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By ROY MORELAND

The chaotic state of the law of homicide in Kentucky prior to 1960 was occasioned largely by the judicially-created crimes of the felony wilful murder and the negligent voluntary manslaughter. As a result, in 1960 the Kentucky State Senate passed a resolution directing the Legislative Research Commission [hereinafter referred to as L.R.C.] to study homicide law in Kentucky. This writer wrote a series of articles during the 1950's and 60's studying Kentucky homicide law and was a consultant in that L.R.C. study. The Commission made its report to the legislature in 1962, together with an appendix prepared by the writer setting out a suggested homicide statute with comments from the discussion in the Commission study group. A part of that suggested statute pertaining to involuntary manslaughter was adopted by the legislature in 1962 and is now KENTUCKY REVISED STATUTE [hereinafter referred to as KRS] § 435.022. The statute eliminated the felony wilful murder and negligent voluntary manslaughter from Kentucky law.

The examination of homicide in Kentucky in this article is occasioned by the belief that all law should be re-examined approximately every ten years and, more importantly, by the fact

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* The late Mr. Moreland was Professor of Law Emeritus, University of Kentucky College of Law; LL.B., University of Kentucky; J.D., University of Chicago; S.J.D., Harvard University Law School. AUTHOR'S NOTE. Appreciation is expressed to the writer's colleague, Professor Robert Lawson, who offered a number of suggestions, particularly as to the interpretation of the Model Penal Code's treatment of drunkenness and imperfect self-defense, and to Professor John Batt who offered several criticisms, particularly as to the treatment of mental deficiency.

1 These articles were Kentucky Felony Wilful Murder, 52 Ky. L.J. 585 (1964); Kentucky Homicide Law With Recommendations, 51 Ky. L.J. 59 (1962); and A Suggested Homicide Statute for Kentucky, 41 Ky. L.J. 139 (1953).

that the Kentucky Crime Commission and the L.R.C. are examining Kentucky homicide law, as well as all other state substantive crimes with a view toward legislative recommendations. The re-examination is occasioned also by a desire to consider a third alternative punishment for intended murder; to consider whether the negligent murder should be re-introduced into Kentucky criminal law; to examine the various factors which reduce intentional murder to voluntary manslaughter and to determine if they should be specifically enunciated in the voluntary manslaughter statute; and finally, to consider whether "wantonly disregardful" is the best phrase to describe the state of mind requisite for the negligent homicide, whether it be on the level of murder or involuntary manslaughter in the first degree. These purposes will be approached by examining in turn the homicide law in Kentucky.

I. Murder

Probably the most sound and practical categorization of common law murder is the one promulgated nearly one hundred years ago by Judge Stephen. Certainly it is the one that is most frequently cited. He divided common law murder into four categories: the intentional murder, the negligent murder, the felony murder, and the killing of an officer in the course of his official duties.

A. Intentional Murder

Stephen's definition of the mental state requisite for intentional murder is "an intention to cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not." The definition includes the rule that if the intention is to cause grievous bodily harm, but the result is the death of the victim, it is nonetheless murder. This is because of the legal principle that one intends the natural consequences of his acts. A natural and probable consequence of a grievous wound is the

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4 For a Kentucky case citing Stephen's analysis of murder, see Turner v. Commonwealth, 167 Ky. 365, 369, 180 S.W. 768, 770 (1915).
5 J. Stephen, supra note 3, at 80-81.
6 See Professor Perkins' discussion of this type of "intentional" murder, Perkins, A Re-examination of Malice Aforethought, 43 Yale L.J. 537, 552-55 (1934).
death of the wounded person. The definition also includes a situation where death was "substantially certain" to follow from the act. This sounds much like the "extreme danger" found in an "extremely negligent" murder but the category exists as a type of "intentional" murder at common law. Intended murder also includes the principle of "transferred intent." Thus, if A intending to kill B fires at him but inadvertently kills C instead, it is intentional murder. The "man-killing" intent which A has toward B is thus transferred to C. These principles are spelled out in Stephen's definition of common law intentional murder. However, it is not necessary nor desirable that these principles be incorporated into a statute. They are continually being re-examined by the courts and occasionally modified. To enumerate them in a statute would "freeze" them in the law.

At common law there also is an inference of intent from a killing occurring when a deadly weapon is involved in the commission of a crime. This inference is subject to rebuttal, which is often difficult, and the principle has occasioned sharp criticism but is entrenched in the law.

Another common law inference of fact (sometimes called a presumption of law) is that once it is proven that the defendant committed the killing, an inference of intent arises from the act of killing. This rule has been repudiated in England through the decision in the Woolmington case. Woolmington was charged with the murder of his estranged wife. The prosecution proved that she was killed with a gun which the defendant had taken into the house. The defendant was the only witness and claimed that his wife was shot as they wrestled over the gun after he had threatened to commit suicide. The trial judge charged the jury that the defendant was guilty of murder unless he showed that what happened was something less than intended murder, thus putting the burden on him to rebut. He did not meet this burden and was convicted as a result. The House of Lords quashed

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8 Note, 34 Ky. L.J. 224 (1946); Note, 35 Ky. L.J. 78 (1946). A number of Kentucky cases are cited in these Notes.
9 See, e.g., REPORT OF LAW REV. COM. OF N.Y. 539, especially n. 36 (1937); R. Moreland, THE LAW OF HOMICIDE 30 (1952) [hereinafter cited as Moreland].
10 See Note, 34 Ky. L.J. 920 (1946). A number of Kentucky cases are cited in this note.
the conviction, thus eliminating the rule of many years standing that intent will be inferred from the mere act of killing. The rule is under similar attack in this country by the commentators and in the cases and is on its way out of the law.  

These two inferences of intent are not included in Stephen's definition of murder and the "freezing" of these inferences in a statute would be most unfortunate. The courts should have an opportunity to re-examine such common law principles while statutes should be geared to fundamentals.

None of these common law principles are included in Kentucky's present murder statute (KRS § 435.010, which simply provides a punishment for "wilful" murder). Thus the question is raised whether the common law crime of intended murder has been substantially changed by the Kentucky legislature. The answer is clear. While KRS § 435.010 prohibits "wilful murder," the Kentucky courts look to the common law for the definition of this term. But there are at least ten or twelve such definitions and to include them in a statute would make for an unwieldy and pedantic codification of some vague and medieval terms. More importantly, these definitions are continually being re-examined by the courts and modified almost as often. Some of them, for example, may be types of negligence of a high degree. Again to enumerate them in an intentional murder statute would be further unfortunate freezing of questionable principles into the law of the state.

Thus, it is arguable that the Kentucky legislature was wise in describing intentional murder by the bare phrase "wilful murder." It would appear that no further definition is needed; the term "wilful" is a dictionary word with a definite, accepted meaning. Of course, it may be asked why the phrase "intentional murder" was not used, since "intent" is also a dictionary word of accepted meaning. But it is believed that "wilful" was used instead of "intentional" for very good reasons. Intent in the law of murder has had a variable interpretation. It will be remembered that in

\[12 \text{ See the critical note by Selby Hurst, Note 34 Ky. L.J. 306 (1946). See also Mooreland 21-24.} \]

\[13 \text{ Commonwealth v. Illinois, 152 Ky. 320, 153 S.W. 459 (1913).} \]

\[14 \text{ E.g., the current California statute includes the old common law examples of the use of poison, torture, and lying in wait to help define murder in the first degree. The whole series of homicide statutes in that state is a conglomerate of words and phrases. Cal. Penal Code} \ 5 \text{ § 189.} \]
the beginning all murder was a killing committed “with malice aforethought.” Gradually “aforethought” lost all meaning and judges such as Stephen began to break down the various meanings of malice, one of which was “intent.” Finally, in an attempt to provide a difference between a planned, intended murder and an unplanned one, the word “premeditated” was introduced to describe the planned killing and to distinguish it from an unplanned one. The law was going through the same whittling down process as it had with the word “aforethought,” although many statutes still use the term “premeditated” to try to help the jury in determining punishment.

The difficulty the courts had in giving the word “intent” a definite meaning in murder statutes is indicated by the use of supplemental, descriptive words such as “deliberate” and “purposely.” For that reason, a statute which simply punished “intended” murder would be subject to varying interpretations. Kentucky has taken a different attack on the problem. Instead of dividing murder into degrees by distinguishing between a premeditated killing and one arising out of simple intent, Kentucky has used a different word than intent, i.e., “wilful,” and has given the task to the jury to decide the punishment from the evidence.

There is, however, one problem in Kentucky’s wilful murder statute that should be corrected. The jury has only two choices in the determination of punishment: death or life imprisonment. The first may be thought too extreme by some jurors, the other too lenient due to possible parole. There are many who do not favor giving a death sentence under any circumstances. However, a majority of Kentuckians think it should be continued. There was a recent panel on the subject before the State Bar Association at its annual meeting. The late Judge Morris Montgomery of the Court of Appeals was the moderator and three circuit judges and the writer composed the panel. The three circuit judges spoke in favor of the abolition of the penalty. The writer urged that it be retained for at least three offenses—killing a kidnapped person by the kidnappers, the rape of a child under ten years of age, and killing a peace officer in the course of his official duties. Judge Montgomery spoke emotionally in favor of the penalty, saying that during his time on the bench the Court had never affirmed

15 See the discussion in Moreland 196-212.
a death sentence except in the case of a heinous, brutal killing for which crime death is a proper punishment. Practically all of those who spoke from the audience agreed with Judge Montgomery. During Governor Breathitt’s administration it was Judge Montgomery who led the opposition to a determined drive for the abolishment of the death penalty in Kentucky. The legislature refused to abolish it, and it is not likely to be abolished in the state within the foreseeable future.

But many are strongly opposed to it. No one was executed in Kentucky during Governor Breathitt’s term of office. At the time of this writing, more than ten convicted criminals occupy death row in the state penitentiary at Eddyville. And yet a jurymen who would vote for the death penalty has little choice. His only alternative is to vote for a life sentence. However, under the present parole system in Kentucky, a defendant who receives a life sentence is eligible for parole in six years, and it is well known that many who receive life sentences serve these short periods of imprisonment. Thus, a death sentence may be deemed too severe while a life sentence, subject to parole in six years, may set out a public outcry as too lenient. To remedy this unfortunate situation, an editorial in the Louisville Courier Journal on February 16, 1960, suggested a third alternative: confinement in the penitentiary for fifteen years before becoming eligible for parole.

The writer recommends the present Kentucky intentional murder statute with this additional alternative provision as to punishment. The statute would then read:

Any person who commits willful murder shall be punished by death, by confinement in the penitentiary for life, or for a minimum of fifteen years before becoming eligible for parole.

B. The Negligent Murder

The negligent murder is the second of Stephen’s murder categories. Two problems exist in defining precisely the extent of this type of murder. First, the degree of danger requisite for the crime must be determined and secondly, the question of whether a particular state of mind is required must be answered. Early English cases and the classic common law treatises listed several situations considered highly dangerous and sufficient to constitute murder if an unintentional death occurred. Examples of such
cases (usually given as illustrations in the early texts) include shooting into a crowd, driving a horse into a crowd, and throwing a beam or other object off a roof causing it to fall into a crowded thoroughfare below. Modern examples of such extremely dangerous acts include shooting into a train, into a dwelling house, and into an automobile containing passengers. Other cases have held these situations to support less than murder when a death occurs.

The common law used various picturesque words and phrases to describe the attitude of mind requisite for the negligent murder. For example, the cases and early texts speak of a "depraved mind, regardless of human life," and "a heart devoid of social duty and fatally bent on mischief." This raises the question whether the test of negligence in murder is objective or subjective. Stephen took the position that it was subjective, that the accused must have "knowledge of the danger." Holmes, on the other hand, in his book *The Common Law* and in a series of cases in which he wrote the opinions, was the leading advocate of the view that the test is an objective one. The writer takes the position that civil and criminal negligence including such negligence amounting to murder are both objective. However, the same result is forthcoming in virtually every case, regardless of which approach is taken. If an ordinary prudent man would realize the extreme danger in his act, it may be inferred that the defendant realized it, unless he was drinking or suffering from some other mental deficiency short of insanity.

However, to take the view that negligence on the murder level is objective does not change the fact that the mental factor is a *sine qua non* in the crime in virtually all cases. Not only did the early cases and texts require "a wicked mind" or its equivalent, but many statutes today embody the mental element specifically, often in the very words of the common law. One could take the view that if an ordinary prudent man would realize the extreme

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17 See the discussion and citations to cases, Moreland 35, ns. 20-23.
18 3 J. Stephen, supra note 3.
20 Moreland 37. Holmes' opinions and other text authority are cited in ns. 27 and 28.
21 See the discussion, id. at 26-41.
danger, it may be inferred that the defendant recognized the existence of that danger. That would make the offense wholly objective. But, as suggested above, some defendants because of drunkenness, sleepiness, or other mental condition might not realize it at all. Suffice it to say, that in such cases juries and courts, albeit through often cloudy reasoning, generally hold the accused realized the danger existed.\(^2\) This being true, perhaps it would be better if the courts frankly took Holmes’ view and thus were able to hold the accused responsible regardless of his mental attitude.

Undoubtedly the mental attitude is still important in the negligent murder. In most cases involving extreme danger it may be satisfied by raising a factual inference of knowledge of the extreme danger. Even in cases where this is doubtful because of the accused’s mental condition, the courts find it by devious reasoning. Courts generally refuse to let a defendant escape responsibility because of drunkenness or other mental condition which he, himself, caused.

The issue can be raised directly by asking whether a negligent murder statute would correctly describe the crime if it covered death occurring unintentionally because the accused was doing an extremely dangerous act. It is submitted that it would not under most decisions, due largely to the fact that the law, with rare exception, requires *mens rea* in all criminal cases. Of course, extreme negligence shows a blameworthy state of mind, so the *mens rea* requirement is satisfied without a stretching of reasoning. At any rate, it would appear that the ancient concept of depravity still must be satisfied in a statutory definition of negligent murder. In interpreting that statute the court may speak largely of “depraved conduct” but there can be no doubt that an inference of a blameworthy, anti-social state of mind must be preserved. Holmes went further than the statutes and law of his time and a complete repudiation of the attitude of mind, and a conviction based wholly on conduct would still go beyond the law of today. That being true, the mental attitude must be satisfied in drawing a negligent murder statute even today. It must

\(^2\) For example, in cases of drunkenness, the courts ordinarily hold the accused had knowledge of the danger if he was able to drive a car and an ordinary prudent man would have realized it. See the discussion *id.* at 38-40.
appear specifically in the statute or from a reasonable interpretation of the statute by the courts.

It follows, then, that both the extreme danger created by the defendant's act as well as his mental attitude must be included in a negligent murder statute. The danger required in the act presents little problem—it can be satisfied by saying "by an act extremely dangerous to human life," or similar language. But the mental attitude phase of the description presents a more difficult problem. Of course, one may satisfy the requirement by using one of the picturesque words or phrases found in the common law. Thus, the statute could state "if by an extremely dangerous act, evincing a depraved mind, regardless of human life." New York and some other states still use that phrase in their negligent murder statutes. But "depraved" is a Sunday word with a distinct moral connotation. Similar objection can be made to the phrase "with an abandoned and malignant heart" found in other statutes. In some fourteen or so states the statutes provide that certain homicides shall be murder in the second degree. In such jurisdictions the tests for the negligent murder are the same as they were at common law. The same interpretation will be true in those states which use "implied malice" to define the crime. The net result is that most jurisdictions describe the crime in terms of the common law. "A depraved mind," "a malignant heart," and "with malice aforethought" are all historic survivors and will be given a common law interpretation.

If, then, the common law and historic survivor statutory phrases are not satisfactory to describe the mental attitude requisite for the negligent murder, since all are outmoded and ambiguous, what other descriptive words or phrases can be used? The Model Penal Code suggests the phrase "committed recklessly under circumstances manifesting extreme indifference to the value of human life." The word "recklessly" is unfortunate here for it is the same word used by the Model Code in defining negli-

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23 See, e.g., N.Y. Penal Code § 125.25 where the new New York statute uses the phrase "depraved indifference."
24 For examples, see MORELAND 214.
25 Id. at 215.
26 The words and phrases used in statutes in various states may be found listed and categorized in MORELAND 213-25.
gence on the manslaughter level, but the phrase “extreme indifference to the value of human life” is equivalent to the “depraved mind” and other mental attitude phrases of the common law. The writer, faced with the problem in 1962 of selecting a suitable phrase to describe this attitude of mind in drafting the Kentucky statute on negligent manslaughter in the first degree (the equivalent of common law negligent murder), used the phrase “wanton disregard of human life and safety.” The phrase “wanton disregard of human life” is equivalent to the anti-social requirement found in common law negligent murder and current statutes as well.

The writer feels that the mental attitude of one who is “wantonly disregardful of” (wantonly indifferent to) human life and safety is satisfactorily understandable, but there are those who claim that the meaning of the word “wanton” is ambiguous. One of the dictionary phrases used to describe “wanton” is “arrogant recklessness.” The word “arrogant” is a rather strong one, but it hardly affords the connotation of the attitude required for the negligent murder. It is also unfortunate to use the word “reckless” with the word “wanton,” since “recklessness” is the key word for the negligent homicide on the manslaughter level. If the writer correctly interprets the attitude of the common law, one who commits a negligent murder has the mental attitude, “I don’t give a damn if I do kill somebody by my extremely dangerous act.” Of course, one cannot put that language into a statute, or hardly into an opinion or rule, but it illustrates the point. The phrase “wanton disregard” (or extreme indifference for) the lives and safety of others is the most satisfying one to describe the mental attitude of a person who would be guilty of placing others in such extremely dangerous situations. If that phrase were used the statute might read:

28 Id. at § 201.3(1)(a).
30 “A ... hunter shoots through a farm house with a high power rifle. He is not trying to hit anyone for he has no idea in what part of the building the occupants may be, but it is quite immaterial to him whether anyone is killed, injured, frightened, or not. The hunter is acting with a wanton and willful disregard of an obvious human risk and hence has malice aforethought. . . .” R. Perkins, Criminal Law 670 (1957). See Banks v. State, 85 Tex. Crim. 165, 211 S.W. 217 (1919); Commonwealth v. Malone, 354 Pa. 180, 47 A.2d 445 (1946).
Any person who causes the death of a human being by an act creating such extreme risk of death or great bodily injury as to manifest a wanton indifference to the value of human life under the circumstances shall be guilty of murder in the second degree and shall be confined in the penitentiary for not less than one nor more than fifteen years.\textsuperscript{31} [Term of punishment purely suggestive.]

First Alternate Statute

Is it possible to draft a negligent murder statute which would satisfy those who do not believe the word “wanton” should be used in the above statute? Any substitute for “wanton indifference” should not involve the word “recklessly”, a term which appears in both the negligent manslaughter and negligent murder provisions of the Model Penal Code,\textsuperscript{32} but should be reserved solely for the description of the negligent manslaughter since the word does not give the connotation requisite for the negligent murder; the “don’t give a damn if I do kill somebody by my dangerous act” attitude. Similarly to add an adverb to the word “reckless” and make the phrase “extremely reckless” simply would not raise a connotation of the “depraved” mind required. In addition, if the same word is used in describing both the negligent murder and the negligent manslaughter, judges and juries would have a most difficult time distinguishing the two. The use of the adverb “extremely” or some other word to distinguish the two would not be too helpful in providing accuracy. When does “reckless” become “extremely reckless?” It is like drawing the weight line between a “big bear” and an “extremely big bear.”

If, then, the word “wanton” does not appeal to the drafter of a negligent murder statute, the following statute, based in part on the Model Penal Code, section 201.2(1)(b) might be used:

Any person who causes the death of a human being by an act creating such a very high risk of death or serious bodily harm as to indicate under the circumstances extreme indifference to the value of human life shall be confined in the penitentiary

\textsuperscript{31} Compare KRS § 435.022(1).
\textsuperscript{32} MODEL PENAL CODE §§ 201.2(1)(b) and 201.3(1)(a).
for not less than one year nor more than fifteen years. [Term of punishment purely suggestive.]

Does this statute satisfy both the very high degree of danger and the reprehensible state of mind required under the common law? It is believed that it does. Of course, to reach that conclusion, it may be necessary to interpret the phrase "as to indicate under the circumstances extreme indifference to the value of human life" as an "inference of fact" from the act creating a very high risk of life. This creates an inference of the fact of the state of mind, required by the common law, from the circumstances.

Second Alternative Statute

It is further submitted that the requirement of a blameworthy state of mind in the defendant which still exists today in the majority of cases, in the statutes, and in the recommended provisions of the Model Penal Code, could be eliminated and the standard made admittedly objective by a slight rewording of the above statute.

Any person who causes the death of a human being by an act creating such a very high risk of death or serious bodily harm as to indicate under the circumstances extreme indifference to the value of human life, according to the standard of a reasonable man, shall be confined in the penitentiary (for not less than one year nor more than fifteen years). [Term of punishment purely suggestive.]

Under this statute the standard is not the defendant but a reasonable man under the circumstances. The cases indicate there has been no subjective determination of the defendant's mental attitude anyway. Juries under the "depraved mind" approach have been inferring defendant's attitude from the circumstances surrounding the case. What has been the standard in such interpretation? The jury. The juror is asked whether he had an attitude of extreme indifference. He answers that question by asking himself whether from his own interpretation of the circumstances he concludes there is an inference of the fact of

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extreme indifference. If the jury fails to find an inference of fact of extreme indifference, it may conclude there is an inference of fact of recklessness and that the defendant is therefore guilty of manslaughter.

All this, as a matter of theory, is an objective determination of a subjective fact by an inference of fact as to the defendant’s attitude of mind. But the objective determination is made by the jury, who consider themselves to be reasonable men. Thus the final result is the same as it would be if the standard were admittedly objective.

Nor have the courts faced the issue of inadvertent negligence in discussing the inference of fact. For example, in cases of drunkenness the courts almost invariably affirm a conviction, saying if the defendant was able to drive a car he was able to know the danger. This may well be an overstatement. The gist of the matter is that juries and courts are unwilling to let inadvertence, resulting from the defendant’s own activity or omission, serve as a defense in cases of drunkenness, sleepiness, fatigue, etc. Of course, such finding of fact of mental competence should be rebuttable under a subjective standard by an affirmative showing of mental incapacity because the act was inadvertent. But as one reads the cases, effective rebuttal simply does not appear. The writer made a somewhat detailed analysis of drunkenness cases and found that the courts generally do not refuse to affirm convictions because of inadvertence. It is suspected that juries and courts do not look with favor on that kind of rebuttal. After all, it is bad policy to allow one who drives while drinking or sleepy to escape criminal responsibility on the technicality that his negligence was inadvertent.

One should not be too severe with the courts in resorting to the evidentiary device of inference of fact. However, they can and should be blamed for insisting on a subjective standard and then applying what in effect is an objective one. It is highly arguable that the courts in the negligent murder should stop paying lip service to subjectivity, when it is clear that their standard is actually objective. Under such mental gymnastics, subjective “inadvertence” is fictitious.

34 Moreland 39-41.
There is no reason why the test should not be objective. In the first place, as to inadvertence and mens rea, the standard applied is in reality objective already. The writer is no friend of "liability without fault," but one can be at fault if judged by the standard of a reasonable man. One must meet community standards as to mental attitudes when coupled with dangerous acts, otherwise he has mens rea. In the ordinary case of inadvertence because of drunkenness, etc. where the defendant is at fault because he created his mental condition, he may be said to have mens rea. If one is just plain "dumb", the problem is more difficult. When one considers the number of serious crimes by those who are sort of mental "kooks" he will consider that the concept of mens rea needs a broadened definition, one that will give more social security. Sirhan Sirhan admittedly has a muddled mind. Yet the jury found him guilty of the "intentional" murder of Robert Kennedy. Perhaps the time has come for a restated substantive definition of mens rea so that the legal rule, as well as the jury, can provide community protection.

The question of whether negligence on the murder level should be objective is being increasingly discussed. The majority of cases, texts, statutes, and the Model Penal Code take the view that it is subjective because if it were objective, there would be no mens rea in cases of inadvertence. Mueller, Perkins, and Collings faced the problem frankly in recent articles, citing cases and texts pro and con, and concluded that cases of inadvertence force a subjective standard. Perkins went so far as to conclude that negligence in murder is different in kind from negligence and belongs under the label of "malice."

The writer has argued for years that negligence on the murder, as well as on other levels, should be objective and there is respectable authority for that position, quite notably Holmes. Justin Miller and May’s Criminal Law are in accord. Various

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35 Mueller, supra note 33.
36 Perkins, Alignment of Sanction with Culpable Conduct, 49 Iowa L.J. 325 (1964).
38 See, e.g., Moreland 36.
39 G. Holmes, supra note 19, at 55–56. See listing of his opinions taking that view, Moreland 37, n. 27.
commentators support the objective standard, citing American cases. A leading American case is Commonwealth v. Welansky, where the Massachusetts court said:

[E]ven if a particular defendant is so stupid [or] so heedless ... that in fact he did not realize the grave danger, he cannot escape the imputation of wanton or reckless conduct in his dangerous act or omission, if an ordinary normal man under the same circumstances would have realized the gravity of the danger. A man may be reckless within the meaning of the law although he himself thought he was careful.

The objective standard is used in the section on "Negligent Homicide" in the Model Penal Code, although the subjective standard is employed in the other sections on Negligence.

One problem remains. Since 1962 when KRS § 435.022(1) was adopted, there has been no negligent murder in Kentucky. The question arises whether the crime should be re-introduced in the state or whether that which would otherwise be punished as a negligent murder should continue to be penalized as involuntary manslaughter in the first degree under that statute. The suggested answer to that question will be deferred until the general discussion on Involuntary Manslaughter, infra.

C. The Felony Murder

Stephen's third category in the categorization of murder at common law by the requisite states of mind is the felony murder.


The social purpose underlying the requirement of compensation to the person harmed is not identical with that which forms the basis of punishment. Conceivably, therefore, the standard adopted in the criminal law of negligence might be entirely different from that used in the civil cases. This is not exactly the answer since the "measuring stick" here, as well as there, is the conduct of a reasonable man under like circumstances. But whereas the civil law required conformity to this standard, a very substantial deviation is essential to criminal guilt. Perkins, A Rationale of Mens Rea, 52 Harv. L. Rev. 914-915 (1948).

This is apparently contrary to his view as expressed elsewhere; for example, in the article cited supra, at note 36.

42 [I]f the jury come to the conclusion that any reasonable person, that is to say a person who cannot set up a plea of insanity, must have known that what he was doing would cause at least grievous bodily harm and the death is the result of that grievous bodily harm, then that amounts to murder. .... Regina v. Ward [1956] 1 Q.B. 351, 356 (C.C.A.).


If an unlawful killing occurred in the commission of a felony it was murder. The doctrine was under repeated attack\(^{45}\) because of its harshness, but it was not until the memorable decision of Judge Stephen in *Regina v. Serne*\(^{46}\) in 1887 that it was definitely determined that the felony in the course of which the killing occurred must be one *dangerous to life and likely in itself to cause death*. Notice that Stephen’s statement of the rule is worded in substantially the same language as that used in the negligent murder. Making the point even more clear, the opinion goes on to state that the intent to commit a felony is not enough unless the felony in itself is of such a kind as to show an act in committing it that will endanger life or cause bodily harm.

The 1957 English Homicide Act expressly abolished the felony murder rule in England.\(^{47}\) This is the logical and proper way to handle the felony murder, especially in light of *Regina v. Serne*. And yet, although abolished in England, and although it should be abolished in this country by statute or under the reasoning in *Regina v. Serne*, that is not what has happened. Instead, it lingers on in what may well be called *transition statutes*. These statutes have attempted to reduce the harshness of the common law doctrine by limiting the felonies applicable, usually to four. Some thirteen states classify homicides committed in the perpetration or attempted perpetration of arson, rape, robbery, and burglary as murder in the first degree or as simple murder where murder is not divided into degrees. Statutes in several states add to the above four the offenses of mayhem, kidnapping, or larceny. On the other hand, some statutes codify the common law making the statute apply “to any felony.” Other statutes are varied.\(^{48}\) The Model Penal Code\(^{49}\) continues the transition feature, adding two or three felonies, and raising a presumption of “recklessness and violence,” if a killing is committed in the commission or attempt to commit any of these felonies. To one who is no friend of “presumptions of law,” the device in the Model Code appears as an attempt to preserve a portion of the historic survivor, the felony murder rule. Taken

\(^{45}\) Moreland 42.
\(^{46}\) 16 Cox Crim. Cas. 311, 313 (1887).
\(^{47}\) 5 & 6 Eliz. 2, c. 11 (1957).
\(^{48}\) An attempted categorization of such statutes is in Moreland 217.
\(^{49}\) Model Penal Code § 201.2(1)(b) (Tent. Draft No. 9, 1959).
as a compromise, as a transition statute, it may well serve a temporary purpose. It would be better to abolish the felony murder rule and prosecute such killings as negligent murders. Then if the fact was that the killing was committed in the commission of a felony, the determining factors would be the amount of danger in the act and the indifference to human life and safety shown in its perpetration.

D. Killing An Officer In The Course Of His Official Duties

The fourth category in Stephen's analysis of murder embodied cases where an officer was unintentionally killed by the defendant while in the commission of his official duties. This category, developed as a protection of law officers, has passed from the law as a separate category. Like the felony murder, guilt may occur only if the act in the commission of which an officer was killed was extremely dangerous in itself and showed an extreme indifference to human life and safety. Thus, these cases too are now handled as negligent murders. There is no value in laboring the discussion as the doctrine, never very entrenched in the law, is at last, as Livingston Hall points out, "non-existent."

II. MANSLAUGHTER

A. Voluntary Manslaughter

Voluntary manslaughter at common law is generally said to be an unlawful homicide resulting from an intention to kill or do serious bodily harm to another which would be murder except for extenuating circumstances. The law recognizes that such "provocation" as might raise "heat of passion" in a reasonable man may serve as such a mitigating agent. In such cases the law could, since the killing is intentional, hold the accused guilty of murder. On the other hand, it might excuse him because of the extenuating circumstances. However, the present law takes an intermediate compromise position and holds the accused guilty

50 Moreland 59.
52 For a detailed study of voluntary manslaughter at common law see Moreland 64-98.
of voluntary manslaughter. A reasonable man should not kill under such circumstances, but occasionally, when overcome by emotion some do kill, and the law recognizing this frailty of human nature, reduces the offense if in fact the defendant was filled with heat of passion.\textsuperscript{58} The primary problem in a study of voluntary manslaughter, then, is to determine what are the exceptional circumstances which the common law has determined justify such a reduction and whether the same circumstances should serve as reducing agents today.

The common law recognized four and, in general, only four, situations of provocation which would reduce an intentional murder to involuntary manslaughter,\textsuperscript{54} although there are a few cases where other circumstances were deemed sufficient.\textsuperscript{55} These four situations constituting provocation are: (1) sudden, mutual combat, (2) the sight of adultery of one’s wife, (3) an assault and battery upon one’s person, and (4) an illegal arrest. Many considered the four recognized classic situations as too narrowly limiting what may raise sufficient “heat of passion” to reduce intentional murder to voluntary manslaughter. For example, words, no matter how approbatous, would not serve as such a reducing agent.\textsuperscript{56} Thus, in \textit{Freddo v. State},\textsuperscript{57} the defendant killed a fellow employee who called him a “son of a bitch.” It was held that this would not reduce the offense to manslaughter.\textsuperscript{58} Nor are gestures, however vile, sufficient. The deceased committed sodomy upon the defendant and told friends of the act. They made insulting gestures and the defendant killed the deceased. It was held the gestures, particularly when made some time after the occurrence, were not enough to reduce the killing to manslaughter.\textsuperscript{59}

\textsuperscript{58} The test of provocation is an objective one (the reasonable man) but if in fact the defendant, subjectively speaking, was not filled with the heat of passion, there is no reduction. So the law catches the defendant coming and going. See, e.g., Davidson v. Commonwealth, 167 Va. 451, 187 S.E. 437 (1936).
\textsuperscript{54} For a detailed discussion of these four situations see \textit{Moreland} 69-87.
\textsuperscript{55} \textit{R. Perkins, Criminal Law} 64 (2d ed. 1969).
\textsuperscript{56} \textit{Id.} at 61.
\textsuperscript{57} 127 Tenn. 376, 155 S.W. 170 (1912).
\textsuperscript{55} The defendant in this case was highly incensed. The judge recommended that the Governor exercise clemency. And yet, some people, “talk like that,” without meaning the phrase in its literal sense. One remembers the application of the phrase by President Harry Truman to one who had criticized his daughter’s singing.
\textsuperscript{58} \textit{State v. Gounagias}, 88 Wash. 304, 153 P. 9 (1915); \textit{R. Perkins, supra note 55}, at 63.
The somewhat limited categories of provocation outlined above were broadened by the English Homicide Act of 1957, which provided that the question of whether the provocation was enough to cause a reasonable man to lose his self-control should be left to the jury. The jury was to take into account everything both done and said in determining the question. This statute was embodied in the Model Penal Code in slightly modified language:

Criminal homicide constitutes manslaughter when:

(b) A homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonableness or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.

This broad definition of provocation is subjective; it is viewed from the actor's viewpoint under the circumstances as he believes them to be. However, his extreme mental or emotional disturbance must be "reasonable" in the eyes of the jury. This approach would seem best when all the circumstances are considered.

It is commonly said that the crime of intentional unlawful killing may be reduced to voluntary manslaughter solely by provocation. This is inaccurate, since several circumstances other than provocation have been held to reduce the offense. These situations are (1) the mental deficiency of the accused, (2) cases involving an imperfect defense of self or of another person, or of habitation, and (3) drunkenness.

In Kentucky, there are several cases holding that mental deficiency (diminished capacity) will reduce an intentional homicide to manslaughter on the ground that the deficiency prevents the accused from having the "intent" (malice) requisite for intentional murder. It would appear that the current test of insanity in Kentucky and in many other states as well, is so broad
that the "mental deficiency" rule of reduction is no longer needed for that purpose. The current test\(^6\) is whether the defendant at the time he committed the act did not have substantial capacity either to appreciate the criminality of his conduct, or if he did understand it, to resist the impulse to violate the law. In either case his conduct must have been the result of mental disease or defect. One who has some "mental deficiency" may well be said to come within the ambit of "mental defect." However, to find the defendant insane under the present Kentucky rule would result in complete acquittal. On the other hand, a finding of "mental deficiency" would result in a verdict of voluntary manslaughter, which would subject the defendant to a limited punishment. Thus, it may be argued that mental deficiency as a reducing agent should be continued for that reason.

The Model Penal Code provides that evidence of "mental disease or defect" may be introduced to show that defendant did or did not have a state of mind which is an element of the offense. An alternate provision provides that, in jurisdictions having the death penalty, evidence of "mental disease or defect" may be introduced as ground for mitigation of punishment.\(^6\) It is submitted that both provisions are ambiguous, as to the net result of such evidence. Also, why should a distinction be made as to capital offenses? The rule that such evidence may serve to reduce the offense from first to second degree murder or to voluntary manslaughter would seem more satisfactory. In Kentucky, which does not divide murder into degrees, the offense would be reduced to voluntary manslaughter. Note the provisions are stated in terms of "mental disease or defect," instead of "mental deficiency," to correlate with the Model Code definition of "insanity."

Imperfect defense of self, or of another person, or of habitation is well recognized in the common law as a reducing agent. These situations occur where the accused would be entitled to plead self-defense if he had not been at fault in bringing on the difficulty which resulted in the homicide.\(^7\) Also included in the imperfect self-defense category are those cases in which the slayer er-

\(^6\) Terry v. Commonwealth, 371 S.W.2d 862 (Ky. 1963).
\(^7\) Note, Criminal Law—Imperfect Self-Defense, 37 Ky. L.J. 334 (1948).
roneously and unreasonably believed that his life or the life of another was in danger or in which the accused used greater force than was reasonably necessary. Some of these cases expressly state that heat of passion is not always necessary to make out the offense of voluntary manslaughter.

Under the Model Penal Code, when the actor believes that the force he employs is necessary for his self-defense, his belief entitles him to justification although his belief is erroneous, except when he acts "recklessly, recklessly only, or with criminal negligence." These situations would then be murder, manslaughter, or criminal negligence respectively under the Model code. The actor should not have the benefit of the various grades of mitigation in such cases if his use of force under the circumstances was such a substantial deviation from the standard of care that would be exercised by a reasonable man under the circumstances as to continue either of the three grades of criminal carelessness.

The Model Penal Code follows the common law that voluntary intoxication is no defense to crime. However, intoxication that negates the accused's capacity to form the culpable mental state essential to the commission of the crime may serve as a defense because the prosecution cannot make out a requisite element of the offense. Thus, evidence of intoxication may be adduced to disprove the "intent" required for the offense. For example, larceny requires the specific "intent to take, carry away, and permanently appropriate to one's own use," but an intoxicated person may not have such specific intent.

But many crimes do not require specific intent. Thus, while an intoxicated person cannot be guilty of larceny, he may be guilty of a homicide requiring only "general intent." A defendant who was intoxicated at the time of the act can be guilty of the "reck-

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69 Note, supra note 62 at 447.
73 MODEL PENAL CODE § 3.09, Comment 2 (Tent. Draft No. 8, 1958).
75 Id. at 2.08(1).
lessness” required for voluntary manslaughter. However, he cannot be convicted of “premeditated” murder, or even “intentional” murder. So, while intoxication is not a defense to crime, it may prevent the prosecution from making out an essential element of a certain crime.76

B. Involuntary Manslaughter

An involuntary manslaughter is the unintended unlawful killing of a human being. Modern texts classify such killings under the broad heading of negligence. A major problem in a discussion of this category is whether the most wanton and extremely negligent of these homicides should be classified as negligent murder or as involuntary manslaughter in the highest degree. Another equally difficult problem is the wording of the statute defining the offense.

The definition which appears in KRS § 435.022(1) was the result of a study by the Legislative Research Commission in the early sixties. It reads as follows:

Any person who causes the death of a human being by an act creating such extreme risk of death or great bodily injury as to manifest a wanton indifference to the value of human life according to the standard of conduct of a reasonable man under the circumstances shall be guilty of involuntary manslaughter in the first degree and shall be confined in the penitentiary for not less than one nor more than fifteen years.

There are those members of both bar and bench who question the use of the word “wanton” in this definition as ambiguous. This term is being employed increasingly by the courts, however, primarily in connection with another word or phrase77 as a part of the definition of the negligent murder.

The use of the word “wanton” would seem appropriate in the construction of a statute. It is singularly appropriate to describe the attitude of mind of the individual who commits an extremely dangerous act and who, although there is no intention to kill, is indifferent as to whether death or serious bodily harm result. The

76 Id. at 2.08(2).
Model Penal Code builds its definition on the use of "recklessness" indicating extreme indifference under the circumstances. 78 But the word "reckless" is used in the Model Code's definition of the negligent homicide on the manslaughter level, 79 which naturally causes confusion since the shades of meaning differ in each of the two grades of negligence.

Faced with some doubt as to the clarity of meaning of the word "wanton" and not desiring to use the word "reckless," which is a part of the definition on a lower homicide level, the writer has cast about for another definition, more acceptable, perhaps, than either the one in KRS § 435.022(1) or the one in the Model Penal Code employing the word "recklessly." 80

One solution has been suggested by Gerhard Mueller, 81 who suggests that the proper connotative result might be achieved by omitting the use of any word, whether it be recklessly, wanton, or some other term. The Model Code hints at this possibility by stating in the Comments that the conception the draft employs is that of "extreme indifference to the value of human life." 82 Professor Wechsler, the Chief Reporter for the Model Penal Code, made a similar suggestion in proposing revisions to the Illinois Criminal Code several years ago. It was his recommendation that the actor should be guilty of a negligent murder when the death is the result of an act "which is utterly disregardful of the consequences." 83 If the descriptive word were thus omitted, the definition could then be worded to state that a negligent homicide would be murder when the death was the result of an extremely dangerous act and indicating under all the circumstances extreme indifference to human life and safety. Thus, the two elements would be satisfied: an extremely dangerous act and an indication under all the circumstances of extreme indifference to human life and safety. The circumstances might include the fact that the actor was driving while drinking heavily, that he was driving at high speed, that he had run several lights before the accident,

78 MODEL PENAL CODE § 201.2 and Comments (Tent. Draft No. 9, 1959).
79 See MODEL PENAL CODE § 201.8 (Tent. Draft No. 9, 1959).
80 See MODEL PENAL CODE § 201.2(1)(b) (Tent. Draft No. 9, 1959).
81 In a letter to the author.
82 MODEL PENAL CODE § 201.2(1)(b) Comment at 29 (Tent. Draft No. 9, 1959).
and that he was impudent and truculent at the time of the arrest.

It is believed that such a definition is fully descriptive of the requisites of the negligent murder. Of course, the same problem exists here as in the case of the use of the word "wanton." Would a jury or a judge know any better what is extreme indifference than what is wanton disregard? Such discussion illustrates the limitations of either words or phrases to portray exact meaning. Perhaps the use of phrases to describe the kind of act and attitude of mind requisite in the crime rather than the use of wanton is better because, while the word "wanton" is connotative of the type of person who would be guilty of such an act, the question is whether it is connotative to the average person in terms of negligence.

If, then, the use of the word "wanton" does not appeal to the drafter of a negligent murder statute and he prefers to use descriptive phrases to describe the offense, the following statute, modeled in part on the Model Penal Code, section 201.2(1)(b) might be used:

Any person who causes the death of a human being by an act creating such a very high risk of death or serious bodily harm as to indicate under the circumstances, extreme indifference to the value of human life shall be confined in the penitentiary for not less than one nor more than fifteen years. (Term of punishment purely suggestive.)

This is the First Alternative Statute discussed in the text on the negligent murder, supra.

1. Involuntary Manslaughter In The First Degree

The above discussion of negligent murder raised but did not resolve the question whether a negligent homicide arising out of an extremely dangerous act and an attitude of wanton disregard for human life and safety, should be punished as a negligent murder or as involuntary manslaughter in the first degree. It is the position of this writer that such a homicide should be involuntary manslaughter in the first degree. A number of commentators have also repudiated the concept of the negligent murder. For example, Rex Collings, a Professor of Law at the University of California School of Law at Berkeley after an exhaustive study of the area concluded:
By now it is no secret that I am firmly opposed to the "negligent murder" and the American equivalent, the "abandoned and malignant heart. . .".84 Collings suggests that in such cases the defendant under American Law can be convicted of involuntary manslaughter, if the negligent murder is repudiated. But he is also somewhat dubious as to whether manslaughter is not also indefensible, stating that lesser offenses such as reckless driving while intoxicated could apply.85 Collings has trouble with the problem of *mens rea*.

There is no great difficulty in satisfying the technicality of *mens rea*; the objection to the negligent murder is not technical but practical. Juries are loath to convict defendants on charges of negligent murder and, when they do, appellate courts are inclined to reverse the conviction. An examination of the cases noted in the American Digest System over the past twenty-five years reveals a few cases where the defendant was convicted of the offense. It may be argued that it is wise to keep the crime on the statute books in order to cover such cases. However, if the proper result were reached in the particular case, it might have been achieved by the application of some other doctrine, such as for example, that death was "practically certain" to result from such a dangerous act.

One must also take cognizance of the fact that the negligent murder is an old and well established concept and that it is included in the new Model Code of the American Law Institute and in the new English Homicide Act. Historic survivors are difficult to weed out of the law. When this writer began a study of homicide law forty-five years ago, malice aforethought, the felony murder, and murder occasioned by the killing of an officer in the course of his official duties were all embedded in the law. Today they have all been re-rationalized and modified, as have many other concepts. The law is continually changing, especially in the direction of becoming more lenient and humane. It pains modern students and practitioners to convict an individual of murder for an unintentional killing even though it was the result of negligent conduct.

Other approaches are available. The punishment for an unin-

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84 Collings, *supra* note 37, at 285.
85 Id. at 286.
tentional, negligent murder is ordinarily life imprisonment. In Kentucky, an individual who has been given a life sentence is eligible to seek a parole in six years. The punishment for manslaughter in the first degree is ordinarily fifteen to twenty years. The maximum punishment for involuntary manslaughter in the first degree (an offense which carries the same definition as a negligent murder) carries a maximum punishment of fifteen years in Kentucky. One is eligible to seek parole in four years. There is a potential two year difference in the time to be served but any such inconsistency may easily be ironed out. The point is that as far as actual punishment is concerned, there need be no great difference between a life sentence for negligent murder and a fifteen year sentence for involuntary manslaughter in the first degree. Any difference is adjustable.

The reluctance to convict of murder one who kills another unintentionally through his negligent conduct is illustrated by the experience of the study group which studied the entire subject of homicide under a resolution of the Kentucky Senate in 1960. When the question arose as to whether the negligent murder should be incorporated into the Kentucky law of homicide, that group voted four to one against the suggestion. It was the opinion of the majority of the group that murder was too harsh a penalty for an unintended killing by negligence even in cases where the negligence could be termed extreme.

Indeed, when what would have been the negligent murder provision was incorporated by the study group into the involuntary manslaughter provision in the first degree in the identical language and passed by the legislature in 1962, it was seven years before a conviction under that provision reached the Kentucky Court of Appeals. In the first case, Fugate v. Commonwealth, the Court reversed the conviction. Justices Osborn and Neikirk dissented. The defendant in the case was driving a pick-up without lights at dusk on a winding road at a speed of 40 to 45 miles an hour. There was evidence that he had been drinking. He struck the deceased who was about three feet "beside" the road, dragged the body about 25 to 30 feet without leaving skid marks, and went on without stopping. On the following day he attempted to hire

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88 Kentucky Institution Regulation 6 (1966).
87 445 S.W.2d 675 (Ky. 1969).
someone to wash the blood off the truck and threatened to “get” anyone who told on him. The majority and dissenting opinions do not differ on the law, only on the interpretation of the facts. Judge Osborn in his dissent considered that the facts showed a strong case of extreme carelessness and wanton disregard for human life and safety. This writer agrees with the dissent. What one must do in cases is to consider all of the circumstances—whether the defendant was driving without lights, evidence of intoxication, failure to stop or yield and the speed at which the defendant was driving as well as the defendant’s actions following the accident. Evidence of a defendant’s actions and remarks after a crime may have probative value to show his state of mind and emotion at the time of the alleged criminal act. As Judge Osborn points out, if he was not wantonly indifferent to the rights of others, why did he travel while drinking, with his lights out and at an unreasonable speed on a winding road in semi-darkness? Why did he leave a dying man on the side of the road? Why did he threaten to kill anyone who told on him? All of his actions relative to this accident show a wanton state of mind. The case indicates how difficult it is to obtain an ultimate conviction, even when the offense has been lowered to involuntary manslaughter in the first degree.

At the same term of the Kentucky appellate court, an opposite result was reached in the case of a woman who had also been convicted under KRS § 435.022(1). She had made and sold “heads,” a lethal mixture made by mixing a harmless liquid with paint thinner, to the victim who drank it and died. Examination of her premises showed several empty cans of the thinner and there was evidence of several sales of the mixture. The facts of the case are simple and it is clear that the concoction was extremely dangerous to human life. The only question then is whether her act could be considered “wantonly disregardful?” As in many of the “wantonly disregardful” cases, the defendant was of low character and was engaged in disreputable activities. It is much easier to convict such persons of wanton disregard. Who will raise a voice in their favor?

89 Brown v. Commonwealth, 449 S.W.2d 738 (Ky. 1969).
But should such an individual be convicted of murder? There are arguments both pro and con for omitting the negligent murder from a homicide statute. To omit the crime and punish such homicides as involuntary manslaughter in the first degree would not change existing Kentucky law. It is believed that entirely deleting it is more in accord with practicalities and with present tendencies toward further humaneness in the law. More and more juries and courts believe that murder is too harsh a penalty for such cases, even in situations of extreme negligence. While such killings are reprehensible, they are unintended—and that seems to be the decisive factor.\footnote{No statutes covering the negligent murder have been found in these nine states: Alaska, Indiana, Kansas, Kentucky, Louisiana, Nebraska, Ohio, Texas, and Wyoming. In these jurisdictions the offense is punished as a common law crime except in those states where common law crimes have been abolished or there is some statutory limitation, as in Kentucky.}

2. Involuntary Manslaughter in the Second Degree

Thirty-five years ago there were no clear-cut definitions of criminal negligence on either the manslaughter or murder level. Cases frequently enunciated the familiar rule that the negligence which must be proved in criminal trials was a far higher degree than that required in a civil suit.\footnote{Marye v. Commonwealth, 240 S.W.2d 852 (Ky. 1951). See generally R. Perkins, supra note 55, at 756.} Early cases often used the word “gross” to describe this greater degree. The word was also frequently used to describe civil negligence under certain circumstances but it was not helpful and has long since been discarded in both civil and criminal cases.

The first break in the confusion by the enunciation of a definite, descriptive and acceptable definition of criminal negligence was as to negligent manslaughter and came at approximately the same time in England, Canada, and the United States. The leading English case is \textit{Andrews v. Director of Public Prosecutions},\footnote{[1937] A.C. 576.} decided in 1937. The key definitive word in that case is “recklessness.” Prior to \textit{Andrews}, the courts had occasionally used the word in defining criminal negligence, usually in connection with another word, but that case was one of the first to single it out as the one most suited to describe the attitude of mind and conduct requisite to the crime. The court was specific: “Probably
of all the epithets that can be applied 'reckless' most nearly covers the case."\(^{93}\)

In Archbold's *Criminal Pleading, Evidence and Practice*, the author collects many cases which support the deduction: "Where death results as a consequence of a negligent act, it would seem that to create criminal responsibility the degree of negligence must be so gross as to amount to recklessness."\(^{94}\) This statement was cited with approbation in the Canadian case, *Rex v. Grisman*,\(^{95}\) where it was held that the negligence which merits punishment in the eyes of the law may be found where a "general intention to disregard the law is shown or a reckless disregard of the rights of others."\(^{96}\) The first half of this definition is worthless; the second, embodying "reckless disregard," contains the accurate, descriptive phrase then beginning its early development.

American courts have also accepted the word "reckless," eliminating less accurate descriptive terms. In *Commonwealth v. Gill*\(^{97}\) an attempt was made to clarify the kind of negligent conduct which gives rise to criminal liability. The defendant was charged with involuntary manslaughter occasioned by negligent driving. The trial court instructed that the slightest negligence was sufficient to sustain a conviction. The appellate court reversed the conviction, saying that more than ordinary negligence is required; a higher degree is necessary. The court said: "Carelessness or negligence resulting in death in order to be indictable as involuntary manslaughter, must have present in it an element of recklessness."\(^{98}\)

American text writers and commentators such as Perkins,\(^{99}\) Wharton,\(^{100}\) Berry\(^{101}\) and Harno\(^{102}\) uniformly use "recklessness" as the key word in describing criminal negligence on the man-

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\(^{93}\) *Id.* at 583.


\(^{95}\) [1926] 2 D.L.R. 738.

\(^{96}\) *Id.* at 743.


\(^{98}\) *Id.* at 108.

\(^{99}\) ... despite an unfortunate lack of uniformity in expressing the idea, there is a tendency to speak of the types of behavior amounting to criminal negligence in terms of 'reckless conduct' or 'recklessness.' R. Paxons, *supra* note 55, at 73.


slaughter level. And, the Model Penal Code uses the one word "recklessly" to describe the attitude of mind and conduct requisite for the negligent homicide on the manslaughter level.\(^{103}\)

While "recklessness" is the word most used to describe criminal negligence on the manslaughter level, it nevertheless must be admitted that it is still often linked with another word, such as carelessness, to define the offense. This is due to the fact that the description is an illustration of the prolixity in the law—never use one word to describe a legal concept, use three or four, then each will bolster the others.\(^{104}\)

If, then, "recklessness" is selected as the one word most accurately describing the attitude of mind and conduct requisite for criminal negligence on the manslaughter level, it is important that one using the term have an understanding of the meaning of the word. Here there is still an element of uncertainty. It is difficult to find or frame a wholly satisfactory definition of the word itself. The Model Penal Code has a description in the phrase, "conscious disregard of substantial and unjustifiable risk."\(^{105}\) Two problems exist in this definition.

First, it is difficult to distinguish between "disregard of substantial and unjustifiable risk" and the tort standard of negligence as "lack of the care that a reasonable man would exercise under the circumstances." Admittedly, it is often difficult to determine when carelessness has passed the point of lack of the care a reasonable man would take and crossed the threshold of "disregard of substantial and unjustifiable risk." The torts criterion is much easier to understand and apply by juries and judges. So, cognizance of the ambiguity of the current Model Code definition of "recklessness" leads one to an appreciation of the fact that as time passes the courts must further refine and clarify its meaning. Yet, it is a matter of great progress that presently the word "recklessly" has been chosen as the specific term in use to describe negligence on the manslaughter level.\(^{106}\) The use of this one word

\(^{103}\) \textit{Model Penal Code} § 201.3(1)(a) (Tent. Draft No. 9, 1959).
\(^{104}\) The writer is reminded of the attorney under whom he served as a law clerk. In a suit for specific performance of a contract, for example, he always alleged that the plaintiff had always been "ready, willing, eager, and desirous" of performing.
\(^{106}\) MORELAND 134,
to describe the requisite quality of mind and conduct and the elimination of all other loose words which manifestly are not accurate will in time result in further specificity of the definition.\(^\text{107}\)

The other problem in the definition of "recklessness" in the Model Penal Code is the use of the phrase "conscious" in the definition. This presents squarely the question: is criminal negligence on the manslaughter level subjective or objective? This question, probably the one which has occasioned more difficulty and difference of opinion than any other in the field of criminal negligence on all levels, is currently being widely discussed by the commentators. A considerable part of the discussion has been generated by Glanville Williams who distinguishes between "advertent" and "inadvertent" negligence.\(^\text{108}\) For criminal negligence, according to Williams, advertent negligence is a prerequisite.\(^\text{109}\) This writer does not consider the words too well chosen; both are somewhat ambiguous and neither appears common in the law. For advertent negligence to obtain, the actor must be "aware" of the reasonable risk he is creating. This writer much prefers to examine the problem under the usual labels of subjective or objective negligence.

At least three well-known writers in this field, Mueller, Collings, and Perkins, have examined the problem recently in considerable detail, all citing Williams in their discussions. Mueller follows the historic view that there can be no criminal liability without \textit{mens rea} and that consequently there should be no guilt in the case of inadvertent negligence.\(^\text{110}\) He insists on using the word "inadvertent" following Williams' labels, instead of employing the objective-subjective classification. However, Mueller admits that some American cases follow the objective view, even on the murder level. It is his position that in America there is no liability for unconscious negligence except where "severe disasters" arouse public opinion, citing \textit{Commonwealth v. Welansky},

\(^{107}\text{Contra, Mueller, The Devil May Care—Or Should We? A Reexamination of Criminal Negligence, 55 Ky. L.J. 29 (1966). "Any attempted explanation of the degree of negligence would be in vain. There is no thermometer of negligence, and no compass can measure its degrees. The difference between the criminal and the civil measure of negligence is that between an undifferentiated plus and minus." Id. at 32.}\n
\(^{108}\text{G. Williams, CRIMINAL LAW \$ 24 (2d ed. 1961).}\n
\(^{109}\text{G. Williams, supra note 108 at \$ 24; C. Kenny, OUTLINES OF CRIMINAL LAW §§ 22-25 (19th ed. by Turner, 1966).}\n
\(^{110}\text{Mueller, supra note 33, at 47.}\
the Coconut Grove disaster. Collings, who attempts to think his way through the cases and texts, apparently is best satisfied with the Model Penal Code’s definition of "recklessness" which requires "awareness." However, he points out that there are both cases and texts which apply the object standard on both the murder and manslaughter levels. The position of Jerome Hall, a brilliant although occasionally reactionary thinker, is that "recklessness" requires awareness, but that the jury may find awareness if they conclude that a reasonable man would have been aware under the circumstances.

At first blush the Model Code seems to state the subjective requirement of awareness in one sentence and the objective standard in the following sentence. The Code provides:

(c) Recklessly.

A person acts recklessly . . . when he consciously disregards a substantial and unjustifiable risk . . . . The risk must be of such a nature and degree that considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.

Why does not the Model Penal Code frankly use the phrase, “reasonable man,” instead of the phrase “law abiding person,” a phrase not used in the cases? Why coin a new phrase which must await judicial definition? Both Jerome Hall and the Model Code are using the reasonable man, not as a standard, but as a procedural device for determining awareness. The use of this device in this way is partly the reason that the courts are moving perceptively and somewhat rapidly towards a frank acceptance of the objective view of negligence on the criminal side on all levels.

By far the most accurate, clear, and rational statements as to the nature of criminal negligence appear in Perkins’ *Criminal Law*. Speaking of criminal negligence he states:

113 Collings, supra note 37.
114 J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW, 120, 121 (2d ed. 1960). See Mueller, supra note 33, at 34.
Some have urged that awareness should be requisite for criminal negligence but this is not the position taken by the common law. Whether negligence is criminal or ordinary (slight) depends not upon the element of awareness but upon the degree of the negligence. If harm has resulted from a failure to use the degree which the ordinary reasonable man would have employed under the circumstances, it has resulted from negligence; but it was not criminal negligence unless the conduct fell far short of measuring up to the standard. Whereas the civil law requires conformity to the standard there has been no criminal negligence without a 'gross' deviation from the standard of care that a reasonable person would observe under the actor's circumstances.\textsuperscript{116}

This quotation states the position of this writer. It leads to this statement: civil and criminal negligence are the same in kind; they differ only degree.\textsuperscript{117}

Perkins faces the subjective-objective problem squarely in a subsequent study of "recklessness." Again he points out that although Williams and Hall require "awareness" of the danger, "judicial use of the term has usually not included such a requirement."\textsuperscript{118} Perkins is exactly right; a subjective requirement of awareness on the manslaughter level is almost wholly the creature of the commentators, not the cases. Perkins points out that the Model Penal Code employs "recklessness" and "negligence" as mutually exclusive terms but in the Restatement of Torts,\textsuperscript{119} reflecting existing judicial usage, no element of awareness is included.\textsuperscript{120} Some commentators in requiring awareness have reached an illogical result in the negligence concept making negligence necessarily subjective on the manslaughter level.

Why not frankly use the objective criterion of the "reasonable man" as the standard on the criminal side as well as on the civil? The standard would be the same on both, the only problem being to describe the greater degree of negligence required on the criminal side, and it would indeed be true that civil and

\begin{itemize}
\item \textsuperscript{116} R. Perkins, \textit{supra} note 55, at 72 (emphasis added).
\item \textsuperscript{117} Nail v. State, 33 Okla. Crim. 100, 106, 242 P. 270, 272 (1925).
\item \textsuperscript{118} R. Perkins, \textit{Criminal Law} 760-61 (2d ed. 1969).
\item \textsuperscript{119} \textit{Restatement (Second) of Torts} § 500 (1965).
\item \textsuperscript{120} "The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind." \textit{Id.} at comment g.
\end{itemize}
criminal negligence would be the same in kind, differing only in degree. The greatest advance in the law of negligence on the civil side occurred when the objective "reasonable man" was adopted as the criterion in civil negligence.\textsuperscript{121}

The supposed requirement that it be subjective on the criminal side is because of the problem of mens rea. But, as Perkins points out, the word "negligence" has been commonly employed by the criminal courts, "whether the unreasonable risk was created advertently or inadvertently."\textsuperscript{122} The courts, with few exceptions, do not speak specifically of mens rea. When they do, they ordinarily use the reasonable man as a procedural device, in order to determine its existence. And it is true in most cases that if a reasonable man would have recognized the danger, the defendant saw it, unless he fell below the standard of a reasonable man. For example, infants have a lower standard,\textsuperscript{123} physicians and surgeons have a higher standard.\textsuperscript{124} The law also takes into consideration unusual physical characteristics in individuals. For example, an individual who is blind is judged by the reasonable-man standard but the fact that he is blind is "a part of the circumstances."\textsuperscript{125} On the other hand the law makes no allowance for those of less than normal intelligence unless they are insane.\textsuperscript{126} Mueller makes much of these variations in the standard of the "reasonable man," thinking that they illustrate not only the flexibility of the law but a result of subjective justice of unusual individuals.\textsuperscript{127} Perhaps, as Mueller suggests, further categorization of groups above or below the standard of the reasonable man would result in further refinement in the standard and further justice in a quasi-subjective way.

If the suggestions herein were followed and criminal negligence on the manslaughter level were frankly made objective, there would be little change in the actual results in the law as now applied. An increasing number of cases and texts already employ the objective standard. Moreover, the increasing tendency to use

\textsuperscript{122} R. Perkins, supra note 55, at 761.
\textsuperscript{123} Mooreland 143.
\textsuperscript{124} Id. at 151.
\textsuperscript{125} Id. at 157.
\textsuperscript{126} Id. at 160.
\textsuperscript{127} Mueller, supra note 33, at 44.
the reasonable man as a procedural device to determine awareness is hocus pocus reaching the same result that would be reached if the objective man were frankly used as the standard.

If this change were made, little change need be made in the description of the crimes herein discussed. For the negligent manslaughter the definition then might well be:

Any person who causes the death of a human being by reckless disregard of a substantial and unjustifiable risk of danger to human life and safety under the circumstances, according to the standard of a reasonable man, shall be guilty of involuntary manslaughter. . . .

Similarly, an objective negligent murder statute (or negligent manslaughter in the first degree statute if the crime is reduced) might read:

Any person causing the death of a human being by an act creating such a very high risk of death or serious bodily harm as to indicate under the circumstances extreme indifference to the value of human life, according to the standard of a reasonable man, shall be guilty of. . . .

To make criminal negligence objective would not create liability without fault. This writer is no advocate of liability without fault, but a negligent act is a faulted act. Negligence itself is a "blameworthy state of mind," and satisfies any reasonable, modern conception of mens rea. It is the cases of so-called "inadvertent negligence" that cause difficulties, because at the time of the killing the defendant may not have had realization of the danger. But that does not mean that he was not criminally negligent. Hall mentions several of these situations:

If . . . one who is about to drive an automobile knows that he is ill or very tired or if he drinks alcoholic beverage knowing this will incapacitate him, subsequent damage may . . . be attributed to the immediately prior conduct . . . [I]t is tenable . . . that he was reckless, not merely negligent. . . . So, too, a

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128 The suggested statute is a combination of KRS § 435.022(2) (1962) and the definition of recklessly in the Model Penal Code § 2.02(2)(e) (Proposed Off. Draft, 1962). This writer is not satisfied with this definition of recklessly but is unable to provide a better one at this time. That is grist for tomorrow's mill.

129 This suggested statute is a combination of KRS § 435.002(1) (1962) and the Second Alternative Negligent Murder Statute, in the text, supra, in this study.
Hall is bothered by the fact that in such cases the homicidal act is non-voluntary. But an act need not be voluntary to be criminal. Three of the four situations Stephen categorized in his celebrated analysis of common law murder are unintentional. One who takes several drinks and drives an automobile, or drives knowing he has not had enough sleep, or knows he is responsible for intricate railroad instrumentalities and fails to read regulations, has been criminally negligent if a homicide is caused thereby. His act is reckless in most of these cases. Indeed, it may even be so extremely careless as to indicate under the circumstances the extreme indifference requisite for murder. Hall in his analysis of so-called inadvertent negligence cases has failed to take account of at least two factors important in criminal negligence: (1) the importance of the instrumentality in use and (2) the importance of other circumstances in determining negligence on all levels, civil and criminal. It is submitted that in inadvertent negligence cases, advertent negligence exists in the background under this type of analysis. There may be rare exceptions, but they are so rare that it is almost impossible to hypothecate such a situation.

Hall is so extreme in his hypothesis that negligence should never be criminal that he brushes aside the history of several hundred years and the realities of situations such as these. Hall and Holmes are as far apart as the poles! Holmes appreciates the fact that an individual should be criminally responsible for negligent conduct that is deeply injurious to the community. If a reasonable man in the community would consider the act, or omission to act where there was a duty to do so, to be extremely community-dangerous, Holmes would hold the actor criminally liable if a death occurred thereby. Hall, on the other hand,

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131 J. STEPHEN, supra note 3, at 80-81.
132 See, e.g., Hall, supra note 130.
133 O. HOLMES, supra note 19, at 55-56. While Holmes never had the opportunity to pass upon the question directly in any case, he incorporated his view as dictum in a number of cases. See Commonwealth v. Pierce, 138 Mass. 165, 178 (1884) and the discussion and citations to opinions by Holmes, MORELAND 37.
fanatically devoted to a narrow, non-realistic conception of mens rea, is so interested in the mental element behind acts that he disregards community danger and dangerous conduct. But Hall is gradually losing his battle, the law is moving perceptively toward the Holmes objective position, as one who reads current cases and commentators discovers.

This writer does not wish to labor the following fairly small matter, but the criminal law, in total disregard of mens rea, has long punished the individual who contrary to community standards refuses, for religious reasons, to provide medical care for his sick child, and death occurs. Suppose that a father has a very sick child but refuses to call in a doctor because he is very religious and believes in the efficacy of prayer. Let it be understood that the father is sincere and is doing what he subjectively believes to be best for his child. Nevertheless, the father is guilty of a criminal homicide if the child dies because he did not have medical attention. Admittedly, these cases are somewhat of an anomaly in the law, but they do exist in considerable numbers and represent what is wholly an objective standard.134

The Reporters who framed the chapter on Homicide in the Model Penal Code were unduly impressed by the writings and opinions of Hall. Hall, unlike the cases and unlike most commentators, takes the position that no negligence should be criminal. The Model Code also takes that position as to negligence on the very lowest level in an offense the Code calls Negligent Homicide.135 The Model Code and Hall insist that the recklessness required for manslaughter and for murder require an awareness. This is not supported by Holmes, by current English cases,136 by a number of American cases, nor by many commentators. In the Code's definition of recklessness137 the procedural device of the reasonable man is used to make out the subjectivity of awareness; but this device, also used in many cases, is really a use of the objective standard in two steps, as argued above. In addition, the Code's definition of murder, built on "recklessness," the same word

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134 The father is held to the objective standard of the community in such cases. See the cases and comments in the footnote, Moreland 127 n. 38 (1952).
136 Id. at comment.
used in the description of manslaughter, is difficult of application.  

C. Criminal Negligence In The Operation Of A Motor Vehicle—
"Negligent Homicide," In The Model Penal Code

A high percentage of homicides are committed by the negligent operation of automobiles. In 1957, for example, there were an estimated 5,740 manslaughters by negligence, of which perhaps 99% involved automobiles. And yet it has been notoriously difficult to convict the negligent motorist of involuntary manslaughter. Several reasons have brought about this situation. First, juries are loath to place the harsh label of manslaughter on a defendant in such cases. Secondly, involuntary manslaughter is a very serious offense, with a severe penalty of imprisonment and fine, too harsh juries generally feel for an unintentional killing under such circumstances. Finally, jurymen all drive cars and realize that they too are negligent on occasion, so they are apt to be somewhat lenient as to the penalty. They, too, may some day be in the dock charged with a similar offense.

Consequently, a number of states chose the expedient of creating a new substantive crime by legislation, with a new name and a lesser penalty to alleviate the situation. The first and still the best article on this new legislation is a study by Stefan Riesenfeld, published in 1936. In that article he points out that Michigan promulgated the first of such statutes. Other states followed suit, until such legislation became quite common. The Michigan statute provided that the offense should be included within every charge of manslaughter. This gave the jury an opportunity to convict of the lesser offense if they did not desire to convict of ordinary manslaughter. Negligent homicide was defined as driving in a "careless, reckless, or negligent manner," poor descriptive adjectives in the light of later statutes in other jurisdictions. The punishment provided was a $1,000 fine, or five years imprisonment, or both.

141 See the Michigan statute, Moreland 246 (1952).
142 Riesenfeld, supra note 140, has an Appendix analyzing such statutes.
The Kentucky Negligent Homicide In The Operation of An Automobile Statute, KRS § 435.025, was the outgrowth of the Court of Appeals decision in Mayre v. Commonwealth, reversing a conviction of involuntary manslaughter based upon ordinary negligence, and ruling that nothing less than gross negligence could suffice for criminal liability. Gross negligence was defined in the opinion as "the failure to exercise slight care." This definition was severely criticized. It was the consensus of opinion that under such a definition of criminal negligence it would be practically impossible to secure a conviction of involuntary manslaughter. An editorial in a Lexington newspaper stated that "slight care in the operation of an automobile is practically no care at all!" A Kentucky Statute, subsequently enacted, provides:

Any person who, by negligent operation of a motor vehicle, causes the death of another, under circumstances not otherwise punishable as a homicide, shall be imprisoned in the county jail for not more than one year.

This statute satisfies the purpose of such automobile legislation in that it provides an offense less than ordinary involuntary manslaughter for the offense; not using the manslaughter label at all, and has a punishment of only one year imprisonment in the county jail. However, the use of the word "negligent" to define the offense is ambiguous in that the word does not indicate the degree of negligence required for the offense. After a certain amount of uncertainty, the Court of Appeals determined that ordinary negligence was sufficient for liability. Thus one may be liable both civilly and criminally for the same negligent act under this statute.

As might be expected in the case of such new and perhaps transitional legislation, these statutes differ in their detail in the various states. For example, words and phrases describing the negligence required for liability under such legislation include: "gross negligence," "reckless, willful or wanton disregard of the safety of others," "negligent operation of a motor vehicle," "reckless disregard for the safety of others," "careless, reckless or negli-

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143 240 S.W.2d 852 (Ky. 1951).
144 KRS § 435.025 (1952).
145 Kelly v. Commonwealth, 267 S.W.2d 536 (Ky. 1954).
gent manner, but not wilfully or wantonly,” “culpable negligence,” “without due caution and circumspection,” “a higher degree of negligence than required for civil liability,” “wilful, wanton and reckless conduct,” “the act as a consequence of which death occurs must be unlawful; no degree of negligence is required,” and “the degree need be no more than ordinary negligence.” A casual inspection indicates not only the diversity of such descriptions in the various states, but also the fact that some of them show a rank ignorance in the whole area of criminal negligence generally. They illustrate the vast ambiguity and error often found in new and novel legislation and decisions based thereon.

Occasionally such statutes have been extended to negligent homicides in the operation of motor vehicles other than automobiles. For example, such legislation has been held to cover negligent homicide in the operation of a motor-boat. The original plan of such legislation was in part, if not largely, to remove the label of manslaughter. The Model Code has created a new offense which is a degree less than manslaughter in the second degree. In other words, the new offense is still a felony, although a lesser felony than manslaughter. The Model Penal Code provision also broadens such legislation to include all other negligent homicides caused by “gross” negligence as well as those in the operation of an automobile. Thus, the new Model Code provision not only covers the old series of automobile cases, but also moves on to cover all other unintentional homicides not committed “recklessly” or “recklessly with extreme indifference, but with awareness.” The net result of such a provision is to cause the current series of statutes called “negligent homicide in the operation of an automobile” to have the effect of “transitional legislation.” The additional Negligent Homicide provision also does not necessarily require “awareness;” the act may not be inadvertent. This new section (201.4) is the only provision of the Model Code embracing homicide which codifies criminal negligence as such. But the framers of the Model Code are unwilling to do away with their

146 See Riesenfeld, supra note 140, for an analysis of these statutes in the Appendix to the article. See also MODEL PENAL CODE § 201.4, Comments (Tent. Draft No. 9, 1959).
requisite of subjective “awareness.” 148 As suggested above, if the objective reasonable man test were permitted on this level of negligence (and the requisite of mens rea thus satisfied) it would appear that, at least as a matter of theory, mens rea should be satisfied under the objective test in the higher (manslaughter and murder) provisions of the Model Code. 149

While general approval is in order for section 210.4 of the Model Code, there are several features of the section which could readily be improved. The definition of “negligently” in the Model Code is woefully ambiguous. There are two elements in the definition: (1) the actor should “perceive” a “substantial and unjustifiable risk,” and (2) the act must involve a “gross deviation” from the standard of care of a reasonable person. 150 The same two elements plus “awareness” appear in the Model Code definition of “recklessly.” 151 Admittedly, the drafting of a comprehensive definition of negligence is difficult, but that does not change the fact that both these elements are vague and ambiguous. What is a “substantial and unjustifiable risk?” That is for the jury to decide. Perhaps, but reasonable men may differ greatly in applying the terms to the circumstances of particular cases on two negligence levels. Secondly, the word “gross” has been kicked around in the civil and criminal law for over a hundred years without a consistent definition ever being arrived at by the courts. For example, the definition of the Kentucky Court of Appeals of “gross negligence” as “want of slight care” 152 is illustrative of the ambiguity of the word. The phrase “substantial and unjustifiable risk” is also badly ambiguous and the word “gross” on both the civil and criminal sides has been found so indefinite and uncertain that it has been practically abandoned.

Is the new “Criminal Negligence” provision in the Model Penal Code a broadening of the “Homicide In The Operation Of An Automobile” statutes or is it an independent approach to the entire criminal negligence problem based largely on the elements of “awareness” and “unawareness?” This writer believes it is the

148 MODEL PENAL CODE § 201.4 Comment (Tent. Draft No. 9, 1959).
149 See Hart, The Aims of The Criminal Law, 23 LAW & CONTEMP. PROB. 401, 416-17 and especially the Conclusion in italics at 440-41 (1948).
151 See also n. 148.
152 Kelly v. Commonwealth, 267 S.W.2d 536 (Ky. 1954).
latter, a new fundamental approach to the whole negligence problem which has gone off almost wholly on a distinction between awareness and unawareness. It is true the Model Code uses the reasonable man standard, as do many cases, as a procedural device to permit the jury to determine awareness, and using the reasonable man as a procedural device to make out subjectivity may well be a transitional move toward objectivity; but, as a matter of theory, objectivity has not yet arrived in the Model Code. As for the automobile cases, it is submitted that they are absorbed in the new general provision on "Negligent Homicide."

It is with such dissatisfactions with the definitions of negligence in the Model Penal Code in mind that an attempt will now be made to draft a statute on the lowest level of criminal negligence that will be more clear and unambiguous. Such a statute might well read:

Where an accused person is guilty of a homicide arising out of a dangerous act of more than ordinary negligence under the circumstances, but less than recklessness, according to the standard of a reasonable man, he is guilty of Negligent Homicide.

The decisive elements of this definition are clear and well-established. The definition of ordinary negligence is well-known—one is liable for ordinary (civil) negligence when he fails to use the care that a reasonable man should use under the circumstances. If his carelessness is not of that high a degree, he is not liable at all. If his negligence is of a higher degree than ordinary negligence, it is criminal negligence. The line between these two degrees of negligence plots the line between civil negligence and criminal negligence of the lowest degree. It is true that the test for civil negligence is worded generally and broadly, but juries and judges have had no great trouble applying it to specific cases. It has been almost above criticism by lawyers and the courts.

Similarly, when criminal negligence on the lowest level crosses the line into recklessness on its upper level, the accused is guilty of manslaughter. The line between criminal negligence

on the lowest level and recklessness on the higher one marks the
decisive point between these two degrees of negligence.

This definition of criminal negligence on the lowest level may
be shown by a graph as follows:

**Civil Negligence—Criminal Negligence On Lowest Level**

A. Ordinary or Civil Negligence  
B. Lowest Degree of Criminal Negligence  

Less care than a reasonable man would use under the circumstances.  
A higher degree than ordinary negligence is required.  

A > B (and beyond)

The degree of negligence increases in this direction from A to B (and beyond).

Where there were formerly three degrees of negligence (1) ordinary negligence (civil), (2) the negligence requisite for manslaughter and (3) the negligence required for murder, there are now four degrees. The Model Penal Code has added an additional degree, to come between ordinary negligence and the negligence required for manslaughter in the third degree. This naturally increases the difficulty in drawing definitions for the various degrees of criminal negligence.

Various propositions have been argued pro and con in this paper. In order that the reader may see with more particularity, the ultimate suggestions the writer has in mind, the following rough draft is presented:

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154 See analogous graph, Moreland 32 (1952).
**Suggested Statute**

**Murder.**

Any person who commits wilful murder shall be punished by confinement in the penitentiary for life, or for a minimum of fifteen years before becoming eligible for parole.

**Voluntary Manslaughter.**

(1) An unlawful homicide, which would otherwise be wilful (intentional) murder shall constitute voluntary manslaughter when:

- (a) committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be.

- (b) the person who committed the killing or was a party to it was at the time so intoxicated as to be unable to form the wilfulness (intent) requisite for murder.

- (c) the person who committed the killing or was a party to it was at the time of the crime, although not legally insane, suffering from such mental disease or defect as to substantially impair his mental responsibility for his acts or omissions in doing or being a party to the killing.

(2) Any person who commits voluntary manslaughter shall be confined in the penitentiary for not less than two nor more than twenty-one years.

**Involuntary Manslaughter In The First Degree.**

Any person who causes the death of a human being by an act creating such a very high risk of death or serious bodily harm as to indicate under the circumstances extreme indifference to the value of human life, shall be confined in the penitentiary for not less than one year.
nor more than fifteen years.\(^{155}\) (Term of punishment purely suggestive.)

*Involuntary Manslaughter In The Second Degree.*

Any person who causes the death of a human being by reckless disregard of a substantial and unjustifiable risk of danger to human life and safety under the circumstances, according to the standard of a reasonable man, shall be guilty of involuntary manslaughter in the second degree and . . . (Punishment optional).

*Criminal Negligence.*

Where an accused person is guilty of a homicide arising out of a dangerous act of more than ordinary negligence under the circumstances, but less than recklessness, according to the standard of a reasonable man, he is guilty of Negligent Homicide.

\(^{155}\) This is the negligent murder reduced to involuntary manslaughter in the first degree, as a matter of social policy. Three statutes with different wordings are suggested in the paper in the section devoted to the negligent murder. This is the second alternative statute suggested.