

California Law Review

Volume XXV

SEPTEMBER, 1936

Number 1

Negligent Homicide A Study in Statutory Interpretation

I.

IN 1935, the California Legislature enacted an amendment to the new Vehicle Code, by virtue of which the criminal law relating to motor vehicles was changed.¹ Perhaps the most noteworthy alteration was made in the chapter entitled "Felonies and other Offenses,"² wherein a number of new offenses were inserted.³ Among these newly defined crimes that of negligent homicide is of paramount interest.

Section 500 provides:

"Negligent Homicide. When the death of any person ensues within one year as the proximate result of injuries caused by the driving of any vehicle in a negligent manner or in the commission of an unlawful act not amounting to felony, the person so operating such vehicle shall be guilty of negligent homicide, a felony, and upon conviction thereof shall be punished by imprisonment in the county jail for not more than one year or in the state prison for not more than three years."

The creation of this new crime raises the question of its relation to the other crimes of homicide in the Penal Code, and particularly to involuntary manslaughter. The definition of involuntary manslaughter under California law is very similar to that of the new crime of negligent homicide. It is, according to Section 192 of the Penal Code, "the unlawful killing of a human being, without malice . . . in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection."

¹ Cal. Stats. 1935, p. 2141.

² Chapter V of Division IX, §§ 500-506.

³ The code in its original form defined four crimes: Driving While an Habitual User of Drugs or Under the Influence of Narcotic Drugs or Intoxicating Liquor (section 502); Theft and Unlawful Driving or Taking of a Motor Vehicle (section 503); Injuring or Tampering With Vehicle (section 504); Reckless Driving (section 505); see Cal. Stats. 1935, pp. 173, 174. The amendment added the crimes of Negligent Homicide (section 500) and Person Driving Under Influence of Liquor Guilty of a Felony (section 501), repealed section 502 and substituted When Person Driving Under Influence of Liquor Guilty of Misdemeanor (section 502), amended section 503 and added Driving When Addicted to or Under Influence of Narcotic Drugs (section 506); Cal. Stats. 1935, p. 2141.

A comparison of the two crimes shows that each may be committed in two ways: either in the commission of an unlawful act not amounting to felony, or in the commission in a certain manner of an act not unlawful in itself. While both crimes coincide entirely with regard to the first alternative (apart from the requirement of driving a motor vehicle in section 500), the second alternative shows certain differences. Section 500 of the Vehicle Code reads briefly: "in a negligent manner," while the definition of manslaughter in the second alternative distinguishes between the commission of a lawful act which might produce death, in an unlawful manner, and the commission of such an act without due caution and circumspection.

This similarity of the elements of both offenses, taken with the great difference in the penalties, raises the problem as to when a careless driver who has caused the death of a person is guilty of manslaughter and when of negligent homicide; and the same question arises with respect to death caused by the commission of a misdemeanor in the operation of a motor vehicle. Are there any differences between the two crimes, or has the jury the choice between them, or does section 500 of the Vehicle Code supersede the crime of manslaughter when committed in the operation of a motor vehicle? The Vehicle Code is silent as to these three possibilities, and leaves the question entirely to the courts.

The only section which touches the question of an implied repeal is section 803(c) of the Vehicle Code. It provides:

"Except as expressly provided in Section 802, this code does not repeal any existing statute, nor any sentence or clause thereof."

This seems at first sight to be authority enough that the general manslaughter provision is not excluded from application to homicide committed in the operation of a motor vehicle. But this conclusion does not necessarily follow. In the first place, section 803(c) in terms prohibits only a repeal. It does not exclude a mere restriction of a general statute; and restriction and repeal are apparently different concepts.⁴ In the

⁴ The distinction between restriction, which is only a modification of or an exemption to a statute, and repeal is not a well established one. It is made in ENDLICH, A COMMENTARY ON THE INTERPRETATION OF STATUTES (1888), at 287: "Inconsistency between two statutes, or statutory provisions, in order to avoid a repeal by implication, is sometimes so treated as modifying the earlier in some particular respect, or taking certain things out of its operation, as an exception to it." Similarly 1 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION (Lewis' ed. 1904), at 532, seems to distinguish between a repeal and a situation where the second act has only the result of restricting the effect of the general act from which it differs. The distinction was also made by the Court of Appeals of New York in *In re Murray Hill Bank* (1897) 153 N. Y. 199, 211, 47 N. E. 298, 301: "In order to avoid a repeal by implication, which is not favored by the courts, the later act or the particular provision is regarded as an exception to the earlier

second place, even if such a restriction were a repeal, one could argue that section 803 of the code does not exclude a partial repeal of the manslaughter statute by section 500 of the Vehicle Code, because the latter section was enacted subsequent to the code and to section 803 contained in it, so that the implied repealing force of section 500 would not be affected by the earlier section 803.

But even if the restriction of the manslaughter statute by section 803 is legally possible, it does not, of course, necessarily follow that section 500 actually has this effect. This latter question can be answered only by an investigation of the possible scope of manslaughter and of negligent homicide.

In view of the fact that other jurisdictions also have special statutes concerning killing in the operation of a motor vehicle, it seems helpful for our purpose to consider the law of those jurisdictions, to see whether they have similar problems and how they have solved them.

II.

The discussion of the situation in other jurisdictions with regard to offenses similar to the California negligent homicide statute may conveniently be divided in two parts. In the first there is an account of the statutes which fulfill a function similar to that of section 500 of the California Vehicle Code; in the second there is a consideration of the purpose of the different legislatures in enacting these statutes, or at least the purpose the courts have imputed to them, and how the courts have worked out the relation between manslaughter and the new crime.

(A) The first⁵ jurisdiction to establish the crime of negligent homi-

statute or the general provision." Much less decisively the California Supreme Court observed in *Ex parte Smith* (1870) 40 Cal. 419, 420: "An exception is not repugnant to the general rule, or, if it be, it is only to the extent of the exception." From this point of view a statute which states that it is not to be construed as repealing prior statutes may nevertheless be construed as restricting or as making an exemption from prior general statutes, unless it explicitly provides that it is not to be construed as "repealing or affecting" other statutes (see example in *Breden v. State* (1890) 88 Ala. 20, 7 So. 258) or states expressly that it has no repealing but only cumulative effect (see *Chicago & N. W. Ry. Co. v. City of Chicago* (1893) 148 Ill. 141, 35 N. E. 881).

⁵ One state—Texas—had from 1879 until recently two different offenses, one called "manslaughter" and the other "homicide by negligence" (TEX. REV. STAT. (1879), PEN. CODE arts. 578 ff., 593 ff.) But the crime of manslaughter which was abolished in 1927 (Tex. Stats. 1927, p. 412), embraced only the case which would come under the definition of voluntary manslaughter in California (See TEX. REV. STAT. (1879), PEN. CODE art. 593) while the crime of homicide by negligence, which is subdivided into a first and second degree, corresponds approximately to the offense of involuntary manslaughter. (See TEX. STAT. (Vernon, 1928), PEN. CODE arts. 1230 ff., 1238 ff.). The main difference is that it is not sufficient that homicide occur in the commission of an unlawful act not amounting to felony, but the perpetration of this act must cause the death through the negligence of

cide committed in the operation of a vehicle was Michigan, in 1921.⁶ Her legislation has become a sort of model in this field. The act prescribed:

"Section 1. Every person who, by the 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 and upon conviction shall be sentenced . . .

"Sec. 2. The crime of negligent homicide shall be deemed to be included within every crime of manslaughter charged to have been committed in the operation of any vehicle, and in any case where a defendant is charged with manslaughter committed in the operation of any vehicle, if the jury shall find the defendant not guilty of the crime of manslaughter such jury may in its discretion render a verdict of guilty of negligent homicide.

"Sec. 3. In any prosecution under this act, whether the defendant was driving at an immoderate rate of speed *shall be a question of fact for the jury* and shall not depend upon the rate of speed fixed by law for the operation of such vehicle."

Vermont created a similar offense in 1925, without, however, giving it a particular name.⁷ The statute was phrased as follows:

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

A similar statute was adopted by New Hampshire in 1931, the only substantial difference being the use of the word "reckless" instead of "careless and negligent" in the Vermont statute.⁸

Louisiana introduced in 1930 a crime of "involuntary homicide."⁹ The most important provisions of the new statute were:

"Any person who, by operation or use of any vehicle in a grossly negligent or grossly reckless manner, but not wilfully or wantonly, causes the death of another person, shall be guilty of the crime of involuntary homicide, and upon conviction shall be punished by imprisonment for a term not exceeding five years . . . Provided that this Act shall not repeal

the offender. *Salamy v. State* (1931) 117 Tex. Crim. Rep. 465, 37 S. W. (2d) 1028. In California the statute does not require negligence besides the commission of an unlawful act not amounting to felony. Thus the Texas law, where homicide by negligence is not limited to homicide committed in the operation of a motor vehicle, and takes the very place of manslaughter in other jurisdictions, must be kept separate from the jurisdictions where negligent homicide designates a special crime committed in the operation of a vehicle, and is no help for the problems arising from the new crime of negligent homicide in California.

⁶ Mich. Stats. 1921, p. 217. The statute has been modified by Mich. Stats. 1931, p. 624 at p. 689, but the parts of the original statute quoted in the text are substantially unaltered.

⁷ Vermont Stats. 1925, p. 102; see also Vt. PUB. LAWS (1933) §5152.

⁸ N. H. Stats. 1931 (Special Session 1930), p. 85.

⁹ La. Stats. 1930, p. 141; see LA. CODE CRIM. PROC. (Dart, 1932) §§ 1047, 1049.

the existing law of manslaughter, and the District Attorney may, in his discretion, charge persons who cause death by the grossly negligent use of any vehicle under the existing manslaughter laws, and the crime of involuntary homicide shall be deemed to be included within every charge of manslaughter, and shall be a responsible verdict under the said charge of manslaughter, and if the person so charged be found not guilty of manslaughter a verdict of involuntary homicide may be rendered by the jury."

In Canada the legislature in 1930 gave special consideration to homicide cases arising out of the operation of motor vehicles by amending the section of the Criminal Code dealing with the offense charged¹⁰ through the addition of a new (third) paragraph:¹¹

"Upon a charge of manslaughter arising out of the operation of a motor vehicle the jury may find the accused not guilty of manslaughter but guilty of criminal negligence under section two hundred eighty four, . . ."

Section 284 of the Canadian Criminal Code makes it a crime to cause grievous bodily harm to any person by any unlawful act.

Similarly in England in 1934 the Road Traffic Act of 1930¹² was amended by the following section:¹³

"Upon the trial of a person who is indicted for manslaughter in connection with the driving of a motor vehicle by him, it shall be lawful for the jury, if they are satisfied that he is guilty of an offense under section eleven of the principal Act (which relates to reckless or dangerous driving) to find him guilty of that offense. . . ."

New Jersey enacted in 1935 a statute¹⁴ which made homicide through the careless operation of a motor vehicle a particular misdemeanor.¹⁵ The statute does not contain any reference to manslaughter. It reads:

"Any person who shall cause the death of another by driving any vehicle carelessly and heedlessly in wilful and wanton disregard to the rights or safety of others shall be guilty of a misdemeanor."

In the same year Congress enacted a statute adding the crime of "negligent homicide" to the laws for the District of Columbia.^{15a} The definition of the crime is the same as that of the Michigan statute in its 1931 form; it is, however, only a misdemeanor. Also the other provisions of the federal statute are identical with the sections of the Michigan statute quoted before.

Finally, mention must be made of Ohio, where the manslaughter

¹⁰ CAN. CRIM. CODE (Crankshaw, 1935) § 951.

¹¹ Canada Stats. 1930, p. 162, c. 11, § 25.

¹² 20 & 21 GEO. V (1930) c. 43.

¹³ 24 & 25 GEO. V (1934) c. 50, § 34.

¹⁴ N. J. Stats. 1935, p. 913.

¹⁵ A misdemeanor in New Jersey is a much more serious crime than in other jurisdictions, all of the statutory offenses being misdemeanors. *Jackson v. State* (1887) 49 N. J. L. 252, 255, 9 Atl. 740, 741.

^{15a} 74th Congress, 1st Sess. (1935) 385.

statute was modified in 1935 by making homicide through the unlawful operation of an automobile a particular degree of manslaughter.¹⁶ The new statute provides:

"Sec. 12404. Whoever unlawfully kills another, except in the manner described in the next *five* preceding sections, is guilty of manslaughter in the *first degree* and shall be imprisoned. . . .

"Sec. 12404-1. Whoever shall unlawfully and unintentionally kill another while engaged in the violation of any law of this state applying to the use or regulation of traffic on, over, or across the roads or highways shall be guilty of manslaughter in the second degree. . . ."

While these statutes expressly define a crime of killing another through the unlawful or negligent operation of a motor vehicle, there are statutes of other states which define offenses embracing both wounding and killing another by the negligent operation of motor vehicles. These statutes must likewise be mentioned in this connection. Such jurisdictions are, for instance, Nebraska,¹⁷ Wyoming,¹⁸ and Connecticut.¹⁹

It might be worthwhile to note that at least two states have consciously declined to follow this modern trend, and have not adopted the crime of negligent homicide, even though bills creating this new crime were proposed to the legislature. In Maryland an act providing for "the punishment of manslaughter wherein death ensues as a result of the driving, operating, or controlling of an automobile, motor vehicle, or other vehicle" was vetoed.²⁰ In Wisconsin a legislative bill was introduced in 1929 which changed the manslaughter definition and was intended also to introduce the crime of negligent homicide in the same terms as the Michigan statute. The legislature, however, changed the manslaughter statute without enacting the parts of the bill relating to the new offense.²¹

¹⁶ Ohio Stats. 1935, p. 205.

¹⁷ Nebraska Stats. 1919, p. 830: ". . . if any person operating a motor vehicle in violation of the provisions of this article shall by so doing seriously maim or disfigure any person, or cause the death of any person or persons, he shall upon conviction thereof . . ." The statute has been amended several times. The latest version of this section adds the word "injure" to "maim or disfigure": NEB. COMP. STAT. (Supp. 1935) § 39-1106.

¹⁸ Wyoming Stats. 1921, p. 70, now WYO. REV. STAT. ANN. (1931) § 72-128: ". . . if any person operating a motor vehicle in violation of the provisions of this Act, shall, by reason of such violation or violations, seriously maim, injure or disfigure or cause the death of any person or persons, such person shall be deemed guilty of a felony . . ." The statute of 1921 was slightly different.

¹⁹ CONN. STATS. 1918, § 6191; as amended by a statute of 1935 (CONN. GEN. STAT. (SUPP. 1931, 1933, 1935) p. 733) the provision reads: ". . . and any person operating a motor vehicle upon the highways of this state, who shall, in consequence of his intoxication or of any gross or willful misconduct or of gross negligence, cause any loss of life or the breaking of a limb, shall be fined not more than one thousand dollars or imprisoned not more than ten years or both."

²⁰ Md. Stats. 1935, p. 852.

²¹ See the account of the court in *State v. Whatley* (1932) 210 Wis. 157, 161, 162, 245 N. W. 93, 95, 99 A. L. R. 749, 752.

The statutes here quoted offer a somewhat strange picture. Only in Ohio are the zones of the two offenses (manslaughter and the new crime) well delimited; there homicide committed by a traffic violation is specified as manslaughter in the second degree. In other jurisdictions the offenses are not expressly delimited one from the other. In still others it is explicitly provided either that if the juries do not convict of manslaughter they may convict of negligent homicide, or that convictions of manslaughter are not restricted. The relationship of the two crimes seems thus at first sight, at least, somewhat obscure and rather complicated.

(B) What were the reasons for the creation of the new offense? What needs in the administration of criminal justice were to be satisfied by it? These questions become particularly important in the solution of the problem concerning the relationship of the new crime to manslaughter. Some statutes have expressly provided for this relationship; others have left the question open. In the latter case the courts sometimes seem to have been bewildered by this situation. Thus the Wyoming court²² observed after a discussion as to whether the manslaughter statute is applicable to homicide through the violation of speed laws:

"If this rule were applied in this state, an unlawful homicide committed in exceeding the speed fixed in section 19 of said act of 1921, . . . would at the same time be punishable under section 30 of said act as a felony by a penalty varying from a fine of \$200 to imprisonment in the penitentiary for not more than 10 years, and under section 7070 W. C. S. 1920, . . . punishing manslaughter at not to exceed 20 years imprisonment in the penitentiary . . . and we do not pass upon it, but have deemed it advisable to call attention to the seeming incongruities under our law."

But it can hardly be called an "incongruity" if a legislature intended the manslaughter statute and the statute defining the new crime to be concurrently applicable. The legislature must have had a certain purpose in mind when defining the new crime. This purpose is, shortly described, "to get convictions."

1. This was clearly the case in Canada. The situation is well described in two recent opinions of the Manitoba Court of Appeals discussing the meaning of the above²³ quoted amendment of 1930.²⁴ In one of these cases the court said, after a discussion of the precedents relating to this type of case:

"The differing judgments which led up to *Rex v. Barton*, the difficulty, referred to in the cases, in obtaining convictions for manslaughter with the result that offenders were not given any punishment, the statements of Anglin, C. J. C., and the dissenting judgment of Smith, J., in *Rex v. Barton*,

²² State v. McComb (1925) 33 Wyo. 346, 357, 239 Pac. 526, 530.

²³ See text to note 11, *supra*.

²⁴ Rex v. Preusantanz (1936) 2 D. L. R. 421, 65 Can. Crim. Cas. 129; and Rex v. Kennedy (1936) 2 D. L. R. 448, 65 Can. Crim. Cas. 158.

and the doubt which remained as to the right or duty of provincial courts, led to the conclusion that s. 951 (3) was designed to give validity to findings of juries which, in acquitting of manslaughter but convicting for a lesser offense, might appear perverse or contradictory, and that the literal meaning should be given to s. 951 (3) that in any case upon a charge of manslaughter arising out of the operation of a motor vehicle the jury may find the accused not guilty of manslaughter but guilty of criminal negligence although the evidence indicates manslaughter."²⁵

The reason that juries are reluctant to convict for manslaughter, although the evidence indicates this crime, is probably a popular feeling that manslaughter is not the right label for cases of homicide committed through violation of traffic rules, or at least not for all of them. They feel the degree of guilt to be less than in ordinary manslaughter cases and the punishment often too severe.²⁶

The legislature took account of this situation and gave the jury the alternative to convict of a lesser crime in the automobile cases, thus avoiding acquittals or contradictory verdicts. But the manslaughter statute still remains applicable to those cases, and the prosecution, if it sees fit, may charge with manslaughter and the jury may convict of this crime. The yardstick for this choice is evidently the degree of culpability. This has the important consequence of introducing degrees in the field of criminal negligence in this type of case. Thus the Canadian court said:²⁷

"Although any degree of negligence, if in the class of culpable negligence, is sufficient to constitute manslaughter, s. 951 (3) in my view impliedly establishes in auto accidents two classes of culpable negligence; one of grosser negligence, and another which, while still culpable, is not as reprehensible as the first according to the common standards."

Of course, this yielding to popular feeling leads practically to a restriction of manslaughter in such cases, even though the defendant seemingly could not complain of a manslaughter conviction; and the Canadian court has not overlooked this effect:²⁸

"It may be that Parliament has unconsciously made a way, inconsistent with the common law, for the reduction of the crime of manslaughter in motor negligence and extended to that kind of killing an indulgence not extended to other killings by negligence."

²⁵ *Rex v. Kennedy*, *supra* note 24, at 452, 65 Can. Crim. Cas. at 163. Similarly the court said in *Rex v. Preusantanz*, *supra* note 24, at 432, 65 Can. Crim. Cas. at 141: "It must be kept in mind that the enactment was passed not for the benefit of the accused but in the public interest in order to induce juries who might be unwilling to find killing by an unlawful act or omission, without lawful excuse, to perform or observe a legal duty, to find killing by criminal negligence, for that is what it comes to."

²⁶ The punishment for manslaughter in Canada is imprisonment for life. CAN. CRIM. CODE § 268.

²⁷ *Rex v. Preusantanz*, *supra* note 24, at 422, 65 Can. Crim. Cas. at 130.

²⁸ *Ibid.* at 437, 65 Can. Crim. Cas. at 146.

The situation in England was similar. There it became a "rule," as it has been said, "that in any but the most flagrant cases the motorist accused of manslaughter was almost assured of acquittal."²⁹ It was therefore proposed by a writer to create a crime called "Killing by the negligent conduct of a road vehicle."³⁰ The legislature chose instead to allow conviction of the lesser crime of dangerous driving in spite of the inconsistency of the verdict, a way which was theretofore only doubtfully proper.³¹ Professor Turner has described the purpose as follows:³²

"The only way in which it can be comprehensible to rational minds is by assuming that it was the intention of the legislature to invest the jury, in cases where motorists have caused death, with the prerogative of mercy. They are now in effect allowed to say: 'We find that the prisoner has committed manslaughter, but we shall convict him of dangerous driving instead.' This is, however, rather hard on other slayers of men, for whose cases juries are given no such discretion: it may be regarded then as an interesting revival of the spirit which centuries ago gave rise to the privilege known as Benefit of Clergy, adapted to suit modern prejudices, and in the refined form previously reserved for peers and clerks in holy orders, because there is now no branding of the thumb and even the license is not indorsed with any indication that manslaughter has been committed."

One point may be noted in this connection. Manslaughter requires in England a higher degree of culpability than mere negligence. Homicide by "civil" negligence is not covered. It was therefore demanded in the daily press that a motorist who causes death and is guilty of civil negligence should be made liable for manslaughter by statutory amendment.³³ These cases not constituting manslaughter seem to come likewise under the new statute.³⁴

2. The introduction of the crime of negligent homicide in Michigan, however, seems to have had for the most part different reasons. The intent of the Michigan legislature might be called in a certain sense the opposite of the intent imputed by the courts to the Canadian legislature. In Michigan also one may say the intention was "to get convictions." But the definition of the new crime was necessary not because the juries hesitated to apply the manslaughter statute in spite of the evidence, but because the manslaughter statute was held inapplicable, although a punishment of some sort would have been appropriate from the standpoint of legal policy.

The starting point for an understanding of the new statute is the

²⁹ See note (1932) 74 L. J. 289.

³⁰ *Ibid.*

³¹ See Turner, *Mens Rea and Motorists* (1935) 5 CAMB. L. J. 61, 71; but see also Notes (1932) 74 L. J. 289; (1933) 75 L. J. 42.

³² Turner, *The Mental Element in Crime at Common Law* (1936) 6 CAMB. L. J. 31, 52.

³³ See *supra*, note 29.

³⁴ See Note (1933) 75 L. J. 42.

celebrated case, *People v. Barnes*,³⁵ one of the most quoted cases in the field. There the driver exceeded the legal speed limit and killed a pedestrian, who apparently ran into the car. The court set aside a conviction of manslaughter and said:

"In this case, in order to warrant the conviction of the respondent, it should have clearly appeared that Mary Robb's death ensued as a direct and natural result of the reckless or gross negligence of the respondent. The crime sought to be proven was involuntary homicide, caused by culpable negligence, and, to make an act carelessly performed resulting in death a criminal one, the carelessness must have been gross, implying an indifference to consequences; and the term 'gross negligence' means something more than mere negligence. It means wantonness and disregard of the consequences which may ensue, and indifference to the right of others that is equivalent to a criminal intent.

"Not every degree of carelessness or negligence, if death ensues, renders the party guilty of manslaughter. . . .

"To warrant a conviction of manslaughter, the conduct of the accused must have been the proximate cause of the death, and must have been characterized by such a degree of culpable negligence as to amount to gross negligence; and this is a question for the jury."

Seven years after this decision the Michigan legislature enacted the statute defining negligent homicide. In *People v. Campbell* the court was called upon to interpret its bearing. It said:³⁶

"In this state under the common law, one is not criminally responsible for death from negligence unless the negligence is so great that the law can impute a criminal intent. If death ensues from negligence which shows a culpable indifference to the safety of others, the negligence is said to be gross or wanton or wilful, and is equivalent to criminal intent, a necessary element of every common-law crime . . . See *People v. Barnes*. . .

"By the enactment of this statute, the Legislature of 1921 obviously intended to create a lesser offense than involuntary manslaughter or common-law negligent homicide, where the negligent killing was caused by the operation of a vehicle. To do this it eliminated as necessary elements of the lesser offense negligence classed as wanton or wilful. Included in these terms is gross negligence. So that, in the enactment of the statute, there was expressly eliminated as elements of the crime all negligence of such character as to evidence a criminal intent; and, as we have before pointed out, wanton or wilful or gross negligence of that character. Therefore this statute was intended to apply only to cases where the negligence is of a lesser degree than gross negligence.

"According to the classification of degrees of negligence by courts and text-book writers, all negligence below that called gross is slight negligence and ordinary negligence. Slight negligence is never actionable either in civil or criminal law and is not so under this statute. . . . Probably, in view of the numerous fatalities caused by the operation of automobiles on our streets and highways, the Legislature was led to enact a statute making one criminally responsible for a lower degree of negligence, for any negligence between slight and gross."

To this statement the court added, however: "Terms and classification of negligence are confusing."

³⁵ *People v. Barnes* (1914) 182 Mich. 179, 198, 199, 148 N. W. 400, 406, 407.

³⁶ *People v. Campbell* (1927) 237 Mich. 424, 428, 429, 212 N. W. 97, 99.

The majority of the court reversed the conviction because of an error relating to the question of contributory negligence of the deceased. Three judges dissented, but as to the point of the degree of negligence required under the negligent homicide statute they reached the same conclusion.³⁷

This opinion is therefore just the opposite of the Canadian decision. There, the particular crime covered the same but not the whole ground of manslaughter; the Michigan statute, on the contrary, was said to cover ground not embraced by the manslaughter statute and only this ground.³⁸ The extent of criminal homicide in automobile cases was thus enlarged.

This function was expressly pointed out again by the court in *People v. McMurchy*,³⁹ where the constitutionality of the act, which had been questioned by a strong minority of the court in *People v. Maki*,⁴⁰ was upheld. The court emphasized the fact that the crime of manslaughter did not suffice to protect society against reckless drivers and that therefore the offense of manslaughter ought to be complemented by another offense.⁴¹

The statute has been held applicable to homicide resulting from driving at an immoderate rate of speed⁴² and homicide by a driver who

³⁷ The minority opinion said in the Campbell case, *supra* note 36, at 434, 212 N. W. at 101: "It is an innovation in the law of homicide, departs from the doctrines of common law manslaughter, and carries its own yardstick for measuring culpability . . . The willful, wanton and culpable negligence involved in manslaughter are all eliminated in a prosecution under this statute, for it plants negligent homicide upon ordinary negligence causing the death of a human being. In manslaughter . . . the negligence must be something more in degree than is sufficient to afford a right of action for damages. In negligent homicide the negligence need be no more than that ordinarily involved in an action for damages."

Accord: *People v. Orr* (1928) 243 Mich. 300, 220 N. W. 777, where a conviction of manslaughter was reversed, because the evidence warranted only a charge of negligent homicide for want of willfulness and wantonness.

³⁸ The court said in *People v. Campbell*, *supra* note 36 at 429, 212 N. W. at 99: "Therefore, this statute was intended to apply *only* to cases where the negligence is of a lesser degree than gross negligence." (Italics ours.)

³⁹ *People v. McMurchy* (1930) 249 Mich. 147, 228 N. W. 723.

⁴⁰ *People v. Maki* (1929) 245 Mich. 455, 223 N. W. 70.

⁴¹ The court said in *People v. McMurchy*, *supra* note 39, at 161, 228 N. W. at 728: "We are not concerned with whether the term 'negligent homicide' was adopted as a euphemism for the more harsh term of 'involuntary manslaughter of a lesser degree.' Similar standards of measurement are used to determine the respective crimes. Evidently the fear of being convicted of the crime of involuntary manslaughter did not act as a deterrent to the large number of drivers who through negligence less than gross have caused death. There is no doubt but that the Legislature was prompted to pass a law to curb reckless, careless, and negligent driving which caused death, in cases where the negligence was less than gross."

⁴² *People v. McMurchy*, *supra* note 39; *People v. Spence* (1930) 250 Mich. 573, 231 N. W. 126.

had fallen asleep,⁴³ which acts were not manslaughter under the Michigan law because of the absence of gross negligence.

The Michigan courts, however, have not maintained the separation between manslaughter and negligent homicide, the latter being only a complement to manslaughter in cases where the negligence is less than gross. There was at common law and there is apparently in Michigan⁴⁴ another group of cases, constituting manslaughter, where the issue of negligence is not involved at all, namely, homicide in the commission of an unlawful act (*malum in se*) not amounting to felony. The typical example is driving while under the influence of liquor. This is a crime in all jurisdictions;⁴⁵ in Michigan it is a misdemeanor.⁴⁶ Hence if death results the driver is guilty of manslaughter. The Michigan court in the famous case of *People v. Townsend*,⁴⁷ which is the leading case in this field,⁴⁸ succinctly pointed out that driving while intoxicated is an unlawful act (*malum in se*) and that if death results the driver is guilty of manslaughter. The question of the degree of negligence does not arise.⁴⁹ In such cases is a conviction of negligent homicide proper? The statute (in contrast to the California negligent homicide statute) does not in terms cover cases where the homicide occurred in the unlawful operation of a motor vehicle, and the manslaughter statute needed in these cases no complement. Nevertheless, the courts have applied the negligent

⁴³ *People v. Robinson* (1931) 253 Mich. 507, 235 N. W. 236.

⁴⁴ Michigan has no statutory definition of manslaughter. MICH. PENAL CODE § 321, Mich. Stats. 1931, p. 688.

⁴⁵ See the comment of the present writer, Note (1936) 24 CALIF. L. REV. 555, 557.

⁴⁶ MICH. COMP. LAWS (1929) § 4746.

⁴⁷ *People v. Townsend* (1921) 214 Mich. 267, 183 N.W. 177, 16 A.L.R. 902.

⁴⁸ See Note (1936) 24 CALIF. L. REV. 555, 567, 568, text to notes 67-69.

⁴⁹ The court made this distinction particularly with respect to matters of pleading. It said (*supra* note 47, at 273, 274): "The distinction between involuntary manslaughter committed while perpetrating an unlawful act not amounting to a felony and the offense arising out of some negligence or fault in doing a lawful act in a grossly negligent manner and from which death results must be kept in mind upon the question of pleading. In the former case it is sufficient to allege the unlawful act with sufficient particularity to identify it and then to charge that as a consequence the defendant caused death of the deceased, and there is no need to aver in detail the specific acts of the accused; but in case of manslaughter committed through gross or culpable negligence while doing a lawful act the duty which was neglected or improperly performed must be charged as well as the acts of the accused constituting failure to perform or improper performance." But the difference affects also the substantive law, as killing in the perpetration of an unlawful act, *malum in se*, is, according to the court, *ipso facto* manslaughter. The court said (*ibid.* at 281): "References made by defendant to the case of *People v. Barnes*, 182 Mich. 179, . . . have been duly considered, but are not applicable to the charge or facts in this case, for here the unlawful act causing the death was *malum in se*." But *cf.* *People v. Barnes*, *supra* note 35, with respect to acts not *mala in se*.

homicide statute in such cases. In *People v. Gibson*,⁵⁰ the defendant, who had killed a boy in the operation of a motor vehicle while under the influence of liquor, was convicted of negligent homicide rather than manslaughter, even though defendant was charged with the latter crime. Similarly in *People v. Beauchamp*,⁵¹ a drunken driver was charged with and convicted of negligent homicide. The court considered the intoxication only as influential upon the question of negligence and not as sufficient in itself to sustain the conviction. No reason was given for this view, which is apparently a deviation from the rule laid down in *People v. Townsend*. The ground was probably that the negligent homicide statute of Michigan does not provide for homicide in the perpetration of an unlawful act while driving but only for homicide caused in the operation of a motor vehicle in a careless, reckless or negligent manner. Thus, in order to bring these cases under the negligent homicide statute, the prosecuting attorney and the court ignored the unlawfulness of the operation of the vehicle and considered it only as an element of negligence. Practically, however, this leads to an overlapping of the negligent homicide and manslaughter statutes in these cases.

The situation in Michigan seems therefore to be that negligent homicide covers some ground not covered by the manslaughter statute, namely, negligence short of gross negligence, and it does not cover some ground covered by manslaughter, namely, killing through negligence amounting to wilfulness and wantonness or gross negligence. In so far as killing in consequence of a misdemeanor is concerned, however, the statutes are overlapping, at least as they are interpreted and applied by the courts, because such homicide is covered concurrently by both statutes. In the District of Columbia the law is apparently the same.

3. In Louisiana the legal situation is in effect more similar to that of Canada than that of Michigan. At first sight the statutes of Louisiana and Michigan seem not to differ much, except that the Louisiana statute requires also in the "involuntary homicide" cases that the homicide be committed in a grossly negligent or grossly reckless manner. It must be noted, however, that gross negligence designates, according to the Louisiana statute, a degree of culpability which is not quite as severe as is understood in Michigan under this term. The Louisiana statute differentiates it expressly from wilfulness and wantonness, while the Michigan courts interpreted gross negligence as culpability equal to wilful and wanton conduct. Moreover, also in contrast to Michigan law, any act made criminal by the legislature is held in Louisiana to imply culpable negligence and to warrant a conviction of manslaughter if

⁵⁰ *People v. Gibson* (1931) 253 Mich. 476, 235 N. W. 225.

⁵¹ *People v. Beauchamp* (1932) 260 Mich. 491, 245 N. W. 784.

death ensues. Thus the Louisiana court, affirming a conviction of manslaughter in a case where death resulted from the operation of a car without lights, said:⁵²

"It is not necessary here to consider the distinction between gross negligence and negligence from mere omission of some duty. The statute imposes a penalty for operating an automobile at night without lights, and its violation amounts to something more than simple negligence arising from some act of mere omission of duty.

"The act of violation is within and of itself *criminal* and *culpable* negligence."

One year thereafter the above quoted statute introducing the crime of involuntary homicide was enacted. Its relation to manslaughter has been several times the object of judicial discussion. The leading case is *State v. Flattman*.⁵³ The court stated:

"In fact, involuntary homicide, as defined in the first section of this act, is nothing more nor less than involuntary manslaughter, committed by the grossly negligent use or operation of a vehicle.

"All that the Legislature did by the provisions of sections 3 and 5 of Act No. 64 of 1930 was to leave it to the discretion of the jury, trying a person for manslaughter committed by the grossly negligent use or operation of a vehicle, to say whether the penalty should be imprisonment at hard labor for a term not exceeding twenty years,⁵⁴ or imprisonment with or without hard labor, at the discretion of the judge, for a term not exceeding five years."⁵⁵

The new statute was in no way a legislative pardon in so far as manslaughter is concerned.⁵⁶ The statutes are furthermore not inconsistent with each other:

"The act of 1930 provides, in effect, merely that involuntary manslaughter committed by the grossly negligent use or operation of a vehicle shall be subject to a less severe penalty than that which is prescribed for involuntary manslaughter committed otherwise, if the district attorney charges the defendant—or the jury convicts him—of involuntary homicide instead of manslaughter."⁵⁷

In *State v. Porter*⁵⁸ the court was compelled to restrict somewhat these broad statements. In this case the indictment did not explicitly state whether the charge was manslaughter or involuntary homicide. The court said:

"The question then arises whether a person may be prosecuted and convicted for manslaughter under that act. The answer is that he cannot

⁵² *State v. Wilbanks* (1929) 168 La. 861, 123 So. 600, 601. (Italics ours)

⁵³ *State v. Flattman* (1931) 172 La. 620, 628, 629, 135 So. 3, 6. (Footnotes ours)

⁵⁴ This is the punishment for manslaughter. LA. CODE CRIM. PROC. (Dart, 1932) § 1046.

⁵⁵ This is the punishment for involuntary homicide. LA. CODE CRIM. PROC. (Dart, 1932) § 1047.

⁵⁶ *State v. Stelljes* (1931) 172 La. 401, 134 So. 373.

⁵⁷ *State v. Williams* (1932) 173 La. 1061, at 1062, 139 So. at 481.

⁵⁸ *State v. Porter* (1933) 176 La. 673, 146 So. 465.

and the reason is that the act, in specific terms, defines and denounces a separate and distinct crime, the crime of involuntary homicide, which is, in a sense, akin to manslaughter, but which is not manslaughter in law. The Legislature has seen fit to create and define the crime of involuntary homicide and to fix the punishment therefor, and that crime is by the act, put in a class by itself."⁵⁹

But in spite of that, the offense embraces only cases which are also covered by the manslaughter definition, which is not repealed.

"It is argued by counsel for defendant that one who kills a human being by the grossly negligent or grossly reckless use of a vehicle may be guilty of manslaughter. That is unquestionably true and the act in specific terms so recognizes. . . ."⁶⁰

The cases which are covered by both are, however, not completely the same. Involuntary homicide must not be the result of a wilful or wanton act.

"The clause 'but not wilfully or wantonly' written into Act No. 64 of 1930 immediately following the definition of the crime, was intended merely as an exception, for most assuredly one who causes the death of another wilfully and wantonly, as those words are used in criminal law, is guilty of manslaughter or worse. They constitute no element of the crime of involuntary homicide. . . ."⁶¹

Negligent homicide in Louisiana is thus a "crime of lesser degree than manslaughter."⁶² Its relation to manslaughter is different from that in Michigan. In Michigan the crimes are related to each other, graphically speaking, like two interlocking circles, covering in common the field of homicide committed through the operation of a motor vehicle in the commission of an unlawful act, and that not by the words of the statute, but by judicial decision. In Louisiana the crimes are related to each other like concentric circles, the crime of manslaughter embracing the whole field of involuntary homicide and in addition the field of wilful and wanton acts. In Louisiana the acts contemplated by the involuntary homicide statute must be grossly negligent or grossly reckless; ordinary negligence does not suffice. Gross negligence is, however, not considered, as by the Michigan courts, as negligence included in wilfulness and wantonness, but as a degree of negligence short thereof. As far as acts are concerned which are unlawful and punishable as misdemeanors, they seem likewise to be included in both crimes. In *State v. Flattmann*⁶³ defendant committed the homicide while driving under the influence of liquor. He was charged with manslaughter but convicted only of involuntary homicide, although driving while drunk is a mis-

⁵⁹ *Ibid.* at 679, 146 So. at 467.

⁶⁰ *Ibid.* at 680, 146 So. at 468.

⁶¹ *Ibid.* at 685, 146 So. at 469.

⁶² *Ibid.* at 681, 146 So. at 468.

⁶³ *Supra* note 53.

demeanor,⁶⁴ and if injury results, a felony.⁶⁵ Thus the function of the involuntary homicide statute is obviously "to facilitate convictions" as in Canada and not to extend the scope of criminal homicide in motor vehicle accidents as in Michigan; this follows from the phraseology of the Louisiana statute. The defendant seems to be unable to complain in Louisiana if he is convicted of manslaughter even though his acts were only grossly negligent, and not wilful or wanton, because the manslaughter statute is concurrently applicable with the involuntary homicide statute to this sort of conduct in the discretion of the jury. In Michigan, however, he could complain if he was no more than ordinarily negligent and the jury rendered a verdict of manslaughter, because this offense does not embrace the lesser degrees of negligence.⁶⁶

4. In Vermont it is expressly said that the application of the manslaughter statute is not restricted. Whether this means a concurrent applicability of this statute in order to get convictions or a complementary one where the requirements of the manslaughter definition are not fulfilled cannot be said with certainty. The courts have not passed upon the question to the knowledge of the writer. Manslaughter is not specifically defined in the Vermont Code.⁶⁷ In New Hampshire the statute referring to homicide by the negligent operation of a motor vehicle is quite similar. Manslaughter in the second degree, on the other hand, is committed by the act, procurement, or culpable negligence of another.⁶⁸ Thus both offenses may here be concurrent.

5. In Nebraska the situation seems particularly confusing due to certain peculiarities in the law of manslaughter and the terms of the special statute, which contains no reference to the law of manslaughter. There seems to be no particular degree of negligence required with regard to manslaughter.⁶⁹ The Nebraska court took the view by *dictum*, however, in *Thiede v. State*,⁷⁰ that the mere violation of a speed statute does not furnish an "unlawful" act sufficient to constitute manslaughter if death ensues.

"We believe the rule to be that, though the act made unlawful by statute is an act merely *malum prohibitum* and is ordinarily insufficient,

⁶⁴ LA. GEN. STATS. (Dart, 1932) §§ 5202, 5262.

⁶⁵ LA. GEN. STATS. (Dart, 1932) §§ 5292, 5293.

⁶⁶ *People v. Orr*, *supra* note 37.

⁶⁷ VT. PUB. LAWS (1933) § 8377. The courts require a high degree of carelessness to constitute manslaughter (see Appendix, *infra*). Since the negligent homicide statute uses the words "careless or negligent" operation, it is probably of complementary application, in cases of ordinary negligence.

⁶⁸ N. H. PUB. LAWS (1926) c. 392, § 9. The courts have not defined "culpable negligence." See *State v. Karvelos* (1923) 80 N. H. 528, 120 Atl. 263.

⁶⁹ See *Schultz v. State* (1911) 89 Neh. 34, 130 N. W. 972, 33 L. R. A. (N. S.) 403, Ann. Cas. 1912C, 495.

⁷⁰ *Thiede v. State* (1921) 106 Nev. 48, 53, 182 N. W. 570, 572.

still, when such an act is accompanied by negligence or further wrong, so as to be, in its nature dangerous, or so as to manifest a reckless disregard for the safety of others, then it may be sufficient to support the wrongful intent essential to criminal homicide, and when such act results in the death of another may constitute involuntary manslaughter."

"Such an unlawful act alone unaccompanied by negligence is insufficient."

From this point of view the Nebraska statute declaring it a special felony to cause death by the operation of a motor vehicle in violation of the traffic rules of the Nebraska motor vehicle statute would seem to be supplementary to manslaughter because no negligence besides the violation of the Vehicle Act is required. The legislature, however, cannot have had this purpose in mind when enacting this statute, because the decision of *Thiede v. State* was handed down after the statute was passed.

The courts have not yet passed very thoroughly upon the relationship of the offenses. In *Crawford v. State*⁷¹ defendant killed a person while driving an automobile on the wrong side of the road. He was convicted of manslaughter. Defendant urged that he could be convicted only of the special offense of killing in the operation of a motor vehicle in violation of the Motor Vehicle Act. The supreme court affirmed the conviction of manslaughter. It pointed out that the special crime relates only to homicide in violation of the Motor Vehicle Act and that driving on the wrong side of the road was a misdemeanor but not part of the act; hence it concluded that an indictment for and conviction of manslaughter was correct.

"It was therefore proper for the county attorney to embody in the information any unlawful act on the part of the offender which was the proximate cause of the death under the Manslaughter Act."⁷²

In *Benton v. State*⁷³ the driver was intoxicated and drove at an excessive rate of speed. He was convicted of manslaughter. The court referred neither to the special crime of homicide in violation of the Motor Vehicle Act nor to the crime of homicide in the operation of a motor vehicle while intoxicated,⁷⁴ which the legislature had enacted after *Crawford v. State*. The court said that the evidence showed that defendant was grossly negligent and committed an unlawful act, and that under such circumstances a conviction of manslaughter was proper. The court cited *Crawford v. State* as authority, without regard to the distinction there made. It pointed out further that driving while drunk is likewise an unlawful act sustaining a conviction of manslaughter.

⁷¹ *Crawford v. State* (1927) 116 Nev. 125, 216 N. W. 294.

⁷² *Supra* note 71, at 129, 216 N. W. at 296.

⁷³ *Benton v. State* (1933) 124 Nev. 485, 247 N. W. 21.

⁷⁴ Neb. Stats. 1927, p. 411. The statute has been amended several times; see now NEB. C. S. SUPP. § 39-1106.

Without even discussing the special penal provisions, the court stated that "when one drives an automobile in violation of law pertaining to the operation of such vehicles on the public highway and in so doing, as a result of the violation of the law, causes death to another, [he] is guilty of manslaughter."⁷⁵ Thus concurrent applicability of the statutes seem to be the consequence. To explain this attitude of the court, one must look at the penalties imposed by these statutes. Manslaughter is punishable with imprisonment from one to ten years; causing death by the operation of a vehicle while drunk, with imprisonment from three to ten years; and homicide in the operation of a motor vehicle violating the Motor Vehicle Act, with fine or imprisonment from one to ten years.⁷⁶ One might think that if the driver were intoxicated, he should be convicted of the more severe crime and not of manslaughter; if he violated the Motor Vehicle Act he should be convicted only of the lesser crime. But the court held the manslaughter statute concurrently applicable in all these cases, evidently because the situation is legally less complicated, and because it is easier to get convictions under it in accidents where the evidence tends to show that the driver violated several statutes relating to conduct on the road.

6. In Wyoming, as has been mentioned, the court called⁷⁷ attention to the "incongruity" but did not say that there was any restriction of the manslaughter statute. Thus concurrent applicability seems to be indicated.

7. So far (as until now discussed) the statute defining the special offense has been either complementary or concurrently applicable but has not restricted the manslaughter statute. The concurrent applicability was established "in order to get convictions."

This result can be reached also if the new statute really restricts and supersedes the manslaughter statute, and this seems to be the case with respect to the rest of the statutes mentioned.

In Connecticut the legislature enacted the new statute as a section following the definition of manslaughter.⁷⁸ It seems to follow from this arrangement that this section restricts manslaughter to homicide not committed through the grossly negligent operation of a motor vehicle. Some evidence for this construction is furnished by the fact that while before the enactment of this amendment manslaughter cases regarding

⁷⁵ *Supra* note 73, at 488, 124 N.W. at 23.

⁷⁶ NEB. COMP. STATS. (1933) § 28-403 (manslaughter), NEB. C. S. SUPP. (1935) § 39-1106 (homicide in the operation of a motor vehicle violating the Motor Vehicle Act and homicide in the operation of a motor vehicle while drunk).

⁷⁷ *Supra* p. 7. A case under the special statute of 1921 is *Thompson v. State* (1929) 41 Wyo. 72, 283 Pac. 151.

⁷⁸ CONN. GEN. STAT. (1930) § 6046 (manslaughter); § 6047 (misconduct of operator of motor vehicles).

automobile accidents are in the reports,⁷⁹ the later cases involve only this new statute. Moreover the courts have kept the definitions of the manslaughter cases, so far as negligence is concerned.⁸⁰ In New Jersey the situation is similar. The statute of 1935 seems to exclude the manslaughter statute from application to homicide committed through "bad driving,"⁸¹ which is made a separate "misdemeanor," even though manslaughter was, prior to the amendment, considered as being broad enough to cover these cases.⁸² The degree of negligence required by the new offense is no less than the negligence required by the New Jersey court for manslaughter.

In Ohio there can be no doubt that homicide committed through driving in the violation of traffic rules is a special lesser degree of manslaughter excluding the ordinary manslaughter statute defining manslaughter in the first degree. The question of the degree of negligence is without any bearing. The manslaughter statute requires the commission of an unlawful act. Gross negligence alone is not sufficient. The act must be prohibited by law. The Ohio law has been so interpreted by the supreme court in *Johnson v. State*⁸³ and the courts have always since adhered to this rule, considering not even the violation of an ordinance as an unlawful act within the meaning of the statute.⁸⁴ Hence Ohio has drawn the logical consequences from the "get convictions" idea. It has reduced the degree of the crime with respect to homicide proximately caused by the unlawful operation of a motor vehicle.

In this connection must be mentioned also the law of Wisconsin, where the crime of negligent homicide has not been introduced but was proposed in the legislature. The new crime was in its definition similar to the Michigan statute.⁸⁵ In Wisconsin, however, manslaughter

⁷⁹ *State v. Campbell* (1910) 82 Conn. 671, 74 Atl. 927, 135 Am. St. Rep. 293; *State v. Goetz* (1910) 83 Conn. 437, 76 Atl. 1000, 30 L. R. A. (n. s.) 458.

⁸⁰ *State v. Ford* (1929) 109 Conn. 490, 146 Atl. 828; *State v. Carty* (1935) 120 Conn. 231, 180 Atl. 287.

⁸¹ This is the name of the statute in the index of the N. J. Stats. 1935, p. 1301.

⁸² *State v. Dugan* (1913) 84 N. J. L. 603, 89 Atl. 691, *aff'd*, (1914) 85 N. J. L. 730, 89 Atl. 1135; *State v. Blaine* (1927) 5 N. J. Misc. Rep. 633, 137 Atl. 829, *aff'd*, (1928) 104 N. J. L. 325, 140 Atl. 566; *State v. McGrath* (1928) 6 N. J. Misc. Rep. 217, 140 Atl. 452, *aff'd*, 105 N. J. L. 251, 142 Atl. 918.

⁸³ *Johnson v. State* (1902) 66 Ohio St. 59, 63 N. E. 607, 90 Am. St. Rep. 564, 61 L. R. A. 277.

⁸⁴ *State v. Collingsworth* (1910) 82 Ohio St. 154, 92 N. E. 22; *State v. Schaeffer* (1917) 96 Ohio St. 215, 117 N. E. 220 (one of the leading cases relating to the constitutionality of speed statutes); *Schier v. State* (1917) 96 Ohio St. 205, 117 N. E. 229; *Jackson v. State* (1920) 101 Ohio St. 152, 127 N. E. 870; *Steele v. State* (1929) 121 Ohio St. 332, 168 N. E. 846 (overruling *State v. O'Mara* (1922) 105 Ohio St. 94, 136 N. E. 885, which opinion considered city ordinances as local "law"); *Driggs v. State* (1931) 40 Ohio App. 130, 178 N. E. 15, *aff'd*, (1931) 123 Ohio St. 686, 177 N. E. 633; *Masoncup v. State* (1933) 47 Ohio App. 32, 189 N. E. 512.

⁸⁵ See the text in *State v. Whatley* (1932) 210 Wis. 157, 162, 245 N. W. 93, 95, see text to note 21, *supra*.

in the fourth degree (involuntary manslaughter) did not, according to the courts, require gross negligence as in Michigan, but mere negligence was held to be sufficient.⁸⁶ Hence there were no cases to be covered by a new statute as in Michigan, and a new statute was necessary only if it was thought advisable to reduce the degree of the crime of homicide in the operation of a motor vehicle in order to get convictions, or if the manslaughter statute was deemed to need a restriction, not only with respect to traffic accidents, but in general. The proposed bill assumed both of these changes advisable, and in order to establish a clear relationship between both crimes it changed the manslaughter law, making manslaughter in the fourth degree the "killing of a human being by the act, procurement or gross negligence of another, except negligent homicide." The legislature, however, did not adopt the negligent homicide statute; it adopted the amendment requiring gross negligence instead of mere culpable negligence for manslaughter in the fourth degree. If the new statute had been passed it would have excluded the manslaughter statute.⁸⁷ This exclusion would have been a complete one in contrast to the Michigan law, without any concurrent application as in Michigan in cases of homicide in commission of an unlawful operation of the vehicle. For in Wisconsin, homicide in the negligent commission of an unlawful act constitutes manslaughter in the first degree,⁸⁸ and would therefore fall neither under the definition of manslaughter in the fourth degree nor under negligent homicide.

These observations show that the principal purpose of statutes like section 500 of the California Vehicle Code is "to get convictions" and that there was a need for them either because juries have been reluctant to apply the manslaughter statutes,⁸⁹ feeling the guilt of the defendant

⁸⁶ See *State v. Whatley*, *supra* note 85, at 161, 245 N. W. at 94: "... This court had held that under the term 'culpable negligence' as used in that statute one can be held for manslaughter in the fourth degree even though the killing is involuntary and is due to inadvertence. *Clemens v. State*, 176 Wis. 289, 304, 185 N. W. at 209; *Kleist v. Cohodas*, 195 Wis. 637, 643, 219 N. W. 366. In each of those cases that statute, in so far as it permitted of a conviction of manslaughter in the fourth degree, even though the killing was but involuntary and due to inadvertence, was severely criticized as attaching too arduous a consequence to acts and omissions of mere inadvertence, and a modification of the law by the legislature was deliberately proposed."

⁸⁷ Thus the court said in *State v. Whatley*, *supra* note 85 at 162, 245 N. W. at 95: "It is apparent that the proposed newly named offense of negligent homicide, as thus defined, would have included and perhaps been solely applicable to all such instances of involuntary killing, which were due to inadvertence as theretofore amounted to violations of sec. 340.26, Stats."

⁸⁸ WIS. STAT. (1929) § 340.10.

⁸⁹ A typical case of this sort in an American jurisdiction is *Commonwealth v. Vartanian* (1925) 251 Mass. 355, 146 N. E. 682, where a reckless driver who killed a man was found not guilty of manslaughter but convicted of driving so as to endanger the lives and safety of the public. The supreme judicial court upheld the conviction.

to be not very great, or, as in Michigan, because the judicial definition of manslaughter did not include all cases of this sort, even though some punishment appeared desirable. This has led to three different solutions: Either

- (1) the negligent homicide statute is concurrently applicable with the manslaughter statute in cases where the degree of culpability of the driver is not very great; in all cases where the negligent homicide statute is applicable, a conviction of manslaughter may take place (*e.g.* Louisiana); or
- (2) the negligent homicide statute is exclusive and complementary to manslaughter with regard to the field defined by it because it either restricts ordinary manslaughter to homicide other than that committed in the operation of a motor vehicle (*e.g.* Ohio) or because it covers only cases of lesser culpability (*e.g.* the proposed statute in Wisconsin and, apparently, the statute in Vermont); or
- (3) there is an overlapping of the two statutes so that some cases are only manslaughter, others only negligent homicide, and some either one or the other in the discretion of the jury (*e.g.* Michigan).

III.

The foregoing observations demonstrate that the scope of the manslaughter definition is the key or at least one of the most important factors for the understanding of the relationship between manslaughter and negligent homicide and of the reasons or needs for the creation of the latter offense. It seems advisable, therefore, to discuss at some length the development of the law of manslaughter, particularly with respect to motor vehicle accidents, before entering into an examination of the particular situation in California.

The best starting point appears to be the definition of Blackstone, in his *Commentaries*, because it has been the model for a great many American jurisdictions and has had great influence on the courts. Blackstone defined manslaughter as "the unlawful killing of another, without malice either express or implied [*e.g.* in the commission of a felony], which may be either voluntarily, upon a sudden heat, or involuntarily, but in the commission of some unlawful act."⁹⁰ Blackstone was probably the very first to make this bipartition.⁹¹ Involuntary manslaughter is again subdivided into two groups of cases, because Blackstone states that the requirement of an unlawful act is satisfied also "where a person

⁹⁰ 4 BL. COMM. *191.

⁹¹ See the statement of the court in *Commonwealth v. Gill* (1935) 120 Pa. Super. 22, 182 Atl. 103.

does an act lawful in itself, but in an unlawful manner, and without due caution and circumspection."⁹² This partition of manslaughter and the subdivision of involuntary manslaughter was generally accepted. Eden in his *Principles of Criminal Law* repeated it verbatim two years after the appearance of the *Commentaries*.⁹³ Early American cases repeated it,⁹⁴ and Stephen in his *Commentaries* took this passage from Blackstone without change.⁹⁵ Thus its influence on the later development⁹⁶ cannot be overrated. Particularly with the invention of rapidly moving vehicles and the increasing number of accidents on the roads the manslaughter definition has become more and more an object of judicial decisions. (Of course, these cases are in general in the nature of involuntary manslaughter.)

Both alternatives of involuntary manslaughter, in the commission of an unlawful act and in the commission of an act, lawful in itself, but without due caution and circumspection and in an unlawful manner, have offered many difficulties to the courts, especially in motor vehicle cases.

(1) The second alternative (killing in the commission of a lawful act performed without due caution and circumspection) seems to have become a problem child of the courts at an earlier date than the first, since the bulk of the legislation regarding driving has grown up only very recently. The chief question is as to what degree of negligence is required. Blackstone and Eden said "without due caution and circumspection" and Blackstone is apparently the originator of this formula.⁹⁷ It has been adopted by a number of codes.⁹⁸ On the one side it is not required that the negligence be so great as to show an abandoned and malignant heart, so as to imply malice.⁹⁹ This would constitute the

⁹² 4 BL. COMM. *192.

⁹³ EDEN, *PRINCIPLES OF PENAL LAW* (2d ed. 1771) 224, 225, 231.

⁹⁴ See for instance *Commonwealth v. Gable* (1821) 7 Serg. and Rawl. 423, 428, an early Pennsylvania case where Blackstone's definitions are fully adopted. This case was taken as a leading precedent also in *Alabama: Williams v. State* (1887) 83 Ala. 16, 19.

⁹⁵ 4 STEPHEN'S *NEW COMMENTARIES ON THE LAWS OF ENGLAND* (Brown's 13th ed. 1899) 49. These *Commentaries* have likewise a certain influence on the codes, cf. note of Prof. Stone in (1923) 11 CALIF. L. REV. 434.

⁹⁶ See for instance with respect to Pennsylvania the account in *Commonwealth v. Gill*, *supra* note 91; see also *State v. Custer* (1929) 129 Kan. 381, 282 Pac. 1071.

⁹⁷ See Note (1923) 11 CALIF. L. REV. 434.

⁹⁸ See *People v. McMurchy*, *supra* note 42, at 170, 228 N.W. at 731: "An examination of the automobile speed laws of the 48 states discloses that in 10 statutes defining manslaughter include death caused by lack of 'due caution and circumspection.' Eleven states include under the crime of manslaughter death caused by 'culpable negligence'."

⁹⁹ See the cases cited in the comment of the present writer in (1936) 24 CALIF. L. REV. 555, 569, at notes 78 ff., to which in note 81, *State v. Dorsey* (1889) 118 Ind. 167, 20 N. E. 777, should be added.

homicide murder. On the other hand, all jurisdictions¹⁰⁰ except Texas seem to agree that slight negligence or even "ordinary" or "civil" negligence is not sufficient. It must be some carelessness which is labeled "wilful" or "wanton" or "gross or culpable." The meaning of these terms is not well settled. It must be ascertained for every jurisdiction, but in general, except in Wisconsin, it is agreed that "culpable" means something more than ordinary negligence, and this, on the other hand, is a term the significance of which is very well fixed. Eden early warned that "It is extremely dangerous to give any extract from cases of homicide, where every circumstance weigheth 'something in the scale of justice.'"¹⁰¹ But it can be said that it is a fair description of the situation when the court in a recent Missouri case says:¹⁰²

"In the zone between these two extremes, misadventure or mere civil liability, on the one hand, and carelessness so gross and wanton as to import malice, on the other, the killing of a human being by culpable negligence is manslaughter."

(2) In the first group of cases which form involuntary manslaughter, *i.e.*, homicide in the commission of an unlawful act not amounting to felony, the issue of negligence is not raised, unless as in Texas and Wisconsin the unlawful act must by statutory provision be accompanied or done by negligence.¹⁰³ Thus the court in *Commonwealth v. Gill*, discussing the point of negligence, observed:¹⁰⁴

"Of course, in this discussion, we have paid little attention to the first class of cases of involuntary manslaughter, *viz.*, where one, while doing an unlawful act, accidentally kills another. If the act is unlawful—that is, is forbidden by law, illegal, contrary to the law—and the death of another results as a consequence of it, it constitutes involuntary manslaughter."

Gradually there seems to have grown up a dislike of this rule. With the growing number of petty statutory offenses, particularly with respect to "rules of the roads," a sort of disharmony came into the law of manslaughter. If such a penal provision, however petty, relating to conduct on the road, is violated, no negligence is required for a conviction, while if the defendant has violated no statute, then convictions require not only negligence but "culpable" or "gross negligence." The

¹⁰⁰ For the law in the different jurisdictions see Appendix, *infra* p. 37.

¹⁰¹ EDEN, *op. cit. supra* note 93, at 226. Very recently the court in *Commonwealth v. Gill*, *supra* note 91, at 25, 182 Atl. at 108, said very similarly: "In a case falling under the second class of the definition of manslaughter, where it is alleged that the death resulted from the doing of an act 'lawful in itself but done . . . without due caution and circumspection,' it is impracticable to attempt to define the exact degree of negligence that must be shown in order to sustain a conviction, but there should be present some element of rash or reckless conduct, which approximates acting in an *unlawful* manner."

¹⁰² *State v. Studebaker* (1933) 334 Mo. 471, 480, 66 S.W. (2d) 877, 881.

¹⁰³ See *supra* note 7 and WIS. STAT. (1931) § 340.10.

¹⁰⁴ *Supra* note 91, at 25, 182 Atl. at 108.

disharmony became particularly unbearable where the statutory offense required no *mens rea* whatsoever.¹⁰⁵ Thus is maintained a sort of absolute liability,¹⁰⁶ which is an incongruity in the law of homicide.¹⁰⁷

Therefore it has appeared desirable to restrict the harshness of the "while in the commission of an unlawful act" rule and to limit the criminal responsibility for homicide committed in the perpetration of an unlawful act. Different methods have been applied and sometimes there appears in the cases a strange mixture of the various solutions tried in other instances.

(a) The classical method of restricting liability for killing while in the commission of an unlawful act is the famous distinction between *malum in se* and *malum prohibitum*.¹⁰⁸ As early as the 17th century Hale¹⁰⁹ and Foster¹¹⁰ denied the criminal liability for homicide of one who killed another while engaged in an unlawful act which was *malum prohibitum* only. For, they said, "the prohibitory statute will not enhance the accident beyond its intrinsic moment." Eden, in his *Principles*, stated subsequently that an act *malum prohibitum* only is not an unlawful act in the sense of the homicide definition:

"If however the act, on which death ensueth, be unlawful only as *malum prohibitum*; if (for instance) it should consist in shooting at game without a statutable qualification, it is not under that description to be considered as an unlawful act."¹¹¹

This restriction of unlawful acts to acts *mala in se* eliminates, of

¹⁰⁵ The problem of the requirement of *mens rea* in statutory offenses becomes more and more troublesome. See Sayre, *Mens Rea* (1932) 45 HARV. L. REV. 974; Turner, *op. cit. supra* note 31; Turner, *op. cit. supra* note 32; Jackson, *Absolute Prohibition in Statutory Offenses* (1936) 6 CAMB. L. J. 83; Stallybrass, *The Eclipse of Mens Rea* (1936) 52 L. Q. REV. 60.

¹⁰⁶ To the same effect: Turner, *op. cit. supra* note 32, especially at 42, 43.

¹⁰⁷ This incongruity is the remainder of a long historical development. First all homicide caused by an unlawful act was murder. By the time of Foster the unlawful act was required to be a felony in order to be the basis of a murder conviction. Nowadays in England, particularly under the influence of Stephen, the felony must be a felony of violence. See Turner, *op. cit. supra* note 32, at 42, 43, 54 ff., 65; Perkins, *A Re-Examination of Malice Aforethought* (1934) 43 YALE L. J. 537, 557 ff.; Arent and MacDonald, *The Felony Murder Doctrine and Its Application Under the New York Statutes* (1935) 20 CORN. L. Q. 288, 289-291; HARRIS, *PRINCIPLES AND PRACTICE OF THE CRIMINAL LAW* (Wilshire's 15th ed. 1933) 194. In the crime of manslaughter, however, the old "in the commission of an unlawful act" rule remained for a long time unqualified and was adopted also by Stephen. As Professor Turner observes (*op. cit. supra* note 32, at 43): "In the case of murder he instinctively recoiled from the doctrine of absolute liability without clearly grasping that the principle which was opposed to it applies also to manslaughter. So he was led into confusion and self contradiction."

¹⁰⁸ About this distinction in general see Note (1930) 30 COL. L. REV. 74; see also Note (1907) 4 ANN. CAS. 800.

¹⁰⁹ 1 HALE, P. C. (1778) 475, 476.

¹¹⁰ FOSTER, *CROWN CASES* (1791) 258, 259.

¹¹¹ EDEN, *op. cit. supra* note 93, at 213.

course, many of the discrepancies which arise from the bipartition of involuntary manslaughter. If the act is not unlawful in the sense of the definition of manslaughter when only *malum prohibitum*, then in order to constitute manslaughter, it must be committed with the same degree of negligence as lawful acts. This distinction, however, is very uncertain and generally abandoned. The most radical solution, of course, would be to require "culpable" or "gross" negligence in all cases. This seems to be the rule evolved by the Massachusetts courts.¹¹²

(b) At the time when the disharmony between homicide through culpable negligence and homicide in violation of a statutory rule with a penal sanction became most troublesome another safety valve was invented which relieved many courts from going back to this old and vague distinction. This was the requirement of proximate causation.

While in the older books and cases the question of proximate causation seems never to have been raised, it has become a very important remedy for eliminating the undesirable results of the homicide definitions.¹¹³ The courts have sometimes required a very minute proof of the proximately causal connection between the violation of the prohibitory statute and the ensuing death.¹¹⁴ Particularly in cases where the defendant drove in violation of speed limits the defense has been admitted that the deceased ran into the car and would have been killed also by slower driving. The concealed affinity between the issue of "proximity" of cause and negligence has become more and more troublesome in the field of torts. In the field of criminal law the issue of proximate causation seems by the very reason of this affinity¹¹⁵ to

¹¹² See *Commonwealth v. Arone* (1928) 265 Mass. 128, 131, 163 N. E. 758, 760, where a traffic homicide occurred, the driver having violated two traffic laws. The court said: "The jurors could have found that both these provisions had been disregarded. Such disregard could be found to be negligent . . . But, of itself, this would not establish wilful, wanton or reckless conduct." See also *Commonwealth v. Pierce* (1884) 138 Mass. 165. It may further be noted along this line that in jurisdictions where different degrees of manslaughter exist, according to whether it happens in the commission of an unlawful act or by negligence, the courts have often ignored this distinction. See *State v. Denevan* (1926) 49 S. D. 192, 206 N. W. 927; *Christie v. State* (1933) 212 Wis. 136, 248 N. W. 920.

¹¹³ With respect to murder see *Perkins, loc. cit. supra* note 107. With respect to manslaughter, particularly committed in the operation of a motor vehicle, see *Note* (1935) 10 TEMP. L. Q. 67.

¹¹⁴ Good examples are *Kimmel v. State* (1926) 198 Ind. 444, 154 N. E. 16; *Thompson v. State* (1933) 108 Fla. 370, 146 So. 201; *Jackson v. State* (1920) 101 Ohio St. 152, 127 N. E. 870; *State v. Nicholas* (1934) 62 S. D. 511, 253 N. W. 737; *State v. Rossmann* (S. D. 1936) 268 N. W. 702; cf. also *Note* (1935) 99 A. L. R. 756, 772 ff.

¹¹⁵ As to the connection between guilt and proximity of causation, see also *Strahorn, Criminology and the Law of Guilt* (1936) 84 U. OF PA. L. REV. 491, 505; as to the function and concept of proximate causation in criminal law in general see *ibid.*; *Gausewitz, Considerations Basic to a New Criminal Code*, I (1936) 11 Wis. L. REV. 346, 380; *MILLER, HANDBOOK OF CRIMINAL LAW* (1934) 82, 91.

have become a helpful remedy to prevent too great disharmonies between cases where manslaughter is predicated upon culpable negligence and where it is predicated upon the commission of a statutory misdemeanor.

In Tennessee the question of proximate cause has even been coupled with the distinction between *malum in se* and *malum prohibitum*. The courts have refused to make an inquiry into the proximate causation of the death if the defendant committed an unlawful act which was *malum in se*, allowing it only if the offense was *malum prohibitum*. In the latter case the death must have been a natural and probable result of the offense. Driving at a rate of speed forbidden by statute thus supports a conviction of manslaughter only if the death was a natural and probable consequence.¹¹⁶ In the case of driving while intoxicated such "speculative inquiries" are not allowed.¹¹⁷ The rule in Maine is similar: Misadventure will not excuse if the defendant was engaged in an unlawful act which was *malum in se*, but it will do so, if the act was *malum prohibitum* only, unless the prohibitory statute was for the purpose of safeguarding life or safety. But a statute prohibiting a certain speed has not such a purpose, according to the court.¹¹⁸

(c) While proximate causation in manslaughter cases has been required generally, some jurisdictions have preserved the further requirement that the unlawful act proximately causing the death must have some special qualification, and that unlawfulness alone is not sufficient. Thus a number of jurisdictions do not consider the violation of a local penal ordinance sufficient to constitute an "unlawful" act within the meaning of the manslaughter definition, sometimes invoking the distinction between *malum prohibitum* and *malum in se*.¹¹⁹ A few jurisdictions have gone further and declared that the violation even of statutes of a mere prohibitory character does not constitute an "unlawful" act in the sense of the manslaughter definition. These jurisdictions are Indiana, Michigan and Nebraska. A square decision to this

¹¹⁶ *Hiller v. State* (1932) 164 Tenn. 388, 50 S.W. (2d) 225; *contra*, *McGoldrick v. State* (1929) 159 Tenn. 667, 21 S.W. (2d) 390 (the question of proximate cause is excluded also by driving in violation of speed limit).

¹¹⁷ *Keller v. State* (1927) 155 Tenn. 633, 299 S.W. 803.

¹¹⁸ *State v. Budge* (1927) 126 Me. 223, 137 Atl. 244.

¹¹⁹ *Commonwealth v. Adams* (1873) 114 Mass. 323 (referring to the distinction); *People v. Pearne* (1897) 118 Cal. 154, 50 Pac. 376 (referring to the distinction); *State v. Collingsworth* (1910) 82 Ohio St. 154, 92 N.E. 22; *State v. Born* (1912) 85 Ohio St. 430, 98 N.E. 108; *Steele v. State* (1929) 121 Ohio St. 332, 168 N.E. 846; *State v. Bowser* (1927) 124 Kans. 556, 261 Pac. 846; *Nichols v. State* (1933) 187 Ark. 999, 63 S.W. (2d) 655 (ordinances have only evidentiary effect); *semble* *State v. Clark* (1923) 196 Iowa 1134, 196 N.W. 82; but *cf.* *Thompson v. State*, *supra* note 114, and *State v. Sandvig* (1927) 141 Wash. 542, 251 Pac. 887 (where the only restriction made is that the ordinances must be pleaded specifically).

effect, however, is found only in a Nebraska case.¹²⁰ In Indiana the cases have sometimes announced the rule that "the words 'unlawful act' used in the statute defining involuntary manslaughter, comprise as they did at common law more than an act prohibited by positive statute,"¹²¹ but some cases contain *dicta* which seem to reject this interpretation.¹²² Moreover the opinion in the Michigan case of *People v. Barnes*, which is in general invoked as the leading case for the proposition that the violation of a speed statute is not *malum in se* and, therefore, no basis for manslaughter conviction if death results, is in reality very hesitating.¹²³ But it is important to note that the discrepancy between "gross negligence" and "unlawfulness of the act" is the very difficulty which the court wanted to eliminate. It said

"While it might be said that the wilful violation of this statute would constitute negligence, it does not follow that such negligence would in a given case amount to gross negligence or manslaughter, . . ." ¹²⁴

It was, therefore, the logical consequence of this line of reasoning to apply the negligent homicide statute to a homicide committed in the perpetration of an unlawful act, as the court did in *People v. Beauchamp* and *People v. Gibson*, in spite of the failure of the statute to mention this alternative.¹²⁵ In Canada also there seems to be a strong conflict as to whether the mere violation of a prohibitory statute without culpable negligence suffices.¹²⁶

(d) The law of North Carolina is noteworthy in this connection. There several earlier cases made the distinction between acts *malum in se* and acts *malum prohibitum*.¹²⁷ Later the courts held the defendant

¹²⁰ Thiede v. State, *supra* note 70.

¹²¹ Minardo v. State (1932) 204 Ind. 422, 183 N. E. 548; Dunville v. State (1919) 188 Ind. 373, 375, 123 N. E. 689; Potter v. State (1904) 162 Ind. 213, 217, 70 N. E. 129 (gun case).

¹²² Cf. Kimmel v. State, *supra* note 114.

¹²³ The court seemingly held the issue of proximate causation and gross negligence to be the vital point. The same vagueness appears in the Pennsylvania case of Commonwealth v. Lowans (1934) 21 Pa. D. & C. 66 (driving without license) which quoted at length from *People v. Barnes*, *supra* note 35; but cf. Commonwealth v. Romig (1935) 22 Pa. D. & C. 341 (driving without license), where the distinction between *malum in se* and *malum prohibitum* is disapproved. The cases are commented upon in Note (1935) 10 TEMP. L. Q. 67.

¹²⁴ *Supra* note 35, at 143, 148 N. W. at 405.

¹²⁵ Notes 50 and 51, *supra*.

¹²⁶ Cf. the discussion by Trueman, J. A., in *Rex v. Dolynchuk* [1934] 1 W. W. R. 200, 203, annotated in (1934) 3 FORTNIGHTLY L. J. 260; see also *Rex v. Cahill* (Sup. Ct. of Prince Edward Island), abstracted in (1933) 2 FORTNIGHTLY L. J. 241, and note *ibid.* at 237. In general the courts in American jurisdictions consider the violation of speed statutes as unlawful acts within the manslaughter definition; cf. *State v. Custer*, *supra* note 96.

¹²⁷ *State v. Horton* (1905) 139 N. C. 588, 51 S. E. 945; *State v. Trolinger* (1913) 162 N. C. 618, 77 S. E. 957.

guilty of manslaughter "without regard to this distinction, if the act is a violation of a statute intended and designed to prevent injury to the person and is in itself dangerous and death ensues."¹²⁸ Since 1932, however, a further refinement has been added.¹²⁹ The courts now look to see whether the particular violation of such a statute by the defendant was or was not culpable. By this reasoning the North Carolina courts, which are not bound by any statutory definition, have introduced the issue of culpable negligence into the first alternative of involuntary manslaughter and have thus restored harmony among the motor vehicle accident cases. The courts now make the following distinction:

"An intentional, wilful or wanton violation of a statute or ordinance, designed for the protection of human life or limb, which proximately results in injury or death, is culpable negligence,"

and hence constitutes manslaughter.

"But an unintentional violation of a prohibitory statute or ordinance, unaccompanied by recklessness or probable consequences of a dangerous nature, when tested by the rule of reasonable prevision is not such negligence as imports criminal responsibility."¹³⁰

This discussion of the evolution of the general law of manslaughter with respect to automobile cases purports to demonstrate that the law has become constantly more refined and complicated. The introduction of distinctions in the degree of culpability and the increasing number of statutory offenses with regard to the operation of motor vehicles have destroyed harmony between the alternatives of the apparently simple bipartition of manslaughter.

Considerations of the degree of guilt have become desirable with regard to homicide in the commission of an unlawful act and the courts have tried to achieve this aim either by a restriction of the field of unlawful acts within the meaning of the manslaughter definition or by emphasizing the requirement of proximate causation or, finally, by interpreting the requirement of the commission of an unlawful act as the culpable commission of an unlawful act.

Finally, the restriction of the scope of manslaughter to homicide of a higher degree of culpability than mere negligence has made it desirable in cases where society needs a penal protection against ordinary negligence, as in automobile cases, to enact provisions prescribing punishment of some sort in these cases.

¹²⁸ See *State v. Palmer* (1929) 197 N. C. 135, 137, 147 S. E. 817; *State v. Agnew* (1932) 202 N. C. 755, 164 S. E. 578; *State v. Stansell* (1932) 203 N. C. 69, 72, 164 S. E. 580.

¹²⁹ See *State v. Agnew* and *State v. Stansell*, *supra* note 128.

¹³⁰ *State v. Cope* (1933) 204 N. C. 28, 167 S. E. 456.

IV.

On the basis gained by this survey of the negligent homicide statutes of other jurisdictions, and their application, and of the general trend of the manslaughter law with respect to automobile cases, it should be possible to reach a solution of the problems raised by the California negligent homicide statute.

1. It seems almost without doubt that no implied repeal or restriction of the manslaughter provision was intended. Even if one admits the possibility, pointed out above, that section 500 of the Vehicle Code operates to exempt the motor vehicle cases from the general manslaughter statute, it is almost certain that section 500 of the Vehicle Code actually does not have this result. The survey of the other jurisdictions has shown that in only one state (Ohio) the automobile cases are clearly taken out of the operation of the general manslaughter statute, while in the other states the negligent homicide and manslaughter statutes are concurrent or complementary. Furthermore, the Ohio statute by its terms indicated its restrictive effect. Hence it is reasonable to assume that the operation of the California statute was not intended to go farther than that of the similar statutes of Michigan, District of Columbia, Louisiana, Vermont, Canada, or England.

This conclusion is strengthened by the attitude which the California courts took with respect to the relationship between the manslaughter statute and section 367e of the California Penal Code, which made it a felony for a driver to cause the death of or bodily injury to any person through driving while intoxicated. The supreme court declared expressly in *People v. Collins*¹³¹ that the introduction of this lesser crime did not prevent prosecutions for manslaughter in such cases. The court said:

"No ground appears to us for holding that the adoption of section 367e had the legal effect claimed . . . To hold that the legal effect of section 367e is to withdraw from the crime of involuntary manslaughter all prosecutions where death is caused by intoxication is to impute to the legislature an intention to eliminate from that offense prosecutions for the most prolific source of fatal accidents and thereby reduce the maximum punishment for such offenders by one half. That is not the tendency of recent legislation."

To be sure, in *People v. Lewis*¹³² the Appellate Department of the Superior Court of the County of Los Angeles has declared in a case involving the relationship between section 367d of the Penal Code and section 112 of the California Vehicle Act that "where two legislative enactments punish exactly the same act they are in conflict." But this

¹³¹ *People v. Collins* (1925) 195 Cal. 325, 346, 347, 233 Pac. 97.

¹³² *People v. Lewis* (1934) 4 Cal. App. (2d) 775, 778, 37 P. (2d) 752, 753.

rule is of doubtful authority. It seems clearly in contrast with the statement made by the supreme court in *People v. Collins*. Moreover, the supreme court cases which are cited by the appellate department as authority to support its statement, involve a completely different proposition, *i.e.*, the relationship between a local ordinance and a penal statute.¹³³ Hence there is no authority in California that two penal statutes regarding the same act are necessarily in conflict and that the latter either has repealing effect or is void. The intent of the legislature is controlling and if it can be assumed that both statutes were intended to be concurrently applicable, the conflict is eliminated.

2. If, then, the definition of manslaughter in the California Penal Code is not restricted by the negligent homicide statute the question arises as to what is the precise relationship between these crimes. Is there a concurrent applicability as in Louisiana or Canada or is there rather a relationship similar to that in Michigan, *i.e.*, a relation partly complementary and partly concurrent. In other words, are all cases of negligent homicide also punishable as manslaughter, or only some of them, the rest falling under the newly created offense? This can be ascertained only by a consideration of the scope of manslaughter in California.

The definition of involuntary manslaughter in Penal Code section 192 is very similar to the above mentioned definition of Blackstone. A difference exists only with respect to the second alternative. The Penal Code requires, in addition to Blackstone's definition, that the lawful act must be one which might produce death, and while Blackstone required that the act be committed in an unlawful manner *and* without due caution and circumspection, the Penal Code declares that the doing of the act in an unlawful manner, *or* without due caution and circumspection, is sufficient.

The main question is, therefore, what does "without due caution and circumspection" mean; what degree of culpability is required? The law on this point seems in California to be less settled and less clear than in other jurisdictions.

The question was for the first time explicitly passed upon in the case of *People v. Seiler*.¹³⁴ In denying a petition for rehearing the supreme court withheld its approval of the definition of the district court of appeal, which had required that the commission of the act be "in a culpable reckless manner." The supreme court said:

¹³³ *Ex parte Stephen* (1896) 114 Cal. 278, 282, 46 Pac. 86; *In re Murphy* (1923) 190 Cal. 286, 290, 212 Pac. 30; *In re Mingo* (1923) 190 Cal. 769, 771, 214 Pac. 850.

¹³⁴ *People v. Seiler* (1922) 57 Cal. App. 195, 201, 207 Pac. 396, 399, (1923) 11 CALIF. L. REV. 434.

"The lack of due caution and circumspection need not go to the extent of being wanton or reckless, although it might possibly be such as would be defined as culpable. But the word 'culpable' is not an apt description of the idea intended to be conveyed by the words 'due caution and circumspection.'"

This statement was repeated by the supreme court in *People v. Wilson*.¹³⁵ The court declared that the following rule could be laid down as proper:

"When a person is doing anything dangerous in itself, or has charge of anything dangerous in its use, and acts with reference thereto without taking those proper precautions which a person of ordinary prudence would have used under the circumstances and the death of another results therefrom, his act or neglect is a criminal act against the person so killed even though his negligence does not amount to a wanton or reckless disregard of human safety or life."

This rule has been followed by the district courts of appeal in *People v. Crossan*¹³⁶ and *People v. Marconi*.¹³⁷

It is not easy to understand the true significance of this rule. Did the supreme court therein formulate the proposition that ordinary (civil) negligence would suffice to constitute manslaughter? Certainly California has widened the concept of criminal negligence necessary to constitute manslaughter further than most of the other jurisdictions. But it does not seem correct to say that the quoted passages from *People v. Seiler* and *People v. Wilson* are authority for the proposition that the negligence which suffices as the basis for civil liability and the negligence which is the foundation for criminal liability under the manslaughter statute are of the same degree. To be sure the language of the court contains a term which is customarily used in the definition of civil negligence, namely, the following: "precautions¹³⁸ which a person of ordinary prudence would have used under the circumstances." But as a whole the definition differs from that of ordinary negligence, including, as it does, the element of something dangerous in itself or in its use. Furthermore, the court admitted in the quoted passage from *People v. Seiler* that the lack of due caution and circumspection might be such as would be defined as culpable, even though this word was not considered to be a proper term to convey the significance of due caution and circumspection. Above all it can be assumed that if the court

¹³⁵ *People v. Wilson* (1924) 193 Cal. 512, 518, 226 Pac. 5, 7.

¹³⁶ *People v. Crossan* (1927) 87 Cal. App. 5, 9, 261 Pac. 531, 533.

¹³⁷ *People v. Marconi* (1931) 118 Cal. App. 683, 688, 5 P. (2d) 974, 976.

¹³⁸ The writer, however, is much puzzled by the use of the word "precautions," which may convey possibly something different from the words "care" or "caution," which are used in the definitions of civil negligence. The word "precaution" means caution previously applied, according to Webster's definition, which is quoted with approval in *Harris v. Hicks* (1920) 143 Ark. 613, 221 S.W. 472.

had intended to put criminal negligence on the same plane as civil negligence it would have said so and would not have given a different and rather complicated definition for the term due caution and circumspection. Finally it must be said that the authorities cited either support the contrary proposition or are not at all in point.¹³⁹ The district courts of appeal seem never to have understood the cases of *People v. Seiler* and *People v. Wilson* to be authority for the proposition that there is no distinction in degree between civil and criminal negligence. In *People v. Marconi*¹⁴⁰ the court, in approving the refusal of an instruction by the lower court, stated that there might be a difference. Moreover, there are decisions of the district courts of appeal directly to this effect. Shortly after the case of *People v. Seiler* the same appellate court had to pass again on the point.¹⁴¹ In sustaining the refusal of a proposed instruction by the trial judge, the court stated that caution is more than the attention of a prudent man and drew a sharp distinction between "negligence," which has a "highly specialized meaning," and want of "due caution and circumspection." This case was followed in *People v. Crossan*¹⁴² as being in harmony with the *Wilson* case. In *People v. Driggs*¹⁴³ the court went so far as to maintain (evidently in contrast to the *Crossan* case) "that in order to constitute criminal negligence, there must enter into the act some measure of wantonness or flagrant or reckless disregard of the safety of the others, or wilful indifference. If no one of these elements enters into the act, the person charged cannot be held guilty of criminal negligence." This statement was approved and quoted very recently in *People v. Hurley*¹⁴⁴ where the whole question was reconsidered.

Even if the *Driggs* and *Hurley* cases seem to restrict the field of due caution and circumspection more than the supreme court did, and are

¹³⁹ The court cites as authority for its rule *Reg. v. Doherty* (1887) 16 Cox. Crim. Law Cas. 306; *Johnson v. State*, *supra* note 83; and *Morris v. State* (1895) 35 Tex. Crim. Rep. 313, 33 S.W. 539. But in *Reg. v. Doherty* (at 309) the court said explicitly that the defendant must have conducted himself "in such a careless manner that the jury feel that he is guilty of culpable negligence, and ought to be punished," and explained that in order to proceed criminally against a man there must be some more serious negligence than in order to claim civil damages. In *Johnson v. State* the court discarded entirely the negligence issue because the statute requires the perpetration of an unlawful act (*cf.* text to notes 83 and 84). The Texas case is likewise no authority, because Texas distinguished between manslaughter and homicide by negligence and the decision related to this latter crime, which requires only negligence or carelessness. *Cf.* note 5, *supra*.

¹⁴⁰ *Supra* note 137.

¹⁴¹ *People v. Anderson* (1922) 58 Cal. App. 267, 270, 271, 208 Pac. 324, 325, 326.

¹⁴² *Supra* note 136.

¹⁴³ *People v. Driggs* (1931) 111 Cal. App. 42, 47, 295 Pac. 51, 53.

¹⁴⁴ *People v. Hurley* (1936) 85 Cal. App. Dec. 236, 56 P. (2d) 978.

not very strong authority, one cannot say that the definition of the supreme court puts civil and criminal negligence on the same level and that this is considered as settled California law.

It might be mentioned that among the definitions of negligence necessary to constitute manslaughter which are given in other jurisdictions the definition of the supreme court of South Carolina¹⁴⁵ is the most similar to that attempted by the California Supreme Court. The South Carolina court, however, has explicitly stated that civil negligence does not suffice.¹⁴⁶ This may be of aid in understanding the California Supreme Court rule.

Thus lack of "due caution and circumspection" is one thing and "negligence" is another. The Vehicle Code, however, uses the words "in a negligent manner." Hence from the terms used the crime of negligent homicide appears to be complementary to manslaughter, covering the field of merely negligent acts causing death. The situation would therefore be similar to that in Michigan. This apparently is the correct solution.

3. One formidable objection, however, might be made against this interpretation by a reference to sections 195 and 199 of the Penal Code. Section 195 provides:

"Homicide is excusable . . . When committed by accident and misfortune . . . in doing any other lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent."

Section 199 prescribes: "The homicide appearing to be justifiable or excusable, the person indicted must, upon his trial, be fully acquitted and discharged." Upon the basis of these sections one could argue that sections 195 and 199 prescribe that a homicide which is neither murder nor manslaughter is necessarily excusable and hence not punishable at all;¹⁴⁷ that, therefore, a statute like section 500 of the Vehicle Code could not make homicidal acts punishable which are not embraced in the definitions of murder or manslaughter, without partially repealing sections 195 and 199 by implication, and that the assumption of such repeal is precluded by section 803 of the Vehicle Code. This contention is perplexing. One might answer that section 195 of the Penal Code does not use the words due caution and circumspection, but "usual

¹⁴⁵ See cases cited in appendix, *infra*.

¹⁴⁶ *State v. Davis* (1924) 128 S. C. 265, 122 S. E. 770.

¹⁴⁷ The California law is different in this respect from the old common law. There excusable homicide was excused only as being not punishable as manslaughter or murder, but it was considered as involving some degree of legal blame and punishment. See *State v. Averill* (1911) 85 Vt. 115, 130, 81 Atl. 461. In California, however, excusable homicide is not criminal at all by virtue of section 199 of the Penal Code.

and ordinary caution," meaning only ordinary care. Thus there would be the possibility of cases of homicide not punishable as manslaughter because they did not involve culpable negligence and yet not being excusable homicide because of being committed without usual and ordinary caution. In other words there would be a gap between manslaughter and excusable homicide, which—it could be argued—was quite properly filled by the creation of the new crime of negligent homicide. If this answer could be accepted all difficulties would be eliminated. It must be admitted, however, that this interpretation of section 195 is not free from doubt. The language of the section in the California Penal Code was taken, as the code commissioners said,¹⁴⁸ from the New York Penal Code (Field's Draft). In New York the Court of Appeals recently had occasion to interpret the meaning of the words "with ordinary caution," and the relation between murder and manslaughter on the one hand and excusable homicide on the other.¹⁴⁹ It said:

"'Ordinary caution' must mean the absence of culpable negligence, otherwise a gap might exist—a case of homicide not excusable under section 1054 [defining excusable homicide], yet not criminal under the definitions of sections 1044, 1046, 1050, and 1052 [defining murder and manslaughter]."

Therefore a homicide not constituting murder nor manslaughter is excusable, if not justifiable, and consequently not criminal at all under section 199 of the California Penal Code, unless one thinks that in California the existence of a gap, which the New York Court refuted, could be assumed.

From this point of view there are two possibilities. Either one accepts the view that section 803 of the Vehicle Code does not prevent the later amendment of the Code (adding section 500) from having restricting effect on sections 195 and 199 of the Penal Code, or that such a limitation is not forbidden by section 803 of the Vehicle Code. Then a situation similar to that in Michigan would exist. Or one comes to the contrary conclusion that section 803 forbids any restriction of the sections 195 and 199 of the Penal Code and that therefore section 500 of the Vehicle Act does not and cannot extend the field of criminal homicide in so far as it is committed in the operation of an automobile, to a field not covered by the manslaughter definition. In order to give section 500 of the Vehicle Code any application, then, it would be necessary to construe the terms "without due caution or circumspection," "lack of usual and ordinary caution" and "in a negligent man-

¹⁴⁸ Code Commissioners Notes, § 197 CAL. PEN. CODE (1871).

¹⁴⁹ *People v. Angelo* (1927) 246 N. Y. 451, 453, 159 N. E. 394. The same reasoning is set forth by Gausewitz, *Work of the Wisconsin Supreme Court; Criminal Law* (1933) 9 WIS. L. REV. 21, 24.

ner," as equivalent, all meaning a degree of culpability higher than mere civil negligence. Section 500 would then be concurrently applicable with the manslaughter statute to homicide committed in the operation of a motor vehicle. The situation would then be comparable to that in Louisiana.

4. Where the homicide occurs through driving a motor vehicle in the commission of an unlawful act, the relationship is doubtless that of concurrent applicability, *i.e.*, the same act is covered by both statutes. A similar situation seems to have been created, as has been shown, in Michigan, where the courts held the negligent homicide statute applicable also to homicide in the commission of an unlawful act not amounting to felony. An important difference, however, exists. In Michigan, as in the District of Columbia and Louisiana, the statute expressly provides that the crime of negligent homicide is included in every charge of manslaughter.¹⁵⁰ In California such a provision does not exist. Hence it seems to follow that the jury cannot convict the defendant of negligent homicide under a manslaughter charge, because negligent homicide is probably not an offense necessarily included in the charge of manslaughter in the sense of section 1159 of the Penal Code.¹⁵¹ So, unless the district attorney charges both crimes, the jury probably has not the power to convict of the lesser crime, and the "get convictions" purpose of the statute seems to be impaired to that extent.¹⁵² If the defendant is charged in two counts with manslaughter in the commission of an unlawful act not amounting to felony, and with negligent homicide caused by the driving of a motor vehicle in the commission of an unlawful act not amounting to felony, then the jury evidently has a choice. But if the courts accept the interpretation here advanced that the negligent homicide statute is applicable to homicide occasioned by the merely negligent operation of a car, while manslaughter is applicable to homicide of higher culpability, the courts may distinguish between degrees of culpability also, if the killing happened in the commission of an unlawful act. It has been shown that the whole development of the manslaughter law tends toward distin-

¹⁵⁰ See *supra* p. 4, and p. 5.

¹⁵¹ This question has not yet been passed upon by the district courts of appeal or the supreme court. But in *People v. Okada* (June 18, 1936) 85 Cal. App. Dec. 1062, 58 P. (2d) 967, where defendant was charged with negligent homicide committed in the operation of a motor vehicle in a negligent manner, the court reversed a conviction of negligent homicide in the commission of an unlawful act. The information was very strictly interpreted; *cf.* the more liberal construction in an analogous situation in *State v. Michelski* (N.D. 1936) 268 N.W. 713.

¹⁵² The question would arise: Could the defendant, if acquitted under a manslaughter charge, be indicted again for negligent homicide or would that violate the rule against double jeopardy?

guishing degrees of culpability where the homicide happened in the commission of a misdemeanor. The Michigan and Massachusetts courts¹⁵³ have pointed out that the commission of a misdemeanor implies negligence but not culpable or gross negligence. Even though under the present manslaughter law in California a defendant may be charged and properly convicted of manslaughter when the misdemeanor committed in the operation of the automobile involves only a slight degree of culpability, the information should in such cases include a count for negligent homicide and the courts ought to convict of this crime and not of manslaughter. If the harmony of the cases is to be kept, the same yardstick should be applied to homicide in the commission of an unlawful act which is applied to the other group of involuntary homicide cases: the distinction in degrees of culpability.

Of course, for a conviction of manslaughter as well as of negligent homicide it is necessary that the driving which constitutes a misdemeanor be the proximate cause of the death. In this respect there is no distinction between the crimes.¹⁵⁴ Any unlawful operation of a motor vehicle, not being a felony, can fall under the definition of negligent homicide. Hence homicide in the operation of a motor vehicle while under the influence of intoxicating liquor may also constitute negligent homicide¹⁵⁵ and is not necessarily murder or manslaughter. Here the courts will doubtless look at the degree of negligence involved.

Concluding, it must be said that the California statute is not a masterpiece of legal draftsmanship, that many doubts are raised by it, and that an amendment seems to be desirable. But the interpretation which has been attempted in the foregoing lines seems to be one which

¹⁵³ See the quoted passages from *Commonwealth v. Arone*, *supra* note 112, and *People v. Barnes*, text to note 124, *supra*. To the same effect also *Clemens v. State* (1922) 176 Wis. 289, 185 N.W. 209; but *cf.* the quoted passage from *State v. Wilbanks*, text to note 52, *supra*, which is apparently *contra*. The view of the text is approved by Gausewitz, *op. cit. supra* note 149, at 24, 25.

¹⁵⁴ Section 500 of the Vehicle Code expressly requires proximate causation; with regard to manslaughter it is required by judicial authority. See *People v. Wilson*, *supra* note 135; *People v. Kelly* (1925) 70 Cal. App. 519, 525, 234 Pac. 110 (statement of the supreme court in an opinion denying hearing). In order to fulfill the requirement of proximate causation it must apparently be shown that the unlawfulness of the act, the violation of the statute, was the cause of the death. *People v. Kelly*, *supra*. In *People v. Freeman* (August 14, 1936) 86 Cal. App. Dec. 618, the court did not so hold and declared the mere fact that defendant struck deceased sufficient. This seems not to be reconcilable with the *Kelly* case. The same conflict exists between the two Pennsylvania cases cited in note 123, *supra*. The prevailing view seems to be that the violation of the statute must have been the cause of the accident; see *State v. Rossmann*, *supra* note 114, at 704; *Jackson v. State*, *supra* note 114.

¹⁵⁵ This question was left open by the present writer in Note (1936) 24 CALIF. L. REV. 555.

is in harmony with the other jurisdictions and corresponds probably to the intent of the legislature.¹⁵⁶

Stefan A. Riesenfeld.*

RESEARCH ASSOCIATE,
SCHOOL OF JURISPRUDENCE,
UNIVERSITY OF CALIFORNIA.

APPENDIX

Degree of Negligence Necessary to Constitute Manslaughter

ALABAMA: The courts convict in automobile accident cases either of manslaughter in the first or in the second degree. Voluntary manslaughter (manslaughter in the first degree) is constituted by wilful and wanton conduct, so as to endanger life or limb, or by a wanton disregard of human limb. *Reynolds v. State* (1931) 24 Ala. App. 249, 134 So. 815, *aff'd*, (1931) 223 Ala. 130, 134 So. 817; *Curlette v. State* (1932) 25 Ala. App. 179, 142 So. 775; *Lay v. State* (1935) 26 Ala. App. 458, 162 So. 319; *Lewis v. State* (Ala. App. 1936) 167 So. 608. Manslaughter in the second degree is a killing proximately caused by an unlawful act; whether ordinary or civil negligence suffices seems not well settled. Seemingly, in the affirmative is *Mitchell v. State* (1877) 60 Ala. 26, 33 (manslaughter in the second degree is committed when the homicide results from the commission of a misdemeanor or civil tort); in the negative, *Fitzgerald v. State* (1895) 112 Ala. 34, 20 So. 966; see also *Crisp v. State* (1926) 21 Ala. App. 449, 109 So. 282, *rev'd*, (1926) 215 Ala. 2, 109 So. 287.

ARIZONA: The statute is the same as in California. The courts make a distinction between civil and criminal negligence. *Gutierrez v. State* (Ariz. 1934) 34 P. (2d) 395; *Steffani v. State* (Ariz. 1935) 42 P. (2d) 615.

ARKANSAS: Gross negligence seems to be required. *White v. State* (1924) 164 Ark. 517, 520, 262 S.W. 338.

COLORADO: Gross negligence is required. *Thomas v. People* (1892) 2 Colo. App. 513, 31 Pac. 349.

CONNECTICUT: Gross negligence is required. See cases cited *supra* notes 79 and 80.

DELAWARE: Gross negligence is required. See *State v. Long* (1919) 30 Del. 397, 108 Atl. 36; *State v. McIvor* (1920) 31 Del. 123, 111 Atl. 616; *State v. Kreuger* (1921) 31 Del. 152, 111 Atl. 911; *State v. Disalvo* (1923) 32 Del. 232, 121 Atl. 661; *State v. Dean* (1923) 32 Del. 290, 122 Atl. 448; *State v. Hemmingway* (1931) 34 Del. 598, 156 Atl. 365.

FLORIDA: Manslaughter requires "culpable" negligence, which is of considerably higher degree than civil negligence. *Kent v. State* (1907) 53 Fla. 51, 43 So. 773; *Cannon v. State* (1926) 91 Fla. 214, 107 So. 360; *Austin v. State* (1931) 101 Fla.

¹⁵⁶ The conclusions of the writer seem to be supported by the recent case of *People v. Pryor* (Oct. 19, 1936) 82 Cal. App. Dec. 254. The question was whether the information charged defendant sufficiently with the crime of negligent homicide. The court touched upon the distinction between manslaughter and negligent homicide and apparently proceeded on the theory that manslaughter requires a higher degree of negligence than negligent homicide, for which all that is required is "a mere negligent act," i.e. an act "merely carelessly done from a lack of ordinary prudence."

*The writer wishes to acknowledge gratefully the invaluable assistance in the preparation of this article generously given to him by Professors Haynes and Kidd of the School of Jurisprudence of the University of California.

990, 132 So. 491; *Thompson v. State* (1933) 108 Fla. 370, 146 So. 201; *Hulst v. State* (Fla. 1936) 166 So. 828; see also *Denmark v. State* (1924) 88 Fla. 244, 102 So. 246; *Shaw v. State* (1924) 88 Fla. 320, 102 So. 550.

GEORGIA: The courts seem not to have dealt with this question in automobile cases. The convictions in these cases are in general for manslaughter in the commission of an unlawful act.

IDAHO: The court did not define the meaning of "due caution and circumspection," stating that they "have a common and ordinary meaning and are understood by the average person." *State v. Brooks* (1930) 49 Ida. 404, 410, 288 Pac. 894.

ILLINOIS: Gross or wanton negligence is required. *People v. Falkovitch* (1917) 280 Ill. 321, 117 N. E. 398; *People v. Adams* (1919) 289 Ill. 339, 124 N. E. 575; *People v. Camberis* (1921) 297 Ill. 455, 130 N. E. 712; *People v. Schwartz* (1921) 298 Ill. 218, 131 N. E. 806; *People v. Glasebrook* (1926) 320 Ill. 567, 151 N. E. 489; *People v. Sikes* (1927) 328 Ill. 64, 159 N. E. 293; *People v. Hadfield* (1929) 337 Ill. 462, 169 N. E. 195; *People v. Wallage* (1933) 353 Ill. 95, 186 N. E. 540; *People v. Schneider* (1935) 360 Ill. 43, 195 N. E. 430, *reh'g*, (1936) 200 N. E. 321; *People v. Herkless* (1935) 361 Ill. 32, 196 N. E. 829. See also *Harno, Recent Criminal Cases in Illinois* (1927) 22 ILL. L. REV. 1, 14.

INDIANA: Gross negligence is required. *State v. Dorsey* (1888) 118 Ind. 167, 20 N. E. 777, 10 Am. St. Rep. 111 (a leading case); *Smith v. State* (1917) 186 Ind. 252, 115 N. E. 943; *Dunville v. State* (1919) 188 Ind. 373, 123 N. E. 689; *State v. Gallaher* (1923) 193 Ind. 629, 141 N. E. 347 (leading case with respect to constitutionality of speed statutes); *Mimardo v. State* (1923) 204 Ind. 422, 183 N. E. 548.

IOWA: Gross negligence or more is required. *State v. Clark* (1923) 196 Iowa 1134, 196 N. W. 82; *State v. Richardson* (Iowa, 1932) 240 N. W. 695, *reh'g*, (1933) 216 Iowa 809, 249 N. W. 211.

KANSAS: Culpable negligence in the sense of recklessness is required. *State v. Harrison* (1926) 121 Kan. 670, 249 Pac. 623; *State v. Custer* (1929) 129 Kan. 381, 282 Pac. 1071.

KENTUCKY: Gross negligence is required. *Held v. Commonwealth* (1919) 183 Ky. 209, 208 S. W. 772; *Jones v. Commonwealth* (1926) 213 Ky. 356, 281 S. W. 164. If the negligence is more than gross, then it is voluntary manslaughter. *Colvin v. Commonwealth* (1933) 247 Ky. 480, 57 S. W. (2d) 487; *Hawpe v. Commonwealth* (1930) 234 Ky. 27, 27 S. W. (2d) 394; *King v. Commonwealth* (1934) 253 Ky. 775, 70 S. W. (2d) 667.

LOUISIANA: Gross negligence seems to be required. See text under II and also *State v. Linam* (1932) 175 La. 865, 144 So. 600.

MAINE: A higher degree of negligence is required. *State v. Rist* (1930) 129 Me. 222, 151 Atl. 194. See also *State v. Pond* (1926) 125 Me. 453, 134 Atl. 572.

MARYLAND: Gross or criminal negligence is apparently necessary. *Kiterakis v. State* (1923) 144 Md. 81, 124 Atl. 401; *Neusbaum v. State* (1928) 156 Md. 149, 143 Atl. 872.

MASSACHUSETTS: Wilful, wanton and reckless conduct is necessary. *Commonwealth v. Guillemette* (1923) 243 Mass. 346, 137 N. E. 700; *Commonwealth v. Arone* (1928) 265 Mass. 128, 163 N. E. 758.

MICHIGAN: Gross negligence is required. See text under II.

MINNESOTA: Culpable or criminal negligence is required. *State v. Goldstone* (1920) 144 Minn. 405, 175 N. W. 892; *State v. Kline* (1926) 168 Minn. 263, 209 N. W. 881; *State v. La Rose* (1928) 175 Minn. 537, 221 N. W. 899.

MISSISSIPPI: Culpable negligence is required. *Sims v. State* (1928) 149 Miss. 171, 115 So. 217; *Wells v. State* (1932) 162 Miss. 617, 139 So. 859.

MISSOURI: Gross negligence is required. *State v. Millin* (1927) 318 Mo. 553, 300 S. W. 694; *State v. Baublits* (1930) 324 Mo. 1199, 27 S. W. (2d) 16; *State v. Murphy* (1929) 324 Mo. 183, 23 S. W. (2d) 136; *State v. Studebaker* (1933) 334

Mo. 471, 66 S. W. (2d) 877; see also *State v. Sawyers* (1935) 336 Mo. 644, 80 S. W. (2d) 164; see also *State v. Tucker* (Mo. 1936) 96 S. W. (2d) 21.

MONTANA: The wording in the California statute has been adopted; apparently no special degree of negligence is required. See *State v. Gondeiro* (1928) 82 Mont. 530, 268 Pac. 507; sometimes the word "criminal" negligence is used. *Territory v. Manton* (1888) 8 Mont. 95, 19 Pac. 397.

NEBRASKA: The courts have not required a particular degree of negligence. See note 69, *supra*. But a slight failure in duty does not suffice. *Stehr v. State* (1913) 92 Neb. 755, 139 N. W. 676. Apparently "civil" negligence does not entail criminal responsibility.

NEVADA: The statute corresponds to the California law. The courts have not emphasized a special degree of negligence. *Ex parte Liotard* (1923) 47 Nev. 169, 217 Pac. 960, 30 A. L. R. 63.

NEW HAMPSHIRE: The court left the question undecided. See text under II, and note 68, *supra*.

NEW JERSEY: Gross negligence is required. *State v. Schutte* (1915) 87 N. J. L. 15, 93 Atl. 112; *State v. Harlow* (1928) 6 N. J. Misc. Rep. 149, 140 Atl. 438; *State v. Blaine*, *supra* note 82.

NEW MEXICO: The statute is like CAL. PEN. CODE § 192. The courts seem not to have passed upon the question.

NEW YORK: Culpable negligence is of a higher degree than civil negligence. *People v. Angelo* (1927) 219 App. Div. 646, 221 N. Y. Supp. 47, *aff'd*, (1927) 246 N. Y. 451, 159 N. E. 394 (with long list of English precedents); *People v. Pace* (1927) 220 App. Div. 495, 221 N. Y. Supp. 778.

NORTH CAROLINA: Culpable negligence in the sense of gross negligence is required. *State v. Tankersley* (1916) 172 N. C. 955, 90 S. E. 781; *State v. McIver* (1917) 175 N. C. 761, 94 S. E. 682; *State v. Gray* (1920) 180 N. C. 697, 104 S. E. 647; *State v. Rountree* (1921) 181 N. C. 535, 106 S. E. 669; *State v. Palmer* (1929) 197 N. C. 135, 147 S. E. 817; *State v. Durham* (1931) 201 N. C. 724, 161 S. E. 398; *State v. Stansell* (1932) 203 N. C. 69, 164 S. E. 580; *State v. Cope* (1933) 204 N. C. 28, 167 S. E. 456; *State v. Dills* (1933) 204 N. C. 32, 167 S. E. 459.

NORTH DAKOTA: The courts have apparently never discussed the question.

OHIO: The act as a consequence of which death ensues must be unlawful. No degree of negligence is required. See text under II.

OKLAHOMA: Culpable negligence is the omission of something which a reasonable and prudent man would do. See *Herndon v. State* (1927) 38 Okla. Crim. Rep. 338, 261 Pac. 378; *Romines v. State* (1929) 45 Okla. Crim. Rep. 40, 281 Pac. 310; but see *Nail v. State* (1926) 33 Okla. Crim. Rep. 100, 242 Pac. 270, where there is made a distinction of degree between civil and criminal negligence, and *Ansley v. State* (1929) 44 Okla. Crim. Rep. 382, 281 Pac. 160, where gross negligence seems to be required.

OREGON: Oregon seems to follow the Michigan rule. *State v. Miller* (1926) 119 Ore. 409, 243 Pac. 72; *State v. Lockwood* (1928) 126 Ore. 118, 268 Pac. 1016; see also *State v. Newberg* (1929) 129 Ore. 564, 573, 278 Pac. 568, 571 (not an automobile case. The court said: "... the authorities apply . . . the same principles of law as are applied in a civil action . . . , except that they demand a higher degree of carelessness than constitutes negligence, and require that the evidence must establish, between that culpable negligence and the death, the relationship of an efficient proximate cause").

PENNSYLVANIA: Recklessness is required. *Commonwealth v. Gill* (1935) 120 Pa. Super. Ct. 22, 182 Atl. 103, but *cf.* *Commonwealth v. Oclis* (1927) 91 Pa. Super. Ct. 528 (the case is explained in *Commonwealth v. Gill*).

RHODE ISLAND: Gross negligence seems to be required. *State v. Wagner* (R. I. 1913) 86 Atl. 147.

SOUTH CAROLINA: Gross negligence is not always expressly required; want of ordinary caution in dealing with a dangerous agency like a gun or automobile is

sufficient. *State v. Tucker* (1910) 86 S. C. 211, 68 S. E. 523; *State v. McCalla* (1915) 101 S. C. 303, 85 S. E. 720; *State v. Hanahan* (1918) 111 S. C. 58, 96 S. E. 667; but mere civil negligence does not suffice. *State v. Davis* (1924) 128 S. C. 265, 122 S. E. 770. In *State v. Clardy* (1906) 73 S. C. 340, 53 S. E. 493, gross negligence was required.

SOUTH DAKOTA: Culpable negligence is required by statute and is apparently a higher degree. *State v. Denevan* (1926) 49 S. D. 192, 195, 206 N. W. 927. See also *State v. Rossmann* (S. D. 1936) 268 N. W. 702.

TENNESSEE: A degree of negligence higher than is required in civil cases is necessary. *Copeland v. State* (1926) 154 Tenn. 7, 285 S. W. 565; *Hiller v. State* (1932) 164 Tenn. 388, 50 S. W. (2d) 225.

TEXAS: The negligence required for a conviction of homicide by negligence apparently need be no more than ordinary (civil) negligence. *Haynes v. State* (1920) 88 Tex. Crim. Rep. 42, 224 S. W. 1100; *Young v. State* (1932) 120 Tex. Crim. Rep. 39, 41, 47 S. W. (2d) 320, 321 (saying: "It may be doubted if there is greater unanimity among the courts of all jurisdictions upon any one thing than in the general definition of negligence").

UTAH: The statute is like the California definition. The courts have apparently not passed upon the point. In *State v. Lake* (1921) 57 Utah 619, 196 Pac. 1015, the court held an explanation of the term "due caution and circumspection" not indispensable.

VERMONT: A higher degree of carelessness is required. *State v. Carlton* (1876) 48 Vt. 636; *State v. Averill* (1911) 85 Vt. 115, 81 Atl. 461.

VIRGINIA: Culpable and criminal negligence is required. *Goodman v. Commonwealth* (1930) 153 Va. 943, 151 S. E. 168.

WASHINGTON: The courts seem not to have considered this question explicitly; but see *State v. Hopkins* (1928) 147 Wash. 198, 206, 265 Pac. 481, 483 ("This plainly does not mean that intent to do an unlawful or grossly negligent act, resulting in the unintentional death of another, is not an element of the crime of manslaughter. We think these are elements in the crime of manslaughter").

WEST VIRGINIA: The courts seem not to have passed upon the point.

WISCONSIN: Gross negligence is now required by statute. See *State v. Whatley* (1932) 210 Wis. 157, 245 N. W. 93; *Christie v. State* (1933) 212 Wis. 136, 248 N. W. 920. Before 1929 mere inadvertence sufficed. *Clemens v. State* (1921) 176 Wis. 289, 185 N. W. 209, 21 A. L. R. 1490. See also Gausewitz, *Work of the Wisconsin Supreme Court; Criminal Law* (1933) 9 Wis. L. Rev. 21.

WYOMING: Culpable negligence is required. *State v. McComb*, *supra* note 22.

Concluding the survey of the American jurisdictions it may be noted that Missouri formerly in *State v. Emery* (1883) 78 Mo. 77, 47 Am. Rep. 92, took a different view and that this case, which is often cited in older cases of other jurisdictions, is expressly overruled by the Missouri cases cited.

In England, also, criminal negligence requires a higher degree of carelessness than civil negligence. See *Turner*, *op. cit. supra* note 34, pp. 44, 45, 46.