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THE FALLACY AND FORTUITY OF MOTOR VEHICLE HOMICIDE

The motor vehicle has been present in our society for only a few decades, yet it has become an integral part of our way of life. Not only has this invention become a valuable asset to the American family, but it is also an indispensable item in nearly every business operation. Unfortunately, these mechanical devices have given rise to a hodge-podge of complex problems which are indeed difficult to remedy. The above-mentioned social utility is often momentarily forgotten when one hears or reads an item of news relating to a traffic tragedy in which a life has been taken. The solution to this highway slaughter is seemingly in the distant future, as the facts show that little progress has been made in the past.

It is undoubtedly true that carelessness and disregard for the safety of others are contributing factors in a vast majority of fatal accidents.¹ In order to stifle this deadly reckoning, various safety committees plead with the public to better their driving habits, and legislatures are constantly enacting various laws which designate the standard of care which the driver must follow. Violations of these prescribed standards usually warrant criminal punishment to the guilty. This punishment is the most severe when the defendant, in failing to comply with the required standards, causes the death of another. The obvious conclusion is that the effectiveness of the safety committees and the legislation is relatively slight in view of the fact that the fatality rate is ever-increasing.²

The purpose here is to make a detailed study of the criminal sanctions which the several states impose upon the unfortunate driver involved in a highway tragedy. Such an individual is prop-

¹ Numerous surveys may be found which prepare highway data for the general public's information. The purpose of such reports is obviously to instill in the American motorist the fact that good driving habits are a necessity. In regard to the causes of traffic accidents in which a life is taken, TRAVELER INS. CO., DEADLY RECKONING 4 (1961) offers the following statistics: 38.5% of the highway fatalities are attributable to speeding; 22.5% from failure to yield the right of way; 13.5% from reckless driving; and 8.3% from driving off the roadway. The remaining deaths are attributable to such careless acts as driving on the wrong side of the road, improper passing, and improper signaling.

² *Id.* at 1: "The increase in injuries during 1960 was particularly staggering, up seven per cent over last year to a total of 3,078,000. More than 3,116,000 men, women, and children were injured or killed, a tremendous human and economic loss that should cause a great nation like ours to bow its head in shame."

erly described as "unfortunate" in view of the fact that thousands of other drivers have, and exercise, driving habits comparable to those of the defendant. Often the only distinguishing factor between a defendant and others who are of equal culpability³ is the fact that the former, because of fortuitous⁴ circumstances, has become involved in a fatal accident. To "remedy" the problem, courts imprison the individual who, for all practical purposes, is quite often an upstanding citizen of the community. The taking of his freedom is particularly harsh in those instances where the statutes require only ordinary negligence for a conviction to be sustained. This "remedy" solves nothing, as will be explained at the conclusion of this article.

I. HISTORY

The courts were confronted with a new type of litigation soon after the invention of the automobile. Not only were civil actions deemed appropriate to compensate the plaintiff for property damage and personal injuries sustained as a result of the defendant's negligence, but criminal sanctions were also deemed necessary to punish the driver when his conduct caused a death. The earlier cases arose at a time when there was no legislation specifically providing for such a situation, and this new crime had to be categorized under an already existing criminal sanction. Except in the rare instances where the defendant had used his automobile as a weapon to intentionally and maliciously kill his victim,⁵ or where the defendant's act was so wilful and wanton⁶ as to justify

³ "Culpability" as used in this article refers to the negligent manner in which the driver operates his vehicle. For example, two drivers would be "equally culpable" if each drove his respective vehicle in the same unlawful manner, such as traveling at a speed greater than that provided by law.

⁴ "Fortuitous" as used in this article refers to those surrounding circumstances which happen by chance or accident. It is certainly "by chance" that the speeder is involved in a fatal accident in view of the fact that a great percentage of his fellow-drivers are guilty of the same act but reach their destinations without incident.

⁵ 3 WHARTON, CRIMINAL LAW & PROCEDURE § 971 (1957): "If the defendant acts with malice aforethought and with such state of mind strikes another with his automobile thereby causing the death of the latter, the offense is murder, the same as if any other instrument of destruction had been employed with like mental state." See, e.g., *People v. Brown*, 53 Cal. App. 664, 200 Pac. 727 (Dist. Ct. 1921).

⁶ In discussing wilful and wanton operation of the motor vehicle, the court in *Berness v. State*, 38 Ala. App. 1, 3, 83 So. 2d 607, 609 (1953), *aff'd*, 263 Ala. 641, 83 So. 2d 613 (1955) stated: "It is well settled under our decisions that where the accused is himself the driver of an automobile and drives it in a manner greatly dangerous to the lives of others so

a conviction for murder, the prosecutor reverted to the "catch-all" crime of manslaughter to obtain a conviction.⁷ In those states which recognized degrees of this "most elastic of all crimes,"⁸ the driver was found guilty of involuntary manslaughter;⁹ of course, the requisite conditions could have been present to justify a conviction for voluntary manslaughter.¹⁰

The Nebraska Supreme Court was first confronted with a highway homicide case in 1911 in *Schultz v. State*.¹¹ In affirming a

as to evidence a depraved mind regardless of human life, he may be guilty of murder in the second degree if his anti-social acts result in the death of another, and this though he had no preconceived purpose to deprive any particular human being of life." *Accord*, *Powell v. State*, 193 Ga. 398, 19 S.E.2d 678 (1942); *State v. Trott*, 190 N.C. 674, 130 S.E. 627 (1925); *Owen v. State*, 188 Tenn. 459, 221 S.W.2d 515 (1949); *McCarthy v. State*, 153 Tex. Crim. 149, 218 S.W.2d 190 (1949); *Summons v. State*, 145 Tex. Crim. 448, 169 S.W.2d 171 (1943).

⁷ Generally, common-law manslaughter is described as an unlawful homicide, without express or implied malice. I WHARTON, CRIMINAL LAW & PROCEDURE § 271 (1957). Involuntary manslaughter constitutes the killing of a human being either by (1) the consequences of an unlawful act, or (2) the doing of a lawful act in an unlawful manner. PERKINS, CRIMINAL LAW 56 (1957) gives the following description of involuntary manslaughter: "And since manslaughter itself is a 'catch-all' concept, including as a matter of common law all homicide not amounting to murder on the one hand and not legally justifiable or excusable on the other, the general outline of involuntary manslaughter is very simple. Every unintentional killing of a human being is involuntary manslaughter if it is neither murder nor voluntary manslaughter nor within the scope of some recognized justification of excuse."

⁸ KENNY, OUTLINES OF CRIMINAL LAW 141 (15th ed. 1936).

⁹ A case in which the court was met with the problem of highway homicide for the first time was *Held v. Commonwealth*, 183 Ky. 209, 208 S.W. 772 (1919). In utilizing the crime of involuntary manslaughter, the court stated: "This is the first case that has reached this court, involving criminal liability for homicide resulting from the operation of the automobile, but the principles of law involved are thoroughly settled in this jurisdiction, and there can be no doubt that under the decisions of this court, carelessness or negligence or recklessness in the performance of a lawful act, which results in the death of another, is always unlawful and criminal if the agency employed was at a time and place of a character that its negligent or reckless use was necessarily dangerous to human life or limb or property. . . ." *Id.* at 213, 208 S.W. at 774.

¹⁰ A simple example would be the case where the defendant, with adequate provocation and during the heat of passion, used his vehicle to kill his enemy.

¹¹ NEB. REV. STAT. § 28-403 (Reissue 1956) provides that: "Whoever shall unlawfully kill another without malice, either upon a sudden

conviction under the manslaughter statute,¹² the court stated that the social utility of the automobile is not to be overlooked, nor is its reasonable use to be restricted; however, criminal sanctions should be imposed on a motorist when his carelessness causes a death. Thus, the Nebraska court followed the great weight of authority which considered imprisonment of inadvertent drivers to be the solution to the problem. Such an attitude has not yet changed. In fact, the legislatures soon began to take the position that not enough "criminals" were being convicted because of the nature of the crime of manslaughter.¹³ To remedy this situation, a majority of the states have enacted various laws specifically covering death caused by highway carelessness.

Nebraska was an early leader in this area when its first statute specifically covering such a crime was enacted in 1919,¹⁴ only a few years after the decision in *Schultz*. This statute remained in force until 1935 when an amendment was added providing a penalty for causing the death of another when driving while under the influence of an intoxicating liquor.¹⁵ The Nebraska Supreme

quarrel, or unintentionally while the slayer is in the commission of some unlawful act, shall be deemed guilty of manslaughter; and upon conviction thereof shall be imprisoned in the penitentiary not more than ten years nor less than one year."

¹² NEB. REV. STAT. § 28-403 (Reissue 1956) provides that: "Whoever shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, shall be deemed guilty of manslaughter; and upon conviction thereof shall be imprisoned in the penitentiary not more than ten years nor less than one year."

¹³ One writer described the situation as follows: "Juries are frequently unwilling to condemn as a felon one who is guilty only of some act of negligence even though that act has resulted in the death of another. It has been said that the term 'manslaughter' imports a degree of brutality which jurors do not care to place upon a merely negligent driver. Moreover, the penalty in manslaughter cases is often greater than that which jurors feel is warranted in auto death cases. The obstacles to manslaughter convictions appear not only at the trial stage but also at the appellate level. The judges themselves exhibit a good deal of reluctance in auto death manslaughter convictions." Karaba, *Negligent Homicide or Manslaughter: A Dilemma*, 41 J. CRIM. L., C. & P.S. 183 (1951).

¹⁴ "[I]f any person operating a motor vehicle in violation of the provisions of this act shall by so doing seriously, maim or disfigure any person, or cause the death of any person, or persons he shall, upon conviction thereof be fined not less than two hundred dollars nor more than five hundred dollars, or be imprisoned in the penitentiary for not less than one year or more than ten years." Neb. Laws c. 222, § 32 (1919).

¹⁵ Neb. Laws c. 134, § 2 (1935).

Court never based a decision on this statute even though it had the opportunity to do so.¹⁶ The legislature repealed the negligent homicide portion of the Motor Vehicle Act in 1937,¹⁷ and no further action was taken until 1949 when the present statute was passed making motor vehicle homicide a crime.¹⁸

Today, the driver of a death vehicle is by no means punished in a uniform manner throughout the United States. Although their purposes are the same, a search of the different state statutes and the cases arising thereunder reveals that convictions may be had for: manslaughter by automobile;¹⁹ negligent homicide;²⁰ reckless homicide;²¹ homicide by criminal negligence;²² negligent operation of a motor vehicle;²³ and driving so as to endanger, resulting in death.²⁴ Several states do not have a specific statute covering death by automobile and thus still convict under manslaughter provisions.²⁵ An examination of these various classifications will be made in the following section. The most difficult problem confronting a court construing one of these statutes is the

¹⁶ The first case to come before the Nebraska Supreme Court after the passing of the negligent homicide statute was *Crawford v. State*, 116 Neb. 125, 216 N.W. 294 (1927). The court said that Crawford was not entitled to an instruction under the provisions of the negligent homicide statute because one of his alleged "unlawful acts" (driving on the wrong side of the road) was not embodied in the Motor Vehicle Act. The next case to come before the court was *Benton v. State*, 124 Neb. 485, 247 N.W. 21 (1933) in which the defendant was charged with drunken driving and speeding, both violations of the Motor Vehicle Act. The court did not mention the negligent homicide statute in the opinion and based the decision solely on the manslaughter provisions.

¹⁷ Neb. Laws c. 140, § 1 (1937).

¹⁸ NEB. REV. STAT. § 28-403.01 (Reissue 1956) provides: "Whoever shall cause the death of another without malice while engaged in the unlawful operation of a motor vehicle shall be guilty of a crime to be known as a motor vehicle homicide and, upon conviction thereof, shall be (1) fined in a sum not exceeding five hundred dollars, (2) imprisoned in the county jail for not to exceed six months, (3) imprisoned in the penitentiary for a period not less than one year nor more than ten years, or (4) both such fine and imprisonment."

¹⁹ *People v. Markham*, 153 Cal. App. 2d 260, 314 P.2d 217 (Dist. Ct. App. 1957).

²⁰ *State v. Berchtold*, 11 Utah 2d 208, 357 P.2d 183 (1960).

²¹ *People v. Potter*, 5 Ill. 2d 265, 125 N.E.2d 510 (1955).

²² *People v. Decina*, 2 N.Y.2d 133, 157 N.Y.S.2d 558 (Ct. App. 1956).

²³ *Casey v. Commonwealth*, 313 S.W.2d 276 (Ky. 1958).

²⁴ R.I. GEN. LAWS ANN. § 31-27-1 (1956).

²⁵ *State v. McLaughlin*, 250 Iowa 435, 94 N.W.2d 303 (1959).

determination of the degree of negligence which is required to sustain a conviction.

II. DEGREE OF CULPABILITY REQUIRED BEFORE A DRIVER CAN BE CONVICTED

A. WHERE THE MANSLAUGHTER STATUTE MUST BE USED

In those states which are still without specific motor vehicle homicide statutes, and manslaughter statutes are thus utilized, it is established that ordinary negligence is insufficient to sustain a conviction. In certain instances, the statute specifically designates the degree of negligence which is required. Thus, statutory requirements are couched in such terms as "culpable negligence,"²⁶ or "aggravated, culpable, gross, or reckless."²⁷ Where the statutes are silent as to the degree of culpability,²⁸ case law indicates that more than ordinary negligence is mandatory. The Colorado Supreme Court recently stated:²⁹

It is clear that before defendant could be convicted of manslaughter, there must have been evidence tending to prove that he recklessly and wantonly failed to exercise the care and caution that a reasonably prudent person would have exercised under similar circumstances, and that his conduct was such as to indicate a reckless and wanton disregard for the safety of others. Ordinary or simple negligence is not sufficient to sustain a charge of involuntary manslaughter.

Such a conclusion is substantiated by the foremost authorities in criminal law.³⁰

²⁶ See, e.g., FLA. STAT. ANN. § 782.07 (1941). For cases interpreting this statute, see *Penton v. State*, 114 So. 2d 381 (Fla. 1959); *Henderson v. State*, 90 So. 2d 447 (Fla. 1956); *Johnson v. State*, 148 Fla. 510, 4 So. 2d 671 (1941); *Pitts v. State*, 132 Fla. 812, 182 So. 234 (1938); *Franklin v. State*, 120 Fla. 686, 163 So. 55 (1935).

²⁷ See, e.g., MONT. REV. CODES ANN. § 94-2507 (1947). For cases interpreting this statute, see *State v. Bast*, 116 Mont. 329, 151 P.2d 1009 (1944); *State v. Powell*, 114 Mont. 571, 138 P.2d 949 (1943).

²⁸ See, e.g., ALA. CODE tit. 14, § 320 (1958); COLO. REV. STAT. ANN. § 40-2-7 (1953); GA. CODE ANN. § 26-1009 (1953); IOWA CODE ANN. § 690.10 (1950); MASS. GEN. LAWS ANN. ch. 265, § 13 (1959); OHIO REV. CODE ANN. § 4511.18 (Page 1953); PA. STAT. ANN. tit. 18, § 4703 (1945).

²⁹ *Trujillo v. People*, 133 Colo. 186, 189, 292 P.2d 980, 982 (1956).

³⁰ "In order to avoid the harshness of imposing a criminal penalty for manslaughter upon the driver who was merely negligent, the rule has developed by decision or statute that the defendant must be guilty of culpable or gross negligence or recklessness in order to constitute the offense of manslaughter by automobile. Under such a principle the proof of merely that degree of negligence which would entitle a plain-

Several states have set out the required culpability in their statutes in such a manner that a fair reading discloses very little. Such statutes require either of the following before a conviction will stand: the death must be caused by (a) a lawful act performed in an unlawful manner with gross negligence, or (b) an unlawful act. Clearly, ordinary negligence will not suffice for (a), but a more difficult problem arises in regard to (b). The Utah Supreme Court, in a detailed discussion, came to a conclusion which is the near-unanimous view:³¹

We think the "unlawful act", that is, the infraction, must be done in such a manner as to more than constitute a mere thoughtless omission or slight deviation from the norm of prudent conduct. It must be reckless or in marked disregard for the safety of others.

Thus, the driver's conduct must be of a flagrant nature before he may be imprisoned for manslaughter.

Let us now turn to the special motor vehicle homicide statutes which were enacted for the aid of the prosecution. As will be shown, a few jurisdictions authorize convictions where the culpability of the driver is equal to a degree of negligence which formerly had been actionable only in civil cases. One thing that should be noticed is that the existence of such enactments does not necessarily rule out convictions under applicable manslaughter provisions. Some states allow instructions under either crime,³² whereas other jurisdictions have repealed the manslaughter statute in so far as it pertains to homicide by motorists.³³

tiff to recover damages in a civil action is insufficient as a basis for criminal liability." 3 WHARTON, CRIMINAL LAW & PROCEDURE § 972 (1957).

³¹ State v. Lingman, 97 Utah 180, 197, 91 P.2d 457, 466 (1939).

³² D.C. CODE ANN. § 40-607 (1961) provides: "The crime of negligent homicide defined in section 40-606 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." See also Phillips v. State, 204 Ark. 205, 161 S.W.2d 747 (1942); State v. Gloyd, 148 Kan. 706, 84 P.2d 966 (1938).

³³ State v. Marf, 80 Ariz. 220, 295 P.2d 842 (1956) (the negligent homicide statute in question was later repealed); State v. Davidson, 78 Idaho 553, 309 P.2d 211 (1957).

B. MOTOR VEHICLE HOMICIDE PROVISIONS INCORPORATED
INTO THE MANSLAUGHTER STATUTE

Alaska,³⁴ California,³⁵ Maryland³⁶ and Arizona³⁷ have specific provisions in their manslaughter statutes relating to deaths caused by motor vehicles. The unusual fact of these acts is that the traditional manslaughter requirement of reckless conduct is not always present. However, the Alaska statute specifically requires "culpable negligence" although there have been no reported cases arising under this specific provision.³⁸ The Maryland statute designates the required degree of negligence by adopting the common-law standard of "gross negligence."³⁹

The Arizona and California provisions are nearly verbatim. To exemplify this approach of punishing the guilty party, the California statute provides for fine and imprisonment if the driver causes the death of another while:⁴⁰

(a). In the commission of an unlawful act, not amounting to felony, with gross negligence; or in the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence.

(b). In the commission of an unlawful act, not amounting to felony, without gross negligence; or in the commission of a lawful act which might produce death, in an unlawful manner, but without gross negligence.

In both states, the penal provisions vary with the degree of culpability.⁴¹ In these two states, ordinary negligence will suffice as to subsection (b), with the legislatures providing for a partial alleviation of the harshness by establishing a lesser penalty than that which is given when the defendant violates subsection (a). However, it should be noted that there are still instances where the defendant will lose his freedom even though he has been guilty of only ordinary negligence.

³⁴ ALASKA COMP. LAWS ANN. § 64-5-8 (1949).

³⁵ CAL. PEN. CODE § 192.

³⁶ MD. ANN. CODE art. 27, § 388 (1957).

³⁷ ARIZ. REV. STAT. ANN. § 13-456 (Supp. 1961).

³⁸ ALASKA COMP. LAWS ANN. § 64-4-4 (1949) provides that the guilty motorist may be imprisoned for a period of *twenty* years!

³⁹ *Faulcon v. State*, 211 Md. 249, 126 A.2d 858 (1956). *Accord*, *Connor v. State*, 223 Md. 341, 164 A.2d 467 (1960); *Johnson v. State*, 213 Md. 527, 132 A.2d 853 (1957).

⁴⁰ CAL. PEN. CODE § 192.

⁴¹ ARIZ. REV. STAT. ANN. § 13-457 (Supp. 1961); CAL. PEN. CODE § 193.

C. THE NEGLIGENT HOMICIDE STATUTE

The majority of the special enactments which deal with death on the highways may be classified as "negligent homicide" statutes. Some fourteen states have chosen this method of punishing the individual who fortuitously takes another's life on the public streets. A survey of these statutes reveals that the degree of negligence which is needed for a conviction is usually specifically stated in the act. Seven states have the phrase "reckless disregard of the safety of others" embodied in their legislation.⁴² The recent case of *State v. Berchtold*,⁴³ exemplifies the typical judicial attitude in interpreting such statutory standards. In affirming the defendant's conviction, the court stated:⁴⁴

Our statute only requires reckless disregard for the safety of others, which is a much greater lack of care than ordinary negligence, but does not require as great a consciousness of the danger confronted as wilful misconduct required to create civil liability under our guest statute. To be "reckless" does not require "wilfulness" but means rather heedless, careless, or rash inadvertence to consequences. Recklessness may include wilfulness. It requires more than negligence, but a person may be reckless without being wilful. Recklessness indicates indifference and utter disregard for consequences and is not mere inadvertence nor error in judgment.

The remainder of the negligent homicide statutes contain language requiring a degree of culpability ranging from gross⁴⁵ to ordi-

⁴² Oklahoma offers a typical example of such a statute. OKLA. STAT. tit. 47, § 11-903 (1961): "(a) When the death of any person ensues within one year as a proximate result of injury received by the driving of any vehicle in reckless disregard of the safety of others, the person so operating such vehicle shall be guilty of negligent homicide." The following statutes contain very similar language: ARK. STAT. § 75-1001 (1957); IDAHO CODE ANN. § 49-1101 (1947); N.D. CENT. CODE § 12-27-35 (1960); UTAH CODE ANN. § 41-6-43 (Supp. 1961); W. VA. CODE ANN. § 1721(330) (1961); WYO. STAT. ANN. § 31-232 (1957).

⁴³ 11 Utah 2d 208, 357 P.2d 183 (1960).

⁴⁴ *Id.* at 214, 357 P.2d at 187. (Footnotes omitted.)

⁴⁵ ORE. REV. STAT. § 163.091 (1961) provides: "When the death of any person ensues within one year as the proximate result of injuries caused by:

(1) The driving of any motor vehicle or combination of motor vehicles in a grossly negligent manner; or

(2) The driving of a vehicle or combination of vehicles which is known or should have been known by the driver to be defectively equipped; or

(3) The driving of a vehicle or combination of vehicles which is known or should have been known by the driver to be defectively loaded. . . .

nary⁴⁶ negligence. Notwithstanding the fact that penalties are not usually as severe where ordinary negligence is the standard,⁴⁷ the imposition of criminal sanctions under such a set of facts is a rather barbaric treatment of the problem. Is it fair to impose penal sanctions on a driver where criminal negligence is lacking?⁴⁸ It is submitted that it is not. An example of such treatment is afforded by the District of Columbia case of *Sanderson v. United States*,⁴⁹ where the defendant failed to yield the right of way to a pedestrian. In affirming the conviction, the court stated:⁵⁰

The independent testimony established, at least circumstantially, that the lady was in the crosswalk when she was struck and that she was hurled or pushed some twenty feet. These circumstances, considered alone, bespoke negligence. Considered together with defendant's admission, they more than met the tests prescribed by the Supreme Court and authorized an inference by the judge as trier of the facts that defendant was negligent. Clearly the judge was justified in finding defendant negligent by ordinary and usual standards of care.

After an analysis of the various negligent homicide statutes, it is apparent that in some states ordinary negligence is sufficient for the conviction and imprisonment of a driver.

D. RECKLESS HOMICIDE STATUTES

Four states, Illinois,⁵¹ Indiana,⁵² Maine⁵³ and South Carolina⁵⁴ punish their "highway killers" by convictions under a crime known as "reckless homicide." Each of the pertinent statutes set out the

⁴⁶ E.g., CONN. GEN. STAT. REV. § 14-218 (1958) ("negligent operation of a motor vehicle upon the highways of this state"); D.C. CODE ANN. § 40-606 (1961); KAN. GEN. STAT. ANN. § 8-529 (1949) ("negligent disregard of the safety of others").

⁴⁷ CONN. GEN. STAT. REV. § 14-218 (1958) (a maximum of \$500 and/or six months in jail); D.C. CODE ANN. § 40-606 (1961) (maximum \$1,000 and/or one year in jail); KAN. GEN. STAT. ANN. § 8-529 (1949) (maximum \$500 fine and/or one year incarceration).

⁴⁸ A person is guilty of "criminal negligence" when he does some act or omits some duty under circumstances showing an actual intent to injure, or where the breach of duty is so flagrant as to warrant an implication that the resulting injury was intended. *Schultz v. State*, 89 Neb. 34, 130 N.W. 972 (1911).

⁴⁹ 125 A.2d 70 (D.C. Munic. App. 1956).

⁵⁰ *Id.* at 74. (Footnotes omitted.).

⁵¹ ILL. REV. STAT. ch. 38, § 364a (1961).

⁵² IND. ANN. STAT. § 47-2001 (1952).

⁵³ ME. REV. STAT. ANN. ch. 22, § 151 B (Supp. 1961).

⁵⁴ S.C. CODE § 46-341 (1952).

degree of negligence needed as a prerequisite for a conviction. The requirement is uniform that the driver's conduct amount to a "reckless disregard for the safety of others." Such a crime is essentially identical to the one in those states whose negligent homicide statutes specify the same degree of culpability.⁵⁵ As under the comparable negligent homicide acts, ordinary negligence is insufficient to warrant a defendant's conviction.⁵⁶

E. MISCELLANEOUS STATUTES

A study of the applicable statutes of the remaining states reveals that there is no distinguishable pattern in which they may be classified.⁵⁷ The statutory enactments of Minnesota,⁵⁸ New York,⁵⁹ New Jersey,⁶⁰ New Hampshire⁶¹ and Rhode Island⁶² all contain language which establishes a degree of culpability similar

⁵⁵ *Supra* note 42.

⁵⁶ In *People v. Potter*, 5 Ill. 2d 365, 366, 125 N.E.2d 510, 511 (1955), the court took the opportunity to define "reckless disregard" as follows: "The phrase 'reckless disregard for the safety of others' as used in this statute has a common-law definition of its own, descriptive of the conduct constituting the crime. In general, one's conduct is in reckless disregard of the safety of another if he intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize that his conduct not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result to the other." (Citations omitted.) *Accord*, *People v. Garman*, 411 Ill. 279, 103 N.E.2d 636 (1952); *People v. Janoski*, 13 Ill. App. 2d 56, 140 N.E.2d 541, *aff'd*, 12 Ill. 2d 96, 145 N.E.2d 85 (1957); *State v. Beckman*, 219 Ind. 176, 37 N.E. 2d 530 (1941); *Turrell v. State*, 221 Ind. 662, 51 N.E.2d 359 (1943); *State v. McCracken*, 211 S.C. 52, 43 S.E.2d 607 (1947).

⁵⁷ MINN. STAT. ANN. § 169.11 (1960) ("is guilty of criminal negligence in the operation of a vehicle resulting in death"); N.Y. PEN. LAW § 1053-a ("is guilty of criminal negligence in the operation of a vehicle resulting in death"); N.J. REV. STAT. § 2A-113-9 (1951) ("is guilty of a misdemeanor"); N.H. REV. STAT. ANN. (no specific crime defined); R.I. GEN. LAWS ANN. § 31-27-1 (1956) ("shall be guilty of 'driving so as to endanger, resulting in death.'")

⁵⁸ MINN. STAT. ANN. § 169-11 (1960) ("reckless or grossly negligent manner").

⁵⁹ N.Y. PEN. LAW § 1053-a ("reckless or culpably negligent manner").

⁶⁰ N.J. REV. STAT. § 2A:113-9 (1951) ("carelessly and heedlessly, in wilful or wanton disregard of the rights or safety of others").

⁶¹ N.H. REV. STAT. ANN. § 262.15 (1955) ("reckless operation of a motor vehicle").

⁶² R.I. GEN. LAWS ANN. § 31-27-1 (1956) ("reckless disregard of the safety of others").

to the above-mentioned reckless homicide acts. Accordingly, the cases which have been decided under these provisions have uniformly held that more than ordinary negligence is required for a conviction.⁶³ The same result has been reached under the Wisconsin statute which requires "a high degree of negligence."⁶⁴ This has been construed by the Wisconsin Supreme Court to mean something "substantially" more than ordinary negligence.⁶⁵

The Michigan⁶⁶ and Vermont⁶⁷ statutes present another problem in determining the requisite degree of negligence. Both contain the language "careless, reckless or negligent." The Michigan court has utilized the word "or" in a disjunctive concept and has thus sustained convictions when only ordinary negligence was present.⁶⁸ Although the Vermont court has seemingly never ruled

⁶³ The standard judicial approach is exemplified in *People v. Ambrico*, 12 N.Y.S.2d 510, 512 (Kings County Ct. 1939): "[T]he negligence essential to establish criminal liability must be something more than slight negligence, which might be sufficient to support a civil action. The negligence must be of such character as to show a disregard of the consequences which may ensue from the act charged and an indifference to the rights of others." *Accord*, *State v. Homme*, 226 Minn. 83, 32 N.W.2d 151 (1948); *State v. Bolsinger*, 221 Minn. 154, 21 N.W.2d 480 (1946); *State v. Oliver*, 37 N.J. Super. 379, 117 A.2d 404 (Super. Ct. 1955); *In re Lewis*, 11 N. J. 217, 94 A.2d 328 (1953); *People v. Decina*, 2 N.Y. 2d 133, 157 N.Y.S.2d 558 (Ct. App. 1956); *People v. Eckert*, 2 N.Y. 2d 126, 157 N.Y.S.2d 551 (Ct. App. 1956); *People v. Bearden*, 290 N.Y. 478, 49 N.E.2d 785 (1943), *reversing* 265 App. Div. 975, 39 N.Y.S. 2d 607 (2d Dep't 1942); *People v. Brucato*, 32 N.Y.S.2d 689 (Kings County Ct. 1942); *People v. Chalupka*, 32 N.Y.S.2d 688 (Queens County Ct. 1940).

⁶⁴ WIS. STAT. ANN. § 940.08 (1958).

⁶⁵ *State ex rel. Zent v. Yanney*, 244 Wis. 342, 12 N.W.2d 45 (1944): "It is considered that the negligence requisite for a conviction . . . is substantially and appreciably higher in magnitude than ordinary negligence. It is negligence of an aggravated character. It is great negligence. It is conduct that not only creates unreasonable risk of bodily harm to another, but also involves a high degree of probability that substantial harm will result to such other person. In other words, the culpability which characterizes all negligence is magnified to a higher degree as compared with that present in ordinary negligence."

⁶⁶ MICH. STAT. ANN. § 28-556 (1954).

⁶⁷ VT. STAT. ANN. tit. 23 § 1182 (1958).

⁶⁸ The Michigan court stated in *People v. Campbell*, 237 Mich. 424, 428, 212 N.W. 97, 99 (1927): "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. . . . 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. . . . [T]his statute was intended to apply only to cases

on a homicide case arising under this statute, the court has held that ordinary negligence will meet the culpability requirement.⁶⁹ This interpretation was made in a case of careless driving which is an included offense in the statute.

Kentucky, in a unique statute, provides for punishment if the driver of a vehicle is guilty of only ordinary negligence where such conduct causes the death of another. It provides: "Any person who, by negligent operation of a motor vehicle, causes the death of another, under circumstances not otherwise punishable as a homicide, shall be imprisoned in the county jail for not more than one year."⁷⁰ The Kentucky court considered this statute in *Casey v. Commonwealth*,⁷¹ where the defendant's *manslaughter* conviction was overturned because only ordinary negligence was present. In the course of the opinion the court stated:⁷²

Thereafter, in 1952, the Legislature enacted what is now KRS 435.025 defining an offense of negligent homicide by operation of a motor vehicle, which is supplemental to voluntary and involuntary manslaughter. Since that time the law in cases of this kind has classified such offenses into three categories, namely, (1) voluntary manslaughter, based on recklessness and wantonness; (2) involuntary manslaughter based on gross negligence; (3) the statutory offense of negligent homicide, based on ordinary negligence.

The remaining two states, Texas and Louisiana, have general negligent homicide statutes which do not specifically mention motor vehicles but such cases are prosecuted thereunder. Ordinary negligence will definitely not suffice for a conviction under the Louisiana statute⁷³ as criminal negligence is a prerequisite. A conviction under the Texas statutes may be either first⁷⁴ or second⁷⁵ degree.

where the negligence is of a lesser degree than gross negligence. . . . [T]his basic idea of this statute is that everyone who places himself in a situation where his acts may affect the safety of others must use every reasonable precaution to guard against injuring them. If he does not do so, and death ensues, he is guilty of negligent homicide under the statute. It is a harsh statute, but finds justification in the serious results that are liable to follow the negligent operation of automobiles on extensively traveled streets and highways. The court did not err . . . in instructing the jury that death resulting from ordinary negligence constituted an offense under this statute.

⁶⁹ *State v. Labonte*, 120 Vt. 465, 144 A.2d 792 (1958).

⁷⁰ KY. REV. STAT. ANN. § 435.025 (1955).

⁷¹ 313 S.W.2d 276 (Ky. 1958).

⁷² *Id.* at 278.

⁷³ LA. REV. STAT. § 14.32 (1950).

⁷⁴ TEX. PEN. CODE art. 1231 (1948).

⁷⁵ TEX. PEN. CODE art. 1238 (1948).

A "first degree" violation is the lesser offense⁷⁶ and a conviction will be sustained if the defendant is guilty of "negligence and carelessness" while in the commission of a lawful act. In order for a conviction to stand in a prosecution for the more serious degree,⁷⁷ there must be the commission of an "unlawful act" such as a misdemeanor or one which is not a penal offense, but which would give rise to a *civil* action. From a fair reading of the language employed in these statutes, it seems that Texas is another state where a driver may be imprisoned when his culpability is equal to only ordinary negligence.

F. SUMMARY

After a survey of the various criminal sanctions that may be imposed upon the driver of a death vehicle, the degree of culpability required may be summarized as follows:

A. Where Special Homicide Statutes are Lacking. In those states which continue to utilize the manslaughter statute, ordinary negligence will not suffice for a conviction.

B. Motor Vehicle Provision Incorporated into Manslaughter Statute. Of those states which have a provision in their manslaughter statutes relating to motor vehicle homicide, only Arizona and California allow, at reduced penalties, convictions for ordinary negligence.

C. Negligent Homicide. In those states which have the crime of "negligent homicide," some require that only ordinary negligence need be shown by the State.

D. Reckless Homicide. In those states which provide for the crime of "reckless homicide," ordinary negligence will never be deemed sufficient for a conviction.

E. Miscellaneous Statutes. Of the remaining states, there are instances in which gross negligence or reckless conduct is not a requirement of the crime.

⁷⁶ TEX. PEN. CODE art. 1237 (1948) ("confinement in jail not exceeding one year, or by fine not exceeding one thousand dollars").

⁷⁷ TEX. PEN. CODE art. 1242 (1948) provides: "When the unlawful act attempted or executed is known as a misdemeanor, the punishment of negligent homicide committed in the execution of such unlawful act shall be imprisonment in jail not exceeding three years, or by fine not exceeding three thousand dollars." TEX. PEN. CODE art. 1243 (1948) provides: "If the act intended is one for which an action would lie, but not an offense against the penal law, the homicide resulting therefrom is a misdemeanor, and may be punished by fine not exceeding one thousand dollars, and by imprisonment in jail not exceeding one year."

III. THE NEBRASKA POSITION

A. MANSLAUGHTER

The special statute which the legislature of this state enacted in 1949 defines a crime known as motor vehicle homicide and is the only one of its kind in the fifty states or the District of Columbia. It provides:⁷⁸

Whoever shall cause the death of another without malice while engaged in the *unlawful operation* of a motor vehicle shall be guilty of a crime to be known as motor vehicle homicide and, upon conviction thereof, shall be (1) fined in a sum not exceeding five hundred dollars, (2) imprisoned in the county jail for not to exceed *six months*, (3) imprisoned in the penitentiary for a period not less than one year nor more than *ten years*, or (4) both such fine and imprisonment.

By an inspection of this statute, it is noticed that the words "unlawful operation" create the culpability standard rather than the traditional method of designating the driver's conduct which is to be punishable. It is also to be noticed that there is a choice as to the length of time which the defendant may be imprisoned. Seemingly, it is within the judge's discretion whether the driver of a death vehicle is to be sentenced to six months (maximum) in the county jail or to ten years (maximum) in the penitentiary.

Before reviewing the judicial interpretation of the Motor Vehicle Homicide Act, cognizance must first be taken of the manslaughter statute which provides:⁷⁹

Whoever shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of *some unlawful act*, shall be deemed guilty of manslaughter; and upon conviction thereof shall be imprisoned in the penitentiary not more than ten years nor less than one year.

As was pointed out previously, the early cases involving the motor vehicle were based on this statute. Now that Nebraska has enacted specific legislation covering death caused by the unlawful operation of a motor vehicle, the question arises whether or not prosecutions in this area may still be based on the manslaughter statute. The Nebraska Supreme Court rejected the possibility of partial repeal in *Birdsley v. State*,⁸⁰ when it stated that motor vehicle homicide is a crime in amelioration of manslaughter.

Since there is a possibility that the Nebraska driver can yet be convicted of manslaughter, an examination of its culpability

⁷⁸ NEB. REV. STAT. § 28-403.01 (Reissue 1956). (Emphasis added.)

⁷⁹ NEB. REV. STAT. § 28-403 (Reissue 1956). (Emphasis added.)

⁸⁰ 161 Neb. 581, 587, 74 N.W.2d 377, 381 (1956).

requirement is warranted. The early case of *Stehr v. State*,⁸¹ although not involving a motor vehicle, affords a starting point. The facts show that the defendant was convicted of manslaughter after he had allowed his grandson to freeze to death. The defendant allowed the stove to burn out and refused to refuel it notwithstanding the fact that adequate coal was available. In affirming the conviction, the court stated:⁸²

His own testimony shows that for ten or eleven days he saw the child's feet turn from gray to purple, from blue to green and black, and saw its flesh rotting and dropping away, yet made no effort to procure medical aid until the odor of the rotting flesh became unbearable. . . . The degree of negligence in such a case that would make a man criminally responsible can hardly be defined. It is not a slight failure in duty that would render him criminally negligent, but a great failure of duty undoubtedly would. . . . As we view the evidence, the jury had a sufficient basis for finding the defendant guilty of such criminal negligence as would amount to manslaughter.

Thus, it is observed that the court considered the degree of negligence as the important criterion in convicting the defendant, rather than expounding upon the "unlawful act" concept. The conclusion that the Nebraska court required criminal negligence is fortified by *Thiede v. State*.⁸³ The defendant had brewed an intoxicating liquor which had caused another's death from alcoholic poisoning. The court stated:⁸⁴

We believe the rule to be that, though the act, made unlawful by statute, is an act merely *malum prohibitum* and is ordinarily insufficient, 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 supply the wrongful intent essential to criminal homicide, and, when such act results in the death of another, may constitute involuntary manslaughter.

Accordingly, the conviction was reversed and the case remanded because the trial court had failed to instruct upon the question of "recklessness."

Keeping in mind the principle, as gathered by these cases, that ordinary negligence is insufficient, a consideration must now be made of the manslaughter convictions involving a motor vehicle. The following language in the first automobile case is to the effect that the required degree of negligence must equal recklessness:⁸⁵

⁸¹ 92 Neb. 755, 139 N.W. 676 (1913).

⁸² *Id.* at 759, 139 N.W. at 677 (1913). (Emphasis added.)

⁸³ 106 Neb. 48, 182 N.W. 570 (1913).

⁸⁴ *Id.* at 53, 182 N.W. at 572. (Emphasis added.)

⁸⁵ *Schultz v. State*, 89 Neb. 34, 46, 130 N. W. 972, 977 (1911).

Negligence is the gist of the offense, and, in the absence of recklessness or of want of due caution, there is no criminal liability. Actual intent is not an essential element of the offense. It is enough if there is shown a neglect and reckless indifference of the lives and safety of others. The evidence contained in the record [sic] conclusively established a case of negligent and reckless indifference to the lives and safety of others on the part of the defendant sufficient to sustain his conviction

The requirement of recklessness established by the earlier decisions was followed in the next few cases. In *Crawford v. State*,⁸⁶ the court held that an instruction couched in the terms "unlawful, reckless, careless, and negligent manner" adequately described the necessary culpability. As late as 1942, in *Cowan v. State*,⁸⁷ the court held:

Our conclusion is that the evidence is sufficient to sustain the finding of the jury that plaintiff in error was guilty of such gross negligence as to indicate a wanton disregard of human life. Such negligence is criminal in its character and where it results in a death will sustain a conviction for manslaughter.

The *Cowan* case was the last to conform with the requirement that there must be a degree of culpability greater than ordinary negligence if a conviction was to be sustained. The cases which followed seemed to establish a new criteria for determining the guilt of a driver. The emphasis moved to the "unlawful act" clause of the statute. The change in position was based on language found in the earlier case of *Benton v. State*⁸⁸ which held that if one drives an automobile in violation of a law which pertains to the operation of such vehicles, and if this violation is the cause of another's death, the individual is guilty of manslaughter.

An analysis of this language would warrant the conclusion that any violation, no matter how slight, of a law "pertaining to the operation of such vehicles" would justify a manslaughter conviction including the possibility of a ten-year prison term for the defendant.⁸⁹ Such a conclusion was seemingly reached by the court in *Schluter v. State*,⁹⁰ the last of the motor vehicle cases prosecuted under the manslaughter statute:

⁸⁶ 116 Neb. 125, 216 N.W. 294 (1927).

⁸⁷ 140 Neb. 837, 843, 2 N.W.2d 111, 114 (1942).

⁸⁸ 124 Neb. 485, 488, 257 N.W. 21, 23 (1933).

⁸⁹ The Nebraska Supreme Court has, on one occasion, stated that certain "unlawful" acts would not give rise to a conviction under the Motor Vehicle Homicide Act. The example given was failure to have a drivers license. *Id.* at 489, 257 N.W. at 23. It should be noted that this act would not be the cause of another's death.

⁹⁰ 153 Neb. 317, 321, 44 N.W.2d 588, 591 (1950). (Emphasis added.)

The failure of the court to advise the jury as proposed by the defendant to the effect that before the jury could convict him it must find from the evidence beyond a reasonable doubt that at the time the deceased came to his death "the defendant was guilty of such gross negligence as to indicate a wanton disregard of human life" is challenged as being prejudicial. This introduced an element *not heretofore recognized* in this state as a prerequisite for conviction of the crime of manslaughter.

In the light of the previous cases discussed, can it be said that gross or reckless conduct was not a prerequisite for a conviction? The court went on to rationalize its position by stating:⁹¹

The operation of motor vehicles is governed by many legal restrictions and requirements which are designed and intended to secure reasonable safety of persons upon the highways of the state. They were adopted because experience had established that a disregard thereof was likely to result in serious bodily harm or death. It has been considered in this state that a *negligent violation of any* of these by the operator of a motor vehicle on a public highway directly resulting in death of another person may render the operator guilty of manslaughter.

As the language "negligent violation" became the standard adopted by the court it seems clear that the degree of this negligence was immaterial with the entire emphasis being on the fact that there was an "unlawful act" of a vehicle involved.⁹² The *Schluter* case also pointed out that a mere speeding violation would warrant a conviction:⁹³

When a person drives a vehicle upon a public thoroughfare at a speed greater than is reasonable and prudent, and in excess of a speed allowed by law for that location, and the death of another is caused as a result of the violation, the driver of the vehicle is guilty of manslaughter.

The Nebraska position on manslaughter is definitely opposed to that of the great majority of the American jurisdictions.⁹⁴ Such a result is extremely harsh as nearly every traffic accident involving a fatality is attributable to the "unlawful operation" of a motor vehicle. The Nebraska motorist can only hope that one of his momentary inadvertencies will not cause the death of another, or that the county attorneys will continue their benevolent attitude and elect to prosecute only when the negligence is of an extreme nature.⁹⁵

⁹¹ *Id.* at 321, 44 N.W.2d at 591. (Emphasis added.)

⁹² *Supra* note 90.

⁹³ *Schluter v. State*, 153 Neb. 317, 325, 44 N.W.2d 588, 593 (1950) (dictum).

⁹⁴ *Supra* note 30.

⁹⁵ A reading of the cases discloses that the motorist is prosecuted only when his negligence is of a flagrant nature.

B. MOTOR VEHICLE HOMICIDE

The history and effect of the motor vehicle homicide statute is neither as long nor as ambiguous as the manslaughter enactment. However, the result is the same—simple negligence will suffice. The first case of any significance⁹⁶ was *Birdsley v. State*.⁹⁷ Defendant was speeding at night, apparently on the wrong side of the road. In affirming the conviction, the court stated:⁹⁸

Likewise . . . we conclude that in a prosecution for motor vehicle homicide under the provisions of section 28-403.01, R.S. Supp., 1953, it is simply required that the unlawful operation of the motor vehicle by the accused shall be a proximate cause of the death of another.

This was the case which laid the groundwork for ruling out gross negligence or reckless conduct as a prerequisite for a conviction. Like the earlier manslaughter cases, the entire emphasis was placed upon the fact that there had been an "unlawful operation." Negligence, according to the court, is not even an element of the offense. The court specifically ruled out gross negligence in a motor vehicle homicide case in *Hoffman v. State* when it stated:⁹⁹

While of course the requirement of the instructions that there was a burden on the state to show gross negligence can have no determining significance in this case, since the verdict was one of guilty, it appears that attention should be called to the fact that this phase of the instructions was erroneous and should not have been submitted. The law exacts no such requirement in cases such as this.

This position was substantiated in *Prybil v. State*:¹⁰⁰

This court made it clear . . . that negligence or gross negligence as such is not an element of the crime of motor vehicle homicide. There must be proof of unlawful operation. Negligence may be and usually is a basic element in unlawful operation and may be proved but the essential element of the crime as declared by statute is the unlawful act.

Simply stated, the requirements for a conviction under the Nebraska motor vehicle homicide statute are: (1) death of a person, (2) without malice, (3) while in the unlawful operation of a motor vehicle.¹⁰¹

⁹⁶ Earlier cases, which are of no consequence in relation to this article are *Birdsley v. Kelly*, 159 Neb. 74, 65 N.W.2d 328 (1954), and *Vore v. State*, 158 Neb. 233, 62 N.W.2d 871 (1954).

⁹⁷ 161 Neb. 581, 74 N.W.2d 377 (1956).

⁹⁸ *Id.* at 588, 74 N.W.2d at 381.

⁹⁹ 162 Neb. 806, 814, 77 N.W.2d 592, 597 (1956).

¹⁰⁰ 165 Neb. 691, 703, 87 N.W.2d 201, 210 (1957).

¹⁰¹ *Olney v. State*, 169 Neb. 717, 100 N.W.2d 838 (1960).

The harshness of this law is equal to the manslaughter interpretation and need not be reiterated. The question which we must now consider is the wisdom of such punishment. Does the conviction of the driver solve *any* of the problems in *any* respect?

IV. THE FALLACY OF CONVICTING THE UNFORTUNATE DRIVER—AND A PROPOSAL

The various methods of punishing the "criminal behind the wheel" having been examined, an inspection of the wisdom of such action seems appropriate. To create a hypothetical situation, suppose A and B meet at the local country club and, upon their departure, each decides to drive his own car. En route to their respective destinations, both drive in excess of the speed limit and the following events occur: (1) X runs a stop sign, resulting in a collision with A—soon after, X dies; (2) B is arrested by a patrolman for speeding. After the applicable criminal sanctions are imposed, A finds himself faced with a long prison sentence and a heavy fine.¹⁰² B is assessed a nominal fine. The drivers were equally "culpable," since the same "unlawful act" was committed, yet the penal measures are of great divergence. Is it fair to place such rigid penal provisions upon one individual in view of the fact that daily hundreds are guilty of doing the same act (speeding) and given a much lighter punishment? Motor vehicle homicide is indeed a "fortuitous crime."¹⁰³

Not a single objective will be accomplished if the present system of punishment is continued as no progress will be made toward the stifling of the bad driving habits which are the cause of thousands of deaths annually. The present method of imprisonment has had no success in the past and there is certainly no reason to anticipate it will change in the future. As one is speeding down a highway, the thought most remote in his mind is the possibility of someone being killed by his conduct. The one thing upon which this guilty speeder does reflect is the possibility of a "radar trap" or a patrolman lurking about, waiting to pursue a violator. The more rigid the penalties for the various moving violations, the more careful our drivers will be!

Just as imprisonment does nothing to deter the conduct of others, it has no constructive effect on the convicted. Our finest

¹⁰² "Uniformly the courts have said a man will not be excused for killing another even though his victim was negligent. While contributory negligence is a complete defense to an action for private injury resulting from homicide, it is no defense for a public wrong." *Schultz v. State*, 89 Neb. 34, 41, 130 N.W. 972, 975 (1911).

¹⁰³ *Supra* note 4.

citizens drive on the highways and are, at times, guilty of traffic infractions. When such an infraction results in the death of another, a jail sentence is not needed for them to realize their wrong. They did not mean to kill the first time, and the resulting mental torture from feeling they took another's life will more than insure that their driving habits will be corrected in the future.

It is submitted that our legislature should repeal the motor vehicle homicide act and the manslaughter provisions in so far as they relate to the careless motorist, and in their stead establish stricter penal sanctions for violations of the traffic regulations. These penalties should be so severe that the possibility of committing a moving violation is kept foremost in the driver's mind. The details of such penalties would necessarily have to be worked out under legislative supervision, but such regulations are mandatory if anything is to be done about the three million who are annually killed or injured. Heavy fines may be the answer to some degree, but the problem arises here in that the brunt of the punishment always falls on the bread-winner of the family and thus may not have an adequate deterrent effect on the high school and women drivers who are unemployed. A supplemental provision might well be an automatic revocation of the operator's license for a period, determinate upon the nature of the infraction and the number of past offenses. Such action has been taken in other states and has met with success.¹⁰⁴

Although this idea of fortuity has apparently never been expressed by a court, inroads have been made on limiting those statutes establishing punishment for the negligent driver. Thus, in the recent case of *Marshall v. State*¹⁰⁵ the defendant was acquitted of a manslaughter charge when he gave his car keys to a person he knew to be drunk. The drunk had killed himself and another in a highway collision. The court talked in terms of the "complicity" of Marshall's conduct and came to the conclusion that he was not a principle to the crime. Such was the court's way of stating that it would be unfair to convict the defendant of such a crime. Another example of a judicial refusal to impose criminal sanctions where the defendant was a victim of a fortuitous circumstance,

¹⁰⁴ Connecticut has taken similar steps in traffic enforcement and such a program has met with great success. The citizens at first complained of the strict penalties and the ease with which their licenses were suspended. The complaints stopped, however, when the statistics revealed that the annual fatality toll was reduced from 324 to 248 in only four years, notwithstanding an increase in the number of vehicles using the highways.

¹⁰⁵ 362 Mich. 170, 106 N.W.2d 842 (1961).

was *Hubbard v. Commonwealth*,¹⁰⁶ where the defendant had been arrested for being drunk in a public place. Hubbard was ordered to enter a jail cell but refused to do so peaceably. The exertion of trying to get him inside the cell caused the jailer to suffer a heart attack from which he died. In reversing the conviction, the court talked in such terms as "proximate cause" and "intervening cause" but the issue again was fairness. Just as these two courts realized that it would be unfair to punish the defendants for results which greatly exceeded their culpability, it is hoped that other jurisdictions will adopt the proposals previously mentioned and cease the imprisonment of the negligent motorist.

Unfortunately, all cases have not been decided in accord with *Marshall* and *Hubbard*. Such an example is *State v. Frazier*,¹⁰⁷ where the defendant dealt the deceased a slight blow not knowing him to be a hemophiliac. The impact caused a slight laceration on the inside of the deceased's mouth, which produced a hemorrhage, eventually resulting in death. The defendant was found guilty and imprisoned! Convictions under circumstances comparable to the *Frazier* case are unjustified because of the unfairness in the relationship between culpability and punishment, and also because of the fortuitous nature of the wrong.

It is recognized that motor vehicle homicide and manslaughter (when used to convict the negligent motorist) are not the only crimes which may be classified as "fortuitous," but this writer is of the opinion that they are the ones most in need of reform. A good example of another fortuitous crime is the entire area of attempt. To illustrate, suppose A and B (not acting in concert) fire at C, each hoping to kill the intended victim. A proves to be a better shot and kills C, whereas B's shot miscarries. Obviously each is guilty of equal culpability, but the resulting punishment will in no manner be the same. It should be noted, however, that this situation is distinguishable from the motor vehicle homicide area, in that the scheming killer should be given a last minute chance to abandon his plans. If the punishments in the hypothetical were to be equal, there would be no reason for B to stop firing once his preparation reached the indictable stage of attempt.

Another example of "fortuity" which bears notation is the crime of felony murder.¹⁰⁸ To illustrate, A and B each set out to

¹⁰⁶ 304 Ky. 818, 202 S.W.2d 634 (1947).

¹⁰⁷ 339 Mo. 966, 98 S.W.2d 707 (1936).

¹⁰⁸ Under the "felony-murder" doctrine, when one person kills another in perpetration of a common-law felony (or a specified felony which is found in a statutory enumeration), the element of legal malice is

rob separate business establishments. A's victim readily concedes the cash, whereupon the felon flees unhampered by pursuit. B is not as fortunate, as his intended victim brandishes a weapon, and an ensuing scuffle results in the accidental killing of an innocent bystander. Again the culpability is the same, the punishment different, since B will face a murder charge. England has already shown its attitude toward the unfairness involved in such a situation by abolishing this crime by the Homicide Act of 1957.¹⁰⁹ The felony-murder doctrine is firmly embedded in American jurisprudence and may be distinguished by the fact that society has a more legitimate interest in holding the arsonist or rapist to the results of his conduct.

CONCLUSION

It is time that the law makers of the various states accept a realistic approach to the problem which the negligent driver presents. It is submitted that the best possible solution to the problem is to de-emphasize the fact of a motor vehicle killing and instead to enact laws calculated to put a stop to the causes of such killings.

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supplied so as to make the resulting homicide murder. *Commonwealth v. Cater*, 369 Pa. 172, 152 A.2d 259 (1959).

¹⁰⁹ Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11 provides: "(1) Where a person kills another in the course of furtherance of some other offense, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offense. (2) For the purposes of the foregoing subsection, a killing done in the course or for the purpose of resisting an officer or justice, or of resisting or avoiding or preventing a lawful arrest or of effecting or assisting an escape or rescue from legal custody shall be treated as killing in the course or furtherance of an offense."