

Involuntary Manslaughter: Review and Commentary on Ohio Law

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The crime of involuntary manslaughter was defined at common law to include two different types of homicides. An actor was held liable for involuntary manslaughter when a death resulted from the commission of an unlawful act not amounting to a felony, or from the actor's performance of an otherwise lawful act but in a reckless or extremely negligent manner.¹ Involuntary manslaughter was distinguished from murder or voluntary manslaughter by the absence of any intention to kill.²

The law of involuntary manslaughter in Ohio underwent significant revision in the Criminal Code of 1974. Prior to 1974, the crime of involuntary manslaughter was not defined as an offense with its own statutory identity, but instead, essentially included various forms of "unlawful act" manslaughter.³ The Code revisors retained unlawful act manslaughter in the present involuntary manslaughter statute, but specified that felonies and misdemeanors were to be the unlawful acts giving rise to an involuntary manslaughter charge.⁴ In addition, the Criminal Code of 1974 contains three other offenses that may be properly characterized as types of involuntary manslaughter: negligent homicide,⁵ aggravated vehicular homicide,⁶ and vehicular homicide.⁷ The purpose of this article is to explore the present law of involuntary manslaughter in Ohio and to ask whether the Code revisions of 1974, as interpreted by the Ohio courts, are the most effective and just formulations of the law of involuntary manslaughter.

I. INVOLUNTARY MANSLAUGHTER: SECTION 2903.04

The crime of involuntary manslaughter is codified in section 2903.04 of the Criminal Code:

(A) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a felony.

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1. F. WHARTON, HOMICIDE § 6, at 7 (3d ed. 1907).

2. *Id.* § 211, at 333-34.

3. OHIO REV. CODE ANN. § 2901.06 (Page 1954) (manslaughter in the first degree). Other manslaughter status included: § 4511.18 (Page 1967) (homicide by vehicle in the second degree); § 4511.181 (Page 1967) (homicide by vehicle in the first degree); § 1547.13 (Page 1964) (watercraft related deaths); § 4999.04 (Page 1954) (locomotive related deaths).

4. OHIO REV. CODE ANN. § 2903.04 (Page 1975).

5. *Id.* § 2903.05.

6. *Id.* § 2903.06.

7. *Id.* § 2903.07.

(B) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a misdemeanor.

(C) Whoever violates this section is guilty of involuntary manslaughter. Violation of division (A) of this section is a felony of the first degree. Violation of division (B) is a felony of the third degree.⁸

The reader may be surprised to see that section 2903.04 is termed involuntary manslaughter. The section reads like a felony-murder statute with the addition of a provision covering deaths occurring during the commission of misdemeanors. Arguably, section 2903.04 may be called a "felony-misdemeanor manslaughter" provision, employing the term manslaughter because the penalty is substantially less than that for murder.⁹ Yet analysis of section 2903.04 reveals that the provision is merely a codification of an unlawful act form of manslaughter with felonies and misdemeanors designated as the unlawful acts underlying the offense. Nevertheless, section 2903.04 is closely related in theory to the law of felony-murder and can only be clearly understood through a comparison to felony-murder principles.¹⁰ In order to present a clear framework for analysis, it is helpful to trace the history of involuntary manslaughter in Ohio and to examine the changes both proposed and adopted in the 1974 Code revision.

A. *Involuntary Manslaughter Prior to 1974*

Manslaughter was not statutorily differentiated into voluntary and involuntary forms prior to the 1974 Code revision. Section 2901.06 originally defined manslaughter in the first degree:

No person shall unlawfully kill another. Whoever violates this section, except in the manner described in sections 2901.01 to 2901.05 [other homicide offenses], inclusive, of the Revised Code, is guilty of manslaughter in the first degree, and shall be imprisoned not less than one nor more than twenty years.¹¹

This general statutory enactment of the crime of manslaughter was judicially interpreted to include both voluntary and involuntary manslaughter.¹²

According to the Ohio Supreme Court in *State v. Butler*, the crime of involuntary manslaughter was committed when the slayer was engaged in some unlawful act, other than acts that were necessary to constitute first or second degree murder, but without intention to kill and without malice.

8. *Id.* § 2903.04.

9. The penalty for violation of § 2903.04(A) is imprisonment for not less than four nor more than twenty-five years. *Id.* § 2903.04(C); § 2929.11(B)(1). The penalty for violation of § 2903.04(B) is imprisonment for not less than one nor more than ten years. *Id.* § 2903.04(C); § 2929.11(B)(3). The penalties are set forth in §§ 2929.02-.04. *Id.*

10. See text accompanying notes 37-56 *infra*.

11. OHIO REV. CODE ANN. § 2901.06 (Page 1954).

12. *State v. Butler*, 11 Ohio St. 2d 23, 29, 227 N.E.2d 627, 633 (1967). See *State v. McDaniel*, 103 Ohio App. 163, 144 N.E.2d 683 (1956).

The unlawful act, however, may have been the direct or proximate cause of death.¹³ The unlawful act could be either a felony or a misdemeanor. Liability for involuntary manslaughter was imposed irrespective of the defendant's state of mind,¹⁴ but the unlawful act had to be one that would be reasonably anticipated by an ordinarily prudent person as likely to result in a death.¹⁵

Historically, many involuntary manslaughter convictions arose in connection with violations of safety statutes regulating weapons and automobiles. Discharge of a weapon in a public place¹⁶ or driving while intoxicated or at an excessive speed were examples.¹⁷ The problem with vehicular related deaths, however, was that the penalty for manslaughter in the first degree could be quite severe.¹⁸ The courts experienced problems of jury nullification; that is, the reluctance of juries to imprison individuals for deaths arising out of car accidents.¹⁹ Car accidents are frequent occurrences, and many juries simply refuse to convict the unfortunate defendant of a harsh criminal offense. This problem of jury nullification eventually led to the enactment of separate offenses with lesser penalties for vehicular homicides.²⁰ These provisions were the predecessors of current vehicular homicide statutes and will be discussed in more detail below.²¹

Traditionally, Ohio did not provide an involuntary manslaughter charge when a death occurred as the result of the actor's lawful but extremely negligent conduct. Ohio courts held that unless the act amounted to a violation of some law, there could be no involuntary manslaughter offense.²² Thus, involuntary manslaughter in Ohio prior to the 1974 Code revision followed only the unlawful act branch of common law involuntary manslaughter.

B. *The Code Revision of 1974*

In recent years, unlawful act manslaughter has come under increasing attack from commentators because it punishes conduct without reference

13. 11 Ohio St. 2d at 29, 227 N.E.2d at 633.

14. The state of mind necessary for the commission of the unlawful act, of course, must be proven or else there is no underlying act upon which to predicate manslaughter liability.

15. See *Black v. State*, 103 Ohio St. 434, 133 N.E. 795 (1921); *Jackson v. State*, 101 Ohio St. 152, 127 N.E. 870 (1920); *State v. Schaffer*, 96 Ohio St. 215, 117 N.E. 220 (1917). See text accompanying notes 78-86 *infra*.

16. OHIO GEN. CODE ANN. § 12635 (Page 1939).

17. See, e.g., *State v. O'Mara*, 105 Ohio St. 94, 136 N.E. 885 (1922); *Jackson v. State*, 101 Ohio St. 152, 127 N.E. 870 (1920).

18. OHIO REV. CODE ANN. § 2901.06 (Page 1954). The penalty was imprisonment for one to twenty years.

19. See OHIO LEGISLATIVE SERVICE COMMISSION CRIMINAL LAW TECHNICAL COMMITTEE [hereinafter cited as "TECHNICAL COMMITTEE"], Minutes, First Meeting, May 2, 1967, at 5.

20. OHIO REV. CODE ANN. §§ 4511.18, 4511.181 (Page 1967).

21. See text accompanying notes 201-05 and 223-24 (vehicular homicide section) *infra*.

22. See *Martin v. State*, 70 Ohio St. 219, 71 N.E. 640 (1904); *Weller v. State*, 19 Ohio C.C. 166, 10 Ohio Cir. Dec. 381 (1899).

to a specific culpable mental state.²³ The Model Penal Code provision on manslaughter rejects unlawful act manslaughter in favor of a reckless homicide statute.²⁴ The comments to the Model Penal Code manslaughter provision indicate that the Code's reliance on reckless homicide and the elimination of the unlawful act branch of involuntary manslaughter is a departure from traditional formulations of involuntary manslaughter in favor of a simple provision linked to the culpable mental state of recklessness.²⁵ Under the Model Penal Code manslaughter provision, the existence of the unlawful act is relevant only insofar as it may be evidence of the actor's reckless state of mind.²⁶

In its recommendations to the Ohio General Assembly, the Ohio Criminal Law Technical Committee proposed a reckless homicide provision similar to that of the Model Penal Code with the addition of a provision creating liability for deaths occurring from offenses of violence.²⁷ The Committee Comments state:

The Committee chose the designated culpable mental state [of recklessness] as a more refined and better tailored solution to describe the same evils as a blanket provision covering violation of any statute. Lawfulness or unlawfulness of the act would be relevant to the question of recklessness but not conclusive.²⁸

The legislative history of the involuntary manslaughter provision reveals that the Committee's recommendations formed the basis of the original House Bill.²⁹ The Bill, however, underwent a revision that retained the linkage of criminal liability for manslaughter with the reckless mental state but eliminated the manslaughter provision imposing liability for deaths resulting from acts of violence.³⁰ In place of the violent offense provision, the substitute House Bill inserted a broader section imposing liability for the death of another through commission of any offense other

23. W. LAFAVE & A. SCOTT, CRIMINAL LAW § 79, at 602 (1972).

24. MODEL PENAL CODE § 201.3 (Proposed Official Draft, 1962) [hereinafter cited as (P.O.D.)]

25. MODEL PENAL CODE § 201.3, Comment, at 40 (Tent. Draft No. 9, 1959).

26. *Id.* at 40-41.

27. The final draft of the manslaughter provision, OHIO LEGISLATIVE SERVICE COMMISSION, PROPOSED OHIO CRIMINAL CODE § 2903.03 [hereinafter cited as PROP. OHIO CRIM. CODE], contained both voluntary and involuntary manslaughter provisions. The relevant involuntary manslaughter sections read:

(B) No person shall recklessly cause the death of another. An offense under Section 2903.05 of the Revised Code [vehicular manslaughter] does not constitute an offense under this division.

(C) No person shall cause the death of another by committing any offense of violence. An offense under Section 2903.05 or 2903.06 of the Revised Code [vehicular manslaughters] does not constitute an offense under this division.

For a discussion of the reckless homicide provision, see *Symposium—The Proposed Ohio Criminal Code—Reform and Regression*, 33 OHIO ST. L.J. 351, 453-54 (1972).

28. This Comment comes from a Criminal Law Study prepared for the Technical Committee in its consideration of various drafts of the reckless homicide provision. It may be found with the second draft of the reckless homicide statute (May 5, 1970). Professor Lawrence Herman of the Ohio State University College of Law has a copy of this draft.

29. See H. R. 511, 109th Gen. Assembly § 2903.03 (1972).

30. SUB. H. R. 511, 109th Gen. Assembly § 2903.03 (1972).

than aggravated vehicular homicide or vehicular homicide.³¹ The version of section 2903.04 finally passed by the House deleted this broad provision in favor of a pure reckless homicide statute.³² The earlier provision recommended by the Technical Committee dealing with offenses of violence did not reappear in the final House Bill.

All of the previous drafts were mooted when the Senate amended the involuntary manslaughter provision and frustrated prior attempts to replace unlawful act manslaughter with reckless homicide.³³ The Senate amendment returned to unlawful act manslaughter in the form of the present involuntary manslaughter statute.³⁴

C. *Analysis of Section 2903.04*

Section 2903.04 divides involuntary manslaughter into two separate offenses carrying different penalties. Division (A) imposes liability for deaths occurring as a proximate result of felonies. The penalty is imprisonment for a term of not less than four years nor more than twenty-five years.³⁵ Division (B) imposes liability for deaths occurring as the proximate result of a misdemeanor. The penalty is imprisonment for a term of not less than one nor more than ten years.³⁶

1. *Felony-Murder Manslaughter: Section 2903.04(A)*

Manslaughter liability for deaths occurring as a proximate result of the commission of a felony bears a close similarity to traditional liability for felony murder. Felony-murder in itself is a complex area of homicide law and a full discussion of felony-murder principles is beyond the scope of this article.³⁷ A question arises, however, regarding the desirability of including a felony-manslaughter provision in a criminal code that already contains a felony-murder provision. The answer to that question requires a discussion of the interrelationship of felony-murder, section 2903.01(B), to felony-manslaughter, section 2903.04(A).

Liability for felony-murder in Ohio occurs only when the commission

31. *Id.* § 2903.05(B) read:

No person shall cause the death of another by committing any offense. An offense under section 2903.06 [aggravated vehicular homicide] or 2903.07 [vehicular homicide] of the Revised Code does not constitute an offense under this division.

32. *Id.* § 2903.04:

(A) No person shall recklessly cause the death of another. An offense under section 2903.06 [aggravated vehicular homicide] of the Revised Code does not constitute an offense under this section.

(B) Whoever violates this section is guilty of involuntary manslaughter, a felony of the third degree.

33. 134 OHIO SENATE J. 1830 (Nov. 29, 1972).

34. *Id.*

35. Violation of § 2903.04(A) is a first degree felony punishable in accordance with § 2929.11(B)(1).

36. Violation of § 2903.04(B) is a third degree felony punishable in accordance with § 2929.11 (B)(3).

37. See generally CRIMINAL LAW, *supra* note 23, § 75.

of various enumerated felonies coincides with the specific mental state of purposefulness.³⁸ Thus, liability for felony-manslaughter could occur in two situations. First, a charge of involuntary manslaughter would be appropriate when the defendant caused a death as a proximate result of the commission of one of the felonies enumerated in 2903.01(B),³⁹ but the killing was not purposeful. Second, a felony-manslaughter charge would be appropriate when the defendant did not commit one of the enumerated felonies, but did cause a death in the course of any one of a number of felonies in the criminal code.

a. *Felony-Murder Without Purpose*

A classic situation in which the defendant should be found guilty of involuntary manslaughter as opposed to felony-murder is when the defendant in the course of committing an armed robbery accidentally kills the victim of the robbery or a bystander. In such a situation the prosecution would be unable to prove the specific purposeful state of mind to cause death requisite for a felony-murder conviction.⁴⁰

The problem, however, is that the purposeful state of mind necessary for felony-murder conviction in Ohio has been significantly diluted by the Ohio Supreme Court. In *State v. Johnson* and *State v. Lockett*,⁴¹ the Ohio Supreme Court broadly interpreted the purposeful mental state and brought within its reach conduct that may actually be accompanied by a lesser mental state—knowledge, recklessness, or possibly even negligence.⁴² In light of the current Ohio Supreme Court approach to felony-murder, the line between felony-murder and felony-manslaughter becomes blurred.⁴³ As a result, the prosecution has a great discretion to punish involuntary manslaughter as felony-murder.⁴⁴ There is a great disparity in penalty between felony-murder and involuntary manslaughter—the

38. OHIO REV. CODE ANN. § 2903.01(B) (Page 1975). This is an unusual requirement peculiar to Ohio and Alaska, which patterned its felony-murder statute after Ohio. Most states merely require the commission of the specified felony.

39. Those felonies are kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, and escape.

40. "Purpose" under OHIO REV. CODE ANN. § 2901.22(A) (Page 1975) requires a specific intention to cause a certain result.

41. 56 Ohio St. 2d 35, 381 N.E.2d 637 (1978); 49 Ohio St. 2d 48, 358 N.E.2d 1062, *modified*, 438 U.S. 586 (1978).

42. See Note, *Liability of an Aider and Abettor for Aggravated Murder*, 39 OHIO ST. L.J. 214, 228 (1978). This interpretation of *Lockett* and *Johnson* is consistent with prior case law in Ohio, which accorded a presumption of purposefulness when the actor's conduct had death as a logical result. *Id.* at 218-23.

43. See *State v. Lockett*, 49 Ohio St. 2d 48, 68, 358 N.E.2d 1062, 1075 (1975) (Stern, J., dissenting). Arguably, the commission of any one of the felonies enumerated in section 2903.01(B) is accompanied by at least a reckless state of mind. When an actor commits aggravated robbery, for example, a strong argument can be made that the actor perversely disregards a known risk that his conduct is likely to result in death. In such circumstances, death as a result of resistance by the victim or intervention by the police or a bystander is a real possibility, and the prosecution may have little difficulty in showing the reckless state of mind.

44. Justice Stern in his dissent in *Lockett* suggested that involuntary manslaughter was the appropriate charge. *Id.* at 70, 358 N.E.2d at 1076.

difference between a possible life sentence⁴⁵ and a term of from four to twenty-five years. If the goal of the criminal law is to punish conduct in accordance with the degree of the offender's culpability, prosecutorial discretion to draw, at random, the lines between felony-murder and felony-manslaughter undermines the fairness and justness of the present homicide scheme.

b. *Nonenumerated Felony-Murder*

The second instance in which felony-manslaughter liability will arise as opposed to felony-murder liability is when the death occurs as a proximate result of the commission of a felony not enumerated in the felony-murder statute. Theoretically, any felony could serve as the basis for a felony-manslaughter charge. But felonies that are most likely to serve as a basis for felony-manslaughter are those posing some risk of death in their commission; for example, felonious and aggravated assault,⁴⁶ various sex offenses,⁴⁷ and breaking and entering.⁴⁸ Unlike felony-murder, the prosecution need not prove any intention to kill to obtain a conviction under section 2903.04(A). By creating liability for deaths occurring in the commission of any felony, the hope is that the actor will be initially deterred from engaging in that felony.⁴⁹

When a nonenumerated felony is used as a basis for establishing involuntary manslaughter, section 2903.04(A) becomes similar to what may be termed "second degree felony murder." In California, deaths resulting from the commission of nonenumerated felonies are second degree murder⁵⁰ and subject to a less severe penalty.⁵¹ Felony-murder is separated into first and second degrees because deaths occurring from the commission of some felonies are thought to warrant additional deterrence and concomitantly deserve additional punishment.

The gradation of felony-murder into first and second degree is consistent with California's overall gradation of murder into first and

45. Life imprisonment is currently the maximum sentence since the Ohio death penalty was declared unconstitutional in *Lockett v. Ohio*, 438 U.S. 586 (1978). However, a new death penalty bill including felony-murder as a capital offense has already passed the Ohio House of Representatives.

46. OHIO REV. CODE ANN. §§ 2903.11-.12 (Page 1975).

47. *Id.* § 2907.03 (sexual battery); § 2907.05 (gross sexual imposition); § 2907.21 (prostitution).

48. *Id.* § 2911.13.

49. See Note, *Homicide—Felony Murder Doctrine—Shooting of Co-Felon by Victim of Armed Robbery*, 30 So. CAL. L. REV. 357, 361 (1957).

50. CAL. PENAL CODE § 189 (Supp. 1978):

All murder which is perpetrated by means of . . . a destructive device or explosive, poison, . . . or by any other kind of willful, deliberate, and premeditated killing or which is committed in the perpetration of or attempt to perpetrate [an enumerated felony] is murder of the first degree; all other kinds of murder are murder of the second degree. . . .

51. *Id.* § 190 reads:

Every person guilty of murder in the first degree shall suffer death, confinement in state prison for life without possibility of parole, or confinement in state prison for life. . . . Every person guilty of murder in the second degree is punishable by imprisonment in the state prison for five, six or seven years.

second degrees.⁵² No such explicit division exists in the Ohio Code. Felony-murder is either aggravated murder⁵³ or involuntary manslaughter. Even within involuntary manslaughter no attempt is made to distinguish between deaths occurring from the nonpurposeful commission of the felonies enumerated in 2903.01(B) and deaths occurring from a nonenumerated felony. Further, there is no attempt to gradate the nonenumerated felonies into classes reflecting the mental state accompanying the crime. Thus, death caused in the course of a nonpurposefully committed armed robbery⁵⁴ is punished the same as a purposefully committed lesser felony like theft.⁵⁵ Arguably, some distinction should be made in penalty depending on the degree of culpability manifested by the mental state underpinning the felony, but section 2903.04(A) makes no attempt to do so.⁵⁶

2. *Misdemeanor-Manslaughter—Section 2903.04(B)*

Misdemeanor-manslaughter in Ohio follows the common law of involuntary manslaughter imposing criminal liability for deaths occurring as the result of unlawful acts not amounting to felonies.⁵⁷ The punishment for such an offense is significantly less than that imposed for felony-manslaughter under section 2903.04. Like felony-manslaughter, misdemeanor-manslaughter imposes liability irrespective of the actor's intention to kill. Theoretically, any misdemeanor could serve as the basis for a misdemeanor-manslaughter conviction,⁵⁸ but misdemeanors posing

52. *Id.* § 189.

53. Aggravated murder is defined as purposely causing the death of another with prior calculation and design. OHIO REV. CODE ANN. § 2903.01(A) (Page 1975). It carries the highest penalty for homicide crimes in Ohio.

54. OHIO REV. CODE ANN. § 2911.01 (Page 1975) (aggravated robbery):

(A) No person, in attempting or committing a theft offense as defined in section 2913.01 of the Revised Code, or in fleeing immediately after such attempt or offense, shall do either of the following:

(1) Have a deadly weapon or dangerous ordnance as defined in section 2923.11 of the Revised Code on or about his person or under his control.

(2) Inflict, or attempt to inflict serious physical harm on another.

(B) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree.

55. *Id.* § 2913.02 (theft):

(A) No person with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either:

(1) Without the consent of the owner or person authorized to give consent.

(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent.

(3) By deception.

(4) By threat.

56. A purposefully committed theft offense carried out without a weapon is arguably less dangerous than one in which a weapon is used but section 2903.04 makes no gradation in penalty if a death results from the commission of either.

57. Misdemeanor-manslaughter under § 2903.04(B) is a third degree felony carrying a prison term of from one to ten years. *See* § 2903.04(C) and § 2929.11(B)(3). *See also* HOMICIDE, *supra* note 1.

58. There is a question whether the misdemeanor can be one that is prohibited only by a local or municipal ordinance. *State v. O'Mara*, 105 Ohio St. 94, 136 N.E. 885 (1922), held that such a violation could be the basis of a manslaughter charge. *But see State v. Collingsworth*, 82 Ohio St. 154, 92 N.E. 22 (1910).

some risk of death in their commission, like the lesser assaultive⁵⁹ and sexual crimes,⁶⁰ are more likely candidates. Originally, many of the first degree manslaughter convictions under old Code section 2901.06 dealt with vehicular homicides, often arising from various traffic-related offenses.⁶¹ This type of manslaughter was separated into the vehicular manslaughter statutes, and today such misdemeanors would be considered under the current vehicular homicide provisions.

A typical misdemeanor-manslaughter charge arises when the offender commits a simple assault on the victim, who falls, accidentally strikes his head, and subsequently dies from the fall. In this situation the offender merely intended to injure the individual, not cause death, but because death occurs as a proximate result of the assault, society is justified in exacting a stiffer penalty than that associated with the misdemeanor itself.

Misdemeanor-manslaughter presents few conceptual difficulties different from those associated with felony-manslaughter. The two provisions may be construed *in pari materia*. The crime of involuntary manslaughter, however, is further complicated by four problems: attempt, limitations on the underlying felonies or misdemeanors, proximate cause, and merger.

D. *The Scope of Section 2903.04*

1. *Attempt and Involuntary Manslaughter*

Involuntary manslaughter liability may arise if the offender's actions rise only to the level of an attempted felony or misdemeanor.⁶² Attempt is defined in the Ohio Code:

No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, engage in conduct which if successful, would constitute or result in the offense.⁶³

The rationale behind extending manslaughter liability to the attempted crime is that the attempt manifests sufficient criminal intent to warrant homicide liability. The law has an interest in halting crimes before they reach fruition.⁶⁴

Application of the attempt provision of the involuntary manslaughter statute presents few theoretical problems. An issue does arise, however, when a felony or misdemeanor with a mental state requirement less than that of knowledge is the basis of the attempted involuntary manslaughter charge. The question, then, is whether there can be attempted involuntary

59. *E.g.*, OHIO REV. CODE ANN. § 2903.13 (Page 1975) (assault); § 2903.14 (negligent assault); § 2903.21 (aggravated menacing); § 2903.22 (menacing).

60. *Id.* § 2907.07 (importuning); § 2907.06 (sexual imposition).

61. *See* text accompanying notes 202-06, 224 *infra* (vehicular homicide sections).

62. OHIO REV. CODE ANN. § 2903.04 (Page 1975). The felony-murder statute contains a similar provision covering attempted enumerated felonies. *See id.*

63. OHIO REV. CODE ANN. § 2923.02(A) (Page 1975).

64. CRIMINAL LAW, *supra* note 23, § 59, at 426-27.

manslaughter when the attempted felony or misdemeanor requires only recklessness or negligence.

The common law maintained that an attempted reckless or negligent crime is possible when the gist of the offense is not a completed act, but rather the creation of danger to the victim. Thus, it is possible for a person to drive a car knowing that the brakes are defective and that someone may be injured.⁶⁵ This analysis, however, breaks down when the crime entails causing a specific result.⁶⁶ For example, if one purposefully or knowingly attempts negligent assault,⁶⁷ the real crime, if completed, would no longer be negligent assault, but an assaultive crime with a knowing or purposeful mental state.⁶⁸ If there can be no attempted negligent assault, there a fortiori can be no involuntary manslaughter charge.

The common law approach to attempted negligent crimes, however, is not controlling under the Ohio attempt statute. The Committee Comments to section 2923.02 clearly indicate that: "Purposefully or knowingly attempting to commit a crime is sufficient to make the attempt an offense if the crime attempted requires knowledge, recklessness, or negligence for its commission."⁶⁹ Hence, in Ohio there can be attempted negligent assault, and the categories of crimes upon which an involuntary manslaughter charge may be predicated is not restricted in any respect. This approach is sensible from a policy standpoint, despite intellectual difficulties with conceptualizing attempted negligent or reckless crimes. The knowing or purposeful state of mind accompanying the attempt probably indicates sufficient *mens rea* to justify a manslaughter charge.

The problem obverse to attempted negligent crimes arises when a crime requires a purposeful mental state and the actor attempts the crime with mere knowledge. Theft in Ohio requires purpose.⁷⁰ Thus, there is no such crime as a knowingly attempted theft, and, a fortiori, there can be no involuntary manslaughter charge when a death occurs as a result of conduct falling short of the completed crime.

The Committee Comments clearly indicate that a lower mental state should *not* suffice for a higher one under the attempt statute. The Comments indicate: "If the offense attempted specifies that purpose is the

65. *Id.* at 429-30.

66. See Smith, *Two Problems in Criminal Attempts*, 70 HARV L. REV. 422, 434 (1957): "Where, therefore, in a crime which by definition may be committed recklessly or negligently but not intentionally, the recklessness or negligence relates not to a pure circumstance but to a consequence, it is impossible to conceive of an attempt."

67. OHIO REV. CODE ANN. § 2903.14(A) (Page 1975): "No person shall negligently by means of a deadly weapon or dangerous ordnance as defined in section 2923.11 of the Revised Code, cause physical harm to another."

68. CRIMINAL LAW, *supra* note 23, § 59, at 430.

69. OHIO REV. CODE ANN. § 2923.02 (Page 1975), Committee Comments. The original draft of the proposed statute would not have permitted this result. Technical Committee Comments, 15th Meeting, May 2, 1967, at 3. The original draft of the attempt statute read: "A person is guilty of an attempt to commit a crime a material element of which is either purpose or knowledge."

70. See note 55 *supra*.

culpable mental state required for its commission, then the attempt must be purposeful."⁷¹ The question is whether from a policy standpoint this restriction on knowingly attempted purposeful crimes is warranted. It may be persuasively argued that knowledge supplies sufficient intention or culpability to warrant manslaughter liability. If an Ohio court desired to reach this policy result, a technical reading of the attempt statute could be made that avoids the policy comments advocated by the drafters.⁷²

It should be noted as well that there is a requirement in Ohio that the attempt proceed to a certain point before criminal liability will attach. The conduct in Ohio must be such that, if successful, it would result in the offense.⁷³ This requirement has been definitively glossed by the Ohio Supreme Court to require that the conduct be a substantial step strongly corroborative of the actor's criminal purpose.⁷⁴ If the conduct falls short of this stage, no attempt has been committed.

An associated problem is the noticeable omission of a provision for involuntary manslaughter liability for deaths occurring while the offender is in immediate flight from an attempted or completed crime. This circumstance is provided for in the felony-murder statute,⁷⁵ and its absence from section 2903.04 is puzzling. Given the similarities between the statutes, there is no apparent reason why the provision should be included in the felony-murder statute and excluded from involuntary manslaughter. The omission is perhaps best explained by sloppy legislative drafting.

2. "Inherently Dangerous" Crimes

Felony-murder in England was punishable by death.⁷⁶ A problem arose, however, as the law began to define more and more crimes as felonies. It was conceivable that a person could be put to death if a death accidentally occurred during the commission of a relatively minor felony, posing no risk of death in and of itself. Thus, it became desirable to place some limitation on the category of felonies that could serve as the basis for a felony-murder charge.⁷⁷

The restriction has taken on the form of a requirement that the felony must be dangerous to life before it can serve as a basis for a felony-murder

71. OHIO REV. CODE ANN. § 2923.02 (Page 1975), Committee Comments.

72. This result would not have obtained under the proposed statute. See note 69 *supra*.

The attempt statute requires two inquiries: (1) Did the actor proceed purposefully or knowingly? (2) Is knowledge or purpose sufficient culpability for the offense? With a knowingly attempted purposeful crime both inquiries can be answered affirmatively. The actor satisfies the first through knowledge and the second is satisfied because purpose is sufficient culpability for the crime. While this highly technical reading of the statute is not what the drafters intended, the statute is at best ambiguous and this reading is plausible.

73. OHIO REV. CODE ANN. § 2923.02(A) (Page 1975).

74. *State v. Woods*, 48 Ohio St. 2d 127, 357 N.E.2d 1059 (1976).

75. OHIO REV. CODE ANN. § 2903.01(B) (Page 1975): "or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape."

76. CRIMINAL LAW, *supra* note 23, § 71, at 546.

77. *Id.*

charge. In California, for example, only crimes that are "inherently dangerous" may be used as a basis for a second degree felony-murder charge.⁷⁸ Under this approach, the first inquiry is whether the crime is of a nature that death is a reasonably foreseeable result.⁷⁹ Only when death is reasonably foreseeable can malice be rationally imputed from the underlying felony to the death.⁸⁰ If the death is reasonably foreseeable, the crime is inherently dangerous and the issue of proximate causation must be considered. If the crime is not inherently dangerous, the issue of homicide liability ends and the prosecution must seek the highest possible penalty for the underlying felony.

Given the similarity between Ohio's involuntary manslaughter statute and second degree felony-murder, it is necessary to inquire whether Ohio places any limitations on the types of felonies that may serve as the basis for an involuntary manslaughter charge.

The earliest definitive pronouncement on the subject appeared in the 1921 Ohio Supreme Court case of *Black v. State*.⁸¹ In that case, the Ohio Supreme Court upheld the manslaughter convictions of two police officers who accidentally killed a passerby while target shooting inside a bar. The manslaughter conviction was based upon the violation of a statute regulating a discharge of firearms.⁸² The court held:

Unlawful killing, as used in manslaughter, must be such as would naturally, logically and proximately result from the commission of some unlawful act as defined by statute, *and such unlawful act must be one that would be reasonably anticipated by an ordinarily prudent person as likely to result in such killing.*⁸³

The *Black* decision has been followed in numerous manslaughter cases in

78. *People v. Satchell*, 6 Cal. 3d 28, 489 P.2d 1361, 98 Cal. Rptr. 33 (1971).

79. California views the crime in the abstract without specific reference to the facts of the particular case. See *People v. Williams*, 63 Cal. 2d 452, 406 P.2d 65, 47 Cal. Rptr. 7 (1965). Other jurisdictions consider the particular facts of the crime as committed. See, e.g., *Jenkins v. State*, 230 A.2d 262 (Del. 1967). See also CRIMINAL LAW, *supra* note 23, § 71, at 547-48.

80. *People v. Satchel*, 6 Cal. 3d 28, 43, 489 P.2d 1361, 1372, 98 Cal. Rptr. 33, 44 (1971): The felony-murder doctrine, whose ostensible purpose is to deter those engaging in felonies from killing negligently or accidentally, operates to posit the existence of that crucial mental state—and thereby render irrelevant actual malice or the lack thereof—when the killer is engaging in a felony whose inherent danger to human life renders logical an imputation of malice on the part of all who commit it Thus, the determination that an underlying felony will not properly support a felony-murder instruction simply removes the short circuit provided by that doctrine and requires that the existence of the crucial mental state be demonstrated to the trier of fact.

This focus on mental state is analogous to tort law inquiry into whether a duty exists between the defendant and the plaintiff. In *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928), the defendant's agent pushed an embarking train passenger causing him to drop a package of fireworks, which exploded and caused a scale to drop on a bystander. Justice Cardozo held that no duty existed between the defendant and the bystander who was the unforeseeable victim of the accident. *Id.* at 345, 162 N.E. at 101.

81. 103 Ohio St. 434, 133 N.E. 795 (1921).

82. OHIO GEN. CODE ANN. § 12635 (1939): "Whoever runs a horse, or shoots or fires a gun or pistol at a target within the limits of a municipal corporation, shall be fined"

83. 103 Ohio St. 434, 133 N.E. 795 (syl. 1) (emphasis added).

Ohio.⁸⁴ Ohio's approach as defined in *Black* parallels the inherently dangerous requirement imposed by some jurisdictions to limit the class of unlawful acts that may serve as a basis for a felony-murder or manslaughter charge. It is clear from *Black* and other cases that the act must first be analyzed to see if the death would be reasonably foreseeable by an ordinarily prudent person.

The Ohio courts have not yet dealt with restrictions on the felonies or misdemeanors that may be used for an involuntary manslaughter charge under section 2903.04. Thus, it is unclear whether the class of felonies and misdemeanors that may serve as a basis for an involuntary manslaughter conviction is restricted to "inherently dangerous" crimes. A strong argument can be made based on precedent that the courts should impose such a restriction.

3. *The Problem of Causation*

Causation is one of the most confused and misunderstood concepts in the law. Commentators have tried to define it and courts have wrestled with the task of applying it, frequently with less than satisfactory results.

Causation as a legal concept may be broken down into two separate forms: causation-in-fact and proximate cause. Causation-in-fact is a simply applied test: But for the offender's conduct would the harm have resulted?⁸⁵ This test has been further refined to embrace all conduct that is a substantial factor in bringing about the criminal result.⁸⁶ Proximate cause, on the other hand, often referred to as "legal cause,"⁸⁷ questions whether even if the offender's conduct does in fact cause the alleged crime, should he be held liable for that conduct? Is the offender's conduct so closely connected with the end result that it merits legal responsibility?⁸⁸ Most criminal courts require an inquiry into the latter form of causation.

A crucial distinction must be drawn between tort-law proximate cause and criminal-law proximate cause. The distinction stems from the differing policies behind tort and criminal law. The tort law seeks to compensate individuals for injury by placing the loss on the party responsible for the injury.⁸⁹ The criminal law, on the other hand, has as one purpose

84. See, e.g., *State v. Nosis*, 22 Ohio App. 2d 16, 257 N.E.2d 414 (1969); *State v. Kotowski*, 89 Ohio L. Abs. 155, 183 N.E.2d 262 (1962); *State v. Ross*, 87 Ohio L. Abs. 379, 176 N.E.2d 746 (1961); *State v. Minko*, 37 Ohio L. Abs. 174, 46 N.E.2d 469 (1940).

85. W. PROSSER, *HANDBOOK ON THE LAW OF TORTS* § 41, at 236 (4th ed. 1971) [hereinafter cited as *LAW OF TORTS*].

86. *CRIMINAL LAW*, *supra* note 23, §35, at 250. The reason behind refining the but-for test to include all conduct that is a substantial factor in bringing about the end result is to avoid causation problems when two concurring causes join to result in a death, e.g., both A and B shoot at C attempting to kill him and both shots are lethal.

87. Prosser states: "[L]egal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability . . . for the consequences of any act, upon the basis of some social idea of justice or policy." *LAW OF TORTS*, *supra* note 85, § 41, at 237.

88. *Id.* at 238-39.

89. *Id.* §1, at 3.

the protection of society from harm by deterring antisocial behavior through a system of punishment.⁹⁰ The fact that issues of proximate cause may demand different solutions given the policy sought to be advanced is often overlooked or underanalyzed by the courts. While it may be desirable to draw the line of causation broadly to recompense injured victims in a tort action, it may not be just to imprison individuals by drawing the line of causation broadly in a criminal action.⁹¹ The causation requirement in criminal law been said to "limit [the defendant's] punishment consistent with accepted theories of punishment."⁹²

The requirement that death be proximately caused by the offender's commission of an unlawful act has long been judicially recognized in Ohio manslaughter prosecutions. The specific inclusion of proximate cause language in section 2903.04, however, is the first explicit legislative recognition of the doctrine.⁹³ The present task is to see how Ohio courts have interpreted proximate cause in manslaughter prosecutions.

In *Black*, the Ohio Supreme Court held that "[u]nlawful killing, as used in manslaughter, must be such as would naturally, logically, and proximately, result from the commission of some unlawful act as defined by statute."⁹⁴ This definition of causation follows the traditional line of thought on causation in the law of homicide. Generally, the actor is held responsible for deaths directly emanating from all but the most unforeseeable consequences of his initial act.⁹⁵

If death directly emanates from a combination of the criminal act and a foreseeable intervening force, the defendant is still liable. Thus, the intervention of negligent medical treatment will not exculpate the defendant.⁹⁶ The defendant also takes his victim as he finds him; therefore the defendant is responsible for the death even if his act aggravates a pre-existing condition of the victim.⁹⁷ Ohio courts have reached similar results

90. CRIMINAL LAW, *supra* note 23, § 2, at 9.

91. *Id.* § 35, at 251: "But with crimes, where the consequences of a determination of guilty are more drastic . . . it is arguable that a closer relationship between the result achieved and that intended or hazarded should be required. . . ."

92. *Id.* at 252.

93. The term "as a proximate result" is not included in any of the other Ohio homicide provisions, which merely require cause. It might be expected that the term "proximate" should be in the felony-murder statute given its similarity to § 2903.04, but this is not so. No explanation appears from the legislative history.

94. 103 Ohio St. 434, 133 N.E. 795 (1921) (syl. 1).

95. CRIMINAL LAW, *supra* note 23, § 35, at 256: "When intended results come about in a highly unlikely manner, the defendant should not be punished for those results . . . for to do otherwise would bring the criminal law into conflict with our sense of justice." The courts have generally restricted the category of exculpatory intervening causes to those truly unforeseeable to the defendant, *e.g.*, "acts of God." For example, A hits B who while recoiling from the blow is struck by lightning and is killed.

96. CRIMINAL LAW, *supra* note 23, at 256. *See, e.g.*, *Johnson v. State*, 56 Ohio St. 2d 35, 381 N.E.2d 637 (1978); *People v. Calvaresi*, 188 Colo. 277, 534 P.2d 316 (1975); *State v. Jackson*, 223 N.W.2d 229 (Iowa 1974); *State v. Lytle*, 194 Neb. 353, 231 N.W.2d 681 (1975).

97. *Id. See, e.g.*, *Armstrong v. State*, 502 P.2d 440 (Alas. 1972); *State v. Contreras*, 107 Ariz. 68, 481 P.2d 861 (1971); *Swann v. State*, 322 So. 2d 485 (Fla. 1975). This, of course, is the tort concept of "thin skull."

in the application of proximate cause theory to homicide prosecutions.⁹⁸

Proximate cause is a particularly troublesome doctrine in the law of felony-murder. When a death occurs during the commission of a felony, but the death results from force used by someone other than the defendant, the question arises whether the defendant who merely initiated the underlying felony should be liable for the death.

Two different approaches to this problem have been recognized by American courts. The older view applied basic proximate cause analysis.⁹⁹ Under this approach, the defendant is liable for the death, regardless of who inflicts the death-dealing force, if the death was a foreseeable result of the underlying felony. Of course, with most felonies, resistance by the victim or intervention by the police is readily foreseeable; hence a felony-murder conviction is easily obtained.¹⁰⁰

Modern courts have largely rejected this traditional proximate cause approach in favor of an agency theory.¹⁰¹ This view holds that no person can be held responsible for a homicide unless the act of homicide was either constructively or actually committed by him.¹⁰² The key inquiry is whether the defendant's act was done in furtherance of a common criminal design or purpose.¹⁰³ Deaths resulting from force used by someone other than the defendant or his accomplices usually stands outside the scope of felony-murder liability.¹⁰⁴

The shift in causation theory is essentially a policy choice; homicide liability should not extend to deaths that result from acts of parties over which the defendant has no control. It is difficult to argue from a pure proximate cause analysis that the death is not foreseeable from the commission of the initial felony. Nevertheless, agency theory proponents maintain that it is both illogical and unjust to impose homicide liability on

98. See, e.g., *State v. Ross*, 87 Ohio L. Abs. 379, 382, 176 N.E.2d 746, 748 (1961): "Proximate cause means the direct and efficient cause. 'Direct' suggests unbroken connection or bearing straight upon an object; without an intermediary. 'Efficient' has the meaning of 'immediately effecting.' Proximate cause excludes the indirect, the distant and the remote."

99. *Commonwealth v. Moyer*, 357 Pa. 181, 190-91, 53 A.2d 736, 741 (1947):

It is equally consistent with reason and sound public policy to hold that when a felon's attempt to commit robbery or burglary sets in motion a chain of events which were or should have been within his contemplation when the motion was initiated, he should be held responsible for any death which by direct and almost inevitable sequence results from the initial criminal act.

See *Commonwealth v. Almeida*, 362 Pa. 596, 68 A.2d 595 (1949), *cert. den.*, 339 U.S. 924 (1950), *overruled*, *Commonwealth ex rel. Smith v. Myers*, 438 Pa. 218, 261 A.2d 550 (1970).

100. *Commonwealth v. Moyer*, 357 Pa. 181, 191, 53 A.2d 736, 742 (1947).

101. A listing of jurisdictions following the agency approach can be found in *State v. Canola*, 73 N.J. 206, 211-12, 374 A.2d 20, 23 (1977). The court asserts that no jurisdiction currently follows the proximate cause approach in a felony-murder charge when the death of co-felon occurs when the victim or police intervene. *Id.* This may be technically correct, but see *State v. Chambers*, discussed in text accompanying notes 108-17 *infra*, for a felony-manslaughter case upholding the proximate cause theory of liability in a co-felon situation.

102. *Commonwealth v. Campbell*, 89 Mass. 541, 544 (1863), is the source of this idea.

103. *Id.*

104. There may be a difference in result when the person killed was an innocent party. The proximate cause approach may still apply if the person resisting the felony or the police accidentally kill a bystander or another police officer. CRIMINAL LAW, *supra* note 23, §35, at 265.

the defendant for deaths caused by another's act. They maintain that since the use of force by the victim or police is justifiable there is no criminal act for which the defendant can be punished.¹⁰⁵ Further, proponents of the agency theory maintain that little deterrence is achieved by punishing the defendant for the acts of another,¹⁰⁶ and that punishment becomes retributive as a result. On the other hand, proximate-cause theorists maintain that general deterrence is achieved by holding the defendant liable for any and all deaths resulting from his initial criminal act.¹⁰⁷

The question debated by proximate-cause and agency theorists is whether criminal law policy is furthered by holding defendants responsible for all results of the initial criminal act. Does the potential general deterrence of felonies justify the possible injustice of holding the defendant liable for someone else's use of force? The answer to that question depends on whom the courts seek to protect: society from harm caused by felonies, or defendants from potentially harsh treatment under the felony-murder law. The shift to the agency theory manifests a growing preference for the latter concern.

The court of appeals of Lorain County, Ohio, was faced with the problem of which causation theory to apply in *State v. Chambers*,¹⁰⁸ a case interpreting the word "proximate" in section 2903.04. In that case two felons were surprised in the process of committing aggravated burglary by the owner of the house. In attempting to escape, one of the co-felons was shot and killed by the homeowner.¹⁰⁹ The court of appeals affirmed the conviction of Chambers, the surviving co-felon, of a charge of involuntary manslaughter under section 2903.04(A).¹¹⁰ The court held that the Ohio legislature intended to adopt the proximate cause theory of criminal liability by the specific inclusion of the term "proximate" in the involuntary manslaughter statute.¹¹¹ The court stated:

When a person, acting individually or in concert with another, sets in motion a sequence of events, the foreseeable consequences of which were known or should have been known to him at the time, he is criminally liable for the direct, proximate and reasonably inevitable consequences of death resulting from his original act.¹¹²

105. *Commonwealth v. Redline*, 391 Pa. 486, 509, 137 A.2d 472, 433 (1958): "How can anyone, no matter how much of an outlaw he may be, have a criminal charge lodged against him for the lawful consequences of another person?"

106. *Morris, The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50, 67 (1956): "[W]here it is sought to increase the deterrent force of a punishment, it is usually accepted as wiser to strike at the harm intended by the criminal rather than at the greater harm possibly flowing from his act which was neither intended nor desired by him. . . ."

107. Note, *supra* note 49, at 360:

The criminal choice to be deterred is the decision to engage in the felony in the first place and the concern . . . with the fortuitous technicalities of the identity of the person killed and the identity of the person who fired the shot, is not addressed to this crucial matter of state of mind at the time of the original criminal choice.

108. 53 Ohio App. 2d 266, 373 N.E.2d 393 (Lorain County Ct. App. 1977).

109. *Id.* at 267, 373 N.E.2d at 394.

110. *Id.* at 273, 373 N.E.2d at 397.

111. *Id.* at 272, 373 N.E.2d at 395.

112. *Id.* at 272-73, 373 N.E.2d at 397.

The *Chambers* court, in reaching its construction of section 2903.04(A), was guided by the New Jersey appellate court decision in *State v. Canola*,¹¹³ which adopted a similar rationale in the context of a felony-murder prosecution. This approach, however, was subsequently rejected by the New Jersey Supreme Court in the same case.¹¹⁴ In that opinion, the court chose to follow the trend away from imposing liability in the *Chambers* situation, and adopted the agency theory approach to causation. The supreme court in *Canola* reasoned: "Tort concepts of foreseeability and proximate cause have shallow relevance to culpability for murder in the first degree. Gradations of criminal liability should accord with the degree of moral culpability for the actor's conduct."¹¹⁵ Thus, the principal case relied upon by the court in *Chambers* is no longer valid precedent. The definition of proximate cause voiced in *Chambers* may suffer from the same shallow relevance that tort concepts may have to the criminal law. The question then remains whether *Chambers* is a proper and desirable construction of section 2903.04.

The decision is arguably correct given the statute the court was asked to construe. The specific inclusion of the term "proximate" within 2903.04 leads on its face to the rational conclusion that the legislature intended the result reached in *Chambers*.¹¹⁶ Nevertheless, the desirability of the result in *Chambers* may be challenged, and the legislature must be asked whether the broad sweep of the proximate cause theory is justified by the achievement of any valid policy goals.

Since the *Canola* case was a felony-murder prosecution and not a manslaughter case, it is technically distinguishable from *Chambers*. The question does arise, however, whether the proximate cause theory is more appropriate in the manslaughter context than in the felony-murder area because of the difference in penalty. The courts have limited proximate cause in the felony-murder area by adoption of the agency theory mainly because the penalty for felony-murder is severe—death or life imprisonment.¹¹⁷ Manslaughter, on the other hand, carries a sentence of four to twenty-five years in Ohio. Arguably, the proximate cause theory is more palatable when the punishment is less severe.

Nevertheless, the overriding concern in the *Chambers*-type case should be a choice in policy goals. Although some general deterrence might be achieved by adoption of the proximate cause theory, any specific deterrence of underlying felonies by punishing the defendant for someone else's use of force is unlikely. Punishment in this case therefore serves only retributive goals of criminal justice. Agency proponents correctly perceive

113. 135 N.J. Super. 224, 343 A.2d 110 (Super. Ct. App. Div. 1974), *modified*, 73 N.J. 206, 374 A.2d 20 (1977).

114. *State v. Canola*, 73 N.J. 206, 374 A.2d 20 (1977).

115. *Id.* at 226, 374 A.2d at 30.

116. Thomas Swisher, Chief Counsel to the Technical Committee, confirmed this statement to the author of this article on the basis of Swisher's recollection of the committee hearings.

117. *State v. Canola*, 73 N.J. 206, 374 A.2d 20, 29.

that whatever general deterrence is achievable in a *Chambers*-type case, it is outweighed by the potentially harsh treatment of the defendant.

4. *The Problem of Merger*

The doctrine of merger as a limitation on the felony-murder rule has been adopted in many jurisdictions.¹¹⁸ Merger is a complex doctrine, but in essence it disallows felony-murder prosecutions predicated on an underlying felony that has as its overriding purpose the invasion of bodily integrity. The theory of merger is that if the defendant's goal is to do serious bodily harm, the prosecution should not be allowed to shortcircuit a *mens rea* inquiry by using an assaultive crime as the basis of a felony-murder prosecution.¹¹⁹ The similarity of felony-murder principles to involuntary manslaughter in Ohio raises the possibility of using merger as a limitation on section 2903.04.

The most common context in which merger might arise as an issue under section 2903.04 is when an assaultive crime is used as the underlying felony or misdemeanor for the involuntary manslaughter charge. For example, if the actor shoots the victim knowing that serious harm is likely to result, but without an intention to kill, the felony of felonious assault¹²⁰ would supply the underlying felony for an involuntary manslaughter charge if the victim died as a result of the felonious assault. Strict merger principles would dictate that the crime of felonious assault not serve as the underlying felony for an involuntary manslaughter charge unless the assault was committed with an independent felonious intent.¹²¹ Similar reasoning would apply if the misdemeanor of assault were to serve as the basis for a conviction under section 2903.04(B).¹²²

The purpose of the felony-misdemeanor manslaughter rule is to deter the underlying crime. Merger limits felony-murder to prevent the prosecution from bootstrapping into a higher penalty when it cannot prove the requisite intent. The doctrine is a recognition that basing a felony-murder charge on an act whose overall purpose is to invade the bodily integrity of the victim is a way for the prosecution to circumvent the

118. CRIMINAL LAW, *supra* note 23, § 71.

119. Comment, *The Merger Doctrine as Limitation on the Felony-Murder Rule: A Balance of Criminal Law Principles*, 13 WAKE FOREST L. REV. 369 (1977).

120. OHIO REV. CODE ANN. § 2903.11 (Page 1975):

(A) No person shall knowingly:

(1) Cause serious harm to another;

(2) Cause or attempt to cause physical harm to another by means of a deadly weapon or dangerous ordnance as defined in section 2923.11 of the Revised Code.

(B) Whoever violates this section is guilty of felonious assault, a felony of the second degree.

Aggravated assault, § 2903.12, would also suffice.

121. Comment, *supra* note 119, at 389.

122. OHIO REV. CODE ANN. § 2903.13 (Page 1975):

(A) No person shall knowingly cause or attempt to cause physical harm to another.

(B) No person shall recklessly cause serious physical harm to another.

(C) Whoever violates this section is guilty of assault, a misdemeanor of the first degree.

See *People v. Vollmer*, 299 N.Y. 347, 349, 87 N.E.2d 291, 292 (1949): "[W]hen an assault results in death, the assault misdemeanor is merged in the manslaughter."

required showing of intent.¹²³ The underlying felony is not being deterred because it is part and parcel of the homicide itself. This is why manslaughter itself cannot be used as the felony for a felony-murder prosecution.

The same reasoning should theoretically apply to convictions under section 2903.04. There is one crucial distinction, however, between merger operating as a limitation on felony-murder, and merger operating as a limitation on felony-misdemeanor manslaughter. In the felony-murder context, merger is used to limit bootstrapping into a significantly higher penalty by use of an assaultive crime as the underlying felony. Since the penalty for manslaughter is significantly less than that for traditional felony-murder, merger should not be used to impede manslaughter prosecutions. This reasoning makes sense, for it is the imposition of a sentence significantly higher than that of assault that makes merger a necessary doctrine in felony-murder.

5. *Lawful Acts Committed Recklessly*

A final problem with the present involuntary manslaughter provision is its failure to punish the actor for deaths resulting from lawful acts that are recklessly committed. In Ohio, reckless conduct entails "perverse disregard of a known risk" that a specific result is likely to occur.¹²⁴ It is possible that in some cases the actor may commit no felony or misdemeanor, yet act in such a reckless manner that criminal liability may be justifiably imposed. Several examples illustrate the problem.

In *Commonwealth v. Welansky*,¹²⁵ a night-club owner was found guilty of manslaughter for his failure to provide adequate fire escapes, which created a risk for club patrons when a fire broke out. The Massachusetts Supreme Court, in upholding the conviction, stated: "Fire in a place of public resort is an ever present danger. It was enough to prove that death resulted from [the defendant's] wanton or reckless disregard of the safety of patrons in the event of fire from any cause."¹²⁶

Another common example of reckless conduct meriting criminal responsibility concerns the storage of dangerous substances. If the defendant creates a hazardous situation by careless storage of explosives, and an explosion occurs and kills someone, the defendant would be guilty

123. Comment, *supra* note 119, at 395: "If the felony-murder rule in certain applications does not deter, then the rule unjustifiably infringes on a principle of the criminal law equally precious as deterrence; the maintenance of the relation between criminal culpability and criminal liability."

124. OHIO REV. CODE ANN. § 2901.22(C) (Page 1975):

A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances, when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

125. 316 Mass. 383, 55 N.E.2d 902 (1944).

126. *Id.* at 401, 55 N.E.2d at 912. Massachusetts has no statutory manslaughter and therefore follows common law theory.

of manslaughter in some jurisdictions even though no felony or misdemeanor was committed. In *Commonwealth v. Godin*,¹²⁷ a fireworks manufacturer was held liable for manslaughter as a result of an explosion at his plant. The Massachusetts Supreme Court stated: "An employer whose acts or omissions constitute a disregard for the probable harmful consequences and loss of life as to amount to wanton or reckless conduct is properly charged with manslaughter where a foreseeable death is caused thereby."¹²⁸

A final example is presented by the recent indictment of Ford Motor Company in Indiana on three counts of reckless homicide for "failing to repair and modify the Pinto's fuel system and to warn the public of what the firm knew was the car's dangerous tendency to 'burn upon rear-end impact.'"¹²⁹ This landmark case presents the possibility that corporations that knowingly place a defective product on the market creating a high degree of risk to the consumer will be held criminally liable for the resulting death.

Similar instances of reckless homicide could escape conviction under Ohio's current involuntary manslaughter scheme. Unless the prosecution could find some felony or misdemeanor upon which to predicate an involuntary manslaughter charge, the defendant could not be found guilty under section 2903.04. The prosecution could attempt to use some assaultive crime as the basis for an involuntary manslaughter conviction in the *Welansky*, *Godin*, or *Ford*-type case. The problem is that felonious assault in Ohio requires knowing use of a deadly weapon or dangerous ordnance to cause serious physical harm.¹³⁰ It is unlikely that a court would be persuaded to interpret the deadly weapon or dangerous ordnance provision to include unsafe restaurants, fireworks or cars.¹³¹ Aggravated assault in Ohio is similar to voluntary manslaughter, for it requires the defendant to be under extreme emotional stress.¹³² This would not apply in the case of a lawful act committed recklessly. The crime of assault might be the most appropriate underlying offense, since it proscribes knowingly or recklessly causing serious physical harm.¹³³

The problem of merger, of course, would exist if any of the above crimes were used as a means of invoking involuntary manslaughter liability under section 2903.04. It would be much simpler to allow lawful acts committed recklessly to be punished explicitly under the involuntary manslaughter statute without having to resort to a search for an underlying unlawful act.

127. 371 N.E.2d 438 (Mass. 1977).

128. *Id.* at 443.

129. 47 U.S.L.W. 2178 (1978).

130. OHIO REV. CODE ANN. § 2903.11 (Page 1975).

131. See text accompanying notes 155-58 *infra*.

132. OHIO REV. CODE ANN. § 2903.12 (Page 1975).

133. *Id.* § 2903.13. Another possibility in the Ford Motor situation would be to use the crime of arson as the underlying felony. *Id.* § 2909.02 (aggravated arson); § 2909.03 (arson). Both offenses involve the creation of a substantial risk of physical harm to another.

E. *A Proposal for Reform of Section 2903.04*

The Ohio Senate made a serious error in substituting a traditional unlawful act manslaughter provision for the reckless homicide statute proposed by the Technical Committee and approved by the Ohio House.¹³⁴ The adoption of section 2903.04 disrupts the consistency of the Ohio homicide scheme, which attempts to scale criminal liability to a particular state of mind. Perhaps the legislature felt that a broad "catch-all" provision was necessary so that no deaths resulting from criminal conduct would go without serious punishment. It is clear, however, that the present statute is both overbroad and underinclusive. It encompasses conduct that may entail no moral culpability beyond that for the underlying felony while, at the same time, it may be permitting reckless but lawful acts to go unpunished. Further, the confusion in Ohio over the mental state required for felony-murder creates a dangerous situation in which broad prosecutorial discretion may permit conduct that should be punished as manslaughter to be punished as aggravated murder. Finally, the intellectual problems associated with merger add further confusion to the actual scope of available felonies and misdemeanors for a section 2903.04 prosecution.

The only legitimate goal of a felony-misdemeanor statute is to deter the underlying felony or misdemeanor. Yet there is no reason why this deterrence cannot be accomplished while still tying the liability for the death to a particular mental state rather than to the existence of an unlawful act. The causal relationship should be between the actor's mental state and the resulting death and not between the physical fact of a crime and the death. In a reckless homicide provision, the underlying felony or misdemeanor would only serve as evidence of the defendant's state of mind and would not be conclusive of his liability.

The inescapable conclusion is that a reckless homicide statute is a preferable means of punishing unintentional homicides than is a traditional unlawful act manslaughter statute. The legislature should adopt a reckless homicide statute similar to the one originally proposed by the Technical Committee and already accepted by the Model Penal Code. The legitimate goal of deterring particularly dangerous felonies can be achieved by making the felony relevant to the length of sentence without tying the underlying felony to the issue of liability itself. For example, the enumerated felonies could be given a stiffer minimum penalty than other underlying felonies. The statute should provide that the penalty for reckless homicide be four to twenty-five years, but if the death occurred during the defendant's commission of a kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape, the minimum sentence would be ten years imprisonment. These enumerated felonies would become relevant *only* at the sentencing phase of the trial. The trier of fact would thus be

134. See text accompanying notes 27, 28.

establishing liability on the basis of the defendant's mental state. In this way, the involuntary manslaughter statute in Ohio would be consistent with the other homicide provisions, which tie liability to the existence of a particular mental state.

II. NEGLIGENT HOMICIDE: SECTION 2903.05

Involuntary manslaughter at common law also included liability for deaths that result from an actor's criminally negligent conduct.¹³⁵ The Code revisors proposed a separate negligent homicide statute in section 2903.05:

(A) No person shall negligently cause the death of another by means of a deadly weapon or dangerous ordnance as defined in section 2923.11 of the Revised Code.

(B) Whoever violates this section is guilty of negligent homicide, a misdemeanor of the first degree.¹³⁶

The penalty for violation of section 2903.05 is imprisonment for not more than six months.¹³⁷ The crime of negligent homicide punishes offenders for deaths that result from the lowest mental state sufficient for criminal culpability. The theory behind negligent homicide is that such deaths result from conduct serious enough to warrant more than tort liability for damages,¹³⁸ yet do not deserve severe criminal punishment. As will be seen, most negligent homicide cases concern killings that, in a layman's sense, may properly be called accidental.

A. *Negligent Homicide Prior to 1974*

Negligent homicide is a new crime in Ohio introduced by the 1974 Code revision. Prior to 1974, criminal liability for negligent acts was imposed only when the act was made unlawful by a statute; thus resulting, possibly, in a felony-misdemeanor manslaughter charge.¹³⁹ Negligent homicide originated at common law as a form of manslaughter.¹⁴⁰ The jurisprudential problem with punishing negligent conduct is simply a doubt whether such punishment actually deters the conduct itself. Commentators have criticized negligent homicide statutes for punishing the actor's conduct because so many negligent homicide cases involve accidental deaths. Punishment, it is argued, has no real deterrent effect under these circumstances.¹⁴¹ The issue, therefore, is whether criminal

135. HOMICIDE, *supra* note 1, § 6, at 7.

136. OHIO REV. CODE ANN. § 2903.05 (Page 1975).

137. *Id.* § 2929.21(B)(1).

138. The remedy would be a wrongful death action.

139. *In re Jackson*, 45 Ohio App. 2d 243, 344 N.E.2d 162, 163 (1975).

140. See Byrn, *Homicide Under the Proposed New York Penal Law*, 33 FORDHAM L. REV. 173, 203 (1964).

141. Hall, *Negligent Behavior Should Be Excluded From Penal Liability*, 63 COLUM. L. REV. 632, 641 (1963):

The theory of deterrence rests on the premise of rational utility, *i.e.*, that prospective offenders will weigh the evil of the sanction against the gain of the imagined crime. This,

liability is appropriate, or whether the proper remedy lies in the law of torts. Notwithstanding this criticism, negligent homicide statutes are not uncommon.¹⁴²

B. *The Code Revision of 1974*

The negligent homicide statute proposed by the Technical Committee is identical to the version eventually passed by the Ohio legislature.¹⁴³ The key feature of the measure is that it punishes negligent conduct only when a deadly weapon or dangerous ordnance is the medium of the negligent conduct.¹⁴⁴ In explanation, the Technical Committee's comments to the proposed negligent homicide statute indicate that the provision was intended not only to encompass a homicide offense, but also to act as a weapons control measure.¹⁴⁵ The purpose of section 2903.05 is the prevention of unnecessary deaths due to accidents involving firearms or other dangerous weapons.¹⁴⁶

The legislative history of section 2903.05 indicates that the Technical Committee's proposed statute was retained intact through the draft version of the Substitute House Bill. The version finally passed by the House, however, inserted a provision similar to the blanket prohibition punishing actors for deaths caused by any offense, which was part of the draft Substitute House Bill provision on manslaughter.¹⁴⁷ This provision would have imported a broad unlawful act-type of manslaughter provision into the negligent homicide statute. The final version of the bill passed by the Legislature deleted this provision and returned to the proposed negligent homicide statute. The unlawful act provision eventually found its way into section 2903.04.¹⁴⁸

C. *Analysis of Negligent Homicide: Section 2903.05*

Ohio's negligent homicide statute is significantly narrower than the Model Penal Code provision on negligent homicide.¹⁴⁹ That provision would punish criminal negligence regardless of the instrumentality involved.¹⁵⁰ The narrower Ohio provision reflects a policy decision that

however, is not relevant to negligent harm-doers since they have not in the least thought of their duty, their dangerous behavior, or any sanction.

142. CRIMINAL LAW, *supra* note 23, § 78, at 587, discusses various forms of negligent homicide statutes.

143. PROP. OHIO CRIM. CODE § 2903.04.

144. OHIO REV. CODE ANN. § 2903.05(A) (Page 1975). See text accompanying notes 155-58 *infra* for the definitions of deadly weapon and dangerous ordnance.

145. PROP. OHIO CRIM. CODE § 2903.04, Comments, at 75.

146. *Id.*

147. SUB. H. R. 511, 109th Gen. Assembly § 2903.05(B) (1972):

No person shall cause the death of another by committing any offense. An offense under section 2903.06 or 2903.07 [vehicular homicides] of the Revised Code does not constitute an offense under this division.

148. See text accompanying notes 30-34 *supra*.

149. MODEL PENAL CODE § 201.4 (P.O.D.).

150. *Id.* "(1) Criminal homicide constitutes negligent homicide when it is committed negligently."

only negligent homicides occurring in conjunction with certain types of dangerous instrumentalities are worthy of deterrence.

The typical negligent homicide case involves the following facts. The defendant, in the course of demonstrating a gun, or playing with it, accidentally kills someone.¹⁵¹ The gun either accidentally discharges or the defendant fires the gun without regard to who may be in the vicinity of the gunshot. Many negligent homicide cases grow out of hunting accidents in which the defendant fires at another hunter, mistaking him for game.¹⁵²

Under the Ohio provision, the threshold question is whether a deadly weapon or dangerous ordnance is involved. Deadly weapon is defined by the Code to mean: "Any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon."¹⁵³ The comments to the proposed bill indicate that deadly weapons include "firearms, bowie knives, rocks, staves, tire irons, and other items not weapons in and of themselves but capable of use as such."¹⁵⁴ "Dangerous ordnance" is defined negatively as not including a variety of items.¹⁵⁵ The real issue in a negligent homicide prosecution, however, is whether the offender's conduct was criminally negligent. Historically, courts have required a higher standard of negligence than ordinary tort negligence before an actor can be held criminally responsible.¹⁵⁶ A standard of gross negligence is generally held to be requisite for a finding of negligent homicide.¹⁵⁷

The problem with the gross negligence standard is the amorphous nature of the standard itself. It is clear that the courts do not want to punish conduct that should actually be treated under tort law.¹⁵⁸ Only when the conduct becomes so unacceptable that society is justified in exacting punishment should the courts intervene through criminal sanctions. The Ohio statute that defines the culpable mental state of negligence states:

A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or be of a certain nature. A person is negligent with respect to circumstances

151. *In re Jackson*, 45 Ohio App. 2d 343, 344 N.E.2d 162 (1975).

152. *See, e.g.*, *Vires v. Commonwealth*, 308 Ky. 707, 215 S.W.2d 837 (1948); *State v. Hedges*, 8 Wash. 2d 652, 113 P.2d 530 (1941); *State v. Newberg*, 129 Or. 564, 278 P. 568 (1929); and cases collected in Annot., 23 A.L.R.2d 1401 (1952).

153. OHIO REV. CODE ANN. § 2923.11(A) (Page 1975).

154. PROP. OHIO CRIM. CODE § 2903.04, Comments, at 75.

155. OHIO REV. CODE ANN. § 2923.11 (K) (1)-(6) (Page 1975). The Technical Committee Comments indicate that dangerous ordnance includes "automatic and sawed-off firearms, zip guns, explosive and incendiary devices, high explosives, and military weapons unsuitable for sporting use." PROP. OHIO CRIM. CODE § 2903.04, Comments, at 75.

156. *Byrn*, *supra* note 140, at 203.

157. *Id.* But see text accompanying notes 175-78 *infra*.

158. *State v. Lovejoy*, 48 Ohio Misc. 20, 357 N.E.2d 424. (1976) (syl. 1):

Where it appears that killing was unintentional, that the perpetrator acted with no wrongful purpose in doing the homicidal act, that it was done while he was engaged in a lawful enterprise, and that it was the result of negligence, the homicide will be excused on the score of accident or misadventure.

when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist.¹⁵⁹

This definition differs from the Model Penal Code, which defines negligence as "a gross deviation from a standard of care."¹⁶⁰

Ohio's definition of negligence has been interpreted within the context of a negligent homicide charge by the Franklin County Court of Appeals in *In re Jackson*.¹⁶¹ That case involved horseplay with a gun resulting in the death of one of the participants.¹⁶² The court of appeals held that "there has been a substantial lapse from due care when the defendant should have been aware of the likelihood or possibility of the result emanating from the action taken by the defendant."¹⁶³ The court also found that the negligence standard under the Ohio Code required more than ordinary tort negligence.¹⁶⁴

The first problem with the court's definition of criminal negligence is that it employs the term "likelihood," which is not found in the definition of the negligent mental state, but in the definition of recklessness.¹⁶⁵ According to the statutory definition of negligence, negligence arises when the results *may* occur because of the actor's substantial lapse from due care.¹⁶⁶ Recklessness, on the other hand, requires that the results be *likely* to occur. The problem is the difficulty of drawing lines between negligence and recklessness. "Likelihood of result" implies a greater probability than the phrase "may result." The courts must be careful in choosing the words that appropriately express the requirements of the culpable mental state associated with the crime.

A second problem with the court's definition of negligence was voiced by Judge McCormac in a concurring opinion to *Jackson*. While agreeing with the particular result in *Jackson*, Judge McCormac disagreed with the majority's characterization of the negligence standard as embracing more than tort negligence. Judge McCormac argued that "a substantial lapse of due care . . . merely defines a *degree* of tort negligence; i.e. tort negligence which is presumably more than the minimum but clearly within

159. OHIO REV. CODE ANN. § 2901.22(D) (Page 1975).

160. MODEL PENAL CODE § 2.02(2) (d) (P.O.D.) reads:

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

161. 45 Ohio App. 2d 243, 344 N.E.2d 162 (1975).

162. Jackson picked up a gun without checking to see if it was loaded and proceeded to chase some friends around his yard. On reentering the house, he was grabbed by the shoulders while facing two of his friends. The gun accidentally went off killing one of the friends. *Id.* at 245, 344 N.E.2d at 164.

163. *Id.* at 245, 344 N.E.2d at 164.

164. *Id.* at 245, 344 N.E.2d at 163.

165. OHIO REV. CODE ANN. § 2901.22(C) (Page 1975). See note 124 *supra* for the text of the statute.

166. See text accompanying note 159 *supra*.

the range of ordinary tort negligence, as it is something less than [*sic*] the next definable standard, reckless conduct."¹⁶⁷ The fear is that the substantial lapse of due care standard is not gross negligence, and thus the actor is punished for conduct that should be relegated to the tort law of damages.

Judge McCormac's comment indicates the confusion between tort negligence, criminal negligence, and recklessness. His opinion implies that there is a category of conduct lying between the most severe degree of tort negligence and the mental state required for criminal recklessness. That category could be called "gross negligence" although that term is often used to express merely the highest degree of tort negligence.¹⁶⁸ How gross negligence in a tort sense is distinguishable from criminal negligence and how criminal negligence is distinguishable from recklessness is the confusing issue. Judge McCormac also expressed the fear that the amorphous negligence standard is incapable of equal application and that defendants may be punished for noncriminal conduct: "Under the wrong set of circumstances almost anyone can become a criminal offender using this standard of culpable mental state. There is a great tendency to judge the substantiality of one's lapse from care by the harm actually caused."¹⁶⁹ Certainly, if the negligence standard is susceptible to uneven interpretation, Judge McCormac's fears may be well grounded.

The difficulty of defining the standard of negligence necessary for a negligent homicide charge is also manifest in the case of *State v. Lovejoy*.¹⁷⁰ In that case, decedent had accused defendant's son of raping decedent's girlfriend. During the ensuing argument, defendant got his gun in order to scare decedent away from defendant's house. Decedent attempted to enter the house through a screen door and in an ensuing struggle, defendant accidentally fired his gun, mortally wounding decedent.¹⁷¹ Defendant was acquitted of negligent homicide. The judge wrote that criminal negligence must involve "a type of conduct [that] would be a material forsaking of expected concern, a vital abandonment of required care, or a real divergence of appropriate concern."¹⁷² Defendant's legitimate act of repelling an intruder lacked any such negligence.¹⁷³

The language employed in *Lovejoy* at least attempts to give some flesh to the "substantial lapse from due care" language in the negligence

167. 45 Ohio App. 2d at 247, 344 N.E.2d at 165. (McCormac, J., concurring).

168. LAW OF TORTS, *supra* note 85, § 34, at 183: "[I]t is still true that most courts consider that 'gross negligence' falls short of a reckless disregard of consequences, and differs from ordinary negligence only in degree, and not in kind."

169. 45 Ohio App. 2d at 248, 344 N.E.2d at 165 (McCormac, J., concurring).

170. 48 Ohio Misc. 20, 357 N.E.2d 424 (1976).

171. *Id.* at 21, 357 N.E.2d at 426.

172. *Id.* at 26, 357 N.E.2d at 428.

173. "Where the death of a human being is the result of accident or misadventure, in the true meaning of the term, no criminal responsibility attaches to the act of the slayer." *Id.* at 25, 357 N.E.2d at 425 (syl. 2).

definition. The problem is that the language implies almost a subjective awareness of the culpability of the act on the part of the defendant. Recklessness requires a perverse disregard of a known risk,¹⁷⁴ while negligence, at least according to *Lovejoy*, involves a material forsaking of expected concern. Both imply some subjective element of culpability. The question after *Lovejoy* is whether negligence is to be measured by a purely objective test or whether some subjective element inheres in negligence as well as recklessness.

The confusion over the parameters of the criminal negligence standard is apparent in another common context of negligent homicide prosecutions—hunting accidents.¹⁷⁵ Some cases have held that if the killing was committed in the course of the actor's performance of a lawful act, by lawful means, and without any unlawful intent, the actor should not be held liable for negligent homicide.¹⁷⁶ On the other hand, some cases have held that a hunter is bound to exercise reasonable care and that the duty is one of ordinary care or caution.¹⁷⁷ Thus, a finding of ordinary negligence might be sufficient to impose liability. Other cases have held that the degree of negligence must be higher than tort negligence with some manifestation of wantonness or recklessness.¹⁷⁸ The Ohio courts have not yet decided a hunting accident case under section 2903.05, but given the language in *Jackson* and *Lovejoy*, it would be reasonable to predict that more than ordinary negligence will be required.

Another important question left unanswered by the Ohio statute is whether contributory negligence will be a defense to a negligent homicide charge. The rule in the United States is that contributory negligence is not a defense to a negligent homicide prosecution.¹⁷⁹ Some inroads have nonetheless been made on this rule.¹⁸⁰ Some courts have held that the negligence of the deceased is germane to the issue of proximate cause.¹⁸¹ If the negligence of the deceased was a supervening cause of death, then the negligence of the defendant becomes irrelevant. How the Ohio courts will resolve this issue is a matter of speculation, but allowing contributory negligence as a defense to the issue of proximate causation makes sense.¹⁸²

174. See OHIO REV. CODE ANN. § 2901.22(C) cited in note 124 *supra*.

175. See cases in Annot., 23 A.L.R.2d 1401, 1403 (1952).

176. See, e.g., *People v. Joyce*, 192 Misc. 107, 84 N.Y.S.2d 238 (1948); *State v. Horton*, 139 N.C. 588, 51 S.E. 945 (1905).

177. See, e.g., *Childers v. Commonwealth*, 239 S.W.2d 255 (Ky. 1951); *Vires v. Commonwealth*, 308 Ky. 707, 215 S.W.2d 837 (1948); and *State v. Green*, 38 Wash. 2d 240, 229 P.2d 318 (1951).

178. See, e.g., *People v. Joyce*, 192 Misc. 107, 84 N.Y.S.2d 238 (1948); *State v. Newberg*, 129 Or. 564, 278 P. 568 (1929).

179. CRIMINAL LAW, *supra* note 23, § 78, at 592-93.

180. See, e.g., *People v. Jeghem*, 41 Mich. App. 247, 199 N.W.2d 854 (1972), and *State v. Schaub*, 231 Minn. 512, 44 N.W.2d 61 (1950).

181. E.g., *Wren v. State*, 577 P.2d 235, 238 (Alaska 1978): "Negligence of the deceased may also be considered with reference to the issue of whether the defendant's culpable negligence was the proximate cause of death."

182. Ohio has permitted such an approach in a vehicular manslaughter prosecution. See *State v. Schaeffer*, 96 Ohio St. 215, 117 N.E. 220 (1917), and text accompanying note 219 *infra*.

The final important issue under Ohio's negligent homicide provision is simply whether it is broad enough. The Model Penal Code provision on negligent homicide encompasses all criminally negligent conduct regardless of the instrumentality. Ohio limits liability to deadly weapon/dangerous ordnance cases on policy grounds—these are the only types of negligent homicide cases worthy of deterrence.

Traditionally, there have been negligent homicide prosecutions in nonweapon cases. Common situations include druggists negligently filling prescriptions and thereby causing death,¹⁸³ negligent misdiagnosis of a treatable medical condition,¹⁸⁴ or failure to provide medical or surgical attention when there is a duty to do so.¹⁸⁵ All these cases indicate that a standard of negligence above ordinary tort negligence is required for a negligent homicide prosecution.¹⁸⁶ Otherwise the remedy is a malpractice or wrongful death action in tort.

Another nonweapon situation that may be increasingly important in the future concerns deaths caused by defective products. The possibility raised by the Ford Motor Company case that corporations might be held criminally liable for their defective products may create a whole new area of potential negligent homicide liability.¹⁸⁷

Broad liability for criminal negligence, however, poses the question whether deaths occurring as a result of negligence not associated with a weapon can be deterred. Arguably, deaths resulting from negligence irrespective of its medium are accidental.¹⁸⁸ The hunter may accidentally shoot a fellow sportsman, a druggist may accidentally poison a patient. The sole basis for excluding negligent conduct not associated with a weapon from the reach of a negligent homicide statute is the additional goal of controlling the presence and use of weapons. Although this additional goal may be legitimate, it isolates certain types of negligently-caused deaths for special punishment without any theoretical justification.

D. *A Proposal for Reform of Section 2903.05*

The central problem with the current negligent homicide statute is the definition of negligence. The decisions in *Jackson* and *Lovejoy* indicate only that criminally negligent conduct is worse than the highest form of tort negligence without reaching the severity of reckless conduct. Neither the courts nor the legislature have provided any further guidance in the matter.

183. See Annot., 55 A.L.R.2d 714 (1957).

184. See, e.g., *Hampton v. State*, 50 Fla. 55, 39 So. 421 (1905); *Commonwealth v. Pierce*, 138 Mass. 165 (1884); and Annot., 45 A.L.R.3d 114, 123 (1972).

185. See, e.g., *Singleton v. State*, 33 Ala. App. 536, 35 So. 2d 375 (1948); *People v. Beardsley*, 150 Mich. 206, 113 N.W. 1128 (1907); and Annot., 100 A.L.R.2d 483 (1965).

186. See 55 A.L.R.2d at 714, 100 A.L.R.2d at 487, 45 A.L.R.3d at 121.

187. Ford Motor Company was also indicted on one count of negligent homicide in the Indiana prosecution for deaths arising out of the Pinto accidents. The count, however, was dismissed. 47 U.S.L.W. 2178 (1978).

188. Hall, *supra* note 141, at 641, argues that no deterrence occurs below a reckless state of mind.

The Model Penal Code may provide the best solution to a muddled concept like criminal negligence. Its provision on negligence and recklessness employs the same basic standard of a "gross deviation from the standard of care that a reasonable person would observe in the actor's situation."¹⁸⁹ The difference between the two mental states is that recklessness entails a subjective element of "conscious[ly] disregard[ing] . . . a substantial and unjustifiable risk."¹⁹⁰ Negligence, on the other hand, entails a purely objective determination that the actor "should be aware of a substantial and unjustifiable risk."¹⁹¹ Thus, both provisions attempt to establish a standard above that of ordinary tort negligence through the requirement of a gross deviation from a standard of care, while gradating the mental state on the basis of subjective awareness. Adoption of this approach could well settle the present confusion over the parameters of the definition of criminal negligence. Such a negligent homicide statute would also be compatible with the reckless homicide statute proposed earlier.¹⁹²

The decision to retain or discard a negligent homicide provision depends on whether the legislature believes that criminally negligent conduct can be deterred. Arguably, if that conduct contains no subjective element of intent, no specific deterrence can be achieved. The mere existence of a negligent homicide provision, however, may stand as a broad warning to the public that criminal liability can attach for extreme negligence. Negligent homicide probably is ineffective, though, as a weapons control measure because it punishes conduct after the fact. The statute should be broadened along the lines of the Model Penal Code to punish criminally negligent conduct of all forms and thus provide general deterrence of all such conduct.

III. AGGRAVATED VEHICULAR HOMICIDE: SECTION 2903.06

The crime of aggravated vehicular homicide is codified in section 2903.06:

(A) No person while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft shall recklessly cause the death of another.

(B) Whoever violates this section is guilty of aggravated vehicular homicide, a felony of the fourth degree. If the offender has previously been convicted of an offense under this section or section 2903.07 of the Revised Code, aggravated vehicular homicide is a felony of the third degree.¹⁹³

The penalty for violation of this provision is imprisonment for six months

189. MODEL PENAL CODE § 2.02(c), (d) (P.O.D).

190. *Id.* § 2.02(c).

191. *Id.* § 2.02(d).

192. See text following note 134 *supra*.

193. OHIO REV. CODE ANN. § 2903.06 (Page 1975).

to a year for a first offense,¹⁹⁴ or one to ten years for a repeat offender.¹⁹⁵ Aggravated vehicular homicide punishes the actor for deaths arising from motor vehicle accidents as a manslaughter offense separate from either involuntary manslaughter or negligent homicide.

A. *Aggravated Vehicular Homicide Prior to 1974*

Criminal liability for deaths caused by vehicular accidents was originally classified as manslaughter in Ohio. The death-causing medium could be any one of a variety of motor vehicles. Prior to 1967, a number of statutes regulated various types of manslaughter liability for vehicular deaths.¹⁹⁶ Unintentional homicides proximately caused by traffic offenses were treated as second degree manslaughter.¹⁹⁷ The penalty included a fine and/or prison term.¹⁹⁸ Criticism was levelled at the statute for its potential severity of punishment.¹⁹⁹ The problem of jury nullification has already been mentioned as a factor in vehicular homicide cases.²⁰⁰ In 1967, vehicular homicide was reclassified into two sections: first and second degree homicide by vehicle.²⁰¹ First degree homicide by vehicle was the immediate predecessor of aggravated vehicular homicide. A first degree vehicular homicide charge was appropriate whenever a death was proximately caused by the commission of the following traffic offenses: (1) driving while intoxicated or drugged;²⁰² (2) reckless operation;²⁰³ (3) drag racing;²⁰⁴ (4) reckless operation off the street.²⁰⁵ These offenses were the unlawful acts triggering vehicular homicide liability. The penalty could be a fine or imprisonment or both.²⁰⁶

B. *The Code Revision of 1974*

The Code revisors made an important alteration in the law of vehicular homicide. Instead of relying on various offenses to provide the

194. A first offense is a fourth degree felony punishable under § 2929.11(B)(4) (Page 1975).

195. A repeat offense is a third degree felony punishable under § 2929.11(B)(3) (Page 1975).

196. OHIO REV. CODE ANN. § 4511.18 (Page 1965) (homicide by vehicle in the second degree); § 1547.13 (Page 1964) (homicide by watercraft); § 4999.04 (Page 1954) (locomotive related deaths).

197. OHIO REV. CODE ANN. § 4511.18 (Page 1965).

198. *Id.* § 4511.99(A) (Page 1965).

199. Comment, *Criminal Law—Involuntary Manslaughter*, 47 IOWA L. REV. 168, 170 (1961): "There is no deterrent for a bona fide accidental death, unless it be to outlaw the automobile."

200. See text accompanying notes 19-20 *supra*.

201. OHIO REV. CODE ANN. § 4511.181 (Page 1967) (homicide by vehicle in the first degree): No person shall unlawfully and unintentionally cause the death of another while violating [various traffic statutes]. Any person violating this section is guilty of homicide by vehicle in the first degree.

Id. § 4511.18 (homicide by vehicle in the second degree):

No person shall unlawfully and unintentionally cause the death of another while violating any law of this state applying to the use or regulation of traffic, other than sections [in 4511.181]. Any person violating this section is guilty of homicide by vehicle in the second degree.

202. OHIO REV. CODE ANN. § 4511.19 (B) (Page 1973).

203. OHIO REV. CODE ANN. § 4511.20 (Page 1965).

204. OHIO REV. CODE ANN. § 4511.251 (Page 1973).

205. OHIO REV. CODE ANN. § 4511.201 (Page 1973).

206. *Id.* § 4511.99 (B).

basis of the crime, the statute proposed by the Technical Committee pegged the commission of the crime to the particular mental state of recklessness.²⁰⁷ This change represented a movement away from the unlawful act type of manslaughter present in Ohio before 1974.²⁰⁸ The proposed statute also unified the various statutes dealing with vehicular deaths into one statute and added liability for snowmobile and aircraft-related deaths.²⁰⁹ There is no counterpart to the proposed statute in the Model Penal Code, which would treat vehicular deaths under its general reckless homicide statute. The proposed statute underwent minor changes in the Ohio Legislature but remained virtually intact.²¹⁰

C. *Analysis of Aggravated Vehicular Homicide: Section 2903.06*

The application of section 2903.06 is relatively straightforward and raises only a few analytical problems. The first has to do with the definition of the reckless state of mind. The recklessness required for a charge of aggravated vehicular homicide is that found in the "Culpable Mental States" section of the Criminal Code²¹¹ and *not* recklessness as defined by any traffic offense, for example, reckless operation.²¹² The accident must be a result of the actor's perverse disregard of a known risk with heedless indifference to its consequences. The particular accident may involve the violation of a traffic statute or other safety regulation. The violation, however, would not be conclusive of the actor's culpability, but might furnish evidence of the reckless state of mind.²¹³

The second analytical problem relating to the present statute is that it departs from the common-law treatment of vehicular homicide. Older cases relating to vehicular deaths indicated that ordinary tort negligence was sufficient to impose criminal liability.²¹⁴ The alignment of homicide liability with the reckless state of mind is evidence of a policy decision to relate punishment directly to the defendant's state of mind so that more severe offenses may be deterred.

The most important analytical problem relates to the language "participating in the operation" of the motor vehicle. The statute contemplates liability not only for the operator of the vehicle but also for those who may contribute to the driver's recklessness by their actions. The scope of this language was interpreted by the Court of Appeals of Summit

207. PROP. OHIO CRIM. CODE § 2903.05, Comments, at 76.

208. *Symposium—The Proposed Ohio Criminal Code—Reform and Regression*, 33 OHIO ST. L.J. 351, 459 (1972).

209. *Id.*

210. The main change was the addition of liability for repeat offenders. See SUB. H. 511, § 2903.06(B), 109th Gen. Assembly (1972).

211. PROP. OHIO CRIM. CODE § 2903.05, Comments, at 76.

212. *Id.* See OHIO REV. CODE ANN. § 4511.20 (Page 1973) for the definition of reckless operation.

213. Violation of any safety statute is at least negligence per se in Ohio. See *Eisenhuth v. Moneyhon*, 161 Ohio St. 367, 119 N.E.2d 440 (1954).

214. See, e.g., *Egle v. People*, 159 Colo. 217, 411 P.2d 325 (1966); *Jordan v. Commonwealth*, 371 S.W.2d 632 (Ky. 1963); *People v. Fedderson*, 327 Mich. 213, 41 N.W.2d 527 (1950); and the cases collected at Annot., 20 A.L.R.3d 473, 476 (1968).

County, Ohio, in *State v. Hann*.²¹⁵ In that case, the defendant and his minor accomplice attempted to cash a forged check. Upon detection, the two fled the bank with the minor driving the car and were subsequently engaged in a high speed chase with the police. The minor drove the car through a stop sign and collided with another car, killing the driver.²¹⁶ The defendant nondriver was found guilty of aggravated vehicular homicide:

Where one has a strong common interest, that is not merely remote or passive, with the operator of a motor vehicle which causes the death of another while being driven in a reckless manner, he may be found to have participated in the operation of the vehicle, within the meaning of R.C. 2903.06.²¹⁷

The result is correct. While the defendant did not actually perform the reckless driving, his actions contributed to the driver's actions. It was in both parties' interest to avoid arrest for the crime.

An interesting question arises. Must the strong common interest be of an illegal nature? For example, if two people are driving together and are in a hurry to reach a destination, would the acquiescence of the passenger render him liable for aggravated vehicular homicide should a death result as a product of the driver's recklessness? A literal reading of the "strong common interest" gloss on participation would lead to an affirmative answer. However, a strong policy argument can be made that liability should extend only to those cases in which the common interest itself is illegal—to do otherwise might expand the scope of reckless homicide convictions too broadly and render too great a number liable under the statute.

The final issue relating to aggravated vehicular homicide liability is whether the victim's contributory negligence will mitigate or absolve the defendant from liability. The general rule, as in the negligent homicide area, is that the contributory negligence of the victim is not a defense.²¹⁸ The courts, nevertheless, may consider contributory negligence if it is the sole proximate cause of the accident.²¹⁹ For example, if both the driver and victim are driving recklessly, as is the case with drag racing, and the victim's recklessness can be shown to have caused his own death, the defendant could not be held liable for aggravated vehicular homicide.

The present aggravated vehicular homicide statute is an improvement over the prior unlawful act first degree vehicular homicide statute. The

215. 55 Ohio App. 2d 267, 380 N.E.2d 1339 (1977).

216. *Id.* at 268-69.

217. *Id.* (syl. 1).

218. *See, e.g.*, *People v. Pociask*, 14 Cal. 2d 679, 96 P.2d 788 (1939); *People v. Campbell*, 237 Mich. 424, 212 N.W. 97 (1927).

219. *See, e.g.*, *Shaeffer v. State*, 96 Ohio St. 215, 117 N.E. 220 (1917); *Driggs v. State*, 40 Ohio App. 130, 178 N.E. 15, *appeal dismissed*, 123 Ohio St. 685, 177 N.E. 633 (1931). *See also* Comment, *supra* note 199, at 172 (footnote omitted): "If [the defendant] is unable to convince the trier of fact that the unlawful act was not the proximate cause of the death, he may as well plead guilty because his conviction is inevitable."

statute punishes morally culpable conduct associated with reckless driving or operation of motor vehicles in a fair manner. The prison sentence is just and the notoriety of aggravated vehicular homicide prosecutions may increase deterrence of reckless driving.

IV. VEHICULAR HOMICIDE: SECTION 2903.07

The crime of vehicular homicide is codified in section 2903.07:

(A) No person while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall negligently cause the death of another.

(B) Whoever violates this section is guilty of vehicular homicide, a misdemeanor of the first degree. If the offender has previously been convicted of an offense under this section or 2903.06 of the Revised Code, vehicular homicide is a felony of the fourth degree.²²⁰

The penalty for violation of this section is imprisonment up to six months for a first offense²²¹ and six months to five years imprisonment for a repeat offense.²²² Section 2903.07 is identical to section 2903.06 except that it predicates liability on a negligent as opposed to reckless mental state.

A. *Vehicular Homicide Prior to 1974*

Vehicular homicide has a similar history to that of aggravated vehicular homicide. The immediate predecessor to section 2903.07 was second degree homicide by vehicle.²²³ That statute imposed manslaughter liability for vehicular deaths not accompanied by the violation of one of the enumerated traffic offenses in the first degree homicide by vehicle statute. Thus, the old second degree homicide by vehicle statute encompassed deaths arising out of the less serious traffic and safety violations.²²⁴

B. *The Code Revision of 1974*

The Code revisors chose to eliminate unlawful act manslaughter from the vehicular realm. In line with the approach stated in section 2903.06, the Code revisors proposed alignment of vehicular homicide with the mental state of negligence. This alignment was consistent with the overall gradation of the homicide statutes in accordance with particular mental states.

C. *Analysis of Vehicular Homicide: Section 2903.07*

Analysis of vehicular homicide presents few problems apart from the reckless homicide statute since the statutes are companion provisions. The

220. OHIO REV. CODE ANN. § 2903.07 (Page 1975).

221. The violation is a first degree misdemeanor punishable under § 2929.21(B)(1).

222. The violation is a fourth degree felony punishable under § 2929.11(B)(4).

223. OHIO REV. CODE ANN. § 4511.18 (Page 1967). See note 201 *supra*.

224. This section was similar to a nonenumerated felony-murder provision or a misdemeanor manslaughter statute.

only real issue is the scope of the negligent mental state required for a section 2903.07 conviction. The problems with the negligent mental state have already been discussed in the context of the negligent homicide statute.²²⁵ One Ohio court of appeals has held that the negligence required for a vehicular homicide conviction must manifest a substantial lapse from due care.²²⁶ This decision does not aid in resolving the difficulties with understanding that standard itself.

The issue of the scope of participation in the vehicle's operation that is necessary before vehicular homicide liability will arise should be resolved by the *Hann* decision. It makes sense to construe aggravated vehicular homicide and vehicular homicide *in pari materia*.

Section 2903.07 is a good statute and should be retained with the hope that it may promote greater care on the highway.

V. CONCLUSIONS

The Code revisors of 1974 began a creative re-evaluation of involuntary manslaughter law in Ohio, only to have part of that creativity neutralized by the Ohio Senate's insistence on a traditional unlawful act involuntary manslaughter statute. The rest of the homicide scheme in Ohio was scaled to particular mental states, thereby properly focusing the issue of liability on the defendant's *mens rea*. There is no sound reason why reckless homicide should not replace unlawful act manslaughter in Ohio. Adoption of a reckless homicide statute would bring involuntary manslaughter in Ohio into line with the approach favored by a growing number of jurisdictions. Further, it would make the law of involuntary manslaughter internally consistent in Ohio. A reckless homicide statute followed by a negligent homicide statute, with the retention of reckless and negligent vehicular homicide would be a consistent codification of the law of involuntary manslaughter along gradations of mental state.

225. See text accompanying notes 164-78 *supra*.

226. *State v. Ovens*, 44 Ohio App. 2d 428, 339 N.E.2d 853 (1975).