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A SUGGESTED HOMICIDE STATUTE FOR KENTUCKY*

By Roy Moreland**

In no other state, perhaps, is the law of homicide as unsatisfactory and confused as in Kentucky. This is largely due to the inertness1 of the legislature but the courts have contributed in part to the present chaotic condition of the law by unsound reasoning and the use of faulty fictions.

The general situation in this state as to the several offenses involving homicide may be expressed in a few broad statements. The crimes of murder and manslaughter are not defined by statute, although the punishment for willful murder and voluntary manslaughter are prescribed.2 This results in the acceptance of the common law definitions for these offenses.3 Involuntary manslaughter is a common law misdemeanor punishable under section 431.075 of the Kentucky Statutes by imprisonment in the county jail for a term not exceeding twelve months or by a fine not exceeding $5000, or both.4 A supplemental, anomalous statute punishes an unintended homicide occurring in the course of striking, stabbing, or shooting by providing a penalty of confinement in the penitentiary for not less than one nor more than six years.5 Various other supplemental statutes provide for the punishment of specific acts resulting in homicide.6

The writer has just finished an extended study of the law of homicide culminating in a book.7 It is the purpose of this paper

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* The opinion of the Bar as to the suggestions contained in this article is invited and letters agreeing or disagreeing with it in whole or in part will be appreciated.

** A.B., Transylvania College, 1920; LL.B., University of Kentucky College of Law, 1923; J.D., University of Chicago Law School, 1928; S.J.D., Harvard Law School, 1942. Published: A Rationale of Criminal Negligence, 1944; The Law of Homicide, 1952; contributor to various legal periodicals. Professor of Law, University of Kentucky College of Law, since 1926.

1In the case of Ky. R.S. 435.050 (1948) it is due to the ineptness of the legislature.
2 Ky. R. S. secs. 435.010 (1948) and 435.020 (1948).
4 Ky. R. S. sec. 431.075 (1950 Supp.).
5 Ky. R. S. sec. 435.050 (1948).
to turn the findings of that study to account in examining the Kentucky law and in making recommendations for its improvement. To that end, it is planned to restate the common law in summary form as to the various categories of homicide, to examine the statutory regulation of the crime in the various states and, finally, to make specific suggestions for statutory reform in this jurisdiction.

I. Murder

Perhaps the most sound and practical categorization of the common law as to murder is the one promulgated by Judge Stephen in 1883 in his History of the Criminal Law of England. Certainly it is the one most frequently mentioned in legal writings and in decisions. Stephen in dealing with the subject of malice aforethought as used in murder at common law places the state of mind requisite for murder in four categories:

"Malice aforethought means any one or more of the following states of mind preceding or co-existing with the act or omission by which death is caused, and it may exist where that act is unpremeditated:

(a) An intention to cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not.

(b) Knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.

(c) An intent to commit any felony whatever.

(d) An intent to oppose by force any officer of justice on his way to or returning from the execution of the duty of arresting, keeping in custody, or imprisoning any person whom he is lawfully entitled to arrest, keep in custody, or imprison, or the duty of keeping the peace, or dispersing an unlawful assembly, provided that the offender has notice that the person killed is such an officer so employed."

\*\* For a Kentucky citation of Judge Stephens' analysis of murder, see Turner v. Com., 167 Ky. 365, 369, 180 S.W. 768, 770 (1915).
These four categories furnish the most feasible framework, it is believed, for an examination of the law of murder, both at common law and under modern statutes. Each category will now be discussed in turn.

(a) **Intentional Murder.**

"An intention to cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not."

This category embodies what is commonly called the intended murder at common law. It includes not only those homicides which the killer actually "willed" and hoped for, but also those where his conduct was such that death or grievous bodily harm was "substantially certain" to follow from his act.11 This is because if one does an act of such extremely high probability for a tragic result, he will not be heard to say he did not intend it. Or perhaps the law considers that he is *lying* when he says he did not intend the result.

It is to be noted that the rule also covers a situation where the actor did not intend to *kill* but only to do grievous bodily harm. Such a situation is undoubtedly something short of actual intention to kill but closely akin to the negligent murder to be discussed in category (b), *infra*, where conduct "wantonly disregardful of the lives and safety of others,"12 resulting in the death of a human being, is punished as murder at common law. In such a case the actor is guilty if the degree of negligence is sufficiently high, an intent to kill or to do harm not being required. It may well be argued that a homicide arising out of an intent to do grievous bodily harm only should also be in category (b) but it was in the intended murder category at common law and remains there today in the absence of a statute.13

The common law brought another situation within the orbit of the "intended" murder, although an actual intent to kill the deceased was not present. This occurred in the case of so-called "transferred" intent. Thus, if A intending to kill B missed him

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and killed C, who might be his best friend, the law "transferred" A's intent to kill B to C and held A guilty of intended murder.\textsuperscript{14}

\textit{Proof of Intent}

"Intention" is a state of mind which, of necessity, is known only to the accused. If the defendant pleads guilty, this subjective fact is made known; if he does not plead guilty, it devolves on the jury to determine whether the killing was an intentional one. It sometimes happens that the one who intentionally kills utters language at the time of the attack which clearly indicates his intent to kill or to do grievous bodily harm. When, however, he does not indicate his purpose by words it may be possible for the jury to infer it from his conduct at the time of the killing.\textsuperscript{15}

The common law raised an \textit{inference of intent} based upon conduct in at least two instances. Very early in the law it became the rule that once it was proved that the defendant committed a killing it was \textit{inferred} that he did it with express malice (intentionally), thus putting the burden on him of proving circumstances of alleviation, excuse or justification. However, the House of Lords repudiated the rule in a recent English decision,\textsuperscript{16} it has been repeatedly criticised,\textsuperscript{17} and it is believed and hoped that Kentucky would not apply it at the present time if the question were properly presented.\textsuperscript{18} It is a dangerous inference at the best for it may not be true in the particular case. Moreover, it interferes with the prosecution's duty to prove the defendant guilty and the jury's function to find him guilty beyond a reasonable doubt.

The common law raised a second inference of intent from conduct in the case where the killing occurred from the use of a deadly weapon. This was because a deadly weapon used in a deadly manner is so likely to produce death or serious bodily harm that it was thought not to be too harsh to raise an inference

\textsuperscript{14} "... if A. by malice aforethought strikes at B. and missing him strikes C. whereby he dies, tho he never bore any malice to C, yet it is murder, and the law transfers the malice to the party slain." 1 HALE, \textit{PLEAS OF THE CROWN} (ed. of 1778) 466. Shelton v. Com., 145 Ky. 543, 140 S.W. 670 (1911); Wheatley v. Com., 26 Ky. L. Rep. 436, 81 S.W. 687 (1904). See Note, 34 Ky. L. J. 224 (1946); Note, 35 Ky. L. J. 78 (1946). A number of Kentucky cases are cited in these notes.

\textsuperscript{15} See the discussion, Perkins, A \textit{Re-examination of Malice Aforethought}, 43 \textit{YALE L. J.} 537, 549 (1934).

\textsuperscript{16} Woolmington v. The Director of Public Prosecutions, A. C. 462 (1935).

\textsuperscript{17} See, for example, MAY, \textit{CRIMINAL LAW} sec. 165 (4th ed. 1938).

\textsuperscript{18} See the discussion, MORELAND, \textit{THE LAW OF HOMICIDE} 21 et seq. (1952). See also the critical and excellent note by Selby Hurst, Note, 34 Ky. L. J. 306 (1946).
of an intent to kill from its use. The doctrine has been subject to occasional sharp criticism but it remains firmly entrenched in the law.

What changes have been made by the Kentucky legislature in the common law of intended murder? The only Kentucky statute is one which punishes "willful" murder by confinement in the penitentiary for life, or by death. The courts look to the common law for the definition of "willful" murder. There are no degrees of murder in Kentucky.

Similarly, there are no degrees of murder at common law and in England all murder is punished by death to this day. However, most jurisdictions divide the crime into degrees by statute today. The primary purpose in doing this has been to relieve the harshness of the situation at common law and in England by limiting the use of the death penalty. The division of the crime into degrees with the death penalty reserved for the first degree only accomplishes this purpose, it is believed.

Pennsylvania was the first state to adopt this expedient of mitigating the rigor of the common law by dividing murder into degrees and the most common definitions of both first and second degree murder are still the ones derived from this pioneer Pennsylvania Act of 1794.

The definition of first degree murder under the Pennsylvania Act included (a) "wilful, deliberate and premeditated killing," and (b) homicide occurring in the commission of certain named felonies. The most common modern statutory definition of second degree murder, also derived from the Pennsylvania Act is, in substance, "all other homicides which would have been murder at common law."

It will be noted that the Pennsylvania Act introduces the word "premeditated" into the definition of "intended" murder in de-
fining murder in the first degree. Intended murder which is not premeditated is murder in the second degree under the Pennsylvania Act and under most modern statutes.

Is the use of the word "premeditated" to divide intended murder into degrees a wise policy? It is believed that it is. This conclusion is determined largely by the belief that while all intended murder is heinous it should not all be capitaly punished.26 The deliberate, coldblooded, planned murder is more heinous than one which, while intended, is committed without premeditation under the stress and strife of the immediate circumstances which precipitated the killing.

The Kentucky statute changes the common law in that it provides a choice of imprisonment for life or death as the punishment for intended murder. However, contra to the statutory situation in most states, the discretion is wholly in the jury as to which punishment will prevail. It is believed that it would be better to follow the general rule and divide intended murder into two degrees, the degree depending upon whether the intended homicide was committed with or without premeditation.

It is further recommended that the statute define the word "premeditation." Experience in other states has shown that the courts have done much to water down or defeat the legislative purpose by their interpretation of the meaning of "premeditation." While the word means "meditation ahead of time," it does not indicate how much ahead of time. The courts quite naturally gradually narrow the period of time required for the act to be premeditated until it is finally said that the requisite period can be satisfied in a few seconds.27 To prevent this judicial defeat of the intent of the legislature it is recommended that the legislature fix the meaning of the word by defining it.28

The following intended murder statute, which embodies the suggestions above, is recommended:

"Sec. ... Murder in the first degree defined. The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed:

26 Indeed, the death penalty has been abolished in all cases in Maine, Michigan, Minnesota, South Dakota and Wisconsin. Id. at 703, fn. 11.
27 See the searching criticism of Justice Cardozo, Cardozo, Law, Literature and Other Addresses 97-99 (1931).
28 See the discussion, Moreland, The Law of Homicide 207 (1952).
From a deliberate and premeditated design to effect the
death of the person killed, or of another. The word ‘de-
liberate’ as used in this statute means formed, arrived at,
or determined upon as a result of careful thought and
weighing of consequences. The word ‘premeditated’ means
thought on, and revolved in the mind beforehand; contrived
and designed previously.20

Sec. . . . Murder in the second degree defined. Such
killing of a human being is murder in the second degree,
when committed with a design to effect the death of the
person killed, or of another, but without deliberation and
premeditation.”

(b) The Negligent Murder.

Stephen’s second category of murder at common law is worded
as follows:

“Knowledge that the act which causes death will prob-
ably cause the death of, or grievous bodily harm to, some
person, whether such person is the person actually killed or
not, although such knowledge is accompanied by indiffer-
ence whether death or grievous bodily harm is caused or
not, or by a wish that it may not be caused.”

This category embraces the common law negligent murder.
The early English cases and classic common law treatises enumer-
ate a serious of extremely dangerous acts, the doing of which is
said to evince a “depraved heart regardless of human life” and
to warrant a conviction of murder if a death results from such
conduct. Early writers differ as to the basis of liability in such
cases but they are generally considered to come within the general
concept of negligence and to be distinguished from the negligence
required for manslaughter by the relatively higher degree of
danger involved in the act. Various phrases have been used to
describe this higher degree of negligence required for the negli-
gent murder but there seems to be an increasing tendency to de-
scribe it as “conduct wantonly disregardful of the lives and safety
of others.”20 The key word is wantonness whether the noun, ad-
verb, or adjective is used.

20 WEBSTER, NEW INTERNATIONAL DICTIONARY (2nd ed. 1944). See the ex-
cellent article, Keedy, History of the Pennsylvania Statute Creating Degrees of
Murder, 97 UNIV. PA. L. REV. 759 (1949), noting especially 771 fn. 96. See also,
REP. OF LAW REV. COM. OF N. Y. 561, et seq., especially at 564.
20 See MORELAND, A RATIONALE OF CRIMINAL NEGLIGENCE 63-65 (1944). See
Tincher, Proposed Statutory Reform in the Law of Negligent Homicide in Ken-
tucky, 30 KY. L. J. 341, 356 at fn. 84 (1942).
Most of the states have statutes incorporating the negligent murder. Under some of these statutes the crime is murder in the first degree;⁴¹ in most states the offense is murder in the second degree. Various phrases are used in these statutes to describe the kind of conduct requisite for the negligent murder but almost all of them are attempted codifications of the common law. They are therefore subject to the criticisms commonly leveled at the common law definitions of the offense. The phrases used do not describe either the crime or the act with sufficient certainty. They are picturesque but not satisfying; all are ambiguous.

In an attempt to incorporate the principles of the common law in describing the very high degree of dangerous conduct requisite for the negligent murder and yet use phraseology which is reasonably clear and certain of interpretation, the following statute is submitted:

"The un-intentional killing of a human being, unless it is excusable or justifiable, is murder in the second degree, when committed: . . .

By an act so extremely dangerous and disregardful of the lives and safety of others as to be wantonly disregardful of such interests according to the standard of the conduct of a reasonable man under the circumstances."

In this statute the phrase "so extremely dangerous . . . as to be wantonly disregardful . . ." has been substituted for the picturesque but ambiguous phrases commonly used to describe the depraved conduct required for liability as negligent murder. The standard of conduct chosen is an objective one, that of the "reasonable man," which is the standard of conduct in criminal negligence on the manslaughter level.⁴² The statute punishes the offense as murder in the second degree, the rule in most jurisdictions.

Now what is the situation in Kentucky as to the negligent murder? There is no Kentucky statute specifically embodying the offense and there is confusion in the cases as to whether it survived as a common law crime in this state. There is one line of cases

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⁴¹ For example, it is murder in the first degree in New York. N. Y. CONSOL. LAWS, PENAL LAW, sec. 1044 (Thompson, 1939).
⁴² As to a choice between the subjective and objective standards of care for criminal negligence on the murder level, see the discussion, MORELAND, THE LAW OF HOMICIDE 36 (1952).
holding that it did not. *Ewing v. Commonwealth*, representative of this series, states that while at common law malice would be implied from a shooting arising out of the reckless use of a firearm, the doctrine of implied malice is rejected in Kentucky. The court went on to say:

"When we reject the doctrine of implied malice, the issue of malice is a question for the jury, and the offense which would otherwise be murder becomes voluntary manslaughter, where under the evidence the jury find as a fact that the killing was not done with malice aforethought. Accordingly it has been held in Kentucky in a long line of cases that, where one kills another by the wanton, reckless, or grossly careless use of firearms, the offense, if without malice aforethought, is voluntary manslaughter, although he had no intention."

Thus, this line of cases apparently led to the introduction in this state of the preposterous doctrine of negligent voluntary manslaughter, accepted in no other jurisdiction, and criticised in some detail later in this article.

Another line of cases holds that the common law negligent murder did survive in this state. The leading case supporting this view is *Brown v. Commonwealth*, where the accused fired a pistol in a crowded room killing one of the occupants. The court affirmed a conviction of murder saying:

"If he did this not with the intention of killing anyone, but for his diversion merely, but killed one of the crowd, he is guilty of murder; for such conduct establishes 'general malignity and recklessness of the lives and safety of others, which proceed from a heart void of just sense of social duty and fatally bent on mischief.'"

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129 Ky. 237, 111 S.W. 352 (1908). Other Kentucky cases in accord are cited in this decision.

*Id.* at 241, S.W. at 354.

The rule that the wantonly negligent use of firearms resulting in death is voluntary negligent manslaughter is again enunciated in the later case of *Lucas v. Com.* 231 Ky. 76, 21 S.W. 2d 113 (1929) where the court said:

"We are concerned in this case with manslaughter as a result of felonious negligence, for it is apparent the accused was found guilty under the instructions covering it. In many cases this court has declared that, where one kills another by the wanton, reckless, or grossly careless use of firearms, the offense is voluntary manslaughter, although he had no intention to kill."

See also, *Davis v. Com.* 193 Ky. 597, 237 S.W. 24 (1922).


*Id.* at 373, S.W. at 221.
This is an acceptance of the common law negligent murder;\textsuperscript{38} even the wording of the opinion is couched in the picturesque phraseology of old writers in their discussions of that crime.

The net result of these two lines of decisions is that there is case authority in this state for three different crimes involving homicide arising out of criminal negligence,—murder, voluntary manslaughter and involuntary manslaughter. Gregory\textsuperscript{39} and Roberson\textsuperscript{40} both cite cases supporting all three crimes in their texts on Kentucky criminal law. This has, of course, resulted in a great deal of confusion.

What should be done about it? In the first place, the crime of negligent voluntary manslaughter should be repudiated and weeded out of Kentucky law. There can be no such thing as a negligent voluntary manslaughter,—the very name is a contradiction in terms.

The problem has been somewhat clarified, although by no means solved, by the passage of a statute by the 1950 legislature. This statute\textsuperscript{41} limits the punishment for all common law crimes, the punishment for which is not provided by statute, to a maximum imprisonment of one year. This statute eliminates the possibility of punishing the common law negligent murder in this state at the present time, since the punishment of involuntary manslaughter, a lesser crime, is greater than provided for by this statute. Unfortunately, the crime of negligent voluntary manslaughter continues under this statute.

The legislature should adopt a statutory program that would provide for the punishment of criminal negligence on all levels and eliminate the voluntary negligent manslaughter. If this were done, it would be unnecessary to repeal Kentucky Revised Statutes, section 431.075 (1950), since this statute is applicable only to common law offenses.

\textsuperscript{38} See also, Hill v. Com., 239 Ky. 646, 40 S.W. 2d 261 (1931); Guinn v. Com., 11 Ky. L. R. 615, 12 S.W. 672 (1889); Collier v. Com., 2 Duval 163 (Ky. 1865). See GREGORY, KENTUCKY CRIMINAL LAW, PROCEDURE AND FORMS sec. 70 (1918); ROBERSON, NEW KENTUCKY CRIMINAL LAW AND PROCEDURE secs. 358-362 (2nd. ed. 1927).

\textsuperscript{39} GREGORY, KENTUCKY CRIMINAL LAW, PROCEDURE AND FORMS sec. 70 (1918).

\textsuperscript{40} ROBERSON, NEW KENTUCKY CRIMINAL LAW AND PROCEDURE secs. 358-362 (2d. ed. 1927).

\textsuperscript{41} Ky. R. S. sec. 431.075 (1950).
In drafting such a complete program for the statutory punishment of homicides arising out of criminal negligence the first problem to be considered would be whether it is wise to have a crime of negligent homicide with a punishment of greater severity than involuntary manslaughter. Most states have considered it wise and so have the crime of negligent murder, either by statute or under the common law. Kentucky seems to sense such a need in her adoption of the illogical and technically impossible negligent voluntary manslaughter.

It is therefore considered that it would be best to incorporate the negligent murder in the new statute. The definition of the offense in the suggested statute on page 146, supra, is recommended. The maximum punishment for the crime should not be greater than life, it is believed, although the offense is statutory murder in the first degree in a number of jurisdictions.

(c) The Felony Murder

The third category in Stephen’s analysis of common law murder embodies the felony murder doctrine. The common law rule was that if a death occurred in the commission of an unlawful act it was murder or manslaughter depending upon whether the unlawful act out of which the killing arose was a felony or a misdemeanor. This was extremely harsh, particularly as to the felony murder. Judge Stephen leveled a number of vitriolic attacks at the felony murder rule and wrote an opinion in a case which did much to soften its impact. This case, Regina v. Serne, held that if a homicide occurred in the commission of a felony, it would not be murder, unless the felony in itself was one dangerous to life and likely in itself to cause death.

It will be immediately perceived that stating the rule in this manner, it becomes parallel with the rule of negligence in the case of the negligent murder. The cases show an increasing tendency to make the two rules parallel stating that it is not the fact that the accused was committing a felony when the homicide occurred that makes him liable but it is because his act was one so extremely dangerous as to make it wantonly disregardful of the lives.

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42 See Stephen’s analysis, supra, p. 140.
43 16 Cox C. C. 311 (1887).

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of others. This conception of the felony murder doctrine is commonly incorporated in modern statutes which make one who kills while committing a felony guilty under the felony murder rule only when the felony is arson, rape, robbery or burglary,—all felonies ordinarily extremely dangerous in themselves to human life and safety. It only remains to put the affirmative burden on the prosecution to show extreme danger in the act of the accused which caused death in each and every case and some cases have taken this ultimately correct position.

There is no statute embodying the felony murder in Kentucky but it survived as a common law crime in this state. In Commonwealth v. Reddick, the first reported case in the state dealing directly with a homicide in the commission of a felony, the accused burglarized and burned a hotel, where he knew people were living, causing the deaths of three persons. The court pointed out the natural danger in his acts and held that he was guilty of murder although he may not have intended the killings. The question of proximate cause was not presented on the appeal although the facts would undoubtedly support a finding of proximate cause.

Two later decisions, Williams v. Commonwealth and Marion v. Commonwealth, subscribe to the felony murder doctrine but neither of the opinions is clear as to the requisite degree of danger in the felony out of which the homicide arose. In these cases the homicides allegedly arose out of robbery, a felony ex-

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45 People v. Goldvarg, 346 Ill. 398, 178 N.E. 892 (1931) (arson); Williams v. Com., 258 Ky. 830, 81 S.W. 2d 891 (1935) (robbery); People v. Pavlic, 227 Mich. 562, 199 N.W. 373 (1924) (selling liquor, statutory felony) (defendant was not convicted).
46 These are the four felonies incorporated in the statutes of thirteen states. For example see, ALA. Code, tit. 14, sec. 314 (1940); 10 OHIO GEN. CODE ANN. sec. 12400 (Page 1939).
47 See the cases cited in fn. 45, supra.
49 17 KY. L. R. 1020, 33 S.W. 416 (1895).
50 258 Ky. 830, 81 S.W. 2d 891 (1935).
51 269 Ky. 729, 108 S.W. 2d 721 (1937).
52 See Note, 29 KY. L. J. 130, 131 (1940).
tremely dangerous under most circumstances. In the Williams case the court stated that robbery is a crime "which tends to the injury of another." This is a weak statement if the court intends to follow that line of cases which holds that the felony must be "extremely dangerous in itself." Nothing is said in the opinion about proximate cause.

The Marion case simply states that a homicide committed while in the commission of "any other felony" is murder. It may well be argued that the court applied in this decision the historic rule that a homicide arising out of the commission of any felony, regardless of the danger involved, is murder.

In Whitfield v. Commonwealth, the fourth case in the Kentucky series, the defendant was indicted jointly with two others for the crime of willful murder by setting fire to a house and burning a child to death. The evidence showed that the defendant was not near enough to aid and abet in the crime. A conviction was accordingly obtained under an instruction on conspiracy. The defendant contended, inter alia, that the court erred in not submitting to the jury the question of whether the killing of the child was the natural consequence of the burning of the house and therefore within the purpose of the conspiracy. The appellate court affirmed the conviction, holding that there was no doubt that the death of the child was the natural result of burning the house and that therefore it was not necessary for the conspiracy instruction to submit this question for the determination of the jury. This case, it is submitted, is of no value in determining whether the Kentucky courts require a felony extremely dangerous in itself to sustain a conviction of murder under the felony murder doctrine because the conviction was based upon conspiracy and that technical fact made it necessary for the court to determine that the homicide was the natural result of the conspiracy in order to sustain the conviction.53

The last case in the felony murder series in Kentucky is Simpson v. Commonwealth, decided in 1943. This decision, at least so far as language would indicate, follows the historic rule that a

52 278 Ky. 111, 128 S.W. 2d 208 (1939).
54 293 Ky. 831, 170 S.W. 2d 869 (1943).
homicide occurring in the commission of any felony is murder. Another writer has given the case this same interpretation.\textsuperscript{55}

It may be concluded that the Kentucky cases dealing with the felony murder are confused and uncertain. There is doubt whether the more modern and more acceptable rule that the felony in itself must involve an act extremely dangerous to life and safety is the rule or whether the court has continued to apply the historic doctrine that a homicide occurring in the commission of any felony is murder. It is impossible to determine whether the Kentucky court would require that the felony be the proximate cause of the homicide, some courts do not.\textsuperscript{56}

With the situation in this condition, the Legislature in 1950 passed the statute,\textsuperscript{57} mentioned in the discussion of the negligent murder,\textsuperscript{58} which limits the punishment for all common law crimes, the punishment for which is not provided by statute, to a maximum of one year. This statute, as in the case of the negligent murder, eliminates the felony murder in this state, for all practical purposes, since the punishment for involuntary manslaughter, a lesser crime, is greater than provided for by this statute.

The question now arises, What should be the program for the future as to the felony murder in this state? It is suggested that no statutory action at all be taken as to this offense. The crime is practically out of the working law of the state at the present time because of section 431.075 of the Kentucky Statutes, and it is deemed unwise to resurrect the offense. The adoption of the negligent murder statute recommended, supra,\textsuperscript{60} would afford a means for the prosecution of any homicide arising in the commission of any felony where the felony was one extremely dangerous to human life and safety under the circumstances of the case and it was the proximate cause of the homicide.\textsuperscript{60} This would fill the gap left by the elimination of the felony murder\textsuperscript{61} and reach a result in accordance with modern trends.

\textsuperscript{55} Note, 36 Ky. L. J. 106 (1947).
\textsuperscript{56} See People v. Kaye, 43 Cal. 802, 111 P. 2d 679 (1941) and Note, 36 Ky. L. J. 106, 108 (1947).
\textsuperscript{57} Ky. R. S. sec. 431.075 (1950).
\textsuperscript{58} See the discussion, p. 148, supra.
\textsuperscript{59} See page 146, supra.
\textsuperscript{60} See the discussion, Note, 36 Ky. L. J. 106 et seq. (1947).
\textsuperscript{61} If a specific felony murder statute were desired, it might be incorporated in the negligent murder statute as follows:

"Sec. ......... Murder in the second degree defined. The killing of a human
(d) Homicide in Resisting Arrest

The fourth category in Stephen's analysis of murder incorporates the common law rule that killing an officer while resisting a lawful arrest is murder.\(^6\)

The rule, however, is considered by modern writers to be unsound and hazardous.\(^6\) Resistance to lawful arrest was only a misdemeanor at common law and is generally placed in the same category in modern penal codes, so the offense, at most, should be no more than manslaughter. And to take one further step, since the misdemeanor-manslaughter doctrine has broken down, except where the misdemeanor is dangerous in itself,\(^6\) the rule under discussion is superfluous today. Such situations fit logically into the negligence category, on either the manslaughter or murder level, depending upon the degree of danger created by the resistance to the arrest.

But, while the rule is generally repudiated, it survived as a common law crime in this state. \textit{Dilger v. Commonwealth}\(^6\) is often cited by subsequent cases as establishing the rule in Kentucky. In that case the defendant in resisting lawful arrest killed the officer with a "deadly bowie knife." The court in affirming the murder conviction said:

"The law did not require that they should have been told that the killing must have been malicious. The officer is the minister of the law. He represents its majesty. His person is therefore clothed with a peculiar sanctity. An assault being, unless it is justifiable or excusable, is murder in the second degree, when committed:

"b. Unintentionally, by an act so extremely dangerous and disregardful of the lives and safety of others as to be wantonly disregardful of such interests according to the standard of conduct of a reasonable man under the circumstances.

(1) The unintentional killing of a human being perpetrated in committing arson, rape, robbery or burglary shall be deemed homicide by an act constituting wantonly dangerous conduct as defined in this section, provided the arson, robbery, burglary or rape was extremely dangerous in itself under the circumstances and the homicide was the proximate result of its commission."\(^6\)

For a discussion of statutory regulation of the felony murder in the various states, see \textit{Moreland, The Law of Homicide} 217 (1952). See also, Perkins, \textit{A Re-examination of Malice Aforethought}, 43 \textit{Yale L. J.} 537, especially at 566-570 (1934).

\(^6\) See Stephen's analysis, supra, page 140.
\(^6\) See the discussion, infra, pp. 166-168. The modern rule in the case of both the felony murder and the misdemeanor manslaughter is that the crime out of which the homicide arose must be dangerous in itself. This makes the offenses parallel with the negligent murder and the negligent manslaughter respectively.

\(^6\) 88 Ky. 550, 11 S.W. 651 (1889).
upon him, when properly engaged in the execution of his duty, is an assault upon the law; and if he be stricken down at such a time . . . by one knowing him to be an officer, it is murder, although the doer may not have any particular malice.”

This decision illustrates a point common to these cases. While the conviction of murder was based upon the rule under discussion, it might better have been grounded on the reasoning that since the accused attacked the deceased with a deadly bowie knife, it might have been inferred from his use of a *deadly weapon* that he killed him with *express* malice. An article in the Cornell Law Quarterly states that *all* such cases could have been decided on other and sounder grounds.

At any rate, as in the case of the common law negligent murder and common law felony murder, the crime has ceased to have practical value in this state because of the passage by the legislature in 1950 of the act limiting the punishment for all common law crimes, the punishment for which is not provided by statute, to a maximum imprisonment of one year. This statute causes the crime to have no present vitality. It is accordingly recommended, that no statutory action be taken as to the offense. As in the case of the felony murder, the crime is out of the working law of the state because of section 431.075 of the Kentucky Statutes, and it should not be resurrected. The adoption of the recommended negligent murder statute would make it possible to punish the slayer in such cases where he has acted in wanton dis-

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6 Id. at 561, S.W. at 653.

The last Kentucky case applying the common law rule that a homicide in resisting an officer or other person in performing his official duty is murder was Elliott v. Commonwealth, 290 Ky. 502, 161 S.W. 2d 633 (1942). Elliott killed a county jailer in attempting an escape from jail. The appellate court in affirming a conviction of murder, said: "Where an officer is killed in the discharge of his duty 'it is not necessary to constitute the crime of murder that the slayer should have had any particular malice,' provided, of course, that the slaying was not done by the accused in defending himself from an act of the officer in excess of his powers and authority as such." Id. at 505, S.W. at 635. See also Cornett v. Com., 198 Ky. 236, 248 S.W. 540 (1923); Donehy v. Com., 170 Ky. 474, 166 S.W. 161 (1916); Fleetwood v. Com., 80 Ky. 1 (1882). See ROBERSON, NEW KENTUCKY CRIMINAL LAW AND PROCEDURE, sec. 365 (2d ed. 1927); GREGORY, KENTUCKY CRIMINAL LAW, PROCEDURE AND FORMS sec. 76 (1918).

7 The author of the article states that he has not found a *single* case where the decision might not have been put on another ground. Dickey, *Culpable Homicide in Resisting Arrest*, 18 CORN. L. Q. 373, 376 (1933).

85 Ky. R. S. sec. 431.075 (1950 Supp.).

86 Ibid.

90 See page 146, supra.
regard of the officer’s life and safety. If his negligence were less than wanton but of a sufficiently high degree to constitute reckless conduct under the circumstances, he could be punished under the recommended negligent involuntary manslaughter statute to be discussed later in this paper. If his conduct is neither wanton nor reckless, he should not be guilty of any criminal homicide.

II. INTENTIONAL (VOLUNTARY) MANSLAUGHTER

Before discussing the Kentucky cases relating to intentional or voluntary manslaughter, it will be helpful to restate briefly the situation at common law. Voluntary manslaughter at common law is an unlawful homicide resulting from an intention to kill or to do grievous bodily harm to another which would be murder except for some sort of extenuating circumstance. The primary problem, then, in a discussion of voluntary manslaughter is to determine what circumstances the law recognizes as sufficiently extenuating to cause an intentional killing to be voluntary manslaughter rather than intentional murder. The law has long recognized four situations which raise sufficient “heat of passion” in a reasonable man to justify letting them serve as mitigating circumstances. Those four situations 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.

There are Kentucky decisions to the effect that sudden, mutual combat, the sight of adultery of one’s wife, and an assault and battery upon one’s person constitute sufficient “provocation” to reduce what would otherwise be an intentional murder to volun-

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71 Perkins, Rationale of Mens Rea, 52 Harv. L. R. 905, 917 (1939).
72 See the recommended statute at page 166, infra. For the general discussion of unintentional homicide arising out of an unlawful act on the manslaughter level, see pp. 166-168, infra.
73 For a detailed study of intentional (voluntary) manslaughter at common law, see the discussion, Moreland, The Law of Homicide, pp. 64-98 (1952).
74 See the discussion, id. at pp. 69-73.
75 See the discussion, id. at pp. 82-86.
76 See the discussion, id. at pp. 70-71.
77 See the discussion, id. at pp. 77-82.
79 Harris v. Com., 236 Ky. 666, 33 S.W. 2d 666 (1930) (dictum). Roberson, op. cit. supra, note 78, sec. 389.
tary manslaughter. Whether an illegal arrest by an officer will serve as provocation in this state is doubtful. It is believed that the common law and majority rule that it may is the better one. While one should not kill to prevent an illegal arrest, nothing raises greater heat of passion in the breast of a liberty-loving person, and the law does well to compromise with one whose emotions are so sorely pressed as to hold him guilty of voluntary manslaughter rather than murder, if he does kill the offender of his person, because of heat of passion engendered by the unlawful arrest.

It is commonly said that cases of intentional killing are "reduced" to voluntary manslaughter, if at all, by provocation. However, as several writers have pointed out, there are a number of cases holding that there are a few situations where a defendant may be convicted of voluntary manslaughter on the ground of an extenuating circumstance other than provocation. In other words, the provocation category is too narrow to encompass all of the cases of voluntary manslaughter. Among the extenuating circumstances, other than provocation, which may cause an intentional homicide to become voluntary manslaughter are, (1) situations involving an "imperfect" defense of person or habitation, and (2) the "partial" insanity of the accused.

(1) Situations of "imperfect" defense of self or habitation.

Situations of "imperfect defense of self or habitation" occur where the defendant would be entitled to plead self-defense or defense of habitation under the facts of the case if he had not been at fault in starting the difficulty which resulted in the homicide. If he were permitted to plead self-defense or defense of habitation he would be excused and he would be guilty of no crime; since he started the controversy he is denied the right to do so but the law instead of holding him guilty of murder because of the intentional

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81 Alsop v. Com., 4 Ky. L. R. 547, 11 Ky. Op. 851 (1882) held that the illegality of the arrest would not serve as a provocation to reduce the offense to voluntary manslaughter. See Dickey, Culprable Homicide in Resisting Arrest, 18 Conn. L. Q. 373, 386, fn. 40 (1933). But see, Wright v. Com., 85 Ky. 123, 2 S.W. 904 (1887) (illegal arrest by private person).

82 See the discussion, Moreland, The Law of Homicide 77-82 (1952). And see, Dickey, op. cit. supra, note 81, at 387.

83 Note, 36 Ky. L. J. 462 (1946).

84 Note, 86 Ky. L. J. 443 (1948).
killing, compromises by holding him guilty of voluntary man-
slaughter only. In *Tabor v. Commonwealth*, a Kentucky case, the accused and two brothers had a difficulty the day preceding the homicide but separated without bloodshed, one of the brothers saying, "There will be another day." The following day was Sunday and the defendant approached one of the brothers as he stood among a crowd of men and made certain remarks which were de-
signed to further the previous day's altercation. The brother im-
mediately made a reply whereupon the accused fired at him. Thereupon, the second brother threw a rock at the accused in aid of his brother upon which the defendant turned and shot, killing him. At the trial the defendant's plea was self-defense but he was convicted of voluntary manslaughter because by his own actions he had induced the necessity for the homicide, and thus could not avail himself of "perfect" self-defense.

Somewhat similar to the "imperfect" self-defense cases are those in which the slayer erroneously and unreasonably believes himself in danger of attack by the deceased. Some of these de-
cisions expressly state that heat of passion is not always necessary to make out the crime of voluntary manslaughter. Thus, the judge stated in one of these cases:

"It is not always necessary to show that the killing was done in heat of passion to reduce the crime to manslaughter, for where the killing is done because the slayer believes that he is in great danger, but the facts do not warrant such belief, it may be murder or manslaughter according to the circumstances, even though there be no passion."

*Gadd v. Commonwealth*, a Kentucky decision, seems to be one of these cases where the defendant erroneously believed that he was in danger of attack and was convicted of voluntary manslaughter rather than murder.

(2) Reduction to voluntary manslaughter because of the "partial insanity" of the accused.

The law is that a mental defect is not a defense to a criminal

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86 Note, 36 Ky. L. J. 443, 446 (1948).
89 26 Ky. L. J. 443, 447 (1948), citing cases.
90 Allison v. State, 74 Ark. 444, 88 S.W. 409, 413 (1904).
91 305 Ky. 318, 204 S.W. 2d 215 (1947).
action unless it is sufficient to constitute what amounts to legal insanity in the particular jurisdiction. In determining what is legal insanity, most courts adhere to the so-called "right and wrong test." A substantial number of jurisdictions, however, add "irresistible impulse" to the test for criminal insanity; if the accused was irresistibly impelled to commit the criminal act, he is not responsible. Kentucky is one of the jurisdictions which add irresistible impulse to the "right and wrong" test in determining whether the accused is capable of having the intent requisite for a criminal act.

There is a certain trend toward allowing mental defects which are something less than legal insanity in the particular jurisdiction to serve as a mitigation of the offense. One illustration of this trend is shown in a number of cases which have allowed mental disorder less than legal insanity to reduce homicide from what would otherwise be murder to voluntary manslaughter. A leading case of such "partial insanity" used to "reduce" murder to voluntary manslaughter is Fisher v. People, where the court said: "Though such a state of mind would not excuse the homicide, it should reduce it to manslaughter, for deliberation would be absent, and that is essential to constitute murder."

Two cases have been found in which the Kentucky Court of Appeals has subscribed to the mitigating influence of the developing rule that the "partial insanity" of the accused may reduce what would otherwise be intentional murder to voluntary manslaughter. In the first of these, Mangrum v. Commonwealth, the court affirmed a conviction of voluntary manslaughter based upon an instruction that the jury should acquit the defendant if they should believe him insane or "... if they should believe from the evidence that he was of weak or feeble mind, they should consider that fact in determining the degree of his guilt and the measure of his punishment." Again, in Rogers v. Commonwealth, the Kentucky appellate court reversed a conviction of

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92 Maulding v. Com., 172 Ky. 370, 189 S.W. 251 (1916).
93 State v. Felter, 25 Ia. 67 (1868).
94 Note, 32 Ky. L. J. 86 (1943). Weihofen lists Kentucky as one of the seventeen states adding irresistible impulse to the test for criminal insanity. Weihofen, INSANITY AS A DEFENSE IN CRIMINAL LAW 16 (1933).
95 23 Ill. 218, 232 (1859).
96 10 Ky. L. Rep. 94, 95, 39 S.W. 703, 704 (1897).
97 96 Ky. 24, 27 S.W. 813 (1894).
murder holding that the accused was entitled to an instruction on voluntary manslaughter, the court saying that the mental condition of the defendant, "whether feeble-minded or otherwise," was a factor to be taken into consideration by the jury in determining whether the malice requisite for murder existed at the time of the homicide.

It is believed that such decisions represent an advance in the law. As in the analogous case of provocation, they constitute a compromise. For several hundred years a defendant who was charged with intentional murder and who pleaded defective mentality was either found guilty or exonerated completely. The compromise effected by the "partial insanity" rule affords an excellent way of handling a difficult problem. The defendant, whose mental abnormality is substantial, although short of legal insanity, may now in some jurisdictions, including Kentucky, have his offense reduced from murder to voluntary manslaughter.98

An additional category of the crime of voluntary manslaughter is comprised of those cases in which the accused intentionally kills one to prevent a crime not involving violence. Thus, a Kentucky case held the defendant guilty of voluntary manslaughter where he intentionally killed an individual who was stealing his whiskey.99

Kentucky has no statute defining statutory voluntary manslaughter. The voluntary manslaughter statute in this state does not define the crime, it simply provides a punishment for the offense.100 If a statute defining the offense were offered,101 it might be worded substantially as follows:

"Sec. . . . Voluntary Manslaughter. An intended homicide, which would be murder under sec. ........., (intended, but unpremeditated murder), but which is committed in sudden heat of passion immediately caused by a provocation sufficient to deprive a reasonable man of his self-control and power of cool reflection, is voluntary manslaughter."102

100 Ky. R. S. sec. 435.020 (1948).
101 For a study of the statutes relating to voluntary manslaughter in the various states, see MORELAND, THE LAW OF HOMICIDE 228 (1952).
102 This statute is founded largely on the Louisiana statute and upon the interpretation of the common law by Wechsler and Michael. See, LA. CODE CRIM.
In common with most of the statutes in other states, which have attempted to define the crime in terms of heat of passion and provocation, the proposed statute does not attempt a detailed enumeration of the acts which shall be considered to be adequate provocation. It has also been deemed unwise to incorporate in the statute extenuating circumstances other than provocation, such as "imperfect defense of self or habitation" and "partial insanity," which may serve as mitigating agents. Existing statutes in other jurisdictions do not do this. The law as to these has not crystallized and the way should be left open, it is believed, to use and develop them as a part of the common law, at least for the present.

Before leaving the subject of voluntary manslaughter, specific mention and criticism should be made of that anomalous Kentucky crime called the negligent voluntary manslaughter. This hybrid crime, the fruit of an unnatural union between intent and negligence, has caused a great deal of confusion in the law in this jurisdiction. No matter how far intent and negligence are extended they never become synonymous. The negligent voluntary manslaughter is a technical impossibility.

The crime was occasioned by the fact that a line of cases, discussed at page 147, supra, refused to recognize the common law negligent murder. It is hard to determine just why this occurred. Certainly practically all other jurisdictions do recognize the negligent murder—either common law or statutory variety—and another line of cases in Kentucky recognized it so it survived in this jurisdiction until the recent statute limiting punishment for all common law crimes to a maximum imprisonment of one year, which eliminates it for all practical purposes, since the punishment for involuntary manslaughter, a lesser offense, is greater than provided for by this statute. At the time of the passage of this statute,—and that was partly the reason for its adoption—there was authority for three different negligent

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104 See, for example, Ewing v. Com., 129 Ky. 237, 111 S.W. 352 (1908); Lucas v. Com., 231 Ky. 76, 21 S.W. 2d 118 (1929).
105 See for example, Brown v. Com., 13 Ky. L. Rep. 372, 17 S.W. 220 (1891) and other cases and authorities cited in fn. 38, supra.
homicides in this state,—common law negligent murder,\textsuperscript{107} negligent voluntary manslaughter,\textsuperscript{108} and involuntary manslaughter\textsuperscript{109} caused by negligence. This was an impossible situation,—no wonder the opinions of the Court of Appeals were in confusion as an attempt was made to describe the different degrees of negligence required for these three, separate crimes.

The recent decision in \textit{Marye v. Commonwealth},\textsuperscript{110} which is discussed fully in this article, \textit{infra}, has done much to clean up the confusion and to pave the way for a final solution to the problem. This decision repudiates the long-standing rule that ordinary negligence will support a conviction of involuntary manslaughter. The way is now open for a rational solution to the whole problem in this state. Experience in other jurisdictions would indicate that this solution lies in the repudiation of the negligent voluntary manslaughter and a statutory recognition of the negligent murder, as recommended, \textit{supra}.\textsuperscript{111} If the ordinary punishment for the negligent murder, which is twenty one years to life in most jurisdictions, is considered to be too severe, a lesser punishment can be provided by the statute.

III. INVOLUNTARY MANSLAUGHTER

Involuntary manslaughter at common law embraced two closely related, not always distinguishable, concepts. The first was that of an unintentional killing resulting from the doing of a \textit{lawful} act, but without due caution and circumspection. The second and closely allied common law conception was that of an unintended homicide resulting from the doing of an \textit{unlawful} act which was not a felony.\textsuperscript{112} Both principles are now generally interpreted as requiring an act dangerous to life or limb, so there is an over-lap in their application, but they had an independent development until about seventy five years ago. Cases falling within the ambit of the first of these concepts are classified as negligent manslaughter; those falling within the ambit of the

\footnotesize{\textsuperscript{107} See cases cited in fn. 104, \textit{supra}.
\textsuperscript{108} See cases and authorities cited in fn. 105, \textit{supra}.
\textsuperscript{109} See, for example, Jones \textit{v. Com.}, 213 Ky. 356, 281 S.W. 164 (1926) and Note, 31 Ky. L. J. 284 (1943).
\textsuperscript{110} 240 S.W. 2d 852 (Ky. 1951).
\textsuperscript{111} See the discussion, \textit{supra}, p. 149.
\textsuperscript{112} \textit{1 East, Pleas of the Crown} \textit{255-271} (1803); \textit{Foster, Crown Law} (2d. ed.) \textit{258-265} (1791).}
second fall into what is commonly called the misdemeanor-manslaughter category of involuntary manslaughter.

(a) Negligent Manslaughter

The negligent manslaughter, as the name implies, is a manslaughter arising out of criminal negligence. There are two important problems as to the crime. The first has to do with the kind of standard which is to be employed in determining criminal negligence on the manslaughter level. The modern cases are uniform as to this point—the standard adopted is that of the "conduct of a reasonable man under like circumstances." This is called the objective standard of care. The defendant cannot hide behind his personal (subjective) belief that his conduct was non-dangerous. He must measure up to the standard of what the community considers to be non-dangerous conduct.

The second problem of importance in criminal negligence, as found in involuntary manslaughter, has to do with the degree of negligence required for conviction and how to describe it. Practically all jurisdictions demand more than ordinary negligence; generally it is stated that the required degree of negligence is reached when the conduct of the accused creates "such an unreasonable risk of danger as to be recklessly disregardful of human life and safety." This description makes the required degree of negligence synonymous with "recklessness." Sometimes the courts in describing the requisite degree of negligence use such ambiguous words and phrases as "gross negligence," "culpable negligence," "criminal negligence," "wicked negligence," "clear negligence," and "complete negligence." None of these is as clear and accurate as to describe it as "recklessness," it is believed.

Involuntary manslaughter is a common law offense, punishable under section 481.075 of the Kentucky Statutes by imprisonment in the county jail for a term not exceeding twelve months or by a fine not exceeding $5,000, or by both.

The decisions having to do with involuntary manslaughter occasioned by negligence were in confusion in this state prior to the

\[113\] See the discussion, Moreland, The Law of Homicide 127-132 (1952).
\[114\] Id. at 133-141.
recent case of *Marye v. Commonwealth.* There were some decisions which seemed to indicate that more than ordinary negligence was required for conviction of involuntary manslaughter but other cases seemed to hold that ordinary negligence was sufficient. At any rate the matter was definitely cleared up in the *Marye* case, which will now be discussed in considerable detail.

Ted Marye, a student in the College of Law at the University of Kentucky, unintentionally killed Mr. and Mrs. LeRoy Land, while driving his father's automobile in a residential section of Lexington, Ky., at 9:00 p.m. on the night of June 25, 1950. Mr. and Mrs. Land were standing on the lawn in front of their home, having just alighted from a friend's automobile. There was evidence that young Marye was driving at an excessive rate of speed and that he had drunk at least three bourbon highballs about four hours earlier in the late afternoon. There was, however, also evidence that the car from which the Land's had just alighted was standing on the wrong side of the street, that it pulled out in front of Marye's car, and that Marye was not driving at an excessive rate of speed. The lower court instructed the jury that Marye would be guilty if he "carelessly and negligently" ran the automobile against the Lands causing their death. The jury found Marye guilty and fixed his punishment at three months in jail and a fine of $2500 on each indictment.

The appellate court reversed the convictions stating that more than ordinary negligence is required to support a conviction of involuntary manslaughter caused by criminal negligence.

The landmark decision in the *Marye* case marks a decided step in clearing up the confusion as to criminal negligence in this jurisdiction. However, several important matters remain to be determined and clarified. Chief among these is the choice of an adequate definition for "that higher degree of negligence" which the court decides is necessary for the imposition of criminal liability on the involuntary manslaughter level. Unfortunately, the court chose "gross negligence" as the key phrase in that defini-

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116 Marye v. Com., 240 S.W. 2d 852 (Ky. 1951).
117 Very interestingly, the reversals were based partly upon the failure of the court to instruct on "sudden emergency," occasioned by the alleged sudden pulling out of a car in front of Marye's automobile, causing him to swerve upon the sidewalk. As to this point the court stated that there is ample authority in civil cases and "there is no valid reason why the same rule should not apply in a criminal case." *Id.* at 856.
Gross negligence is a vague and ambiguous term. Worse still, the court used one of the poorest possible definitions to describe what gross negligence is (although the definition is one which appears often in decisions). Said the court, “Gross negligence is the failure to exercise slight care.” As a commentator, who criticised the opinion in an editorial in the Lexington Leader pointed out, slight care is practically no care at all. “Presumably, should the driver have one hand on the steering wheel and one foot within reaching distance of the brake pedal, he would be exercising ‘slight care.’”118 A subsequent editorial concluded: “Since it would be virtually impossible for anyone to drive a motor vehicle a half-block without exercising slight care, the Legislature certainly owes it to the people of Kentucky to put some teeth in the law. Otherwise traffic deaths will be legal killing.”119

The decision in the Marye case points up what the courts on the civil side discovered some time ago,—gross negligence is a poor phrase to use to describe lack of care. On the civil side the courts, which formerly used this phrase and certain other equally vague terms to describe the care required under varying circumstances now instruct simply: Did the defendant fail to exercise the care that a reasonable man should have exercised under the circumstances?”120

The problem, however, is much more difficult on the criminal side. The negligence required for manslaughter is greater than that which is required for tort liability. And the negligence required for murder is still greater than that required for manslaughter. A search must be made for terms, as accurate as possible, to describe each of these higher degrees of negligence on the criminal side.

As a result of this search, the courts more and more are turning to “recklessness” as the term best suited to describe the higher degree of negligence required for involuntary manslaughter and certain other crimes based upon negligence below the negligent murder level. “Recklessness” is a word which, while not the most precise in connotation, nevertheless is not nearly so ambiguous as “gross negligence” and certain other terms frequently found in the cases. It raises a concept which is reasonably definite and uni-

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118 Editorial, Lexington Leader, October 26, 1951, 4.
119 Lexington Leader, November 13, 1951, 4.
120 PROSSER, LAW OF TORTS sec. 36 (1941); and see id. sec. 38.
form in the minds of most people. Furthermore, it is believed that the prevailing concept of reckless conduct is the one which most nearly coincides with the feelings of the ordinary judge and jury as to the degree of negligence which merits punishment as a crime in the case of a homicide arising out of lack of reasonable care.121

Of course, the court in the Marye case was denied the use of the word "reckless" to describe the conduct requisite for involuntary manslaughter because that word has already been pre-empted in this jurisdiction by that technically impossible crime, the negligent, voluntary manslaughter. The court discussed this unfortunate crime in the opinion and described it by way of dictum. This dictum reiterated the rule established in a majority line of Kentucky cases that "reckless, wanton conduct" resulting in homicide is negligent, voluntary manslaughter.122

In combining "reckless" and "wanton" in its definition of negligent, voluntary manslaughter the Kentucky court has piled error upon error. "Reckless" and "wanton" are not synonyms. The courts recognize this in most other jurisdictions and use "reckless" in defining the negligence requisite for involuntary manslaughter, while using "wanton" to describe the negligent conduct required for the negligent murder.123 This, it is submitted, is the proper use of the two words,—in no event should they be used as synonyms.

It would appear that the easiest and quickest way to straighten out the situation in Kentucky is by legislative action. If the negligent voluntary manslaughter were repudiated, as suggested, supra,124 the way would be open for a statute placing the negligent manslaughter under the classification of involuntary manslaughter where it ought to be with a punishment appropriate to the felony that it is in other jurisdictions and with a description of the negligence requisite for the offense framed in language in accord with the existing law in the majority of other jurisdictions.125 Such a statute might be worded substantially as follows:

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122 For a recent example, see Newcomb v. Corn., 276 Ky. 362, 124 S.W. 2d 486 (1939).
124 See the discussion, supra, page 148 et seq.
125 See the excellent Note, 39 Ky. L. J. 351 (1951).
"The unintentional killing of a human being, . . . is involuntary manslaughter, when committed: . . .

"By conduct so dangerous and disregardful of the lives and safety of others as to be recklessly disregardful of such interests according to the standard of the conduct of a reasonable man under the circumstances."

(b) Misdemeanor-manslaughter

Where one while in the commission of an unlawful act not amounting to a felony unintentionally kills another, it is involuntary manslaughter at common law. The rule finds ample support in the Kentucky cases, where the crime, however, is punished as a common law misdemeanor.

Originally, as in the case of the felony murder, the rule operated automatically. If it was shown that the accused was engaged in the commission of a misdemeanor, or even of a mere civil wrong, at the time of the homicide he was guilty of manslaughter. As early as Hale and Foster, however, the rule was qualified by the limitation that the unlawful act out of which the killing arose must be malum in se and not merely malum prohibitum. Hale and Foster interpreted the phrase, malum in se, to mean "dangerous in itself," but it was later interpreted to mean "morally or socially evil in itself." Under such an interpretation, it would be manslaughter if D attempted to commit suicide in the middle of a hundred acre field and unintentionally killed a tramp asleep in a clump of bushes nearby, since attempted suicide is an offense morally reprehensible.

About seventy five years ago a tendency toward a return to the early meaning of the phrase became apparent. This arose first on the felony murder level of the unlawful act doctrine in vitriolic attacks upon the rule by Judge Stephen, culminating in his historic decision in Regina v. Serne that a person accused of murder would not be guilty under the felony murder rule unless the felony out of which the homicide arose was "dangerous in itself." This fortunate return to the early interpretation of Hale

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127 For an attempted rationalization as to why the crime is punished as a common law misdemeanor in Kentucky, see Note, 39 Ky. L. J. 351 (1951).
129 Idem.
130 16 Cox C. C. 311 (1887).
and Foster has its parallel on the misdemeanor manslaughter level in the leading case of *Regina v. Franklin*.\(^1\) Since these two cases, the law in England has been that in all such cases the basic test is the amount of danger in the act causing the death rather than its lawfulness or unlawfulness.\(^2\)

American courts are gradually, but surely, coming to the same conclusion. Professor Robinson states the situation as follows:

(\(\text{The}\) "... phrase 'not amounting to a felony' is not of much present day importance, because courts have ruled that it is not the fact that the subordinate act, either misdemeanor or felony, is prohibited by statute, but that it is the characteristics of the prohibited subordinate act that make the unintended killing a crime. If the subordinate act is dangerous to the lives and safety of others, then a killing, though unintended, which occurs in the commission of the subordinate act is a criminal homicide, provided, of course, that the killing was the natural or necessary consequence of the subordinate act."\(^3\)

Stated in this way, the misdemeanor manslaughter is practically synonymous with the negligent manslaughter, and that is the current opinion. The test in all such cases then becomes the usual criterion for criminal negligence on the manslaughter level: Did the conduct of the accused amount to reckless disregard for human life and safety under the circumstances?\(^4\)

The language used in many of the Kentucky misdemeanor-manslaughter cases would seem to indicate a blind following of the historic rule that a homicide occurring in the course of an unlawful act less than felony is necessarily manslaughter. Thus, the Kentucky Court of Appeals said in a recent opinion:

"... Involuntary manslaughter is the killing of another in doing some unlawful act not amounting to a felony and not likely to endanger human life and without intention to kill, or the killing of another while doing a lawful act in an unlawful or negligent manner, where the negligence is such as to indicate a disregard for human life."\(^5\) (Italics writer's).

\(^1\) 15 Cox C. C. 168 (1883).
\(^3\) Robinson, Manslaughter by Motorists, 22 Minn. L. R. 755, 777 (1938). His discussion pp. 774 et seq. will be found very helpful.
\(^5\) Middleton v. Com., 304 Ky. 784, 787, 202 S.W. 2d 610, 611 (1947). Other cases containing similar language are cited in the Middleton case.
Does the Kentucky court really intend to say that a killing occurring in the commission of an unlawful act not likely to endanger human life is involuntary manslaughter?

Mr. Rice in a recent study of the Kentucky misdemeanor-manslaughter cases\textsuperscript{136} comes to the conclusion that, while the language used by the court would seem to go that far, the facts of the cases where such language is used show in each instance sufficient negligence to warrant a conviction on that ground. He concludes that "whether Kentucky, or indeed most any court, will convict of involuntary manslaughter on the sole ground that the homicidal act was committed in the perpetration of an unlawful act where there is no negligence is doubtful."\textsuperscript{137}

The writer has not checked all of the Kentucky cases which use such language to see whether Mr. Rice's conclusion is correct that the facts of each and every one of these cases show sufficient negligence to warrant a conviction on that ground, but, be that as it may, the oft-repeated rule of the court on this matter is most unfortunate. The rule, as enunciated, is out-moded and may lead to a result of injustice in a particular case at any time. The doctrine should be rephrased by the court to conform to the present concensus of judicial opinion that a homicide occurring in the course of a misdemeanor is not involuntary manslaughter unless the misdemeanor is sufficiently dangerous in itself to cause the defendant's act to be criminally negligent.

\textit{(c) Negligent homicide in operation of motor vehicle}

The decision in the \textit{Marye} case\textsuperscript{138} was the occasion for an act passed by the 1952 session of the Kentucky legislature providing punishment for the "negligent operation of a motor vehicle causing the death of another."\textsuperscript{139} Public resentment to the decision was touched off primarily by the Court's definition of gross negligence as "lack of slight care." It was the common concensus of opinion that under such a definition of criminal negligence it would be practically impossible to secure convictions of involuntary manslaughter in automobile homicide cases. The 1952 statute

\textsuperscript{136} Note 41 Ky. L. J. 94 (1952).
\textsuperscript{137} Id. at 96.
\textsuperscript{138} 240 S.W. 2d 852 (Ky. 1951).
\textsuperscript{139} 1952 Leg. Acts of Ky., c. 51, p. 61.
HOMICIDE STATUTE was passed largely to provide another avenue for possible convictions by creating another crime.

This approach to the problem of securing convictions for homicides arising out of criminal negligence in the operation of automobiles when it is impossible to secure enough convictions of involuntary manslaughter is not a particularly new one in the United States. Michigan adopted such an act, the first of a series of similar legislation in American jurisdictions, in 1921. This statute creating the separate offense of negligent homicide in the operation of any vehicle, provided that anyone operating any vehicle "at an immoderate rate of speed or in a careless, reckless or negligent manner, but not wilfully or wantonly" and so causing the death of another should be guilty of "the crime of negligent homicide" and upon conviction should pay a fine not exceeding one thousand dollars or undergo imprisonment in the state prison for a period not exceeding five years. The statute further provided that the offense should be deemed to be included within every crime of manslaughter charged to have been committed in the operation of any vehicle, so if the jury should find the defendant not guilty of manslaughter, it might in its discretion render a verdict of guilty of negligent homicide under the statute.140

Fifteen or more states and the District of Columbia have since passed somewhat similar statutes.141 The great majority of these provide that the degree of negligence requisite for liability shall be the equivalent of "recklessness." However, in a few instances ordinary negligence is sufficient to sustain a conviction.142

The Kentucky statute does not indicate the degree of negligence that is required. The statute simply provides for punish-
ment for homicide resulting from the "negligent operation of a motor vehicle." Consequently, the determination of the degree of negligence requisite for liability will be a matter for determination by the courts. If one were to prophesy, he would be safer if he were to predict that the Kentucky courts, following the majority of jurisdictions, would interpret the statute as requiring a degree of negligence greater than that needed for civil liability. It may well be doubted, however, whether that was the legislative intention. Since the statute was occasioned by the general dissatisfaction arising out of the application of the definition of "gross negligence" in the *Marye* case, it is altogether possible that the legislature intended to provide for liability under the new statute where the negligence of the accused was something less than gross negligence, i.e., ordinary negligence. In any event the statute should be amended to make the legislative intent clear.

In attempting to suggest such an amendment it is rather hard to make a decision as to whether more than ordinary negligence should be required under the statute. Undoubtedly, legislatures have shown a great reluctance to impose criminal liability for negligence which is no greater than that required for civil liability. That reluctance is plainly apparent in the type of statute under consideration where the great majority of jurisdictions require reckless conduct or its equivalent. It is also a matter of record that California which had a statute of this character imposing criminal liability for what might be interpreted as civil negligence has seen fit to repeal the statute.

On the other hand it is arguable that something new must be done if convictions are to be obtained in such cases, since juries have shown a marked reluctance to convict of involuntary manslaughter under a standard higher than ordinary negligence. It is also apparent that civil liability for damages does not seem to be a sufficient deterrent in such cases for—as everyone knows—an insurance company usually stands in the background as a silent partner of the accused to hold him "financially harmless."

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143 The language of the statute is as follows: "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 fined not more than $5,000 or imprisoned in the county jail for not more than one year, or both." Senate Bill No. 145, regular session 1952. The offense it will be noted is a statutory misdemeanor.

Weighing these considerations, the writer, without feeling too sure of his position, recommends that more than ordinary negligence be required to sustain a conviction under the statute. Even though the degree of negligence then required for conviction would be the same as that demanded in the case of the negligent involuntary manslaughter, it is believed that the statute would have several new features which would result in more convictions than would be possible under the recommended negligent involuntary manslaughter statute\(^4\) alone.

Foremost among these is the fact that the new offense is a misdemeanor; the negligent involuntary manslaughter should be a felony,\(^1\) as it is in most jurisdictions. Juries will convict of a misdemeanor when they would be unwilling to make a felon out of the defendant. Again, the punishment for the new offense, while substantial, is less than customarily inflicted for manslaughter. For this reason the jury might well elect to convict of the new offense where the punishment is a fine or a short imprisonment in the county workhouse, or both, although they would be unwilling to convict of involuntary manslaughter where the punishment is customarily confinement in the penitentiary. Finally, it is believed that a jury might convict for a violation of the new statute because it is labeled "Negligent homicide in the operation of a vehicle," rather than "Manslaughter." Juries often feel that the manslaughter label is too harsh for these automobile homicide cases but they are willing to convict the defendant if the offense has a less odious name.

Since the new statute was passed because of a general dissatisfaction with the result in the Marye case, it will be of value to examine that case in the light of these observations. Of course, in analyzing the Marye case cognizance should first be taken of the fact that the case was tried the second time under instructions which embodied the definition of the negligence required for involuntary manslaughter as "lack of slight care." If the requisite degree of negligence had been described as synonymous with "recklessness," the rule in other jurisdictions, it is altogether possible that a conviction could have been obtained. All of this is of

\(^4\) See the recommended statute, supra, page 166.
\(^1\) It is, of course, only a common law misdemeanor at the present time. See the discussion, supra, p. 139.
course colored by the pernicious influence of that impossible crime, the negligent voluntary manslaughter, which is recognized in this state.

But, be that as it may, suppose the jury in the Marye case had refused to convict of involuntary manslaughter, what are the possibilities that they might have agreed upon a conviction of the crime of "Negligent homicide in the operation of a motor vehicle," assuming that the statute had then been in effect and interpreted as requiring a higher degree of negligence than is demanded in civil cases based upon negligence?

It is believed that there is a good possibility that the jury would have agreed upon a conviction under the new statute under those circumstances.\textsuperscript{147} The circumstances probably were sufficient to support a finding of "recklessness" by a jury. Although unwilling to convict a young college student of a felony—assuming that involuntary manslaughter had been one at the time—the jury might well have been willing to convict him of a misdemeanor with a punishment of a substantial fine or even with confinement in the county jail. In considering the result in the Marye case two factors should be kept in mind,—(1) the unsatisfactory definition of gross negligence occasioned by the fact that the negligent voluntary manslaughter has pre-empted the use of "recklessness" in describing the negligence requisite for involuntary manslaughter in this state and (2) the fact that at the time of the case the statute prohibiting the "negligent homicide in the operation of a vehicle" was not in existence. Change either, or both, of these factors and there might well have been a conviction in the case.

\textbf{IV. Suggested Homicide Act}

It has been the plan of this paper to study the Kentucky cases on homicide in the light of the law in other jurisdictions and from such examination and such findings as might result to make those recommendations which, in the opinion of the writer, might lead to an improvement in the law in this jurisdiction. It is believed that the discussions and suggestions which appear in the preceding

\textsuperscript{147} This observation does not take into consideration the "sudden emergency" phase of the Marye case. No determination is attempted as to that phase of the case.
pages may best be summarized and consolidated in the form of a homicide statute.

With these considerations in mind, the following statute is offered:

_Homicide Act_148

Sec. 1. Homicide, General Provisions. Criminal homicide is the unlawful killing of a human being by the act, procurement or culpable omission of another. Criminal homicide is murder, manslaughter, or the unlawful killing of a human being by criminal negligence in the operation of a motor vehicle.

Sec. 2. Murder in the first degree defined. The killing of a human being, unless it is justifiable or excusable, is murder in the first degree when committed:

With a deliberate and premeditated intent to effect the death of the person killed, or of another. The word "deliberate" as used in this section means formed, arrived at, or determined upon as a result of careful thought and weighing of consequences. The word "premeditated" means thought on and resolved in the mind beforehand; contrived and designed previously.

Murder in the first degree is punishable by death, unless the jury recommends life imprisonment.

Sec. 3. Murder in the second degree defined. Such killing of a human being is murder in the second degree, when committed:

a. With an intent to effect the death of the person killed, or of another, but without deliberation and premeditation; or

b. Unintentionally, by an act so extremely dangerous and disregardful of the lives and safety of others as to be wantonly disregardful of such interests according to the standard of the conduct of a reasonable man under the circumstances.

Murder in the second degree is punishable by imprisonment, the minimum of which shall not be less than twenty-one years, and the maximum of which shall be for the offender's natural life, in the discretion of the jury.

Sec. 4. Voluntary manslaughter defined. An intended homicide, which would be murder in the second degree under

148 For a more extended discussion of this statute and some other features see MORELAND, _THE LAW OF HOMICIDE_ 309 et seq. (1952), _THE BOBBS-MERRILL CO._, _INDIANAPOLIS, INDIANA_, price $7.50.
Section 3-a of this act, but which is committed in sudden heat of passion immediately caused by a provocation sufficient to deprive a reasonable man of his self-control and power of cool reflection is voluntary manslaughter.

Voluntary manslaughter is punishable by imprisonment in the penitentiary for a term not exceeding twenty-one years.

Sec. 5. Involuntary manslaughter defined. An unintended homicide committed by the criminal negligence of any person and which does not constitute murder in the second degree under section 3-b of this act shall be involuntary manslaughter. Criminal negligence as used in this section means conduct creating such an unreasonable risk to human life and safety as to be recklessly disregardful of such interests according to the standard of the conduct of a reasonable man under the circumstances.

Involuntary manslaughter is punishable by imprisonment in the penitentiary for a term not exceeding fifteen years or by a fine of not exceeding $10,000, or both.

Sec. 6. Negligent homicide in the operation of a motor vehicle. Any person who, by the operation of a motor vehicle in a reckless manner, but not wilfully or wantonly, shall cause the death of another, shall be guilty of the crime of negligent homicide and upon conviction shall be fined not more than $5,000 or imprisoned in the county jail for not more than one year, or both.

The crime of negligent homicide shall be deemed to be included within every crime of involuntary manslaughter charged to have been committed in the criminally negligent operation of a motor vehicle; if the jury shall find the defendant not guilty of the crime of involuntary manslaughter such jury may in its discretion render a verdict of negligent homicide.¹⁴⁹

Now what are the salient features of the suggested Homicide Act and what changes does it make in the existing Kentucky law? Answers to these questions may be categorized as follows:

(1) **Murder**

"Willful" murder is the only statutory murder in Kentucky at the present time. The common law negligent and felony mur-
ders have been driven underground in this state by Ky. R. S. sec. 431.075, which limits the punishment for all common law crimes, the punishment for which is not provided by statute, to a maximum imprisonment of one year.

The suggested Act changes this situation in two ways:

(a) The Act divides “intended” murder into two degrees. While all murder is heinous, it is not believed that it should all be subject to the same punishment. However, in the past, the attempts of the legislatures of the various states to describe the cold-blooded, planned killing which is ordinarily punished as murder in the first degree, has been defeated by the practice of the courts of watering-down language until the intent of the legislators has been defeated. The recommended statute has attempted to evade this by resorting to the expedient of defining the key words “deliberate” and “premeditated” in the statute itself. The legislature having ascribed to these words the particular meaning in which they are intended to be used, the courts will be unable to extend or modify it.

The statute classifies the unplanned intentional killing as murder in the second degree.

(b) The proposed statute resuscitates the negligent murder. Most jurisdictions incorporate the negligent murder in their homicide statutes; indeed in a number of states it is murder in the first degree by statute. There would probably be few convictions under such a statute but it would be available for an extreme case, it would bring the situation in Kentucky in line with the majority of other jurisdictions, and it would be a major step in the correction of the unfortunate situation prevailing at the present time because of the negligent, voluntary manslaughter, which still remains a crime in this state.

A homicide occurring in the course of a felony is punishable under the proposed negligent murder statute, if the felonious act under the circumstances of the case constituted wantonly negligent conduct.

(2) Intentional (voluntary) manslaughter

The projected statute frames the definition of voluntary manslaughter simply in terms of “provocation” and “heat of passion,”
in effect a codification of the common law, and it does not, it is be-
lieved, change the existing law in the state.

The statute does not, however, incorporate the existing crime, the negligent, voluntary manslaughter. It is the intention of the proposed Act to weed this "impossible" crime out of Kentucky law, distributing criminally negligent homicides into the statutory categories of (a) negligent murder, (b) involuntary manslaughter, and (c) negligent homicide in the operation of a motor vehicle.

A determination whether it is wise to extend the doctrine of mitigation to include "imperfect defense of self or habitation" and/or "partial insanity" has been left a matter for the courts. The projected statute has omitted them. There are already in-
stances of both in the decisions of the Kentucky Court of Appeals.

(3) Involuntary manslaughter

The proposed Act provides that the degree of negligence re-
quired for conviction of involuntary manslaughter is reached
when the conduct of the accused creates "such an unreasonable
risk of danger as to be recklessly disregardful of human life and
safety." This description makes the required degree of negli-
gence synonymous with "recklessness." The standard of conduct
adopted here, as in the negligent murder, is the objective one of
the "conduct of a reasonable man under the circumstances."

Involuntary manslaughter, now a common law misdemeanor
in this state, becomes a felony under the Act, as it is in other juris-
dictions. The Act would have the effect of changing the existing
definition of the negligence required for involuntary manslaughter from "lack of slight care" to the equivalent of "recklessness."

The projected statute completely repudiates the "unlawful
act" doctrine on both the murder and manslaughter levels, thus
throwing all cases which formerly fell into these categories into
the negligent murder and negligent manslaughter divisions of the
law of homicide. The felony murder is already out of Kentucky
law for all practical purposes because of Ky. R. S. sec. 431.075
(1950). Kentucky has been rendering lip service to the mis-
demeanor-manslaughter doctrine but it is doubtful if the Act
changes the result reached in the existing Kentucky cases, since,
as the discussion in this paper points out, the facts of all of them
apparently involve criminally negligent conduct.
(4) Negligent homicide in the operation of a motor vehicle.

The proposed Act incorporates the new offense, the negligent homicide in the operation of a motor vehicle. Some changes are effected in the existing statute passed by the 1952 session of the legislature. The proposed statute clarifies the present situation by providing definitely that more than ordinary negligence is required for a conviction of the offense,—negligence equivalent to "recklessness" is demanded. While the new offense is a misdemeanor, the statute specifically provides that it shall be included in every crime of involuntary manslaughter charged to have been committed in the criminally negligent operation of a motor vehicle, thus giving the jury the election, in its discretion, to convict the accused of either offense. While the degree of negligence required for a conviction under the new offense is the same as is demanded for involuntary manslaughter,—the equivalent of recklessness, it is believed that juries will often convict of it when they would not convict of involuntary manslaughter since it is only a misdemeanor, the name of the offense is less offensive, and the punishment is less.

Conclusion. It is apparent that there are several bad spots in the law of homicide in this state. In addition, the law needs clarification in a number of places. An attempt might be made to correct these defects piecemeal, either by decision or by legislation. But piecemeal correction is slow and often very unsatisfactory in result. It would be better to do a complete job at one time.

Take, for example, the problem of criminal negligence. Proceeding piecemeal, it will take fifty years to correct the existing situation because negligence appears on several levels in the law of homicide. The decision in *Marye v. Commonwealth* was a step in the right direction but it was patchwork correction and several major problems remain unsolved. A realistic approach to the situation would seem to suggest a complete and quick solution of the entire problem.

It is with such considerations in mind that the proposed Homicide Act is submitted. It is believed that it is in line with modern thought on the subject, as reflected in the statutory regulation of homicide in other states, and it is hoped that it will receive careful consideration as a possible working guide for legislative action.