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## Criminal Negligence—Statutory Regulation (II)

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advantageous, inasmuch as intent is a necessary element of criminal assault at common law. In the absence of provisions of this nature many negligent acts deserving punishment would go unpunished.

A statute, to the effect that "a jailer or other officer who negligently suffers a prisoner in custody for a criminal offense to escape" may be punished, is found in thirteen states.<sup>11</sup> Twenty-two states have statutes similar to that of Michigan stating that one who "negligently sets fire to the woods or grounds of another" may be punished.<sup>12</sup> Nevada punishes one who negligently leaves a campfire burning.<sup>13</sup> Mississippi punishes one who carelessly places tacks on the highways.<sup>14</sup>

A summary of this nature points out the fact that criminal negligence forms an important part of statutory criminal law. By observing the various types of statutes, we are able to discern which of them are more advantageous. It is significant that Kentucky stands almost alone in failing to make any statutory provision for criminal negligence.

SAM MILNER.

## CRIMINAL NEGLIGENCE—STATUTORY REGULATION.

### (II.)

A New York statute<sup>1</sup> declares that

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

"2. By an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any individual. . . ."

<sup>11</sup> Me. Rev. Stat. (1930) c. 133, Sec. 15; Ind. Ann. Stat. (Burns, 1926) Sec. 10-1806; Fla. Comp. Laws (1927) Sec. 7536; Wis. Stat. (1929) Sec. 346.36; W. Va. Code (1913) c. 61, Art. 5, Sec. 9; R. I. Gen. Laws (1923) Sec. 5998; Va. Code Ann. (Michie, 1930) Sec. 4506; Vt. Gen. Laws (1917) Sec. 8672; Pa. Stat. Ann. (Purdon, 1930) Sec. 7839; Ore. Code Ann. (1930) Sec. 14-422; Ohio Ann. Code (1934) Sec. 2480; N. C. Code Ann. (Michie, 1927) Sec. 4405; N. H. Pub. Laws (1926) c. 394, Sec. 15.

<sup>12</sup> Mich. Comp. Laws (1929) Sec. 16942; Idaho Comp. Stat. (1919) Sec. 17-2722; Colo. Ann. Stat. (Mills, 1930) Sec. 2011; Ariz. Code (Struckmeyer, 1928) Sec. 4695, 4696; Ala. Code (Michie, 1928) Sec. 4112, 4113; W. Va. Code (1913) c. 61, Art. 3, Sec. 9; Code of Wash. (Pierce, 1929) Sec. 8444; Va. Code Ann. (Michie, 1930) Sec. 4435; Utah Rev. Stat. (1933) Sec. 103-22-1, 103-22-2; S. D. Comp. Laws (1929) Sec. 3983; S. C. Code (1922) Sec. 1208; Ore. Code Ann. (1930) Sec. 14-363; Mont. Rev. Stat. (Choate, 1921, Supp. 1925) Sec. 11501; Ohio Ann. Code (1934) Sec. 12436; N. C. Code Ann. (Michie, 1927) Sec. 4310; N. D. Comp. Laws Ann. (1913) Sec. 9775; N. Y. Consolidated Laws (Cahill, 1930) Sec. 1900; N. M. Stat. Ann. (Courtright, 1929) Sec. 35-1406; Nev. Comp. Laws (Hillyer, 1929) Sec. 10262; N. H. Pub. Laws (1926) c. 391, Sec. 5; Neb. Comp. Stat. (1929) Sec. 28-509.

<sup>13</sup> Nev. Comp. Laws (Hillyer, 1929) Sec. 10317.

<sup>14</sup> Miss. Code Ann. (1930) Sec. 984.

<sup>1</sup> N. Y. Cons. Laws (Cahill, 1930) c. 41, § 1044.

This statute, dispensing as it does with actual criminal intent, and substituting therefor reckless and wanton misconduct, a type of criminal negligence, in so serious a crime as first degree murder, suggests a study of the statutory criminal law of the various American jurisdictions<sup>2</sup> with the object of determining to what extent criminal negligence as a type of intent has been recognized by statute.

For the sake of convenience the statutes dealing with criminal negligence may be divided into several broad and general classes. There are statutes concerned with criminal negligence generally, statutes dealing with negligent homicides, statutes on other negligent offenses against the person less than homicide, statutes on negligent offenses against property, on negligent offenses against the public safety, and on negligent offenses against public justice.

Statutes of a general nature either define criminal negligence, or recognize it as an element of criminal offenses generally. A New York statute<sup>3</sup> provides that

"Each of the terms 'neglect', 'negligence', 'negligent', and 'negligently' imports a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns."

This section is part of a series of definitions of terms employed in the penal law of New York. Statutes defining criminal negligence in terms identical with those of the New York statute exist in Idaho,<sup>4</sup> Montana,<sup>5</sup> Nevada,<sup>6</sup> North Dakota,<sup>7</sup> Oklahoma,<sup>8</sup> Oregon,<sup>9</sup> and South Dakota.<sup>10</sup>

An Arizona statute<sup>11</sup> enacts that

"In every crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence."

Substantially identical statutes have been enacted in Idaho,<sup>12</sup> Montana,<sup>13</sup> and Nevada.<sup>14</sup>

Turning from these statutes of general nature to statutes dealing with negligent homicide, we find provisions similar to those of the New York statute quoted in the first paragraph of this note in the

<sup>2</sup> Except Delaware and New Jersey, the statutes of which were unfortunately unavailable.

<sup>3</sup> N. Y. Cons. Laws (Cahill, 1930) c. 41, § 3.

<sup>4</sup> Idaho Code (1932) § 17-101.

<sup>5</sup> Mont. Rev. Code (1921) § 10713.

<sup>6</sup> Nev. Comp. Laws (1929) § 9978.

<sup>7</sup> N. D. Comp. Laws (1913) § 10358.

<sup>8</sup> Okla. Stat. (1931) § 1783.

<sup>9</sup> Ore. Code (1930) § 14-1028.

<sup>10</sup> S. D. Comp. Laws (1929) § 3626.

<sup>11</sup> Ariz. Rev. Code (1928) § 4486.

<sup>12</sup> Idaho Code (1932) § 17-114.

<sup>13</sup> Mont. Rev. Code (1921) § 10726.

<sup>14</sup> Nev. Comp. Laws (1929) § 9955.

states of Alabama,<sup>15</sup> Colorado,<sup>16</sup> Utah,<sup>17</sup> and Washington.<sup>18</sup> The same statutory offense in Florida,<sup>19</sup> Oregon,<sup>20</sup> and Wisconsin<sup>21</sup> is murder in the second degree, and in Mississippi,<sup>22</sup> North Dakota,<sup>23</sup> Oklahoma,<sup>24</sup> and South Dakota,<sup>25</sup> the crime is simply murder, as degrees of murder do not exist.

Illustrative of the situations comprised by the terms of this statute is the case of *Washington v. State*.<sup>26</sup> The defendant fired through a window into a room in which were four persons, intending "to scare them". One of these persons was killed. The trial court refused to instruct that if defendant did not intend to kill or shoot at any of the occupants of the room, but merely intended to frighten them, he was guilty of no higher offense than second degree manslaughter. On appeal, the supreme court of Alabama held that the instruction requested would have been likely to mislead the jury by withdrawing from their consideration the recklessness of the act, as showing a depraved mind regardless of human life, which might make the offense murder in the first degree.

In the case of *State v. Massey*<sup>27</sup> the court held that one who knowingly, and with a reckless disregard of human life, drove an automobile occupied by several persons full speed into a train so that the death of another resulted was guilty of murder under this statute.

Statutes dealing with negligent homicide amounting to manslaughter are numerous. Homicide "in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution or circumspection" is manslaughter in Arizona,<sup>28</sup> Idaho,<sup>29</sup> Illinois,<sup>30</sup> Montana,<sup>31</sup> New Mexico,<sup>32</sup> Utah,<sup>33</sup> and the territories of the United States.<sup>34</sup> In Arkansas,<sup>35</sup> California,<sup>36</sup> Georgia,<sup>37</sup> Nevada,<sup>38</sup> and Oregon<sup>39</sup> the act need not be one "which might produce death."

<sup>15</sup> Ala. Code (1923) § 4454.

<sup>16</sup> Colo. Ann. Stat. (Mills, 1927) § 1753.

<sup>17</sup> Utah Rev. Stat. (1933) § 103-28-3.

<sup>18</sup> Wash. Code (Pierce, 1929) § 8997.

<sup>19</sup> Fla. Comp. Laws (1927) § 7137.

<sup>20</sup> Ore. Code (1930) § 14-203.

<sup>21</sup> Wis. Stat. (1933) § 340.03.

<sup>22</sup> Miss. Code (1930) § 985.

<sup>23</sup> N. D. Comp. Laws (1913) § 9462.

<sup>24</sup> Okla. Stat. (1931) § 2216.

<sup>25</sup> S. D. Comp. Laws (1929) § 4012.

<sup>26</sup> 60 Ala. 10 (1877).

<sup>27</sup> 20 Ala. App. 56, 100 So. 625 (1924).

<sup>28</sup> Ariz. Rev. Code (1928) § 4536.

<sup>29</sup> Idaho Code (1932) § 17-1106.

<sup>30</sup> Ill. Rev. Stat. (1935) c. 38, § 342.

<sup>31</sup> Mont. Rev. Code (1921) § 10959.

<sup>32</sup> N. M. Stat. (1929) § 35-305.

<sup>33</sup> Utah Rev. Stat. (1933) § 103-28-5.

<sup>34</sup> U. S. C. A., Title 18, § 453.

<sup>35</sup> Ark. Dig. Stat. (1921) § 2356.

<sup>36</sup> Cal. Penal Code (1931) § 192.

<sup>37</sup> Ga. Ann. Code (Park, 1914) Vol. VI, § 64.

<sup>38</sup> Nev. Comp. Laws (1929) § 10069.

<sup>39</sup> Ore. Code (1930) § 14-206.

What is "due caution"? In an Oregon case<sup>40</sup> the trial court ruled that the jury must find the defendant guilty of "gross negligence" to convict him of involuntary manslaughter under this statute. Said the supreme court, "In this instruction the court not only guarded the rights of the defendant, but went further in that direction than the law warrants. 'Due caution' is that care which an ordinarily prudent man would exercise under the circumstances, and the want of that care is negligence without any qualifying terms. . ."

Another type of negligent manslaughter statute is that well represented by the Missouri law:<sup>41</sup>

"Every killing of a human being by the act, procurement or culpable negligence of another, not herein declared to be murder or excusable or justifiable homicide, shall be deemed manslaughter."

This statute phrased in substantially identical terms is also found in Florida,<sup>42</sup> Minnesota,<sup>43</sup> Mississippi,<sup>44</sup> New Hampshire,<sup>45</sup> New York,<sup>46</sup> North Dakota,<sup>47</sup> Oklahoma,<sup>48</sup> and South Dakota.<sup>49</sup> Kansas has a similar statute,<sup>50</sup> but the homicide must be one which would have been manslaughter at common law.

What is "culpable negligence" within the meaning of this statute? In a Missouri case<sup>51</sup> the court said

"The definition of culpable negligence heretofore approved in *State v. Weisman* and other cases is mere negligence, such as would be actionable in a civil suit, whereby life or limb is directly endangered. Culpable negligence as used in our statute . . . means something more than this. . . . Before a person may be convicted of manslaughter by culpable negligence under our statute, not only must death have ensued from the negligent act or omission of such person, but there must be facts and circumstances in evidence tending to prove that such person was actuated at the time by a reckless disregard of the consequences of his act, from which the jury may reasonably infer the criminal intent so necessary to guilt in every lawful conviction for violation of our criminal statutes."

In an Oklahoma case<sup>52</sup> in which the defendant was prosecuted under this statute for homicide resulting from his negligent operation of an automobile, "culpable negligence" was defined as "the

<sup>40</sup> *State v. Clark*, 99 Ore. 629, 196 Pac. 360 (1921).

<sup>41</sup> Mo. Rev. Stat. (1929) § 3988.

<sup>42</sup> Fla. Comp. Laws (1927) § 7141.

<sup>43</sup> Minn. Gen. Stat. (1923) § 10078.

<sup>44</sup> Miss. Code (1930) § 1003.

<sup>45</sup> N. H. Pub. Laws (1926) c. 392, § 9.

<sup>46</sup> N. Y. Cons. Laws (Cahill, 1930) c. 41, § 1052.

<sup>47</sup> N. D. Comp. Laws (1913) § 9491.

<sup>48</sup> Okla. Stat. (1931) § 2228.

<sup>49</sup> S. D. Comp. Laws (1929) § 4024.

<sup>50</sup> Kan. Rev. Stat. (1923) § 21-420.

<sup>51</sup> *State v. Millin*, 318 Mo. 553, 300 S. W. 694 (1927).

<sup>52</sup> *Nail v. State*, —Okla. Cr.—, 242 Pac. 270 (1925).

omission to do something which a reasonable and prudent man would do, or the doing of something which such a man would not do, under the circumstances surrounding the particular case." The court said further that there was a difference only of degree between mere negligence and culpable negligence, and quoted with approval a statement to the effect that "the same negligence, as it affects the individual and the state, is, respectively, gross negligence and criminal negligence." The defendant's culpability, said the court, was a question of fact for the jury, and the test in such a case is the question, "Do the acts charged as criminal show a degree of carelessness amounting to a culpable disregard of the rights and safety of others?"

In Wisconsin the corresponding statute,<sup>53</sup> identical in other respects with that of Missouri, requires, not "culpable negligence", but "gross negligence." In *State v. Whately*<sup>54</sup> the court characterized the "gross negligence" requisite to the crime as of "more reprehensible character than mere inadvertence or want of ordinary care. . . [There must be] either a wilful intent to injure, or that reckless and wanton disregard of the rights and safety of another or his property, which the law deems equivalent to an intent to injure."

The Wyoming manslaughter statute<sup>55</sup> requires "culpable neglect or great carelessness." This provision was construed in *State v. McComb*<sup>56</sup> to require that the negligence "must be more than ordinary negligence, and must be culpable or criminal in its nature. . . And carelessness by reason of driving at a speed that is unreasonable or is such as is likely to endanger life or limb is not necessarily criminal carelessness within the meaning of our statute providing for punishment for manslaughter."

By a Wisconsin statute,<sup>57</sup> involuntary homicide by the "culpable negligence" of one who is engaged in the commission of, or an attempt to commit, a crime less than felony, is manslaughter in the first degree. A similar statute exists in Kansas.<sup>58</sup>

Homicide by the culpable negligence of one who is engaged in the commission of a trespass, or other injury to private rights, is punished as third degree manslaughter by another Wisconsin statute.<sup>59</sup> Similar statutes exist in Kansas<sup>60</sup> and Mississippi.<sup>61</sup>

If the owner of a dangerous animal, knowing of its propensities, keeps it without "ordinary care", the killing of any person by such animal renders its owner guilty of manslaughter, by the terms of a

<sup>53</sup> Wis. Stat. (1933) § 340.26.

<sup>54</sup> 210 Wis. 157, 245 N. W. 93, 99 A. L. R. 749 (1932).

<sup>55</sup> Wyo. Rev. Stat. (1931) § 32-205.

<sup>56</sup> 33 Wyo. 346, 239 Pac. 526, 41 A. L. R. 717 (1925).

<sup>57</sup> Wis. Stat. (1933) § 340.10.

<sup>58</sup> Kan. Rev. Stat. (1923) § 21-407.

<sup>59</sup> Wis. Stat. (1933) § 340.19.

<sup>60</sup> Kan. Rev. Stat. (1923) § 21-414.

<sup>61</sup> Miss. Code (1930) § 997.

statute found in Florida,<sup>62</sup> Kansas,<sup>63</sup> Minnesota,<sup>64</sup> Mississippi,<sup>65</sup> Missouri,<sup>66</sup> South Dakota,<sup>67</sup> and Washington.<sup>68</sup>

If any person navigating any vessel for hire negligently overloads such vessel so that it sinks and any person is drowned or otherwise killed thereby, he is guilty of manslaughter, according to statutes in Arkansas,<sup>69</sup> Florida,<sup>70</sup> Kansas,<sup>71</sup> Minnesota,<sup>72</sup> Mississippi,<sup>73</sup> Nevada,<sup>74</sup> New York,<sup>75</sup> North Dakota,<sup>76</sup> Oklahoma,<sup>77</sup> South Dakota,<sup>78</sup> Washington,<sup>79</sup> and Wisconsin.<sup>80</sup>

One having charge or control of a steamboat, who "from ignorance or gross neglect" causes or allows an explosion or other accident fatal to any person, is guilty of manslaughter under a statute found in Arkansas,<sup>81</sup> Florida,<sup>82</sup> Massachusetts,<sup>83</sup> Minnesota,<sup>84</sup> Nevada,<sup>85</sup> New York,<sup>86</sup> North Dakota,<sup>87</sup> Oklahoma,<sup>88</sup> South Dakota,<sup>89</sup> and Wisconsin.<sup>90</sup> In Wisconsin the statute also applies to railroad trains. In a similar statute found in Maine,<sup>91</sup> the negligence requisite to the crime is "misconduct or gross neglect"; in Tennessee<sup>92</sup> it is "wilful negligence or gross want of skill"; and in Washington<sup>93</sup> it is "ignorance, recklessness, or gross negligence."

Any person having charge of a steam engine, boiler, or other apparatus, who "from ignorance or gross neglect" causes an explosion resulting in the loss of human life, is guilty of manslaughter under

<sup>62</sup> Fla. Comp. Laws (1927) § 7146.

<sup>63</sup> Kan. Rev. Stat. (1923) § 21-415.

<sup>64</sup> Minn. Gen. Stat. (1923) § 10081.

<sup>65</sup> Miss. Code (1930) § 992.

<sup>66</sup> Mo. Rev. Stat. (1929) § 3992.

<sup>67</sup> S. D. Comp. Laws (1929) § 4025.

<sup>68</sup> Wash. Code (Pierce, 1929) § 9004.

<sup>69</sup> Ark. Dig. Stat. (1921) § 2362.

<sup>70</sup> Fla. Comp. Laws (1927) § 7147.

<sup>71</sup> Kan. Rev. Stat. (1923) § 21-416.

<sup>72</sup> Minn. Gen. Stat. (1923) § 10082.

<sup>73</sup> Miss. Code (1930) § 999.

<sup>74</sup> Nev. Comp. Laws (1929) § 10088.

<sup>75</sup> N. Y. Cons. Laws (Cahill, 1930) c. 41, § 1052.

<sup>76</sup> N. D. Comp. Laws (1913) § 9493.

<sup>77</sup> Okla. Stat. (1931) § 2230.

<sup>78</sup> S. D. Comp. Laws (1929) § 4026.

<sup>79</sup> Wash. Code (Pierce, 1929) § 9005.

<sup>80</sup> Wis. Stat. (1933) § 340.21.

<sup>81</sup> Ark. Dig. Stat. (1921) § 2363.

<sup>82</sup> Fla. Comp. Laws (1927) § 7148.

<sup>83</sup> Mass. Gen. Laws (1932) c. 265, § 30.

<sup>84</sup> Minn. Gen. Stat. (1923) § 10083.

<sup>85</sup> Nev. Comp. Laws (1929) § 10090.

<sup>86</sup> N. Y. Cons. Laws (Cahill, 1930) c. 41, § 1052.

<sup>87</sup> N. D. Comp. Laws (1913) § 9494.

<sup>88</sup> Okla. Stat. (1931) § 2231.

<sup>89</sup> S. D. Comp. Laws (1929) § 4027.

<sup>90</sup> Wis. Stat. (1933) § 340.22.

<sup>91</sup> Me. Rev. Stat. (1930) c. 129, § 6.

<sup>92</sup> Tenn. Code (1932) § 10810.

<sup>93</sup> Wash. Code (Pierce, 1929) § 9006.

the terms of a statute existing in Montana,<sup>94</sup> New York,<sup>95</sup> North Dakota,<sup>96</sup> Oklahoma,<sup>97</sup> South Dakota,<sup>98</sup> and Utah.<sup>99</sup>

A Minnesota statute<sup>100</sup> provides that

"Every person who by any act of negligence or misconduct in business or employment in which he is engaged, or in the use or management of any machinery, animals, or property of any kind entrusted to his care or under his control, or by any unlawful, negligent, or reckless act not specified by or coming within the provisions of any other statute, occasions the death of any human being, is guilty of manslaughter in the second degree."

In New York<sup>101</sup> a statute of somewhat more limited scope provides that whoever makes negligent or reckless use of machinery, resulting in the death of any person, is guilty of second degree manslaughter.

And killing another with a gun or other firearm, from carelessness in mistaking him for a deer or other animal while hunting, is in Minnesota<sup>102</sup> first degree manslaughter.

There are other statutory forms of negligent homicide which are classified neither as murder nor as manslaughter. The broadest of these statutes is that found in Texas:<sup>103</sup>

"Whoever in the performance of a lawful act shall by negligence and carelessness cause the death of another is guilty of negligent homicide of the first degree. A lawful act is one not forbidden by the penal law and one which would give no just occasion for a civil action. . . To constitute this offense there must be an apparent danger of causing the death of the person killed or some other. . . The want of proper care and caution distinguishes this offense from excusable homicide. The degree of care and caution is such as a man of ordinary prudence would use under like circumstances. . . To bring the offense within the definition of negligent homicide either of the first or the second degree, there must be no apparent intention to kill."

These general provisions apply also to "the offense of negligent homicide of the second degree, or such as is committed in the prosecution of an unlawful act" not amounting to a felony.

Statutes of a more restricted type exist in other jurisdictions. Several of these deal with homicide resulting from the negligent operation of railroad trains. An Arizona statute<sup>104</sup> declares that

"Every person having charge, wholly or in part, of any railroad car, locomotive, or train, who wilfully or negligently suffers or

<sup>94</sup> Mont. Rev. Code (1921) § 11229.

<sup>95</sup> N. Y. Cons. Laws (Cahill, 1930) c. 41, § 1052.

<sup>96</sup> N. D. Comp. Laws (1913) § 9495.

<sup>97</sup> Okla. Stat. (1931) § 2232.

<sup>98</sup> S. D. Comp. Laws (1929) § 4028.

<sup>99</sup> Utah Rev. Stat. (1933) § 103-52-3.

<sup>100</sup> Minn. Gen. Stat. (1923) § 10080.

<sup>101</sup> N. Y. Cons. Laws (Cahill, 1930) c. 41, § 1052.

<sup>102</sup> Minn. Gen. Stat. (1923) § 10075.

<sup>103</sup> Tex. Penal Code (1925) arts. 1231-1238.

<sup>104</sup> Ariz. Rev. Code (1923) § 4692.



causes the same to collide with another car, locomotive, or train, or with any other object or thing, whereby the death of any human being is produced, is guilty of a felony."

The same statute exists also in Montana.<sup>105</sup> Homicide resulting from a negligent railroad collision is a felony in Utah.<sup>106</sup> By law of Tennessee<sup>107</sup> "wrongful act, gross negligence, or omission" in the operation of railroad trains, resulting in the death of any person, is a felony; and in Connecticut "gross or wilful misconduct or negligence" on the part of any employee of a railroad or electric railway company, resulting in loss of life, has been made a felony by statute.<sup>108</sup>

Several other statutes of this type are concerned with homicide resulting from the negligent operation of motor vehicles. In Louisiana such a statute<sup>109</sup> provides that

"Any person who by operation or use of any vehicle in a grossly negligent or grossly reckless manner, but not wilfully or wantonly, causes death of another person, shall be guilty of the crime of involuntary homicide. . ."

This act does not repeal the existing law of manslaughter, but a charge of involuntary homicide is to be deemed to be included in every indictment for manslaughter, where the death results from the negligent operation of any vehicle.<sup>110</sup>

A similar statute in Michigan<sup>111</sup> enacts that

"Every person who, by operation of any vehicle at an immoderate rate of speed or in a careless, reckless, or negligent manner, but not wilfully or wantonly, shall cause the death of another, shall be guilty of the crime of negligent homicide. . ."

In Michigan, as in Louisiana, a charge of this offense is deemed to be included in every charge of manslaughter.<sup>112</sup>

By a New Hampshire enactment<sup>113</sup>

". . . If the death of any person results from the reckless operation of a motor vehicle the person convicted of such reckless operation shall, in lieu of any other penalty imposed by this section, be fined not more than one thousand dollars, or imprisoned not more than five years, or both, provided that the provisions of this statute shall not be construed to limit or restrict prosecution for manslaughter."

And a Wyoming statute provides<sup>114</sup> that any person operating a motor vehicle at a speed "greater than is reasonable and proper" who

<sup>105</sup> Mont. Rev. Code (1921) § 11230.

<sup>106</sup> Utah Rev. Stat. (1933) § 103-46-27.

<sup>107</sup> Tenn. Code (1932) § 10815.

<sup>108</sup> Conn. Gen. Stat. (1930) § 6047.

<sup>109</sup> La. Crim. Code (1932) § 1047.

<sup>110</sup> Id. § 1049.

<sup>111</sup> Mich. Comp. Laws (1929) § 16743.

<sup>112</sup> Id. § 16744.

<sup>113</sup> N. H. Laws (1931) c. 81.

<sup>114</sup> Wyo. Rev. Stat. (1931) § 72-208.

"shall, by result of so doing, seriously maim, injure or disfigure any person or persons, or cause the death of any person, or persons . . . shall be guilty of a felony."

Statutes have been enacted in several jurisdictions, denouncing negligent offenses against the person not amounting to homicide. In Maine<sup>115</sup> "negligently or carelessly" shooting and wounding any human being is a criminal offense. In Vermont<sup>116</sup> "carelessly or negligently" wounding another by gun shot is a felony. By a West Virginia statute, "carelessly or negligently" shooting or wounding a human being or any live stock while hunting is a misdemeanor.<sup>117</sup>

A Georgia statute<sup>118</sup> provides that

"If any person employed in any capacity by any railroad company doing business in this state, in course of such employment shall be guilty of negligence, either by omission of duty, or by any act of commission in relation to matters entrusted to him, or about which he is employed, from which negligence serious bodily injury, but not death, occurs to another, he shall be guilty of criminal negligence, and shall be punished by confinement in the penitentiary. . ."

In Pennsylvania<sup>119</sup> "gross negligence or wilful misconduct" by any person in charge of a vehicle or vessel employed in the conveyance of passengers, resulting in injury, is a criminal offense. In South Carolina<sup>120</sup> if a railroad employee is negligent or careless, and any person is injured thereby, he is guilty of a misdemeanor. And in Tennessee<sup>121</sup> "wrongful act, gross negligence, or omission" in the operation of any railroad train, resulting in the wounding or crippling of any person, is a misdemeanor. South Carolina has a statute<sup>122</sup> providing that "unskillfulness, mismanagement, or negligence" in the operation of any steamboat, resulting in injury to any person, shall be a misdemeanor.

By a statute found in Florida<sup>123</sup> "whoever, through culpable negligence or reckless disregard for the safety of others, inflicts any personal injury or injuries upon another, not resulting in death, shall be punished by imprisonment in the county jail. . ." A Kansas statute provides that<sup>124</sup>

"If any person be maimed, wounded, or disfigured, or receive great bodily harm, or his life be endangered by the act, procurement or culpable negligence of another, in cases and under circumstances which would constitute murder or manslaughter if death had ensued, the person by whose act, procurement or negli-

<sup>115</sup> Me. Rev. Stat. (1930) c. 129, § 2.

<sup>116</sup> Vt. Pub. Laws (1933) § 8414.

<sup>117</sup> W. Va. Code (1931) c. 61, art. 7, § 11.

<sup>118</sup> Ga. Ann. Code (Park, 1914) Vol. VI, § 117.

<sup>119</sup> Pa. Stat. (1920) § 7850.

<sup>120</sup> S. C. Code (1932) § 1689.

<sup>121</sup> Tenn. Code (1932) § 10814.

<sup>122</sup> S. C. Code (1932) § 1126.

<sup>123</sup> Fla. Comp. Laws (1927) § 7164.

<sup>124</sup> Kan. Rev. Stat. (1923) § 21-435.

gence such injury shall be occasioned, shall in cases not otherwise provided for, be punished by confinement at hard labor not exceeding five years. . ."

Several states have statutes directed against negligent offenses against property. A Wyoming statute<sup>125</sup> declares that

"Any person who shall take into his possession, or hire or loan any property of any . . . person or corporation, and shall, while the same is in his custody, wilfully, or with gross neglect, or with carelessness that is culpable or wrongful in its nature, damage or destroy any such property . . . shall be deemed guilty of a misdemeanor. . ."

In Vermont it is a misdemeanor carelessly to injure public property,<sup>126</sup> and another Vermont statute<sup>127</sup> provides for the punishment of those who negligently injure public shade trees. In Oklahoma<sup>128</sup> the wanton or negligent injury of railroad property is a criminal offense.

There are numerous statutes regarding negligent offenses against the public safety. Negligently setting forest or prairie fires is punished by statute in Alabama,<sup>129</sup> Colorado,<sup>130</sup> Idaho,<sup>131</sup> Michigan,<sup>132</sup> Montana,<sup>133</sup> Nebraska,<sup>134</sup> Nevada,<sup>135</sup> New Hampshire,<sup>136</sup> New Mexico,<sup>137</sup> New York,<sup>138</sup> North Carolina,<sup>139</sup> North Dakota,<sup>140</sup> Ohio,<sup>141</sup> Oregon,<sup>142</sup> South Carolina,<sup>143</sup> South Dakota,<sup>144</sup> Utah,<sup>145</sup> Virginia,<sup>146</sup> Washington,<sup>147</sup> and West Virginia.<sup>148</sup>

"Ignorance or gross neglect" in the operation of any steamboat, resulting in an explosion or other accident endangering human life, is made criminal by statutes found in New York,<sup>149</sup> North Dakota,<sup>150</sup>

<sup>125</sup> Wyo. Rev. Stat. (1931) § 32-375.

<sup>126</sup> Vt. Pub. Laws (1933) § 8525.

<sup>127</sup> *Id.*, § 8536.

<sup>128</sup> Okla. Stat. (1931) § 2325.

<sup>129</sup> Ala. Code (1923) §§ 4112-4113.

<sup>130</sup> Colo. Ann. Stat. (Mills, 1927) § 2011.

<sup>131</sup> Idaho Code (1932) § 17-2722.

<sup>132</sup> Mich. Comp. Laws (1929) § 16942.

<sup>133</sup> Mont. Rev. Codes (1921) § 11501.

<sup>134</sup> Neb. Comp. Stat. (1929) § 28-509.

<sup>135</sup> Nev. Comp. Laws (1929) § 10262.

<sup>136</sup> N. H. Pub. Laws (1926) c. 391, § 5.

<sup>137</sup> N. M. Stat. (1929) § 35-1406.

<sup>138</sup> N. Y. Cons. Laws (Cahill, 1930) c. 41, § 1900.

<sup>139</sup> N. C. Code (1927) § 4310.

<sup>140</sup> N. D. Comp. Laws (1913) § 9775.

<sup>141</sup> Ohio Ann. Code (1934) § 12436.

<sup>142</sup> Ore. Code (1930) § 14-363.

<sup>143</sup> S. C. Code (1932) § 1208.

<sup>144</sup> S. D. Comp. Laws (1929) § 3983.

<sup>145</sup> Utah Rev. Stat. (1933) § 103-22-1.

<sup>146</sup> Va. Code (1930) § 4435.

<sup>147</sup> Wash. Code (Pierce, 1929) § 8844.

<sup>148</sup> W. Va. Code (1931) c. 61, art. 3, § 9.

<sup>149</sup> N. Y. Cons. Laws (Cahill, 1930) c. 41, § 1892.

<sup>150</sup> N. D. Comp. Laws (1913) § 9708.

Oregon,<sup>151</sup> South Dakota,<sup>152</sup> Utah,<sup>153</sup> and Washington.<sup>154</sup> A Missouri statute<sup>155</sup> provides that

"If any master, owner, engineer, or pilot of any steamboat, or engineer, conductor, superintendent or manager of any railroad train or locomotive engine . . . shall wilfully or negligently run or operate any such engine, boat or train of cars so as to endanger the life of any person, he shall, upon conviction, be fined in any sum not exceeding five hundred dollars; and if any accident happen by reason thereof, by which any person is killed, the person so offending shall be deemed guilty of manslaughter."

"Ignorance or gross neglect" in the operation of a steam boiler or other apparatus, resulting in an accident endangering human life, is a criminal offense in Montana,<sup>156</sup> Nevada,<sup>157</sup> New York,<sup>158</sup> North Dakota,<sup>159</sup> South Dakota,<sup>160</sup> and Utah.<sup>161</sup>

The negligent overloading of any passenger vessel, endangering human life, is punished by statute in New York,<sup>162</sup> North Dakota,<sup>163</sup> and South Dakota.<sup>164</sup> Alabama<sup>165</sup> has made a misdemeanor the "negligence, carelessness, or want of proper skill" of any railway engineer causing the derailment of a train, endangering human life. "Gross carelessness or neglect" in the management or control of any common carrier is punishable in Illinois<sup>166</sup> and South Carolina;<sup>167</sup> and Florida has enacted that

"Whoever having management or control of or over any railroad train, steamboat, or other public conveyance used for common carriage of passengers, is guilty of gross carelessness or neglect in or in relation to the conduct, management, and control of such conveyance."

shall be guilty of a misdemeanor.<sup>168</sup>

The reckless handling of firearms on passenger trains is prohibited in Alabama,<sup>169</sup> and carelessly discharging a firearm in a public place or a business house is a misdemeanor in Arizona.<sup>170</sup> One state,

<sup>151</sup> Ore. Code (1930) § 14-236.

<sup>152</sup> S. D. Comp. Laws (1929) § 4126.

<sup>153</sup> Utah Rev. Stat. (1933) § 103-52-1.

<sup>154</sup> Wash. Code (Pierce, 1929) § 9904.

<sup>155</sup> Mo. Rev. Stat. (1929) § 3996.

<sup>156</sup> Mont. Rev. Codes (1921) § 11195.

<sup>157</sup> Nev. Comp. Laws (1929) § 10270.

<sup>158</sup> N. Y. Cons. Laws (Cahill, 1930) c. 41, § 1893.

<sup>159</sup> N. D. Comp. Laws (1913) § 9709.

<sup>160</sup> S. D. Comp. Laws (1929) § 4127.

<sup>161</sup> Utah Rev. Stat. (1933) § 103-52-2.

<sup>162</sup> N. Y. Cons. Laws (Cahill, 1930) c. 41, § 1890.

<sup>163</sup> N. D. Comp. Laws (1913) § 9707.

<sup>164</sup> S. D. Comp. Laws (1929) § 4125.

<sup>165</sup> Ala. Code (1923) § 5334.

<sup>166</sup> Ill. Rev. Stat. (1935) c. 38, § 128.

<sup>167</sup> S. C. Code (1932) § 1690.

<sup>168</sup> Fla. Comp. Laws (1927) § 7759.

<sup>169</sup> Ala. Code (1923) § 5362.

<sup>170</sup> Ariz. Rev. Code (1928) § 4723.

Oklahoma, has a statute<sup>171</sup> providing that an apothecary who "wilfully, negligently, or ignorantly" mislabels drugs or incorrectly fills prescriptions, endangering human life or health, is guilty of a misdemeanor.

Statutes prohibiting the negligent operation of motor vehicles are the most numerous variety of the class of statutes dealing with negligent offenses against the public safety. In New York<sup>172</sup> "Every person operating a motor vehicle upon a public highway shall drive such vehicle in a careful and prudent manner . . ."; and the same provision is found in Montana,<sup>173</sup> and in Missouri,<sup>174</sup> where the driver must also exercise "the highest degree of care." In Oregon<sup>175</sup> and South Dakota<sup>176</sup> the motorist must maintain a "careful and prudent speed", and in Kentucky<sup>177</sup> must drive "in a careful manner." In Utah,<sup>178</sup> a "reasonable and prudent" speed must be maintained; and in Nebraska,<sup>179</sup> New Hampshire,<sup>180</sup> Ohio,<sup>181</sup> South Carolina,<sup>182</sup> and Wyoming<sup>183</sup> a "reasonable and proper" speed. In Ohio the driver of a motor vehicle must also exercise "due regard for the rights and safety of others."<sup>184</sup>

One may not drive "recklessly" in Alabama,<sup>185</sup> Maine,<sup>186</sup> New Hampshire,<sup>187</sup> or Virginia,<sup>188</sup> nor "in a reckless manner" in Nevada<sup>189</sup> or Washington.<sup>190</sup> It is a misdemeanor in Pennsylvania,<sup>191</sup> Rhode Island,<sup>192</sup> and North Carolina,<sup>193</sup> to operate a motor vehicle "recklessly or at a rate of speed greater than is reasonable and proper." In Vermont it is a criminal offense to drive in a "careless or negligent manner."<sup>194</sup> In Tennessee,<sup>195</sup> New Mexico,<sup>196</sup> and Wisconsin,<sup>197</sup>

"Any person who drives any vehicle upon a highway carelessly and heedlessly in wilful or wanton disregard of the rights

<sup>171</sup> Okla. Stat. (1931) § 2438.

<sup>172</sup> N. Y. Cons. Laws (Cahill, 1930) c. 64-a, § 56.

<sup>173</sup> Mont. Rev. Codes (1921) § 1742.

<sup>174</sup> Mo. Rev. Stat. (1929) § 7775.

<sup>175</sup> Ore. Code (1930) § 55-1007.

<sup>176</sup> S. D. Comp. Laws (1929) § 8638-F.

<sup>177</sup> Ky. Stat. (1922) § 2739g-35.

<sup>178</sup> Utah Rev. Stat. (1933) § 57-7-16.

<sup>179</sup> Neb. Comp. Stat. (1929) § 39-1102.

<sup>180</sup> N. H. Pub. Laws (1926) c. 103, § 17.

<sup>181</sup> Ohio Ann. Code (1934) § 12603.

<sup>182</sup> S. C. Code (1932) § 1628.

<sup>183</sup> Wyo. Rev. Stat. (1931) § 72-203.

<sup>184</sup> Ohio Ann. Code (1934) § 12603-1.

<sup>185</sup> Ala. Code (1923) § 3328.

<sup>186</sup> Me. Rev. Stat. (1930) c. 29, § 86.

<sup>187</sup> N. H. Pub. Laws (1926) c. 102, § 11.

<sup>188</sup> Va. Code (1930) § 2145.

<sup>189</sup> Nev. Comp. Laws (1929) § 4350.

<sup>190</sup> Wash. Code (Pierce, 1929) § 196-45.

<sup>191</sup> Pa. Stat. (1920) § 982.

<sup>192</sup> R. I. Gen. Laws (1923) § 1442.

<sup>193</sup> N. C. Code (1927) § 2618.

<sup>194</sup> Vt. Pub. Laws (1933) § 5149.

<sup>195</sup> Tenn. Code (1932) § 2681.

<sup>196</sup> N. M. Stat. (1929) § 11-803.

<sup>197</sup> Wis. Stat. (1933) § 85.40.

or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, shall be guilty of reckless driving. . . ."

The remaining class of negligent crimes—negligent offenses against public justice—includes one type of statute only. This statute makes it a criminal offense for any officer legally in charge of prisoners convicted or accused of crime, negligently to allow any such prisoner to escape. This statute, with slight and immaterial variations, is found in Alabama,<sup>198</sup> Florida,<sup>199</sup> Indiana,<sup>200</sup> Kentucky,<sup>201</sup> Maine,<sup>202</sup> New Hampshire,<sup>203</sup> North Carolina,<sup>204</sup> Oklahoma,<sup>205</sup> Oregon,<sup>206</sup> Pennsylvania,<sup>207</sup> Rhode Island,<sup>208</sup> Vermont,<sup>209</sup> Virginia,<sup>210</sup> West Virginia,<sup>211</sup> and Wisconsin.<sup>212</sup>

Although it is not strictly within the scope of this paper, it is interesting to compare with the American statutes a Canadian enactment which does not fall within any of the classes enumerated above. The statute<sup>213</sup> provides that

"Everyone who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes or maintains anything whatever which, in the absence of precaution or care, may endanger human life, is under a legal duty to take reasonable precautions against, and use reasonable care to avoid, such danger, and is criminally responsible for the consequences of omitting, without lawful excuse, to perform such duty."

It will be observed that these provisions are somewhat broader than those of any of the statutes heretofore considered. This statute has been construed by the Canadian courts to embody the ordinary tort standard of "ordinary care." In *The King v. McCarthy*<sup>214</sup> the Saskatchewan Court of Appeals upheld an instruction that if defendant was not driving his automobile with "the care that an ordinary reasonably prudent man would exercise," he would be guilty of manslaughter for the resulting death of another. On appeal, the judgment was affirmed by the Supreme Court of Canada.<sup>215</sup>

<sup>198</sup> Ala. Code (1923) § 4007.

<sup>199</sup> Fla. Comp. Laws (1927) § 7536.

<sup>200</sup> Ind. Stat. (1933) § 10-1306.

<sup>201</sup> Ky. Stat. (1922) § 1339.

<sup>202</sup> Me. Rev. Stat. (1930) c. 132, § 15.

<sup>203</sup> N. H. Pub. Laws (1926) c. 394, § 15.

<sup>204</sup> N. C. Code (1927) § 4405.

<sup>205</sup> Okla. Stat. (1931) § 2480.

<sup>206</sup> Ore. Code (1930) § 14-422.

<sup>207</sup> Pa. Stat. (1920) § 7839.

<sup>208</sup> R. I. Gen. Laws (1923) § 5998.

<sup>209</sup> Vt. Pub. Laws (1933) § 8672.

<sup>210</sup> Va. Code (1930) § 4506.

<sup>211</sup> W. Va. Code (1931) c. 61, art. 5, § 9.

<sup>212</sup> Wis. Stat. (1933) § 346.36.

<sup>213</sup> Can. Rev. Stat. (1927) c. 36, § 247.

<sup>214</sup> 57 Dom. L. R. 93 (1921).

<sup>215</sup> *McCarthy v. The King*, 59 Dom. L. R. 206 (1921).

What negligent acts should be made criminal offenses by statute is, of course, a matter to be determined by the policy of each jurisdiction. The writer submits, however, that in view of the disagreement which prevails as to what constitutes criminal negligence, it would be advisable in every state to follow the example set by some eight of the American commonwealths in enacting a statutory definition of criminal or culpable negligence.

It is submitted that such a statutory definition should follow closely the tort standard of the want of the care which would be exercised by a man of *ordinary prudence, under the same or similar circumstances*. Aside from the mere precedent of an admittedly large number of cases, which such a statute would sweep away, there seems to be no good reason for requiring any higher degree of negligence in the majority of negligent offenses. A crime is a wrongful act injuriously affecting the public; and since negligent acts, committed without the exercise of ordinary care, are sufficiently wrongful to give rise to a cause of civil action when they injuriously affect the individual, it seems both logical and desirable that such acts, if they injuriously affect the public, should subject the offender to criminal liability.

On the other hand, one may concede that in the case of offenses of a highly serious nature, such as homicide, the mere want of ordinary care ought not to subject the actor to as serious a penalty as would be imposed in the case of an intentional offense or one committed through reckless and wanton misconduct. Fortunately, we are dealing here with statutory offenses, and it is entirely possible to make use of the well known statutory device of degrees of crime, which many jurisdictions have adopted in their treatment of murder and manslaughter. Negligent offenses, therefore, may be made of lower degree than intentional offenses or reckless and wanton ones, and the penalty in such cases may be lessened. It may be objected to this that such a policy will increase the complexity of the criminal law; but it should be remembered that the law is administered by technicians whose business it is to become familiar with its subtleties. So long as the utility of such legal devices in working substantial justice exceeds the disutility of manipulating them in practice, their introduction into the law, by statute or otherwise, should be welcomed.

To summarize, the following types of statutes dealing with criminal negligence are found in American jurisdictions:

- (1) Statutes concerned with criminal negligence generally, found in twelve states;
- (2) Statutes on negligent homicide, found in thirty-four jurisdictions;
- (3) Statutes on negligent offenses against the person less than homicide, found in nine states;
- (4) Statutes on negligent offenses against property, occurring in three states;

(5) Statutes concerning negligent offenses against the public safety, found in thirty-three states;

(6) Statutes on negligent offenses against public justice, found in fifteen states.

The following statutory provisions relative to criminal negligence are recommended as desirable for general adoption:

(1) In every crime or public offense there must exist a union or joint operation of act and intent, criminal negligence, or reckless and wanton misconduct.<sup>256</sup>

(2) Reckless and wanton misconduct is the intentional doing of an act, or failure to do an act which it is his duty to do, by one who knows or has reason to know of facts which would lead a reasonable man to realize that his conduct involves a high degree of probability that substantial harm will result therefrom.<sup>257</sup>

(3) Criminal negligence is the want of the care which would be exercised by a man of ordinary prudence under the same or similar circumstances.

(4) Except in cases where it is otherwise provided by law, the court in passing sentence upon one who has been convicted of a crime or public offense shall take into consideration whether the criminal act was committed intentionally, or through reckless and wanton misconduct, or through ordinary criminal negligence, and shall adjust the sentence accordingly.

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#### WILLS—REVOCATION BY DESTRUCTION.

Mary Nish left her will in the possession of W. S. McCaull, her relative and attorney. Desiring to revoke a codicil of the will, she wrote McCaull and told him to destroy the codicil, which he did by tearing it into some thirty pieces, which he later reassembled and pasted to a piece of paper, thus restoring the codicil to its original legibility. The testatrix was advised of the destruction before her death. In an action to probate the will and codicil as if there had been no destruction, it was held that the codicil had been destroyed by the tearing by McCaull.<sup>1</sup> Thus, the Iowa court fairly and squarely held that a testator might, by a written letter, not executed with the formalities of a will, denote a third person his agent for the purpose of destroying his will, and that the destructive act need not be committed in the presence of the testator, and yet that the statutory requirements for revocation would be satisfied.

<sup>256</sup> Cf. Ariz. Rev. Code (1928) § 4486, cited *supra* in note 11.

<sup>257</sup> Cf. the Restatement of the Law of Torts (1934) § 500.

<sup>1</sup> Re Estate of Mary Nish, — Iowa —, 261 N. W. 521 (1936).