 Ohio St. 384, 131 N.E. 499 (1921).

79. 37 Ohio App. 353, 174 N.E. 745 (1930); *accord*, *State v. McKinney*, 77 Ohio App. 309, 64 N.E.2d 129 (1945).

80. *Kidd v. State*, 15 Ohio L. Abs. 488 (Ct. App. 1933).

81. 94 Ohio App. 540, 116 N.E.2d 767 (1953).

82. Note, *Submission of Lesser Crimes*, 56 COLUM. L. REV. 888 (1956); Comment, *Circumstances In Which a Criminal Court Must Charge The Jury as to The Lesser Degrees of, And Crimes Included in, The Crime Charged In The Indictment*, 25 FORDHAM L. REV. 111 (1956); Comment, *Jury Instructions On Lesser Included Offenses*, 57 NW. U.L. REV. 62 (1962); 56 MICH. L. REV. 706 (1956).

83. *State v. Shipp*, 22 Ohio L. Abs. 104, 105 (Ct. App. 1936).

84. "Although there would be little support for a rule allowing a judge to instruct the jury that they could not acquit the defendant, the difference between such a situation and the majority rule is only one of degree. Essentially both require the judge to withdraw one possible factual situation from the deliberation of the jury . . ." 54 MICH. L. REV. 706, 708 (1956).

opinion as to whether a possible or supposable state of evidence might justify a charge upon the lesser or included offenses."⁸⁵ Most likely, it was this type of shortsighted statement which led the court in *Malone v. State*⁸⁶ to refuse to charge offenses inferior to a first-degree murder indictment, after the trial judge had instructed that the jury could decide on a lesser degree even though the defendant had completely denied the act during trial. The mere fact that the trial judge did charge is sufficient indication that the prosecution's evidence was not so unquestionable as to warrant a refusal to charge lesser offenses.

The general rule should be that a judge in a criminal case shall charge lesser included offenses, unless in his judgment the state's evidence cannot be disbelieved. The judge's "discretion" in refusing to charge should be limited to those cases in which he believes the State's evidence to be absolutely conclusive of the higher crime,⁸⁷ subject to reversal on appeal for preemption of the jury's power to decide all possible factual issues. This appears to be the best rule to advance the original purpose of the entire lesser included offense doctrine — to allow the jury to find the accused guilty of a lesser offense if the prosecution fails to establish an element of the higher crime.⁸⁸ Those whom the jury thinks guilty of some wrongdoing, and who actually may be murderers or habitual criminals, thus would be prevented from returning to society. The rule would be beneficial to the state by rescuing the prosecutor who partially fails, and at the same time would prevent prejudice to the accused who, although obviously guilty of some wrongdoing, is not a murderer in the first degree. In the latter situation, the defendant is highly prejudiced if the judge gives the jury no alternative but to convict of the higher offense or acquit, and the jury convicts.

Those who would oppose this view will argue that under such a rule, the practical weakness of the jury system will result in compromise or "mercy" verdicts.⁸⁹ They would contend that the jury will receive the power to either commute punishment or to subject a defendant to the possibility of conviction of lower offenses when some jurors are deter-

85. *Bandy v. State*, 102 Ohio St. 384, 389, 131 N.E. 499, 500 (1921).

86. 130 Ohio St. 443, 200 N.E. 473 (1936).

87. "It is the general rule that in criminal cases, where the defendant pleads not guilty, the court has no power to direct a verdict of guilty, even where the incriminating offense is conclusive and uncontradicted." *Fouts v. State*, 113 Ohio St. 450, 461, 149 N.E. 551, 554 (1925); *accord*, *State v. Spivak*, 28 Ohio L. Abs. 446 (Ohio App. 1938). The rule advocated by this writer, however, as a practical matter would have the judge charge lesser offenses unless he felt that the evidence was so conclusive that he would direct a verdict of guilty of the higher offense if he could legally do so.

88. It is generally agreed that this is a valid intent. Note, *Submission of Lesser Crimes*, 56 COLUM. L. REV. 88 (1956); Comment, *Jury Instructions on Lesser Included Offenses*, 57 NW. U.L. REV. 62, 74 (1962).

89. Comment, *Compromise Verdicts in Criminal Cases*, 37 NEB. L. REV. 802 (1958); Comment, *Jury Instructions on Lesser Included Offenses*, *supra* note 88.

mined to render a verdict of guilty. This writer asserts, however, that such dangers are of less practical concern than the possible alternatives under the strict *Bandy* rule of convicting a man of a higher crime when he is actually guilty of the lower, or of allowing criminals to obtain an acquittal, to the detriment of society's best interests.

Affirmative Defenses

When an affirmative defense such as insanity or self-defense is alleged, the defendant has the burden of proving it by a preponderance of the evidence.⁹⁰ The court, however, must not encroach on the defendant's right to have the jury apply the subjective test to his actions by charging only the offense listed in the indictment, unless there is no view of the facts on which a charge of lesser included offenses could be predicated. The Ohio homicide cases in which judges have refused to charge follow this rule. In the *State v. Ellis*,⁹¹ the lesser charge was refused when evidence revealed the shooting could not have been in self-defense as the decedent was shot behind the left ear at a distance of twelve to twenty feet.⁹² In *State v. Allen*,⁹³ the defendant alleged self-defense in killing two men who had robbed him. He did not receive a charge on a lesser offense, as ten hours had expired between the time he was robbed and when he procured a shot-gun from a pawn shop, found the robbers, shot one and then crossed the street, reloaded his gun, killed the other, disposed of the gun, and left town. Neither self-defense nor any disbelief in the state's case of second-degree murder was possible in *Zarbo v. State*.⁹⁴ The defendant admitted he had just opened the door, fired at the two men who were pounding there, and asked questions later. He was never attacked and did not kill in the heat of passion. In the *Hagert* case, where the accused killed twin brothers after attempting sodomy, the court was correct in refusing to charge lesser offenses, the only possible question being whether or not he was legally insane.⁹⁵ It should be noted that an allegation of self-defense does not cancel or remove other defenses.⁹⁶ Thus, the court in *State v. Champion*⁹⁷ was incorrect in not holding a trial judge in error when he refused to charge assault

90. *State v. Vancak*, 90 Ohio St. 211, 107 N.E. 511 (1914); *State v. Kennedy*, 72 Ohio App. 462, 52 N.E.2d 873 (1943).

91. 105 N.E.2d 65 (Ohio Ct. App. 1951).

92. *Ibid.* Cf. *State v. Harris*, 32 Ohio L. Abs. 221 (Ct. App. 1940). (Evidence showed the defendant was obviously lying.)

93. 133 N.E.2d 167 (Ohio Ct. App. 1956).

94. 18 Ohio L. Abs. 145 (Ct. App. 1934).

95. *State v. Hagert*, 58 N.E.2d 399 (Ohio Ct. App.), *rev'd on other grounds*, 144 Ohio St. 316, 58 N.E.2d 764 (1944).

96. *State v. Shipp*, 22 Ohio L. Abs. 104 (Ct. App. 1936).

97. 109 Ohio St. 281, 142 N.E. 141 (1924).

and battery because both self-defense and accidental killing were given as defenses.

Conspiracies

When a defendant is indicted as a conspirator to a crime, he "may be prosecuted and punished as if he were the principal offender."⁹⁸ Thus, if it is impossible to conceive how the principal offender can be found guilty of a lesser included crime, the court will not charge lesser included offenses at the trial of the conspirators.⁹⁹

The killer may have murdered for motives peculiar to himself, but if the killing was undisputably perpetrated in furtherance of the ends intended by a pre-conceived plan, the only question for the jury is whether the defendant is in fact one of the conspirators.¹⁰⁰

AN ABORTIVE THEORY & AN UNNECESSARY TECHNICALITY

Directed Verdict Theory

In *State v. Patterson*,¹⁰¹ the defendant was indicted jointly with James Bradley for second-degree murder resulting from an alleged drag-race between the co-defendants. The trial court refused to charge the lesser included offense of manslaughter. The court of appeals, however, reversed the decision, observing that the jury obviously could find there was no intention to kill, and thus might return a verdict of manslaughter if they determined the defendant had unintentionally killed while violating a state traffic regulation. The majority opinion of the Ohio Supreme Court, citing among others, the *Bandy*¹⁰² and *Malone*¹⁰³ cases, went on a long tirade on the possible abuses of charging lesser offenses. The court then admitted that "it would not have been erroneous to have charged upon manslaughter."¹⁰⁴ Nevertheless, the Ohio Supreme Court held that "the refusal of such a charge was not error prejudicial to the rights of the defendant . . ."¹⁰⁵ They reasoned that the instructions given — guilty, or second-degree murder, or acquittal — were

98. OHIO REV. CODE § 1.17.

99. *State v. Patterson*, 172 Ohio St. 319, 175 N.E.2d 741 (1961); *State v. Curnutt*, 84 Ohio App. 101, 84 N.E.2d 230, *appeal dismissed*, 150 Ohio St. 491, 83 N.E.2d 70 (1948) (per curiam).

100. *State v. Strain*, 84 Ohio App. 229, 82 N.E.2d 109 (1948); *Licavoli v. State*, 34 N.E.2d 450 (Ohio Ct. App. 1935).

101. 172 Ohio St. 319, 175 N.E.2d 741 (1961).

102. *Bandy v. State*, 102 Ohio St. 384, 131 N.E. 499 (1921).

103. *Malone v. State*, 130 Ohio St. 443, 200 N.E. 473 (1936). See text at note 86 *supra*.

104. *State v. Patterson*, 172 Ohio St. 319, 325, 175 N.E.2d 741, 746 (1961).

105. *Ibid.*

in reality . . . a direction of a verdict of not guilty of all the lesser included offenses [The] defendant cannot predicate error upon something that is to his benefit and is an added safeguard in the administration of justice.¹⁰⁶

The court also said that the possibility of any prejudicial error in not charging was eliminated under the provisions of Ohio Revised Code section 2945.79,¹⁰⁷ which, on motion for new trial, allows the court to modify a verdict not sustained by the evidence.

The court's action in the *Patterson* case was an illogical usurpation of the accused's right to a jury trial, highly prejudicial to the accused and also in conflict with the rights of the people of Ohio. One writer pointed out part of the irrationality of the opinion very satisfactorily.

In order to properly direct a verdict of not guilty as to the lesser offense, the court would have to hold that the state had failed to prove some element of the charge beyond a reasonable doubt. However, all elements of the lesser offense are, by definition, requisites of the greater. Therefore, the court cannot properly direct a verdict as to the lesser offense without doing so as to the greater.¹⁰⁸

As a practical matter, the supreme court admittedly decided the case on the evidence, and in so doing prejudicially denied the jury an opportunity to consider the factual issue of manslaughter. The court condoned a charge which not only increased the defendant's chances of being convicted of the higher offense, but also made it possible for a driver with no regard for the rights or lives of others on the highway to be set loose again on the streets. The jury's only alternative in this case was to convict of the higher offense or acquit the defendant. In saying that "the state might well complain" because the refusal to charge was a "direct verdict" of not guilty of all lesser included offenses, the court added insult to injury. For the real danger to the public was the possible release of a killer driver into society when he might have been convicted of manslaughter. And with this possibility in the back of the jurors' minds, they easily could have prejudiced the accused by requiring less evidence to convict him of the higher offense rather than let him go free.¹⁰⁹

106. *Ibid.*

107. OHIO REV. CODE § 2945.79(D) provides: "if the evidence shows the defendant is not guilty of the degree of crime for which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict or finding accordingly, without granting or ordering a new trial, and pass sentence on such verdict or finding as modified, provided that this power extends to any court to which the cause may be taken on appeal."

108. Comment, *Jury Instructions on Lesser Included Offenses*, 57 NW. U.L. REV. 62, 70 n. 31 (1962).

109. In *Hanson v. State*, the court in holding it was error not to charge assault and battery as a lesser included offense said: "If the jury, contrary to law, had been instructed that a conviction of the defendant for assault and battery only could not be had under that indictment, his danger of a conviction for the higher crime named in the indictment would, no doubt, have been increased." 43 Ohio St. 376, 378-79, 1 N.E. 136, 137 (1885); *accord*, *Durance v. State*, 16 Ohio C.C.R. (n.s.) 20 (Cir. Ct. 1908).

Counsel Must Request the Charge

The Ohio courts demand that the accused request a charge on lesser included offenses if one is to be given. If the defendant does not ask for the charge, and does not specifically except to the general charge, the appellate courts refuse to reverse even though lesser offenses are in issue.¹¹⁰ The courts argue that counsel, as an officer of the court, has "the duty to exercise diligence and to aid the court, — not by silence to mislead the court into the commission of error."¹¹¹ The court noted that since judges are not infallible, the defendant must advise them of errors of omission, or such errors will not justify reversal. The practical reason for such a rule is to prevent the defendant from gambling on an acquittal where he thinks he will not be convicted of the higher crime. At the same time he remains confident that if convicted he can take advantage of the error and receive a new trial on the lesser offenses. In view of the fact that the defendant who is seeking complete exoneration will resort to such tactics, the rule seems valid. Many writers, however, disagree. Judge Hart, dissenting in *State v. Tudor*,¹¹² felt that errors of omission cannot be waived in a capital case by the failure of counsel to request the charge. While the rationale behind the rule may be sound, strict adherence to it could result in a miscarriage of justice if by mere oversight counsel fails to request the charge. It is already established that the judge has a duty to charge lesser included offenses unless the state's evidence cannot be disbelieved. If the defendant could have been convicted of a lesser included offense, it is the court's duty to see that he receives a jury trial on that issue, regardless of the evil implications of defense counsel's failure to request the charge.¹¹³

HOMICIDE CASES IN WHICH THE COURTS DID CHARGE

Notable Factors

The cases in which courts have charged lesser included offenses reveal that in every case there are certain basic elements which, if possibly in issue, require a judge as a matter of law to instruct on lesser included

110. *State v. Meyer*, 163 Ohio St. 279, 126 N.E.2d 585 (1955); *Todor v. State*, 113 Ohio St. 377, 149 N.E. 326 (1925); *State v. McCoy*, 88 Ohio St. 447, 103 N.E. 136 (1913); *State v. Ellis*, 105 N.E.2d 65 (Ohio Ct. App. 1951); *State v. Anthoulis*, 62 Ohio App. 113, 23 N.E.2d 312 (1939); *Kidd v. State*, 15 Ohio L. Abs. 488 (Ct. App. 1933).

111. *State v. Tudor*, 154 Ohio St. 249, 257-58, 95 N.E.2d 385, 389 (1950).

112. *Id.* at 261, 95 N.E.2d at 391.

113. Any other conclusion would contradict the basic notion that the judge has a duty to charge the law applicable to all facts in issue. *Adams v. State*, 29 Ohio St. 412 (1876). *Todor v. State*, 113 Ohio St. 377, 149 N.E. 326 (1925), is illustrative of the contradictory position taken by the Ohio Supreme Court. In the *Todor* case, the court first states that the duty of the court to charge lesser included offenses is no less than its duty to charge the issues in the original indictment, and then holds that failure to charge is not reversible error when the defendant does not specifically except to the incomplete charge.

offenses. Whenever the prosecution is unable to prove deliberation and premeditation beyond a reasonable doubt in a first-degree murder case, the lesser offense of second-degree murder must be charged.¹¹⁴ Every type or degree of murder requires that the state prove an intention to kill. Thus, whenever the jury can possibly conclude that there was no intent to kill, and an unlawful act is involved, the court must charge the lesser included offense of manslaughter.¹¹⁵ If the defendant has committed an act of violence against another, and the latter subsequently dies, a causal connection must be proven between the act and death before the accused can be held responsible for the death. The judge, therefore, always must charge assault and battery when the proximate cause of death has not been conclusively proven during trial.¹¹⁶ Any time the evidence in a case is largely circumstantial, a charge on lesser included offenses is in order.¹¹⁷ If an accused, admitting a killing, poses the issue of self-defense to a first-degree murder charge, and neither the state nor the accused conclusively meets their respective burdens of proof, the defendant is entitled to an instruction on the lesser included offense of manslaughter.¹¹⁸

Whenever one man, *A*, points a gun at another, *B*, and a scuffle ensues during which the gun goes off, killing *B*, there is always a question of what lesser offenses must be charged. The state will argue the judge cannot charge any offense lower than manslaughter under a first or second-degree murder indictment.¹¹⁹ Pointing a firearm toward another is an unlawful act under section 3773.04 of the Ohio Revised Code and can be used to sustain a verdict of manslaughter.¹²⁰ The defendant will contend that charges on the lesser included offenses of assault and battery, and pointing a firearm should be given to the jury. He will allege the

114. *Rudner v. State*, 27 Ohio App. 59, 160 N.E. 718 (1927), *appeal dismissed*, 117 Ohio St. 620, 160 N.E. 634 (1927) (per curiam); *State v. Gordon*, 92 N.E.2d 305 (Ohio Ct. App. 1948), *rev'd in part on other grounds*, *State v. Abbott*, 152 Ohio St. 228, 89 N.E.2d 147 (1949).

115. *State v. Muskus*, 158 Ohio St. 276, 109 N.E.2d 15 (1952); *State v. Farmer*, 156 Ohio St. 214, 102 N.E.2d 11 (1951); *Robbins v. State*, 8 Ohio St. 131 (1857); *State v. Noble*, 1 Ohio Dec. Reprint 1 (C.P. 1840).

116. *State v. Cochrane*, 151 Ohio St. 128, 84 N.E.2d 742 (1949) (struck with fist); *Marrs v. State*, 26 Ohio St. 162 (1875) (throwing stone); *State v. Yingling*, 44 N.E.2d 361 (Ohio Ct. App. 1942) (blackjack); *Jones v. State*, 8 Ohio App. 463 (1917) (auto collision); *Ohio v. Powell*, 1 Ohio Dec. Reprint 38 (C.P. 1844) (hit with stone).

117. *Martin v. State*, 12 Ohio L. Abs. 173 (Ct. App. 1932).

118. *State v. Vancak*, 90 Ohio St. 211, 107 N.E. 511 (1914); *State v. Landrum*, 96 Ohio App. 333, 113 N.E.2d 705, *appeal dismissed*, 160 Ohio St. 358, 116 N.E.2d 208 (1953) (Mem.); *State v. Kennedy*, 72 Ohio App. 462, 52 N.E.2d 873 (1943); *State v. Shipp*, 22 Ohio L. Abs. 104 (Ct. App. 1936).

119. *Cf.*, *Freeman v. State*, 119 Ohio St. 250, 163 N.E. 202 (1928); *State v. Taylor*, 104 Ohio App. 422, 148 N.E.2d 507 (1957); *State v. Bednarik*, 123 N.E.2d 31 (Ohio Ct. App. 1954), *aff'd on rehearing*, 126 N.E.2d 823 (Ohio Ct. App. 1955); *State v. Colley*, 78 Ohio App. 425, 65 N.E.2d 159 (1946).

120. *State v. McLean*, 49 N.E.2d 778 (Ohio Ct. App. 1942).

shooting was completely accidental, and although he may be guilty of putting the decedent in fear, or of pointing the gun, his actions were not the cause of death. This writer asserts that in this situation the court usually must charge the lesser offenses. It is true the state will aver the killing followed as a proximate result of *A*'s wrongful act of pointing the gun. The state, however, must prove the proximate cause of death beyond a reasonable doubt, and seldom can prove this element so conclusively as to pre-empt jury consideration of the issue. If there is testimony of a struggle during which a gun went off, the jury should decide the cause of death from the evidence presented at trial.¹²¹ And if there is any question of proximate cause of death, then assault and battery, and pointing a weapon should be charged, as they already have been established as lesser included offenses under murder and manslaughter when cause of death is in question.¹²²

Remedies

The remedy most often afforded to an accused who meritoriously appeals his conviction on the basis that the court erred in not charging lesser included offenses is a new trial.¹²³ The appellate court, under section 2953.07 of the Ohio Revised Code, can also invoke section 2945.79 of the Revised Code to modify the degree of crime instead of granting a new trial.¹²⁴ Appeal is the vehicle to use, as those who have tried habeas corpus have failed.¹²⁵ The state of Ohio will not be prejudiced by granting a new trial as it can retry the defendant for the greater offense without fear of a double jeopardy plea.¹²⁶ Nor should the Ohio trial judge ever reject charging lesser included offenses on the basis that the defendant will be released if the charge is prejudicially incorrect. As was noted previously, only four cases¹²⁷ were found in which the charge was ruled erroneous, and in only one of those cases was any relief granted — a new trial.¹²⁸

121. *Ibid.*; Ludden v. State, 7 Ohio L. Abs. 426 (Ohio Ct. App. 1929).

122. See text at notes 45 and 116 *supra*.

123. An exhaustive examination of the Ohio cases revealed that the appellate courts found not charging lesser included offenses was prejudicial error in 13 cases where the issue was raised. The relief granted in 11 of the 13 cases was a new trial.

124. This was the remedy in the other trial cases mentioned in note 123 *supra*. State v. Hrynczyn, 139 N.E.2d 466 (Ohio Ct. App. 1957); Turk v. State, 48 Ohio App. 489, 194 N.E. 42 (1934), *aff'd*, 129 Ohio St. 245, 194 N.E. 453 (1935) (per curiam).

125. Lamos v. Sacks, 172 Ohio St. 295, 175 N.E.2d 177, *cert. denied*, 368 U.S. 904 (1961); Baus v. Alvis, 140 N.E.2d 93 (Ohio C.P. 1956); Thomas v. Cowdrey, 13 Ohio App. 58 (Ct. App. 1920).

126. State v. Robinson, 100 Ohio App. 466, 137 N.E.2d 141 (1956). *But see* Green v. United States, 355 U.S. 184, 216-17 (1957).

127. See text at note 62 *supra*.

128. Dresback v. State, 38 Ohio St. 365 (1882).

CONCLUSION

This writer has not advocated a return to the old rule which placed the problem of lesser included offenses completely in the hands of the jury.¹²⁹ Such a practice can result in decisions like *Van Zandt v. State*,¹³⁰ which are repulsive to every man's conscience. The test presented — the judge shall charge unless in his judgment the state's evidence cannot be disbelieved — is merely an attempt to initiate a rule which recognizes that extreme caution must be exercised in limiting the jury determination of guilt or innocence in a criminal case.

Seldom will it be easy for the judge to ascertain and delineate the lesser offenses to be charged, but onerous as it may be it is his duty.¹³¹ And in so doing, the judge must recognize whether the jury may believe all, part, or none of the state's evidence. Otherwise, the dangers of most practical concern to everyone — the chance that a man guilty of only the lower crime may be convicted of the higher on insufficient evidence, or the possibility of a murderer being acquitted because the state has failed to prove an element of the higher crime — are a reality. The judge should remain content to pass on the competency of evidence. Only when the evidence is so conclusive that the judge would direct a verdict of guilty as charged, should he deny the jury its right to pass on the credibility and weight of the evidence by failing to charge lesser included offenses.

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129. See note 61 *supra*.

130. 13 Ohio C.C.R. (n.s.) 526 (Cir. Ct. 1911); see note 49 *supra*.

131. *Ross v. State*, 35 Ohio App. 539, 172 N.E. 618 (1930). It should be noted that this was not a homicide case. The rules governing charging lesser included offenses in non-homicide cases, however, are identical to those set out above. The main discussion was limited to homicide cases as they presented more complex problems for analysis.