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Kentucky Homicide Law With Recommendations*

By ROY MORELAND**

Homicide naturally is a very old crime. From the beginnings of time men have killed each other, under many circumstances and for many reasons. Cam who killed his brother, Abel, because of jealousy, is but one of the long line and his motivation for the crime only one of the many chronicled in the books.¹

This very variety in the kind of persons who kill and the numerousness of their motivations create great diversity in society's mind as to what should be done with such offenders. The problem is made even more difficult by the inevitable concomitant, the moral question, as to what should be done with those who take human life. People differ widely, and emotionally, in their ideas and "feelings" as to that factor.

It is astonishing, but true, that the law of homicide made comparatively little development from the end of the seventeenth century until around the end of the nineteenth. Judge Stephen,

* The 1960 Legislature passed a resolution directing the Legislative Research Commission (hereinafter referred to as the LRC) to make a study of homicide law in Kentucky and to report its findings to the 1962 Legislature. The writer worked as consultant on that project. This paper is his study but the LRC made its own report to the Legislature which differs almost wholly from this study, although the LRC's report contained the recommendations in this study appended at its end. However, mental deficiency was not recommended as a reducing agent. As is well known, the LRC does not engage in legislation in any degree and did not participate in the passage of the bill involving involuntary manslaughter found in this study and adopted by the 1962 Legislature. Part of the purpose of the publication of this study in its present form is to show the situation in Kentucky law which occasioned the passage of this involuntary manslaughter statute. Two senior law students, Messrs. Earl F. Martin, Jr., and Lloyd Cress, contributed materially to this study as did Mrs. Lena Craig and Roy Pennington of the LRC; Mr. H. Jefferson Herbert, Jr., edited the footnotes for form (only).

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¹ The word murder, itself, is a very old word going back to the Norman conquest of England or further. After the Normans "liberated"—to give the word a modern twist—the Anglo-Saxons, they sought satisfaction in secret slayings of the invaders by waylaying. To crush this evil the Normans levied a heavy amercement fine called the murdrum upon any hundred where a Norman was found slain. By 1340 the people had become "merged" and the fine was abolished but the word lived on as the worst kind of homicide although without its former meaning. Moreland, *The Law of Homicide* 9. (1952).

an English jurist, made a studied and fruitful attempt to analyze and categorize the law of murder in 1883,² and this effort, in the opinion of the writer, marks the beginning of a current vigorous attempt to rationalize and modernize the entire field of homicide. Considerable particular and intensive research in this country has been made in the past twenty or thirty years by a number of competent forward-looking individuals and organizations. Three of these studies are the careful and exhaustive study to be found in the Report of the New York Law Revision Committee on Homicide,³ a long article in the Columbia Law Review by Herbert Wechsler and Jerome Michael,⁴ and the discussion and proposed statutory provision to be found in the Model Penal Code now in preparation by the American Law Institute.⁵ In addition, there is a new Homicide Act in England which changes the law somewhat in that jurisdiction.⁶ It has been the writer's purpose to make a study of homicide as found in these and other available materials⁷ and in Kentucky statutes and decisions and to make such findings and recommendations as seem advisable.

I. MURDER

(a) *Intentional Murder*

Judge Stephen in his memorable analysis and categorization of the crime of murder divided the state of mind requisite for the offense into four categories, the first of which he described as follows:

An intention to cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not.⁸

This category embodies what is usually called the common law intentional murder. It includes not only those unlawful

² 3 Stephen, *History of the Criminal Law of England* 80-81 (1883); Turner v. Commonwealth, 167 Ky. 365, 367, 180 S.W. 768, 770 (1915), contains Judge Stephen's analysis.

³ 1937 Rep. of the Law Rev. Comm'n of N.Y. 515.

⁴ Wechsler & Michael, *A Rationale of the Law of Homicide*, 37 Col. L. Rev. 1261 (1937).

⁵ Model Penal Code §201 (Tent. Draft No. 9, 1959).

⁶ Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11, see 202 H.L. Deb. 726 (5th ser. 1957). See generally Prevezer, *The English Homicide Act: A New Attempt to Revise the Law of Murder*, 57 Col. L. Rev. 624 (1957).

⁷ E.g., Moreland, *op. cit. supra* note 1, at 307-14; Moreland, *A Suggested Homicide Statute for Kentucky*, 41 Ky. L.J. 139 (1953).

⁸ 3 Stephen, *op. cit. supra* note 2, at 80-81.

homicides which the killer actually "willed" but also several other unusual situations to be mentioned later.⁹

What changes have been made by the Kentucky Legislature in the common law intended murder? The only Kentucky statute on murder is one which punishes "willful" murder by confinement in the penitentiary for life, or by death.¹⁰ It has been said that the Kentucky courts look to the common law for the definition of "willful" murder.¹¹ That being so, the statutory offense should include such common law situations as a killing resulting from an intent to inflict grievous bodily harm only,¹² a homicide resulting from an act "substantially certain" to cause death,^{12a} and a death resulting from an application of the well-recognized doctrine of "transferred intent."^{12b} three situations embraced in the common law definition. However, these are incidental situations which are not ordinarily written specifically into statutory definitions; the main point is that this Kentucky statute codifies the common law intended murder, using however the word "willful" instead of "intended."¹³

There are no degrees of murder in Kentucky. Similarly, there are no degrees of murder at common law and all murder is punished by death. Today, however, most jurisdictions divide the crime into degrees by statute. The primary purpose in doing this

⁹ See generally Moreland, *A Suggested Homicide Statute for Kentucky*, 41 Ky. L.J. 139, 141-45 (1953).

¹⁰ Ky. Rev. Stat. §435.010 (1959) [hereinafter cited as KRS].

¹¹ *Commonwealth v. Illinois C.R.R.*, 152 Ky. 320, 153 S.W. 459 (1913).

¹² Roberson, *New Kentucky Criminal Law and Procedure* §350 & n.5 (2d ed. 1927) (no Kentucky cases cited). See generally Moreland, *The Law of Homicide* 17-20 (1952).

^{12a} Moreland, *The Law of Homicide* 18 & n.5 (1952).

^{12b} *Shelton v. Commonwealth*, 145 Ky. 543, 140 S.W. 670 (1911); *Wheatley v. Commonwealth*, 26 Ky. L. Rep. 436, 81 S.W. 687 (Ct. App. 1904); see Note, 34 Ky. L.J. 224 (1946) (Kentucky cases cited). See generally Moreland, *The Law of Homicide* 17-20 (1952).

¹³ Another matter involved in the intended murder is *proof* of intent. Of course, the defendant may plead guilty or he may have uttered language at the time of the killing which showed a subjective intent. But, where intent was not affirmatively indicated the common law raised an *inference* of intent based upon conduct in at least two instances. Very early in the law it became the rule that once it was proved that the defendant committed a killing it was *inferred* that he did it with express malice (intentionally), thus putting the burden on him of proving circumstances of alleviation, excuse or justification. But the rule has been repudiated in England, it has been much criticised in this country, and it is believed and hoped that Kentucky would not apply it at the present time if the question were properly presented. See the critical and excellent Note, 34 Ky. L.J. 306 (1946). The common law raised a second inference of intent from conduct where the killing resulted from the use of a deadly weapon. The doctrine has been criticised but remains firmly entrenched in the law. As to these two inferences of intent see Moreland, *The Law of Homicide* 20-30 (1952).

is to relieve the harshness of the situation at common law by limiting the use of the death penalty. Many believe that the division of the crime into degrees, with the death penalty reserved for the first degree only, accomplishes this purpose.

Pennsylvania was the first state to divide murder into degrees, and the most common definitions of both first and second degree murder are still the ones derived from this pioneer Pennsylvania act of 1794.¹⁴

The definition of first degree murder under the Pennsylvania act included (a) willful, deliberate and premeditated killing, and (b) homicide occurring in the commission of certain named felonies. The most common modern statutory definition of second degree murder, also derived from the Pennsylvania act is, in substance, "all other homicides which would have been murder at common law"¹⁵

While the word *deliberate* has some connotation in the Pennsylvania act, it should be particularly noted that the Act introduces the word premeditated into the definition of intended murder in defining murder in the first degree. Intended murder which is not premeditated is murder in the second degree under the Pennsylvania act and under most modern statutes.

While Kentucky has not attempted to alleviate the harshness of the common law rule of death for all intended murder by dividing intended murder into degrees, the state has met the problem in another way by providing a choice to the jury of imprisonment for life or death as the punishment for intended murder.

The Model Penal Code of the American Law Institute has a third method of wording the definition of the intended murder. The intended murder provision in this Code states that a criminal homicide constitutes murder when it is committed "purposely and knowingly"¹⁶ The word "knowingly" does not, it is believed, have value or real meaning in this definition. If it has to do with the requisite of mental responsibility, it adds nothing to "purposely," for it is only those who have mental competence that are held criminally responsible for purposeful acts. It is also true that

¹⁴ Wechsler & Michael, *A Rationale of the Law of Homicide*, 37 Col. L. Rev. 701, 704-05 (1937); 1937 Rep. of Law Rev. Comm'n of N.Y. 543.

¹⁵ Wechsler & Michael, *supra* note 14, at 705.

¹⁶ Model Penal Code §201.2(1)(a) (Tent. Draft No. 9, 1959).

the word deliberate is used in many intentional murder statutes to indicate more than mere intention, to show that the accused's mind "weighed and considered alternate courses of conduct and finally made a choice—to kill."¹⁷ But, while this has some persuasion, it may be said as a practical matter that an intentional act requires a weighing and a determined choice. The net result of all this reasoning is that the addition of words like deliberate and knowingly adds nothing of practical value to a statute which uses either willful, purposely, or intentional to describe the willed murder.

Those who drew the intentional murder provision for the Model Penal Code had difficulty in determining the punishment for the offense. As originally drawn the death penalty was excluded. The Code provided simply that "murder is a felony of the first degree."¹⁸ The Code provides in section 6.06(1) that a person convicted of a felony of the first degree may be sentenced to imprisonment for a term "the maximum of which shall be life imprisonment." However, a later bracketed provision was added providing for the death penalty in the alternative. As this is written, the membership of the Institute is being circularized as to whether the alternate bracketed provision providing for the death penalty shall remain in the Model Code.¹⁹ This lack of decision as to the retention or rejection of the death penalty is indicative of the general national indecision on this matter. England is going through a similar indecision on the matter but after much agitation, the 1957 English Homicide Act retained the death penalty for certain murders.²⁰

At common law the intentional murder is defined as an unlawful killing *with express malice aforethought*. England still uses that outmoded wording in her definition of murder in the 1957 Homicide Act.²¹ The use of "willful"²² to describe the intentional murder in Kentucky's statute is synonymous with the phrase

¹⁷ Moreland, *The Law of Homicide* 207 (1952).

¹⁸ Model Penal Code §201.2(2) (Tent. Draft No. 9, 1959).

¹⁹ Model Penal Code §210.6(2), as finally written, retains a possible death penalty.

²⁰ Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11, Part II, 5(1); see Prevezar, *The English Homicide Act; A New Attempt to Revise the Law of Murder*, 57 Col. L. Rev. 624, 632 (1957).

²¹ English Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11, Part I, 1(1).

²² Stephen used the word "intention." Moreland, *The Law of Homicide* 17 n.2 (1952).

with express malice aforethought; each will receive exactly the same interpretation and exactly the same interpretation would follow if the words intentional, purposely, or deliberate²³ were used. So the problem is, which is the better choice?

After considering the various possible phrasings for an intended murder statute, it has been concluded to recommend the wording of the present Kentucky statute which uses the word willful to define the offense. It has a clear meaning, it is workable in the hands of the ordinary jurymen, it is explicit. Naturally, as at present, the word would receive a common law interpretation. This decision results in a repudiation of the use of the word premeditation as a device for separating murder into degrees for the purpose of giving differing degrees of punishment. It is becoming commonly accepted that that device has failed to fulfill its purpose. The word naturally connotes a planned event; the determination to kill must be made beforehand. But, as Cardozo has pointed out,²⁴ the courts have so watered down the meaning of the word that no appreciable amount of time is needed; the meditation and the killing may be just short of simultaneous. An attempt to cure this sort of watering down of the term in the statute was made in a book ten years ago²⁵ by defining the word premeditation in the statute itself, hoping thereby to force the courts to interpret it in its natural dictionary meaning. But it has been decided that this will not help—the courts, under the persuasion of the lawyers, will continue to water down the meaning of the word. The framers of the Model Penal Code have come to the same conclusion and so have not divided murder into degrees in their model statute.

A determination to eliminate the use of premeditation as a device for dividing murder into degrees to alleviate the harshness of punishment does not change the fact, however, that *some* method must be devised to allow such alleviation for it is accepted

²³ For illustrations of the use of the word deliberate, see Moreland, *The Law of Homicide* 200 (1952).

²⁴ Cardozo, *Law, Literature and Other Addresses* 97-99 (1931).

²⁵ Moreland, *The Law of Homicide* 212 (1952). See generally *id.* at 208-12.

The Model Penal Code comment also points out that many murders committed without premeditation are committed with as much cruelty and with a disposition as dangerous to society as are shown in premeditated murders. For example, a man makes advances to a girl who repels him; he deliberately but instantly kills her. For the discussion and other illustrations see Model Penal Code §201.6 at 70, comments (Tent. Draft No. 9, 1959).

today that *all* murderers should not receive the death penalty or, perhaps, even the *same* penalty. The present Kentucky statute meets the problem by allowing a choice between death and imprisonment for life. Should this punishment for the offense be further refined? It is believed that it should. It is recommended that the jury have *three* choices instead of two as at present. These three recommended choices will be discussed in turn:

- (1) It is accepted that although death as a punishment for murder is fading, the time has not come, as yet, for its total elimination. Statutes eliminating the death penalty failed in the 1960 and 1962 Kentucky Legislature. In spite of intense agitation against the continuance of capital punishment in that country, the new 1957 English Homicide Act continues its use for certain crimes.²⁶ The day for the total abolishment of capital punishment may come, but it is not here yet.
- (2) One objection to the present choice in Kentucky between death and imprisonment for life is a practical one. Instead of a real choice between death and life imprisonment, there is a choice between death and life imprisonment with a possibility of parole in eight years, since in this state a sentence for life is subject to parole after that period²⁷—and parole may in fact be given if prison behavior has been good. Death may be *more* punishment than the jury wishes to give, but a possibility of an eight year sentence may be *less!* There are not enough choices.

An editorial in the Louisville Courier Journal (Tuesday, February 16, 1960) offers the best solution to this problem that has been seen by those working on the proposed act. The editorial points out that for crimes that appear to have some extenuating circumstances juries are often reluctant to give a death sentence, while for offenses which shock the community a life sentence which can end in eight years sometimes sets off a public outcry. The result is that Kentucky seems to have more than its share of hung juries, members of which are reluctant to take one responsibility or the other.

At the time the editorial was written a bill was pending in both houses of the Kentucky Legislature with a purpose to

²⁶ Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11, Part II, 5(1).

²⁷ KRS 439.110(3).

remedy this gap. This bill would have added a third choice, life imprisonment without parole. This has been tried in some jurisdictions. But, as the editorial pointed out, this bill also contained a rigidity which might make it as difficult to enforce as the death penalty is now. Besides, as the editorial might have stated, it has been found difficult to control prisons containing a large population serving sentences of life without hope of parole. Hopeless, they riot periodically and violently.

To remedy the situation in Kentucky, the editorial offered still another choice—a minimum of twenty years imprisonment before possibility of parole. With this suggestion those studying the Homicide Act are in full accord. The minimum period need not be twenty years; it could be fifteen, for instance. But the suggested minimum period is persuasive and perhaps about what is wanted. This is a severe punishment, but it evades the objections to the death penalty and leaves the prisoner not without hope.

- (3) The third choice is, of course, the present one of imprisonment for life with a possibility of parole in eight years or at any time thereafter.

Thus, a jury could choose between death, a minimum term of twenty years before possible parole, and imprisonment for life with a possibility of parole in eight years. However, either the second or third choice *might* result, in unusual cases, in imprisonment for the prisoner's life in the discretion of the parole board and in the absence of executive clemency. The law as it stands does not give a conscientious jury enough choice. But the addition of this third choice would seem to provide sufficient latitude for all.

Perhaps it should be pointed out that it is arguable that one who receives a sentence of imprisonment for life should not be eligible for parole in the short period of eight years as he is in Kentucky. However, the matter is argumentative. Good reasons can be given pro and con. It is thought better to approach the problem by giving a third choice to the jury rather than by suggesting a change in KRS 439.110(3). A number of states now provide that one serving a life sentence is not eligible for parole until he has served fifteen or more years; the statute recommended herein is unique in providing the equivalent of a division of the

life sentence into two categories, thus affording a choice to the jury²⁸

To summarize the discussion, an intentional murder statute embodying the recommendations contained herein might be worded substantially as follows:

Any person who commits willful murder shall be punished by confinement in the penitentiary for life, or for a minimum term of twenty years before becoming eligible for parole, or by death.

These recommendations change existing Kentucky law in only one particular—a third choice of punishment is provided.

(b) Negligent Murder

The discussion turns now to the second category in Judge Stephen's analysis of common law murder—the negligent murder. The early English cases and classic common law treatises enumerate a series of extremely dangerous acts which are described in terms of conduct evincing "a depraved heart regardless of human life," "a heart devoid of social duty and fatally bent on mischief," and similar picturesque phrases.²⁹ The examples given include such acts as the tossing of a timber or heavy object off a roof, causing it to fall into a crowded thoroughfare.

While early writers differ as to the basis of liability in cases involving extremely dangerous acts,³⁰ Stephen puts them all into one category³¹ This category is within the general concept of negligence, but is to be distinguished from the negligence required for manslaughter and various other lesser offenses by the relatively higher degree of danger involved in the act and the relatively greater indifference to the lives and safety of others manifested by it. The two problems involved in drafting a definition or test of the negligent murder consist of describing the requisite higher degree of danger and relatively greater indifference to the lives and safety of others.

²⁸ Under KRS 439.135 one receiving a sentence of imprisonment for life is eligible for parole in eight years. As a matter of information, a table showing the eligibility of prisoners for parole serving life imprisonment for murder in capital punishment jurisdictions may be found in the Model Penal Code app. F at 130 (Tent. Draft No. 9, 1959).

²⁹ For a listing of a series of these phrases, see 1937 Rep. of Law Rev. Comm'n of N.Y. 622-23.

³⁰ *Id.* at 623-25.

³¹ 3 Stephen, *History of the Criminal Law of England* 80 (1883).

It is believed that the discontinuance of the use of the ambiguous words and phrases commonly used to describe the high degree of danger and the utter indifference to the safety of others required for the crime would make for clarity and stability in the law. With that in mind it is suggested that, in those jurisdictions which adopt the negligent murder, one who unintentionally kills another should be guilty if the homicide is committed by an act creating such extreme risk of death or great bodily injury as to manifest a wanton indifference to the value of human life according to the standard of the conduct of a reasonable man under the circumstances.

Three things are of importance in this test. First, the degree of danger must be *extreme*. There are increasingly higher degrees of danger required in the ascending homicide crimes arising out of negligence. But for murder the degree of danger must be *extreme*. Murder is a most serious offense, and murder by negligence is unintentional. For such a serious unintentional homicide only an *extremely* dangerous act should suffice to create liability.

The second and third points in the definition are related. Civil negligence and negligence on the manslaughter level are commonly judged by the objective standard of the conduct of the reasonable man. There is a decided trend toward making the standard of conduct on the murder level an objective one also—the conduct of a reasonable man.³² But the phrases coming down from the historic common law treatises indicate that this conduct must be so utterly blame-worthy as to show a depraved heart, an individual devoid of a sense of social duty. The suggested definition uses the word wanton to indicate this great *indifference* to the safety of others. One who is wantonly negligent has utter indifference for the safety of others. His conduct is so reprehensible that it indicates he just does not give a damn for the safety of others. This is strong language, but the depraved heart phraseology of the common law is strong language also, indicative of the monster the defendant has to be to be convicted of a murder by negligence.

There is some question, however, whether the word wanton is the best word to use to describe this utter indifference to the safety of others required for the negligent murder. This is be-

³² Moreland, *The Law of Homicide* 36 (1952).

cause, while the word carries the proper connotation of utter indifference, it may be questioned whether the word carries a connotation of negligence. One of the several meanings given the word by the dictionary is "arrogant recklessness."³³ Recklessness *does* connote negligence. It will be found later in this paper that recklessness is commonly used to describe the negligence requisite for manslaughter. Add to the word *recklessness* the vituperative *arrogant* and just about the proper connotation is obtained. And there the study group proposes to let the matter rest.

And yet, repudiating the use of wantonly, the new Model Penal Code has chosen to describe the negligent murder as one "committed recklessly under circumstances manifesting extreme indifference to the value of human life."³⁴ This definition, the compilers of the Code believe, adequately describes the necessary blameworthiness requisite for the crime.³⁵ But recklessly does not carry the connotation that is required; it lacks the descriptive accuracy to precisely describe the utter disregard or indifference to the value of human life that must be present. Besides, it is the word used to describe the negligent manslaughter, and judges and juries would find it a continuing matter of difficulty to distinguish the negligence requisite for the two offenses if the same word were used to describe each, even though qualifying phrases were added.

Another solution to the problem has been suggested by Gerhard Mueller,³⁶ a leader in the criminal law field and a professor of law in the New York University School of Law. Professor Mueller suggests that the proper connotative result might be achieved by omitting the use of *any* word, whether it be recklessly, wantonly, or some other term. The Model Code itself hints at this possibility by stating in the comments that "the conception that the draft employs is that of extreme indifference to the value of human life."³⁷ Professor Wechsler, who drafted the Model Code, made a similar suggestion when in proposing revisions in the Illinois Criminal Code several years ago he recommended that the actor should be guilty of a negligent

³³ Webster, *New International Dictionary* 2871 (2d ed. 1944).

³⁴ Model Penal Code §201.2(1)(b) (Tent. Draft No. 9, 1959).

³⁵ Model Penal Code §201.2(1)(b), comment at 29-33 (Tent. Draft No. 9, 1959).

³⁶ Letter to the writer.

³⁷ Model Penal Code §201.2 comment at 29 (Tent. Draft No. 9, 1959).

murder when the death "is the result of an act which is utterly disregarding of the consequences."³⁸ If the descriptive word were thus omitted, the definition, whether that of the study group or of the Model Code, could then be worded to state that a negligent homicide would be murder when committed by an act extremely dangerous *and* indicating under *all the circumstances* extreme indifference to the lives and safety of others. Hence two elements would be required. an extremely dangerous act *and* an indication *under all the circumstances* of extreme indifference to the safety of others. The circumstances might include such factors as that the actor was driving while drinking heavily, that he was driving at high speed, that he had run several stop lights before the accident, that he had a "common woman" in his car, that he was impudent and truculent at the time of the accident.

The study group would probably go along with such a definition. It points up the high degree of the danger and spells out the extreme indifference which is required of the actor. The study group, however, would in the end prefer their original definition, if the decision were theirs to make, because a jury would have trouble getting its teeth into the meaning of the phrase, extreme indifference. When is indifference extreme? A jury, it is believed, would know better what is a wanton act than what is extreme indifference. The word wanton is more definite and connotative of the type of person who would be guilty of such an act. The ultimate question remains, though, whether it is connotative in terms of *negligence*. The study group believes that it is.

As stated earlier, there is no statutory negligent murder in Kentucky; the state simply punishes "willful murder."³⁹ Whether the common law negligent murder survives in the state is debatable. A line of Kentucky cases holds that it does survive; another line holds that it does not. *Ewing v. Commonwealth*⁴⁰ is illustrative of the line of cases holding that the common law

³⁸ Wechsler, *Proposed Revisions in the Illinois Criminal Code*, 48 Nw. U.L. Rev. 198, 213 (1953).

³⁹ KRS 435.010.

⁴⁰ 129 Ky. 237, 111 S.W. 352 (1908) (citing other Kentucky cases); *accord*, *Lucas v. Commonwealth*, 231 Ky. 76, 21 S.W.2d 113 (1929). See also *Davis v. Commonwealth*, 193 Ky. 597, 237 S.W. 24 (1922).

offense does not survive in Kentucky. That case states that while at common law malice would be implied from a shooting arising out of the reckless use of a firearm, the doctrine of implied malice is rejected in Kentucky. The court went on to say:

When we reject the doctrine of implied malice, the issue of malice is a question for the jury, and *the offense which would otherwise be murder becomes voluntary manslaughter*, where under the evidence the jury find as a fact that the killing was not done with malice aforethought. Accordingly it has been held in Kentucky in a long line of cases that, where one kills another by the wanton, reckless, or grossly careless use of firearms, the offense, if without malice aforethought, is voluntary manslaughter, although he had no intention. (Emphasis added.)⁴¹

Thus, this line of cases led to the introduction into this state of the preposterous doctrine of negligent voluntary manslaughter, accepted in only about one other jurisdiction, and criticized later in this paper in the discussion of voluntary manslaughter.

The leading case in the line which holds that the common law negligent murder does survive in this state is *Brown v. Commonwealth*,⁴² where the accused fired a pistol in a crowded room, killing one of the occupants. The appellate court affirmed a conviction of murder, saying:

If he did this not with the intention of killing anyone, but for his diversion merely, but killed one of the crowd, he is guilty of murder; for such conduct establishes general malignity and recklessness of the lives and safety of others, which proceed from a heart void of just sense of social duty and fatally bent on mischief.⁴³

This is an acceptance of the common law negligent murder;⁴⁴ even the wording in the opinion is couched in the picturesque language of the old text writers in their discussions of the crime.

The net result of these two lines of decisions in Kentucky is that there is case authority in the state for three different crimes involving homicide arising out of criminal negligence: murder,

⁴¹ 129 Ky. at 241, 111 S.W. at 354.

⁴² 13 Ky. L. Rep. 372, 17 S.W. 220 (Ct. App. 1891).

⁴³ 13 Ky. L. Rep. 372, 373, 17 S.W. 220, 221 (Ct. App. 1891).

⁴⁴ *Hill v. Commonwealth*, 239 Ky. 646, 40 S.W.2d 261 (1931); *Golliher v. Commonwealth*, 63 Ky. (2 Dur.) 163 (1865); see Gregory, *Kentucky Criminal Law, Procedure and Forms* §70 (1918); *Roberson, op. cit. supra* note 12, §§358-62 (2d ed. 1927).

voluntary manslaughter, and involuntary manslaughter.⁴⁵ Gregory⁴⁶ and Roberson⁴⁷ both cite cases supporting all three crimes in their texts on Kentucky criminal law. This has, of course, created a great deal of confusion. One of the phases of the confusion, the impossible voluntary negligent manslaughter, should be weeded out of the law, but the problem still remains as to what should be done about the negligent murder.

The problem was somewhat clarified, though by no means solved, by the passage of a statute in 1950⁴⁸ limiting the punishment for all common law crimes, the punishment for which is not provided by statute, to a maximum of imprisonment for a term not exceeding twelve months in the county jail or a 5,000 dollar fine or both. This statute eliminates the probability of punishing the common law negligent murder in this state at the present time, since the punishment of involuntary manslaughter, a lesser crime, is the same as provided for by this statute. This is because there is no statutory involuntary manslaughter in Kentucky, and so the crime is a common law offense and, as such, also punished under the same 1950 statute as the common law negligent murder. The punishment being the same, a prosecutor will naturally prosecute for involuntary manslaughter rather than for negligent murder, since there is a greater possibility that he will get a conviction from the jury for that offense. Unfortunately, the crime of negligent voluntary manslaughter continues after the statute of 1950 since there is a statutory punishment for voluntary manslaughter.

A decision must now be made as to what is to be done about the negligent murder in drafting a recommended homicide act for Kentucky. The study group has decided to choose one of the three of the various possibilities suggested in the discussion. These three are:

- (a) to recommend a statute embodying the negligent murder, describing the offense as a homicide committed by an act creating such extreme risk of death or great

⁴⁵ To these three may now be added a fourth, the new statutory offense, homicide resulting from a negligently operated motor vehicle. KRS 435.025 (enacted in 1952).

⁴⁶ Gregory, *op. cit. supra* note 42, §70.

⁴⁷ Roberson, *op. cit. supra* note 12, §§358-62.

⁴⁸ KRS 431.075.

bodily injury as to manifest a wanton indifference to the value of human life

- (b) to omit the use of *any* word to describe the extreme indifference requisite for the negligent murder, whether the word be wanton, reckless, or some other term. An unintended homicide would then be a negligent murder when committed by an act extremely dangerous and indicating under all the circumstances extreme indifference to the lives and safety of others.”
- (c) to omit the negligent murder from the recommended act.

From these three choices the study group has decided to recommend (c), omission of the negligent murder from the recommended act.

There are several arguments *against* the omission of the negligent murder from the recommended act. While juries rarely convict offenders of the negligent murder, they do occasionally do so in those jurisdictions where the offense is a part of the homicide laws. And it may be urged that occasionally a negligent homicide is so heinous that it deserves a murder conviction. An examination of the cases noted in the American Digest System for the past twenty-five years reveals *some* cases where the defendant was convicted of the offense. It may be argued that it is wise to keep the crime on the statute books to take care of such cases. One must also take cognizance of the fact that the offense is an old, historic one and that it is included in the new Model Code of the American Law Institute and in the new English Homicide Act.

There is another argument for recommending the inclusion of the negligent murder in the proposed Kentucky act. At present the common law offense is outlawed in effect by KRS 431.075, but, most unfortunately, *in place of* the common law negligent murder the Kentucky Court of Appeals has invented the impossible hybrid offense, the negligent voluntary manslaughter. If the negligent murder is omitted from the recommended act it would be difficult to weed the negligent voluntary manslaughter out of Kentucky law. Would the Kentucky Court of Appeals have the courage to do so? That may well be doubted for they have refused to do so up to this good hour although the offense has been repeatedly criticized and members of the court have ob-

jected to it privately. The problem of getting the negligent voluntary manslaughter out of Kentucky law is increased by the fact that involuntary manslaughter, which is what a negligent homicide would be if the negligent murder were eliminated, is not a statutory offense in this state under existing law but a common law misdemeanor punishable under KRS 431.075 by a punishment of a *maximum* imprisonment of twelve months in the county jail or a fine not exceeding 5,000 dollars, or both. Such a punishment would not be sufficient for a negligent homicide arising out of extremely dangerous, wanton conduct, which was probably the chief reason for the birth of the negligent voluntary manslaughter, the punishment for voluntary manslaughter being the statutory one of confinement in the penitentiary for not less than two nor more than twenty-one years under KRS 435.020.

However, there are several arguments for omitting the negligent murder from the proposed act. To omit the offense would not change existing Kentucky practice since it is not practical to prosecute common law negligent murder in the state at the present time because of KRS 431.075. It is also true that while either the statutory or common law negligent murder is in effect in most states⁴⁹ there are few convictions of the offense. Juries cannot get away from the fact that such a homicide is in fact unintentional and that most of us are negligent at times. This attitude of mind upon the part of juries is indicated by the fact that it has been found necessary to introduce the new offense, homicide arising out of the negligent use of a motor vehicle,⁵⁰ into the law because juries refuse in many cases to convict the negligent offender of even involuntary manslaughter. All the more do they refuse to convict of murder.

So there are arguments for including and for omitting the negligent murder from the proposed homicide act. But weighing all considerations, pro and con, the study group has decided to omit the offense. This will not change the present Kentucky law for any practical purpose since the punishment under KRS 431.075 is so small as to make it inexpedient to prosecute for

⁴⁹ No statutes covering the negligent murder have been found in these nine states: Alaska, Indiana, Kansas, Kentucky, Louisiana, Nebraska, Ohio, Texas, and Wyoming. In these jurisdictions the offense is punished as a common law crime except in those states where common law crimes have been abolished or there is some statutory limitation, as in Kentucky.

⁵⁰ In Kentucky this is KRS 435.025.

common law negligent murder. However, since this has caused the creation of the impossible crime, the negligent voluntary manslaughter, the study group has deemed it necessary to devise a way to eliminate that offense. This has been done in the proposed act by creating the offense of involuntary manslaughter in the first degree, which offense is discussed with particularity in the section of this paper, *infra*, devoted to involuntary manslaughter.

(c) *Felony Murder*

The third category in Stephen's analysis of common law murder embodies the felony murder doctrine.⁵¹ It was the historic common law rule that if a death occurred in the commission of an unlawful act it was murder or manslaughter depending upon whether the unlawful act out of which the killing occurred was a felony or a misdemeanor.⁵² Of course, this was extremely harsh, particularly as to the felony murder, but it was not until 1883 that a real, open attack was made upon the doctrine. In that year Judge Fitzjames Stephen made a vigorous, vitriolic attack upon the doctrine in his *History of the Criminal Law of England*.⁵³

More importantly, Judge Stephen incorporated his views in an opinion which he wrote four years later. This memorable decision, *Regina v. Serne*,⁵⁴ was buttressed upon the proposition that the amount of danger in the felonious act and not its unlawfulness should be the basis of liability in such cases. Specifically, the case held that if a homicide occurred in the commission of a felony it would not be murder *unless the felony in itself was one dangerous to life and likely in itself to cause death*.

It will be immediately perceived that when the felony murder rule is stated in this manner it becomes parallel with the definition of the type of conduct requisite for the negligent murder. The modern cases show an increasing tendency to make the two

⁵¹ Stephen stated that malice aforethought, constituting a sufficient mens rea for murder, existed, in addition to three other situations discussed in this paper, when the one who committed the homicide "had an intent to commit any felony whatever" at the time he committed the killing. Moreland, *The Law of Homicide* 17 n.2 (1952).

⁵² Indeed there is authority to the effect that in the time of Coke a homicide occurring in the commission of *any* unlawful act was murder. *Id.* at 42.

⁵³ 3 Stephen, *History of the Criminal Law of England* 57-75 (1883).

⁵⁴ [1887] 16 Cox Crim. Cas. 313.

rules parallel stating that it is not the fact that the accused was committing a felony when the homicide occurred that makes him criminally liable but it is because his act was so extremely dangerous as to make it wantonly disregarding of the lives and safety of others.⁵⁵ This conception of the felony murder doctrine is now being commonly incorporated in modern statutes which make one who kills while committing a felony guilty under the felony murder rule only when the felony is arson, rape, robbery or burglary, all felonies ordinarily extremely dangerous in themselves to human life and safety.⁵⁶ Such statutes serve a useful purpose as transitional devices. When the felony element should ultimately be removed from the rule these specific, named, usually dangerous felonies would be omitted and only the wording of the negligent murder would be used. Then the affirmative burden would be on the prosecution *in each and every* case to show extreme danger in the act of the accused which caused death. Some cases have taken this ultimately correct position.⁵⁷

There is no statute embodying the felony murder in Kentucky but it survives as a common law crime in this state.⁵⁸ However, the Kentucky cases dealing with the felony murder are confused and uncertain. There is doubt whether the modern and more acceptable rule that the felony in itself must involve an act extremely dangerous to human life and safety is the rule or whether the court has continued to apply the historic doctrine that a homicide occurring in the commission of *any* felony is murder.⁵⁹ It is also impossible to determine whether the Kentucky court would require that the felony be the proximate cause of the homicide; some courts do not.⁶⁰

⁵⁵ *People v. Goldvarg*, 346 Ill. 398, 178 N.E. 892 (1931) (arson); *Williams v. Commonwealth*, 258 Ky. 830, 81 S.W.2d 891 (1935) (robbery); *People v. Pavlic*, 227 Mich. 562, 199 N.W. 373 (1924) (selling liquor, a statutory felony) (defendant was not convicted).

⁵⁶ These are the four felonies incorporated in the statutes of some thirteen states. *E.g.*, Ala. Code tit. 14, §314 (1959); Ohio Rev. Code §2901.01 (Page 1954).

⁵⁷ See, *e.g.*, cases cited note 55 *supra*.

⁵⁸ *Simpson v. Commonwealth*, 293 Ky. 831, 170 S.W.2d 869 (1943); *Whitfield v. Commonwealth*, 278 Ky. 111, 128 S.W.2d 208 (1939); *Marion v. Commonwealth*, 269 Ky. 729, 108 S.W.2d 721 (1937); *Williams v. Commonwealth*, 258 Ky. 830, 81 S.W.2d 891 (1935); *Commonwealth v. Reddick*, 17 Ky. L. Rep. 1020, 33 S.W. 416 (Ct. App. 1895).

⁵⁹ Note, 29 Ky. L.J. 130, 131 (1940). *Contra*, Note, 29 Ky. L.J. 128 (1940).

⁶⁰ *People v. Kaye*, 43 Cal. 802, 111 P.2d 679 (1941); Note, 36 Ky. L.J. 106, 108 (1947).

With the situation in this condition, the Legislature in 1950 passed KRS 431.075, mentioned in the discussion of the negligent murder, *supra*, which limits the punishment for all common law crimes, the punishment for which is not provided by statute, to a maximum of confinement in the county jail for twelve months or a 5,000 dollar fine, or both. That statute, as in the case of the negligent murder, eliminates the felony murder in this state for all practical purposes, since involuntary manslaughter, which is not a statutory offense in Kentucky but a common law misdemeanor, is also punishable under KRS 431.075, resulting in the same penalty for involuntary manslaughter as for the felony murder, and prosecutors would prefer to try an accused under the manslaughter charge since a conviction by a jury for that offense is more likely. Unfortunately the negligent voluntary manslaughter continues in this state. A prosecution for that offense, which has a punishment under KRS 435.020 of a minimum of two years and a maximum of twenty-one, is also a possibility in these cases based upon doing a felonious act, dangerous in itself constituting negligence. So while a prosecution for felony murder remains technically possible at this time, it is beyond the realm of probability.

If the felony murder is to be re-activated in Kentucky, it should be in accordance with the accepted modern interpretation of the offense, that is, that the felony out of which the homicide occurs must be extremely dangerous in itself. In that context, three modern, current ways of handling the problem will be discussed in turn.

1. The Transition Statute.

The prevailing method of handling the felony murder in the United States today is to provide that a homicide committed in the course of certain named felonies shall be murder, often in the second degree. Thirteen states enumerate arson, rape, robbery and burglary; other jurisdictions add mayhem, kidnapping, larceny, and some other felonies to the list.⁶¹ So a statute embodying the requisite of extreme danger and employing this transitional device of naming the felonies which shall be deemed extremely dangerous in themselves might be worded:

⁶¹ Moreland, *The Law of Homicide* 217 (1952).

The unintentional killing of a human being is murder in the second degree when committed by an act so extremely dangerous as to constitute wanton indifference to human life and safety. The standard to be applied is that of a reasonable man under the circumstances.

(a) The unintentional killing of a human being perpetrated in committing arson, rape, robbery or burglary shall constitute murder in the second degree as the crime is defined in this statute.

It will be immediately perceived that this statute embodies the definition suggested for the negligent murder in the discussion of that offense, *supra*, plus the additional transitional device of naming four felonies in subsection (a) in the commission of which, if a homicide occurs, the actor would be guilty of what would amount to a negligent murder. Some of these felonies might be omitted from the subsection; other felonies might be added.

How would such a statute work? If a defendant committed a homicide in the course of any felony other than those named, the burden would be upon the prosecution to show that the particular felony, under the circumstances, was so extremely dangerous in itself as to show wantonly dangerous conduct upon the part of the actor and that there was a causal connection between the commission of the felony and the homicide. In other words the prosecutor would have to meet exactly the same burden of showing extremely dangerous conduct that he would have had to meet if the act out of which the killing arose had not been a felony. But if the homicide arose out of one of the named felonies there would be a conclusive presumption that the act was extremely dangerous. Nevertheless the element of causation would have to be satisfied.

The plan would be that in the course of time the transitional called felony murder would be exactly the same. Ten, fifty, or even more years might elapse before the transitional device could be eliminated.

Such a statute would have the advantage of the decided current trend in American statutes toward handling the felony murder in this manner.⁶²

⁶² Moreland, *The Law of Homicide* 217-25 (1952).

(2) The Felony Murder in the Model Penal Code of the American Law Institute.

The Model Penal Code of the American Law Institute handles the felony murder very similarly to the way suggested in the transition statute in (a) above. In other words, the Model Code combines the negligent and felony murders by providing a definition of the negligent murder and then adding, in the same section of the statute, an additional provision that the extreme negligence required for the negligent murder shall be "presumed" if the actor is engaged in any one of six named felonies. The statute reads:

Criminal homicide constitutes murder when:

(b) It is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing robbery, rape by force or intimidation, arson, burglary, kidnapping or felonious escape.⁶³

It will be perceived, however, that this statute differs from the transition statute in (a) above in two particulars:

(i) The definition of the negligent murder employs the word "recklessly" in defining the negligent murder. It is the key word to be used in the definition of the negligent manslaughter, to be discussed *infra*. Judges and juries would find it a matter of continuing difficulty to distinguish the negligence requisite for the two offenses, if the same word were employed to describe each, even though qualifying phrases were used. In addition, it is not believed that the word connotes the utter disregard or indifference for human life and safety requisite for the negligent murder even though the phrase "under circumstances manifesting extreme indifference" is added. The study group prefers instead to use the word wantonly as indicating the utter disregard for the lives and safety of others which is required.

(ii) The transition statute provides that if an unintentional homicide arose out of and in the commission of one of the named

⁶³ Model Penal Code §201.2(b) (Tent. Draft No. 9, 1959).

felonies the actor would be guilty of a negligent murder. To state it in another way, if the homicide occurred in the commission of one of the named felonies there would be a *conclusive presumption* that the killing arose out of an act so extremely dangerous as to make the offense a negligent murder as defined by the statute. The Model Code is less severe in that such extreme negligence is merely *presumed* from the doing of the named felony and, consequently, the presumption is rebuttable. That this is the proper interpretation of the statute is indicated by the Comment of those who drafted it: "If the presumption of extreme recklessness is rebutted, the homicide may still be adjudged reckless, in which event it constitutes manslaughter, as do all reckless homicides whether the actor's conduct is otherwise felonious or not." (Emphasis added.)⁶⁴

(3) English Homicide Act of 1957

The new English act abolishes the felony murder and somewhat changes murder by a killing arising out of resisting arrest and related offenses. Pertinent sections of the act provide:

1. (1) Where a person kills another in the course or furtherance of some other offense, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offense.

(2) For the purposes of the foregoing subsection, a killing done in the course or for the purpose of resisting an officer of justice, or of resisting or avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from legal custody, shall be treated as a killing in the course or furtherance of an offense.⁶⁵

Although the penalty for murder is prescribed by statute in England, its definition prior to this statute has been entirely dependent on the common law⁶⁶ Murder at common law is unlawful homicide with malice aforethought. That *remains* the definition of murder in England under this act. This requisite malice aforethought can be either express or implied, a common

⁶⁴ Model Penal Code §201.2, comment 4 (Tent. Draft No. 9, 1959).

⁶⁵ Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11; see 202 H.L. Deb. 726 (5th ser. 1957).

⁶⁶ Prevezer, *The English Homicide Act: A New Attempt to Revise the Law of Murder*, 57 Col. L. Rev. 624 (1957).

law classification continued in the act in Section 1 (1) Express malice, a requisite of the intentional murder,⁶⁷ discussed *supra*, is made out by showing an intent to kill or to do grievous bodily harm. Implied malice can be made out by showing that the unlawful killing arose out of the doing of an extremely dangerous act, illustrated by the negligent murder,⁶⁸ also discussed *supra*. Both the common law intentional murder and common law negligent murder are continued under the English act in section 1 (1)

But murder at common law may be categorized under two additional applications of the doctrine of implied malice. One of these is found in the felony murder, which is abolished in section 1 (1) of the act. Hereafter in England there must be shown the same implied malice (extreme negligence) which is required when the killing is not done in the course or furtherance of another offense. The other common law application of the doctrine of implied malice is found when the unlawful killing occurs in resisting lawful arrest and certain other related arrest situations. This category of murder is somewhat changed in section 1(2) of the act.⁶⁹ The extreme negligence required in these cases will be *treated as existing* where the killing occurred in resisting, avoiding, or preventing arrest.

The English act differs from both the transition statute discussed in (1) *supra* and the felony murder provision in the Model Penal Code of the American Law Institute discussed in (2) Each of these continues to incorporate certain named felonies in the negligent murder provision. The English act goes the whole way; it abolishes the felony murder completely and puts the affirmative burden on the Crown (state) to make out a case of negligent murder⁷⁰ in each case of implied malice, except in the homicide in the course of arrest cases.

⁶⁷ *Id.* at 625.

⁶⁸ *Id.* at 625-26. Note the discussion therein of the English definition of the negligent murder.

⁶⁹ This category of murder is not discussed in this paper. It has ceased to be recognized. It is discussed at some length in Moreland, *The Law of Homicide*, chs. 7 & 15 (1952). Moreland found only two or three statutory instances of its survival and concluded that they are "ill-advised legislation." *Id.* at 227.

For a description of the four states of mind constituting malice aforethought, express and implied, at common law see *id.* at 17 n.2. The book contains separate chapter discussions of each state of mind.

⁷⁰ For the English definition of negligent murder see *supra* note 68.

Having examined the three modern, current ways of handling the felony murder, the problem now arises of deciding how this historic offense should be treated in a homicide statute recommended for legislative action in Kentucky. Should such a statute utilize the transition statute, the felony murder provision of the Model Code, recommend the elimination of the offense completely as in the English Act, or even, perhaps, use some fourth manner of treatment of the ancient crime?

It has been determined to follow the new English act and recommend the complete abolishment of the doctrine. The felony murder should be abolished because it is a historic survivor for which there is no logical or practical basis for existence in modern law.⁷¹ Judge Stephen put his finger on the fundamental error in the doctrine when he decided in *Regina v. Serné* that it was the amount of danger in the act rather than the fact that it was an unlawful one that created liability for the homicide.⁷² The doctrine "was smuggled into the common law"⁷³ at a time when the punishment for all felonies was death by hanging, so it made little difference whether the actor was hanged for the felony or the homicide. The time has long since passed when it should have been weeded out of the law. The test has now become, was the act in itself, regardless of its unlawfulness, so extremely dangerous and indifferent to the lives and safety of others as to constitute wantonly negligent conduct? Stating the rule in this manner throws such cases squarely into the negligent murder category.⁷⁴

The decision to abolish the felony murder, if followed, *should not change existing Kentucky law* for any practical purpose. Granting that the common law felony murder is recognized in the state in one line of cases,⁷⁵ the passage of KRS 431.075 stopped the practicality of prosecution for the offense, because the penalty for involuntary manslaughter is the same.

The thinking and reasoning up to this point as to the felony murder would call for the abolishment of the offense from Ken-

⁷¹ Ohio has abolished the felony murder. Note, 17 Ohio L.J. 130 (1956).

⁷² [1887] 16 Cox Crim. Cas. 311, 313.

⁷³ Corcoran, *Felony Murder Doctrine in New York*, 6 Fordham L. Rev. 43, 53 (1937).

⁷⁴ Moreland, *The Law of Homicide* 50 (1952).

⁷⁵ Text accompanying notes 58-60, *supra*.

tucky law and the punishment of such a homicide under the new statute, involuntary manslaughter in the first degree, passed by the 1962 Legislature. However, the solution to the problem of the felony murder in Kentucky is not as simple as that. This is because the courts have created in this state the felony willful murder. This decision-created offense, whose very name is a contradiction in terms, will now be discussed.

The Felony Willful Murder

This impossible crime, comparable to that other impossible unlawful homicide, the Kentucky negligent voluntary manslaughter, which was also created by the courts, is found in a line of Kentucky decisions. However, it should be remembered that the historical felony murder is an *unintentional* homicide. The killer has *implied* malice, not *express* malice. With this well-known historical principle in mind, the question arises as to how it was possible for the Kentucky courts to turn an unintentional felony murder into an intentional willful one punishable under KRS 435.010, a willful murder statute.

Nevertheless, there can be no question but that the doctrine is in Kentucky decision law and that it runs far back in the cases.⁷⁶ Nor can there be any mistake as to what is going on for the opinions are explicit in their language. For example, the Kentucky Court of Appeals said in 1943:

The intent to perpetrate a different felony during the commission of which a person is killed, *supplies* the elements of malice and intent to murder *although the death is actually against the original intention of the party*. Responsibility for the consequence rests on the initial or contemplated purpose. (Emphasis added.)⁷⁷

⁷⁶ Roberson, *New Kentucky Criminal Law, Procedure and Forms* §357 (2d ed. 1927) (citing early cases). The reasoning in Roberson and in some of the cases cited therein is exceedingly loose. Of course the common law *unintentional* felony murder with implied malice is very old but to interpret this category of murder in terms of express malice and intentional act is both illogical and technically unsound, no matter who does it. For example, Roberson quotes Hawkins out of context as follows: "It is a general rule that whenever a man intending to commit one felony happens to commit another, he is as much guilty as if he had intended the felony which he actually commits." *Ibid.* To interpret the second felony in this quote in terms of intent is extremely dangerous and probably wrong in more instances than right.

⁷⁷ *Simpson v. Commonwealth*, 293 Ky. 631, 170 S.W.2d 869-70 (1943).

A leading case in the unfortunate series is the well-known recent one of *Tarrence v. Commonwealth*,⁷⁸ decided about ten years ago. In that case the Tarrences, father and son, killed a Louisville lawyer who had been representing the wife of the son in obtaining a divorce. The defendants abducted the lawyer, a felony under KRS 435.150, and in the course of the abduction killed him. The court considered that they were guilty of willful murder under KRS 435.010. In the course of the opinion the appellate court said.

[I]n this jurisdiction the usual form is an instruction that if the accused committed or attempted to commit another felony and in doing so killed a person, the jury should find him guilty of murder.⁷⁹

Stanley on Instructions has an approved instruction, modeled on a Kentucky case,⁸⁰ which points up specifically and graphically the present rule that in this state an unintentional homicide occurring in the commission of a felony is willful murder. The approved instruction reads as follows:

Sec. 870. Murder while committing another felony If the jury shall believe from the evidence beyond a reasonable doubt that the defendant, C. M., in this county and before the finding of the indictment herein, unlawfully, willfully, feloniously and maliciously, with an offensive weapon, assaulted and attempted to hold up and rob the truck in which the deceased, R. M., was riding, and with the intention to rob said truck or any person thereon, and that in doing so he willfully and feloniously shot at and into the truck and thereby wounded and killed R. M., then you should find the defendant, C. M., guilty of willful murder and fix his punishment at death or confinement in the penitentiary for life, in your discretion.⁸¹

If the felony willful murder were abolished, the problem would arise as to what principle should then govern the prosecu-

⁷⁸ 265 S.W.2d 40 (Ky. 1953); *accord*, *Centers v. Commonwealth*, 318 S.W.2d 57 (Ky. 1958); *Page v. Commonwealth*, 317 S.W.2d 879 (Ky. 1958); *Whitfield v. Commonwealth*, 278 Ky. 111, 128 S.W.2d 208 (1939); *Manion v. Commonwealth*, 269 Ky. 729, 108 S.W.2d 721 (1937); *Williams v. Commonwealth*, 258 Ky. 830, 81 S.W.2d 891 (1935); *Reddick v. Commonwealth*, 17 Ky. L. Rep. 1020, 33 S.W. 416 (Ct. App. 1895).

⁷⁹ 265 S.W.2d at 51. The court is speaking here of willful murder under KRS 435.010.

⁸⁰ *Maxey v. Commonwealth*, 255 Ky. 330, 74 S.W.2d 336 (1934).

⁸¹ *Stanley, Instructions to Juries* §870 (1940).

tion of such cases. As stated above, it is believed that such offenses should be prosecuted and punished as involuntary manslaughter in the first degree under the new involuntary manslaughter statute passed by the 1962 Legislature. That proposition will be developed in the discussion of that statute later in this paper.

II. MANSLAUGHTER

A. *Voluntary (intentional) manslaughter*

Any discussion of voluntary manslaughter should begin with the specific statement that voluntary manslaughter is an unlawful *intentional* killing. The very word voluntary indicates that. The question then immediately arises, why are not such homicides punished as murder? It is in answering and rationalizing the answer to that question that a discussion of this crime centers.

From early times the punishment for certain intentional unlawful homicides has been reduced to manslaughter because of extenuating circumstances. The primary problem, then, in a discussion of voluntary manslaughter is to determine what exceptional circumstances have been accepted by the law as justifying such a reduction and to make a determination as to whether the same circumstances should serve as reducing agents today

(a) *Provocation.*

The law has long recognized that such provocation as might raise heat of passion in a reasonable man may serve as a mitigating agent to reduce an intentional unlawful homicide to voluntary manslaughter. Such mitigation, it is said, is buttressed upon "a thorough knowledge of the human heart, and framed in compassion to the passions and frailties which belong to and are inseparable from our natures."⁸² A reasonable man should not commit an unlawful killing because of provocation. But reasonable men *do* occasionally become filled with heat of passion because of provocation, and then kill. The law takes cognizance of this fact. Technically the law *might* be that since such homicides are intentional, and not excusable or justifiable, the offense is

⁸² State v. Ferguson, 20 S.C. (2 Hill) 619, 622 (1835); Foster, Crown Law 296 (2d ed. 1791); 1 Russell, Treatise on Crimes and Misdemeanors 513 (7th American ed.).

murder. On the other hand, the law *might* make such homicides wholly excusable because of the mitigating circumstances. The law does neither. As a matter of social policy, the law compromises with the defendant in this instance, splitting the difference, as it were, between intentional murder and excusable homicide. While a reasonable man should not be punished for murder when he kills under provocation, neither should he go scot free. The law adopts an in-between position and holds him for voluntary manslaughter⁸³ if, in fact, he was filled with heat of passion.⁸⁴

The law has long recognized the following four situations as sufficient to raise such heat of passion in a reasonable man as to justify letting them serve as mitigating agents in cases of intentional killing: (1) sudden, mutual combat, (2) the sight of adultery of one's wife, (3) an assault and battery upon one's person, and (4) an illegal arrest.⁸⁵ There are Kentucky decisions that sudden, mutual combat,⁸⁶ the sight of adultery of one's wife,⁸⁷ and an assault and battery upon one's person⁸⁸ may constitute sufficient provocation to reduce what would otherwise be an intentional murder to voluntary (intentional) manslaughter. Whether an illegal arrest by an officer will serve as provocation in Kentucky is doubtful.⁸⁹ It is believed that the common law and majority rule that an illegal arrest may serve as provocation is the better one. While one should not kill to prevent an illegal arrest, nothing raises greater heat of passion in the breast of a reasonable liberty-loving person, and the law does well to mitigate the offense and the punishment for one whose emotions

⁸³ Moreland, *The Law of Homicide* 67 (1952).

⁸⁴ The test of provocation is an objective one (the reasonable man) but if in fact the defendant, subjectively speaking, was not filled with heat of passion there is no reduction. So the law catches the defendant coming and going. *E.g.*, *Davidson v. Commonwealth*, 167 Va. 451, 187 S.E. 437 (1936).

⁸⁵ For a detailed discussion of these four situations which may serve as provocation, see Moreland, *The Law of Homicide* 69-87 (1952).

⁸⁶ *Hanna v. Commonwealth*, 242 Ky. 584, 46 S.W.2d 1098 (1932); *Roberson, op. cit. supra* note 76 §383; *Gregory, op. cit. supra* note 44, §86.

⁸⁷ *Harris v. Commonwealth*, 236 Ky. 666, 33 S.W.2d 666 (1930) (dictum); *Roberson, op. cit. supra* note 76 §389.

⁸⁸ *Williams v. Commonwealth*, 80 Ky. 313 (1882); *Roberson, op. cit. supra* note 76, §384.

⁸⁹ *Alsop v. Commonwealth*, 4 Ky. L. Rep. 547, 11 Ky. Op. 851 (Ct. App. 1882) (illegal arrest would not reduce murder to voluntary manslaughter); see *Dickey, Culpable Homicide in Resisting Arrest*, 18 *Corn. L.Q.* 373 n.40 (1933). *But see Wright v. Commonwealth*, 85 Ky. 123, 2 S.W. 904 (1887) (illegal arrest by private person) (defense of one's habitation).

are so sorely pressed that he *does* kill because of the heat of passion engendered by the unlawful arrest.⁹⁰

It is commonly said that cases of intentional unlawful killing are reduced to voluntary manslaughter, if at all, by *provocation*.⁹¹ However, this is an inaccurate statement. As several writers have pointed out, there are a number of cases holding that there are a few situations where a defendant may be convicted of voluntary manslaughter because of an extenuating circumstance other than provocation. In other words the provocation category is too narrow to encompass all the cases of voluntary manslaughter. Among the extenuating circumstances, other than provocation, which may reduce an intentional homicide to voluntary manslaughter are: (1) situations involving an imperfect defense of self or of another person, or of habitation, (2) the mental deficiency of the accused,⁹² and (3) drunkenness.⁹³

(b) *Situations of imperfect defense of self, of another person, or of habitation, and some similar situations.*

Situations of "imperfect" defense of self, of another, or of habitation occur where the defendant would be entitled to plead self-defense, or defense of another person or habitation if he had not been at fault in bringing on the difficulty which resulted in the homicide. If he were permitted to plead self-defense or defense of another or of habitation he would be guilty of *no* crime;⁹⁴ since he was at fault in bringing on the difficulty, he is denied the right to a perfect defense. But instead of being guilty of murder because of the intentional killing the law compromises by holding him guilty of voluntary manslaughter only, as happened in a case where the accused was caught in the act of adultery and killed the husband to save his own life.⁹⁵ Similar to the imperfect self-defense cases are those in which the slayer erroneously and unreasonably believed that his life or the life of another was in danger, or in which the accused used greater

⁹⁰ See generally Moreland, *The Law of Homicide* 77-82 (1952); Dickey, *supra* note 89, at 387.

⁹¹ Note, 36 Ky. L.J. 482 (1948).

⁹² Compare Arnett Mann's categorization, Note, 36 Ky. L.J. 443, 452-53 (1948).

⁹³ See generally notes 101-26, *infra*, and accompanying text.

⁹⁴ *White v. Commonwealth*, 333 S.W.2d 521 (Ky. 1960).

⁹⁵ *Reed v. State*, 11 Tex. App. 509 (1892); see Roberson, *op. cit. supra* note 76, §537.

force than was reasonably necessary⁹⁶ Some of these cases expressly state that heat of passion is not always necessary to make out the offense of voluntary manslaughter.

(c) *Mental deficiency not amounting to legal insanity.*

Similarly, mental deficiency, not amounting to legal insanity, without heat of passion may reduce an intentional unlawful homicide to voluntary manslaughter. This category has not been accepted to any large extent but there is authority for it in several states, including Kentucky, and its logic is persuasive. There are several Kentucky cases subscribing to the mitigating influence of the rule of diminished responsibility because of mental deficiency. In *Mangrum v. Commonwealth*, the court affirmed a conviction of voluntary manslaughter based upon an instruction that the jury should acquit the defendant if they should believe him insane or "if they [should] believe from the evidence that he was of weak or feeble mind, they should consider that fact in determining the degree of his guilt and the measure of his punishment."⁹⁷ Similarly, in *Rogers v. Commonwealth*,⁹⁸ the Kentucky court reversed a conviction of murder, holding that the accused was entitled to an instruction on voluntary manslaughter. The court said that the mental condition of the defendant, "whether feeble-minded or otherwise," was a factor to be taken into consideration by the jury in determining whether the malice requisite for murder existed at the time of the homicide.

It should be emphasized that mental deficiency as a mitigating influence should be sparingly and conservatively administered. There is much flux presently in the law as to the *legal* defense of insanity which is a *complete* defense to a crime. Most states still subscribe to the rule in *McNaughten's Case*.⁹⁹ About one-third of the American states, including Kentucky, add to that rule the further amelioration of irresistible impulse.¹⁰⁰ But many persons think the legal test of insanity still too severe. For such persons, mental deficiency which does not excuse the crime, as

⁹⁶ See 2 Burdick, *Law of Crime* §461 (1946); note, 36 Ky. L.J. 443, 447 (1948); Note, 37 Ky. L.J. 334, 337 (1949).

⁹⁷ 19 Ky. L. Rep. 94, 95, 39 S.W. 703, 704 (Ct. App. 1897).

⁹⁸ 96 Ky. 24, 27 S.W. 813 (1894).

⁹⁹ Moreland, *The Law of Homicide* 276 & n.31 (1952).

¹⁰⁰ *Id.* at 283 & n.56.

does legal insanity, but only reduces it, serves as an experimental means of softening the legal insanity rule. But this new extension in the law should be carefully and conservatively applied, else it will gain disfavor and its purpose be defeated.

(d) *The Use of Drunkenness to Reduce Willful (Intentional) Murder to Voluntary Manslaughter*

Under the strict, usual enunciation of the common law rule, drunkenness was no defense to crime. However, if an accused were too drunk to formulate a specific intent, a prosecution for a crime requiring specific intent would fail.¹⁰¹ Murder, for instance, could not be reduced to manslaughter for the sole reason that the accused was drunk. This remains the rule in some jurisdictions.¹⁰²

However, today in some states having statutes distinguishing different degrees of a specified crime, for example where first degree murder requires premeditation, intoxication may reduce a charge of first degree murder to murder in the second degree. The theory is that the intoxication may be so great as to prevent the accused from having the premeditation required for the higher offense.¹⁰³ This is reasonably logical and no particular deviation, it may be argued, from the general rule since it may be said that the accused is too drunk to form the grade of intent (premeditation) requisite for the higher crime. This is certainly true as to those grades of second degree murder requiring only *general* intent as opposed to actual or specific intent, such as the negligent murder, but it is arguable that it is also true where simple intent, rather than general intent, is required for second degree murder, for it may be argued (but less forceably) that simple intent requires less specificity than premeditation.

But the argument becomes even less logical and persuasive when drunkenness is used to reduce a charge of willful (intentional) murder to voluntary manslaughter. And yet it is a fact in quite a number of jurisdictions that the drunkenness of the accused may operate to reduce intentional murder to voluntary manslaughter. The contention that the intent requisite for willful murder is more specific than the intent required for voluntary manslaughter is fallacious, it may be argued, and wholly outside

¹⁰¹ Director of Pub. Prosecutions v. Beard, [1920] A.C. 479.

¹⁰² 1 Burdick, Law of Crime §169 (1946).

¹⁰³ *Ibid.*

the historic reasoning that supports the voluntary manslaughter category in the law of homicide. It is often said that intentional unlawful homicide is reduced to voluntary manslaughter upon a rationalization of *mitigation*, not lack of an ability to make out the intent requisite for intentional murder. To state it differently, voluntary manslaughter as it developed historically was an unlawful homicide resulting from an intention to kill or to do grievous bodily harm and consequently would have been murder, *except for some sort of extenuating circumstance*.

So, to reduce a willful (intentional)¹⁰⁴ killing because the voluntary drunkenness of the accused made it impossible for him to have the willfulness requisite for the higher crime of murder creates a decided departure in the rationale of voluntary manslaughter. There is also the additional fact that it is difficult to substantiate an argument that the intent required for *willful murder* is any different in degree or kind from the intent requisite for *voluntary (willful) manslaughter*. The word voluntary means no more and no less than the killing was willful (intentional). It is submitted that *there are no degrees of willfulness*, unless the concept is made more specific by some additional requisite such as deliberation or premeditation. This additional requisite is not found in the case of willful murder.

And yet the fact remains that there is a considerable number of cases where under modern statutes a willful (intentional) unlawful killing has been reduced to voluntary (willful) manslaughter because of drunkenness. Such decisions may be found in England, in Kentucky, and in various other jurisdictions. A number of them will be examined and a determination made as to whether they represent a wise social policy. If it is determined that they do, an attempt will be made to fit them into accepted principles and it will be decided whether a reduction for this reason should be incorporated in the suggested Homicide Act.

(1) Situation in England.

The fact that in England drunkenness may reduce an intentional (willful) killing to voluntary manslaughter is recognized by Kenny in his discussion of provocation as a reducing agent. He

¹⁰⁴ The word willful rather than intentional is used because KRS 495.010 uses the word "willful" rather than intentional.

points out that the accused will not have his crime reduced because he is more sensitive and more susceptible to heat of passion than ordinary men, but that there are cases where because of the temporary effect of alcohol the accused was rendered more inflammable than an ordinary man and this has reduced the offense. Apparently he considers this reduction to fall within the category of provocation.¹⁰⁵ He concludes that "such uncertainty is a defect in any branch of a legal system."¹⁰⁶ He then adds that the Homicide Act of 1957 has made some changes, apparently with the hope that it will clarify the situation, but the study group is unable to find anything in the act which might justify such wish. It may be stated that Kenny considers such reduction because of drunkenness as having another possible explanation, that drunkenness may create an inability in the accused to form the intent requisite for intentional murder.¹⁰⁷ These are the two possible explanations commonly given for the reduction. Neither is very satisfactory from a technical standpoint.

To support the position that drunkenness may serve as provocation in such cases to reduce the offense to manslaughter, Kenny cites *R. v. Hooper*¹⁰⁸ and *R. v. Letenock*.¹⁰⁹

(2) Kentucky Cases.

The proposition that drunkenness may serve to reduce willful murder to voluntary manslaughter has been given credence in several Kentucky cases and in Gregory's text on Kentucky criminal law¹¹⁰ In *Long v. Commonwealth*¹¹¹ the court held that an instruction on voluntary manslaughter should have been given. Part of the reason for the holding was the fact of the defendant's drunkenness which the court held might have served to reduce the offense from willful murder. The court cited Gregory in support of the holding. In a subsequent Kentucky case, *Lee v. Commonwealth*,¹¹² the appellate court held that "drunkenness may show an absence of malice. Although it does not excuse the

¹⁰⁵ Kenny, *Outlines of Criminal Law* 60 (17th ed. 1951).

¹⁰⁶ *Ibid.*

¹⁰⁷ *Id.* at 59.

¹⁰⁸ [1915] 2 K.B. 431.

¹⁰⁹ [1917] 12 Crim. App. R. 221.

¹¹⁰ Gregory, *Kentucky Criminal Law, Procedure and Forms* §94 (1918).

¹¹¹ 262 S.W.2d 809 (Ky. 1953).

¹¹² 329 S.W.2d 57 (Ky. 1959). See also *Jones v. Commonwealth*, 311 S.W.2d 190 (Ky. 1958); *Pash v. Commonwealth*, 146 Ky. 390, 142 S.W. 700 (1912).

crime, intoxication of a defendant may be considered in determining the degree of the homicide."¹¹³ This case follows the rationalization that drunkenness may prevent the accused from having the type of willfulness (malice) requisite for murder, although he will still be guilty of willful (voluntary) manslaughter. The *Lee* case cites a much earlier Kentucky case, *Henderson v. Commonwealth*,¹¹⁴ which states that it is competent to prove drunkenness as bearing *merely* upon the existence or non-existence of malice. The case specifically states that drunkenness cannot mitigate the offense but can only be used to show that the accused could not be guilty of murder because unable to form the malice requisite for the higher crime. This case definitely repudiates the theory that such cases fall into the category of provocation. It would therefore appear that Kentucky follows the view that drunkenness may reduce a willful murder to voluntary manslaughter because it may serve to prevent the accused from being able to form the willfulness (intent) requisite for the higher offense.

(3) Decisions in other states.

Decisions to the effect that drunkenness may reduce intentional murder to voluntary manslaughter may also be found in other states. Supporting the theory that the drunkenness of the accused may prevent him from forming the malice (intent) requisite for murder and thus reduce the offense to manslaughter are the 1952 Alabama case, *Ray v. State*,¹¹⁵ and *State v. Sprouse*,¹¹⁶ an Idaho case decided in 1941. Other cases are to the same effect.¹¹⁷ Cases supporting the theory that drunkenness may cause the accused to be more susceptible to provocation than a sober man and so reduce the offense may also be found.¹¹⁸

It may be concluded then that, while there are cases to the contrary, there are decisions in England, in Kentucky and in certain other states subscribing to the proposition that drunkenness may serve to reduce an intentional (willful) murder to

¹¹³ 329 S.W.2d at 60.

¹¹⁴ 24 Ky. L. Rep. 1985, 72 S.W. 781 (Ct. App. 1903).

¹¹⁵ 257 Ala. 418, 59 So. 2d 582 (1952).

¹¹⁶ 63 Idaho 166, 118 P.2d 378 (1941).

¹¹⁷ Weihofen, *Mental Disorder as a Criminal Defense* 182 n.23 (1954); 1 Burdick, *Law of Crime* 218 n.32 (1946).

¹¹⁸ 1 Burdick, *Law of Crime* 218 n.33 (1946).

voluntary manslaughter. It may be further concluded that such decisions rest upon two rationalizations: (1) that drunkenness may prevent the accused from forming the higher degree of intent (malice) requisite for murder, and (2) that because of the temporary effect of alcohol the mind of the accused may be rendered more inflammable than the mind of an ordinary person would be and so more readily full of heat of passion. This reasoning causes such cases to fall into the provocation category

It must be admitted that neither of these explanations for reduction because of drunkenness is very satisfactory. To say that drunkenness may prevent the accused from forming the higher grade or degree of intent (willfulness) requisite for murder by interpreting it in terms of the outmoded word malice, and so reduce the offense to intentional (voluntary) manslaughter is to say, in a sense, that intention is divisible into degrees. Historically, murder required malice *aforethought*. Manslaughter was unlawful homicide *without malice aforethought*. Then the intention factor was a real difference between intentional murder and intentional manslaughter. But *aforethought* is no longer a factor in simple intentional (willful) murder. So, it is submitted, it is strained reasoning to say that a higher degree of intent is required for intentional murder than for intentional (voluntary) manslaughter. And yet a sense of justice makes the argument that a higher degree of intention (willfulness) is required for murder than for manslaughter somewhat persuasive.

The explanation that such reduction falls into the provocation may create a situation where the mind is more easily inflamed than that of an ordinary man would be and so he might have heat of passion in a situation where the mind of a sober man would not be inflamed. But the law has always taken a harsh attitude toward drunkenness as a defense since the condition was caused by the drunkard's own voluntary act. His condition was *due to his own fault*. Consequently, it may be argued that there is the cold practical fact that to reduce because of drunkenness would cause a great many accused persons to escape proper liability for their crimes.

And yet there is accepted precedent for the reduction of a willful killing, although the killer was originally at fault, in the old provocation category of sudden, mutual combat (sudden

affray)¹¹⁹ Two men meet and A makes a slanderous statement or does some other unlawful act like leading with his sword. If B, the other person involved, shows that he wants to fight and to engage in mutual combat but is killed in the encounter, A's original unlawful act is not apt to prevent him from having his offense reduced to voluntary manslaughter *on the doctrine of provocation*.

Another illustration of the fact that there is accepted precedent for the reduction of an intended killing, although the killer was originally at fault, is found in the historic doctrine of imperfect self-defense. A defendant is caught by a husband in the act of adultery with his wife. The adulterer kills the husband in self-defense. He is not permitted to plead *perfect* self-defense but his fault in bringing on the situation will not prevent him from having his offense reduced to voluntary manslaughter in *imperfect* self-defense. Incidentally, cases of imperfect self-defense are not in the provocation category. They represent a separate category. If fault in bringing on the situation will not prevent the reduction in these cases why should it prevent the reduction in situations of voluntary drunkenness?¹²⁰

There is also a rather strong argument for reduction on the ground that the drinking of intoxicating liquor is one of the common frailties of man. The whole doctrine of provocation, the original basis for reduction, is built upon a recognition of man's frailty and of a desire of the law to show mercy in certain situations by permitting a reduction of the offense. It may well be argued that drunkenness is one of the situations that should fit into such a scheme of reduction.

As a matter of fact, however, the issue as to whether drunkenness should serve to reduce willful murder to voluntary manslaughter does not have to be faced in drafting the proposed Kentucky Homicide Act. There is no compelling reason for

¹¹⁹ Moreland, *The Law of Homicide* 69 (1952).

¹²⁰ It is interesting that one member of the study group suggests that an accused may have been too drunk to form intent. So he should (technically) be excused of the homicide because the state cannot make out a case (of either murder or voluntary manslaughter). But, *as in imperfect self-defense*, the law will not excuse him altogether and so compromises by making it voluntary manslaughter. It is believed that this rationalization is better than either of the two found in the cases. Such reasoning would make a separate category of drunkenness as a reducing agent. The only trouble with it is that the courts do not use it; such reasoning is not found in the cases.

incorporating it. If it is desirable to permit drunkenness to serve as a reducing agent, there is a basis for it under either of the explanations for the doctrine without incorporating the proposition specifically in the proposed act. If the courts desire to give credence to the doctrine under the theory that reduction because of drunkenness is reduction because of provocation, the general provision incorporating the common law definition of provocation, which is recommended in the act, may be seized upon. If, as in past Kentucky decisions, it is desired to rationalize the reduction as based upon the Commonwealth's inability to make out the intention (willfulness) requisite for murder, Kentucky precedents and accepted legal principles already exist which support that proposition. On the other hand, if it were deemed wise to repudiate such a reduction, a negative provision in the act specifically repudiating the proposition would seem to be most unwise in the face of several Kentucky decisions accepting it and the fact that it has a certain amount of persuasiveness as a matter of public policy. So in either view the proposition need not be mentioned in the proposed act unless it be for the purpose of making the law more clear and explicit by codifying the various factors which will reduce intentional (willful) murder to voluntary manslaughter.

(e) *Is there a conflict in the use of Mental Deficiency and Drunkenness in reducing murder to voluntary manslaughter?*

The question arises whether there is a conflict between the use of mental deficiency not amounting to legal insanity, as categorized in section (c) of this discussion, and drunkenness, in section (d), as factors reducing murder to voluntary manslaughter. The study group takes the position that there is no clash or conflict in using these two reducing agents.

Kentucky, which has used both of these agents on occasion to reduce murder to voluntary manslaughter, will be used to illustrate the point. *Mangrum v. Commonwealth*¹²¹ and *Rogers v. Commonwealth*,¹²² which used the mental deficiency of the accused not amounting to legal insanity to reduce the offense to

¹²¹ 19 Ky. L. Rep. 94, 95, 39 S.W. 703, 704 (Ct. App. 1897).

¹²² 96 Ky. 24, 27 S.W. 813 (1894).

voluntary manslaughter, contained no element of drunkenness, so they are not helpful on the problem.

A third case, *Horn v. Commonwealth*,¹²³ is of help on the problem although the case is one in which it was alleged that the defendant had delirium tremens. Delirium tremens is a form of *legal insanity*. Cases of mental deficiency, the type of mental disorder under consideration, are *less than legal insanity*, it should be pointed out, so the case is not exactly in point. However, Judge Thomas held that as the case involved alleged drunkenness and mental disorder it was proper to give an instruction on voluntary manslaughter on the facts disclosed in the record "on the ground that defendant's condition, howsoever produced, may have been such as to deprive him of the necessary element of malice or malice aforethought essential to create the crime of murder."¹²⁴ This case seems to furnish the answer to the problem of the relation of drunkenness and mental deficiency as agents to reduce willful murder to voluntary manslaughter. There are cases holding that each may serve as such reducing agent in Kentucky. If both are involved in a particular case, each can be submitted to the jury for them to determine whether the offense should be reduced. The only question is whether a separate instruction should be given as to each or whether *one instruction* on voluntary manslaughter is sufficient. The *Horn* case is one where *one instruction* on voluntary manslaughter was given and the conviction of voluntary manslaughter was affirmed.

It is believed that this is proper, for as Judge Thomas said: the question is whether defendant's condition "however produced"¹²⁵ was such as to keep him from having the malice requisite for murder. It is the position of the study group that under such a single instruction the jury might correctly find the offense reduced by drunkenness, by mental deficiency, or by a combination of the two.¹²⁶ The presence of either will not

¹²³ 167 S.W.2d 58 (Ky. 1943).

¹²⁴ *Id.* at 61.

¹²⁵ *Ibid.*

¹²⁶ "Where the defense relies on the consequential effect of intoxication on a mind already mentally disordered, the defendant is entitled to have this clearly presented in the charge, and it is error to state the law on insanity and the law on intoxication separately." Weihofen, *Mental Disorder as a Criminal Defense* 125 (1954) (citing cases pro and con). It is believed that the *Horn* case supports the statement and represents the Kentucky view.

prevent the other from reducing. Thus, there is no conflict or clash between drunkenness and mental deficiency as reducing agents; they may operate independently to reduce or not to reduce, or a combination of the two may serve to reduce, or not to reduce, depending upon the finding by the jury

(f) *The Kentucky negligent voluntary manslaughter*

It becomes necessary at this point to discuss the negligent voluntary manslaughter, the impossible crime practically unknown in other jurisdictions.¹²⁷ It got into Kentucky criminal law in the following manner. As mentioned earlier in this study, there are two lines of decisions in this state, one line recognizing the common law *negligent murder*, the other repudiating it.¹²⁸ Those who refused to recognize the negligent murder diverted those homicides to the lower level of manslaughter. But common law *involuntary* manslaughter by gross negligence was retained; the negligent murder became the new offense of *negligent voluntary* manslaughter, punishable under KRS 435.020. Several things contributed to the reasoning behind such a departure. One was the faulty reasoning that one *intends* the natural consequences of his acts. It is true that such a proposition, somewhat shaky at its best, is found in homicide on the *intentional* murder level. Note that the proposition itself states: one *intends*. The proposition should not be used unless the homicidal *result* is "practically or substantially certain."¹²⁹ For example, one who shoots into a crowd of people may be convicted of *intentional* murder because it is substantially certain that he will kill or grievously wound somebody in such a compact group. But negligence is never intent; the dangerous act may be intended but the *result* of the negligent act is never intended. If it is, the offense is intended homicide, not homicide by negligence. So this proposition as to *intending* natural and probable consequences should not apply

¹²⁷ However, unfortunately, it is not *wholly* unknown. Alabama, for example, has a statute defining manslaughter in the first degree as "Manslaughter by voluntarily depriving a human being of life." Ala. Code Ann. tit. 14, §320 (1958). A wanton killing is a voluntary killing within the definition of manslaughter in that statute. A positive intent to kill is not necessary. The statute is satisfied if the defendant does an act greatly dangerous to the lives of others whereby death ensues. *Ramey v. State*, 245 Ala. 458, 17 So. 2d 687; *Gills v. State*, 35 Ala. App. 119, 45 So. 2d 44; *Clayton v. State*, 36 Ala. App. 175, 54 So. 2d 719.

¹²⁸ Pp. 71-72 *supra*.

¹²⁹ Moreland, *The Law of Homicide* 18-19 (1952).

to negligence. Negligence is always dangerous conduct and shows probable danger but never *intent*, so it can never result in a *voluntary* (intentional) manslaughter.

It is also possible that a certain amount of social policy entered into the creation of this impossible Kentucky crime, the negligent voluntary manslaughter. At that time the punishment for all murder, common law and statutory, was life or death. Both of these are severe. Juries are often loth to give such a severe punishment for a negligent homicide. The next choice available to those who desired to do away with the common law negligent murder was involuntary manslaughter by negligence, a common law offense in Kentucky for which the punishment may have been considered too small for killing by negligence on the murder level. The punishment for voluntary manslaughter in Kentucky is from two to twenty-one years,¹³⁰ a wide span offering an adjustment of the punishment to the circumstances. So it was quite practical to divert such common law negligent murders to the voluntary manslaughter category. The technical fact that negligent homicide is never voluntary (intentional) was disregarded. Finally the common law offense of negligent murder was completely killed off for all practical purposes by KRS 431.075, which limits the punishment for all common law crimes not specifically provided for by statute to imprisonment for a term not exceeding twelve months or a fine not exceeding 5,000 dollars or both.

But whatever the cause or the reasoning for creating the negligent voluntary manslaughter it is firmly entrenched in the decision law of Kentucky. One of the leading older cases supporting the preposterous negligent voluntary manslaughter and indicating the court's confusion as to the technicalities of the situation, as well as its loose use of adjectives which are not synonyms to describe the offense, is *Ewing v. Commonwealth* in which the court said:

When we reject the doctrine of implied malice, the issue of malice is a question for the jury, and the offense which would otherwise be murder becomes voluntary manslaughter, where under the evidence the jury find as a fact that the killing was done with malice aforethought. Accordingly it has been held in Kentucky in a long line of cases

¹³⁰ KRS 435.020.

that, where one kills another by the wanton, reckless, or grossly careless use of firearms, the offense, if without malice aforethought, is voluntary manslaughter, although he had no intention.¹³¹

A current illustration of the illogical, confused and generally undesirable situation which the negligent voluntary manslaughter has led to in a long line of ambiguous decisions is found in *Marye v. Commonwealth*.¹³² There a highly respected appellate judge, in reversing the case for error in the instructions on involuntary manslaughter by negligence, laid down the instructions—and correctly, it is submitted, in the light of Kentucky decisions—to be given in the subsequent trial of the case. The judge stated that at the new trial the instruction on voluntary (negligent) manslaughter should require a finding of reckless and wanton conduct and that the instruction on involuntary manslaughter (by negligence) should require a finding of gross negligence. Gross negligence he defined as a failure to exercise slight care, but he pointed out that more than ordinary negligence was required in a criminal case. Two editorials in the *Lexington Leader*¹³³ were extremely critical of the existing law as laid down in the *Marye* case, pointing out that one can exercise slight care by having one hand on the steering wheel of an automobile and one foot within reaching distance of the brake pedal. The editorials stated that the Legislature owed it to the people of Kentucky to give them more protection. Thus the Legislature did, under the leadership of Senator Richard Moloney of Lexington, passing KRS 435.025, which makes it a crime to kill by the negligent operation of an automobile. The Court of Appeals has held in several cases that this statute is satisfied by ordinary negligence.¹³⁴

As a result of the creation of the *negligent, voluntary* manslaughter, there now exists in Kentucky an impossible substantive crime, since it is impossible to link *negligence* and *intention*. In addition, ambiguous adjectives have been used, sometimes in one combination, sometimes in another, to describe the crime. For

¹³¹ *Ewing v. Commonwealth*, 129 Ky. 237, 111 S.W. 352 (1908) (citing other Kentucky cases).

¹³² 240 S.W.2d 852 (Ky. 1951).

¹³³ *Lexington Leader*, Oct. 26, 1951, p. 4; *id.*, Nov. 13, 1951, p. 4.

¹³⁴ *E.g.*, *Kelly v. Commonwealth*, 267 S.W.2d 536 (1954).

example, the court used "wanton, reckless, and grossly careless" in the *Ewing* case to describe the offense,¹³⁵ terms which are by no means synonyms. The *Marye* case eliminated the phrase grossly careless from the enumeration but the current trend is away from linking wanton and reckless in describing the same degree of criminal negligence.

The situation as to description is still worse on the level of involuntary manslaughter. Courts today in states other than Kentucky no longer use gross negligence to define the negligence required for involuntary manslaughter; they use the word reckless, a word pre-empted in Kentucky by the negligent voluntary manslaughter. Worse still is the definition of the outmoded phrase gross negligence as want of slight care. Want of slight care is practically no care. The situation under existing law is intolerable.

And yet the judge who wrote the opinion in the *Marye* case is not to be criticised; he stated the law as it exists in Kentucky backed by a long line of decisions. The Kentucky Court of Appeals is also not to be criticised for the current situation, because the law does give credence to stare decisis. It is believed that as to negligence the law in Kentucky is so illogical, confused, and ambiguous and the errors are of such long standing that no particular judge, nor the appellate court itself, can straighten out the situation without legislative aid.¹³⁶

(g) *Current extension in the law as to provocation.*

Let us turn now, rather abruptly, to a current development in the law of voluntary manslaughter. It relates to provocation as a reducing agent. For several hundred years the law as to provocation did not change. It is true that an occasional sport case disturbed the equilibrium of the law but such decisions caused little, if any, change in the stated categorization of four, and only four, situations¹³⁷ which could serve as mitigating agents to reduce intentional, unlawful killings to voluntary manslaughter. Now suddenly an important development as to provocation is found in both the new English Homicide Act of 1957 and the current Model Penal Code.

¹³⁵ Note 131 *supra* and accompanying text.

¹³⁶ This situation occasioned the new involuntary manslaughter statute passed by the 1962 Legislature.

¹³⁷ P. 86 *supra*.

Section 3 of the new English Homicide Act provides:

3. Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.¹³⁸

Kenny, the leading elementary authority on English criminal law, points out that the effect of this provision is to change provocation, which was formerly a question of both law and fact,¹³⁹ into a question of fact¹⁴⁰ for the jury. In other words the judge formerly defined provocation as a matter of law and the jury applied the law to the facts. The law had seldom been extended much, if any, beyond the original four situations recognized as constituting provocation at common law. Thus the law remained that insulting words, no matter how opprobrious, would not serve as provocation to reduce an intentional killing to voluntary manslaughter.¹⁴¹ The test remains objective under section 3 of the new act. But the *jury* is asked to determine whether *as a fact* the *circumstances* in the particular case (things done or things said or both taken together) were sufficient to provoke a reasonable man "to lose his self-control." It is as simple as that. But the results will be far-reaching and the limits of provocation are bound to be increased much under the new law. For example, English reports will almost immediately reveal decisions in which juries have found that words alone, or coupled with other circumstances, have constituted provocation in particular cases.

On this side of the water the Model Penal Code has a similar provision as to provocation. It provides that a criminal homicide constitutes manslaughter when:

¹³⁸ Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11; see H.L. Deb. 726 (5th ser. 1957).

¹³⁹ Kenny, *Outline of Criminal Law* §119 at 156 (17th ed. 1958).

¹⁴⁰ *Id.* §120, at 157.

¹⁴¹ *Id.* §120, at 155-56.

(b) a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.¹⁴²

The first question that occurs is the relation of the Model Code provision to the one in the new English Homicide Act. They are worded somewhat differently and it is believed that the English provision is more clearly and definitely phrased. The question is, would they be interpreted to mean the same thing?

The Comment to the Model Code provision correctly states that the law as to what constitutes "adequate provocation" is "substantially enlarged"¹⁴³ by the American provision. The Model Code also provides that "the reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be." Under the circumstances as who believes them to be? The answer to this question depends upon the antecedent of the pronoun he. Is it "person" or is it "actor"? It is submitted that it is "actor," which gives the test a subjective twist. If it were "person" the test would be wholly objective, under the circumstances as a reasonable person would have believed them to be.

The comment to the Model Code provision indicates that the antecedent of "he" is "actor," not "person." The Comment states that the recommended provision introduces a "larger element of subjectivity in the appraisal." It is submitted that this deviation toward subjectivity is unfortunate. It is, however, tempered somewhat by the statement in the Comment that only the actor's "situation" and the "circumstances as he sees them," not his scheme of moral values, are to be considered. The test should be not what the actor saw or felt under the circumstances but what a reasonable man placed in the same situation would have seen or felt. The test should be wholly objective. The English Act and the discussion in Kenny¹⁴⁴ clearly take this position.

¹⁴² Model Penal Code §203(1)(b) (Tent. Draft No. 9, 1959).

¹⁴³ Model Penal Code §203(1)(b), comment at 41 (Tent. Draft No. 9, 1959).

¹⁴⁴ Kenny, *op. cit. supra* note 139, §§ 119-20.

The question of adequacy of provocation under the English Act is wholly a question of fact for the reasonable men who compose the jury

An objection to the use of the word "excuse" may also be made to the Model Code provision on provocation. An "excuse," of which self-defense is the leading example, has long been recognized as wholly absolving the accused of the crime. Justification has a like effect. To use the word "excuse" in a provision relating to provocation, which only reduces the offense, is an unfortunate word choice. Some other term should be selected.

B. The wording of the voluntary manslaughter provision in the proposed act.

The time has now come to make a decision as to the wording of the voluntary manslaughter provision in the proposed Kentucky Homicide Act. The first objective of the act is the definite elimination of the negligent, voluntary manslaughter. Some means must be devised to preclude continued adherence to the line of cases supporting this impossible crime. The Legislature must speak with an unmistakable voice.

A decision must also be made as to whether to follow the English Homicide Act and the Model Penal Code, which have greatly extended the historic doctrine of provocation. It has been determined not to follow these current diversions in the law. Undoubtedly the provocation category is under fire and will be extended. The new English Act and the Model Penal Code will exert tremendous influence in that direction. But it is believed that they go too far, at least for the present, in suddenly turning the issue of provocation from a question of law and fact, covered in an instruction by the judge to be applied by the jury to the facts, into a matter wholly of fact to be decided by the jury with practically no test. The law ordinarily moves more slowly, even if it be assumed that it should move that far eventually. However, it is believed that the question of provocation should be handled in the proposed provision so as to give the courts an *opportunity* to extend the mitigating effect of provocation as the law may develop in the United States and the British Empire.

With these thoughts and other considerations in mind, it has been determined to recommend alternate provisions on voluntary

manslaughter. The first provision will be in definition form; the alternate recommendation will be that the present provision in KRS 435.020 be recodified. There is no definition of the offense in KRS 435.020; the courts go to the common law to find the particulars of the crime.

a. The first recommendation—that the proposed provision be in definition form.

The first recommendation is that the voluntary manslaughter provision be in definition form and in four parts. The proposed wording of each of these parts and a discussion of each follow

(1) Provocation.

If an opportunity is to be given for an extension and development of the concept of provocation, clearly it must not be defined in terms of the four historic situations that now constitute provocation. This would freeze the concept. It is believed that the purpose can be achieved by stating the concept in terms of the common law heat of passion and provocation. Then it will be possible, if so desired, to extend these concepts by court decisions. With that in mind, the following is suggested as this portion of the proposed voluntary manslaughter provision:

Sec. Voluntary Manslaughter. An unlawful homicide which would otherwise be willful murder shall constitute voluntary manslaughter when:

(a) committed in sudden affray¹⁴⁵ or heat of passion immediately caused by a provocation sufficient to deprive a reasonable man of his self-control and power of cool reflection. Sudden affray or provocation shall not reduce a homicide to voluntary manslaughter if the jury finds that the sudden affray or provocation raised no hot blood in the offender in fact or that his blood had actually cooled.

This provision is phrased in terms of the common law. It is believed that it is sufficiently definite to properly circumscribe the crime and at the same time give an opportunity to the courts to extend the concept of provocation. It would give the courts

¹⁴⁵ A substantial number of states add sudden quarrel (sudden affray) to provocation as a reducing agent. See Model Penal Code §201.3(1), comment at 42 (Tent. Draft No. 9, 1959), for a list of statutes. Sudden affray has a definite historical background and does not fit naturally into the provocation concept. So perhaps it should have a separate entity. See Moreland, *The Law of Homicide* 69 (1952).

an opportunity, if they so desired, to extend the concept in accord with the provisions as to provocation in the new English Homicide Act and in the Model Penal Code. Provocation does not operate automatically; the accused must not in fact kill in cold blood. It is not enough that a reasonable man would be provoked if it be affirmatively shown that the accused was *not* provoked. So, as provided in the new Louisiana Code,¹⁴⁶ a provision is added placing this specific limitation upon provocation. Otherwise it might be necessary to state "may constitute," instead of "shall constitute" in the introductory phrasing of the statute.¹⁴⁷

(2) Imperfect Self Defense.

The second part of the recommended voluntary manslaughter provision relates to imperfect defense of self, of another person, of habitation, and similar situations and is worded as follows:

(b) the homicide would be in defense of self, of another person, or of habitation were it not for the fact that the offender was at fault in bringing on the difficulty or in erroneously and unreasonably believing that his life or the life of another was in danger, or in using greater force than was reasonably necessary

This is a codification of common law imperfect defense of self, of another person, or of habitation, and similar situations. It has been repeatedly pointed out that the *provocation* concept is not sufficiently broad to encompass all of the situations of voluntary manslaughter at common law¹⁴⁸ This provision embraces one such situation.

Defense of self, of another person, or of habitation are old and accepted excuses for intentional homicide. But the accused may not be permitted to plead self defense or defense of another person, or of habitation if he were at fault in *bringing on* the difficulty. In such cases the common law, while denying a complete or perfect defense, did take the intermediate position of permitting an imperfect defense and the crime was voluntary

¹⁴⁶ See La. Stat. Ann. §§14-31 (West 1950).

¹⁴⁷ It will be noted that the recommended statute provides: "An intentional unlawful homicide, which would otherwise be willful murder *shall* constitute voluntary manslaughter." (Emphasis added.)

¹⁴⁸ Moreland, *The Law of Homicide* 87 (1952); 2 Burdick, *Law of Crime* §461 (1946); Notes, 36 Ky. L.J. 443 (1948) and 37 Ky. L.J. 334 (1949) (both citing Kentucky cases).

manslaughter. Thus in the Kentucky case, *Tabor v. Commonwealth*,¹⁴⁹ the defendant by his own actions had induced the necessity for the homicide and thus could not avail himself of perfect self-defense.¹⁵⁰ Somewhat similar to the imperfect self-defense cases are those in which the accused erroneously and unreasonably believed himself in danger of attack by the deceased or unreasonably used greater force than was necessary. *Gadd v. Commonwealth*¹⁵¹ seems to be one such case. Some of these decisions expressly state that heat of passion is not always necessary to make out the crime of voluntary manslaughter.¹⁵²

Since these are situations where a defendant may be convicted of voluntary manslaughter on an extenuating circumstance other than provocation, and since such situations are well recognized at common law and in Kentucky cases, it is thought that they should be included in the codification, as it is believed that the principles they embody should be continued in the law

(3) Mental Deficiency

The third part of the recommended provision on voluntary manslaughter relates to mental deficiency not amounting to legal insanity as a ground for reducing the offense of willful murder to voluntary manslaughter, and is worded as follows:

(c) the person who committed the killing or was a party to it was at the time suffering from such abnormality of mind, less than legal insanity, whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury, as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.

On a charge of willful murder, it shall be for the defense to prove that the person charged is by virtue of this section not liable to be convicted of willful murder.

The fact that one party to a killing is by virtue of this section not liable to be convicted of willful murder shall not affect the question whether the killing amounted to willful murder in the case of any other party to it.

¹⁴⁹ 26 Ky. L. Rep. 754, 82 S.W. 443 (Ct. App. 1904).

¹⁵⁰ See generally Moreland, *A Suggested Homicide Statute for Kentucky*, 41 Ky. L.J. 139, 156 (1953) (Ky. cases discussed).

¹⁵¹ 305 Ky. 318, 204 S.W.2d 215 (1947).

¹⁵² Note, 36 Ky. L.J. 443, 447 (1948).

The section as drafted is founded upon a substantially similar provision in the new English Homicide Act. The complete section of the English act is worded as follows:

Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.¹⁵³

The doctrine of diminished responsibility because of mental deficiency less than insanity has been recognized in several states,¹⁵⁴ and now under this new English Act also, as a means of mitigating the harshness of the accepted test of legal insanity. It is argued that the borderline cases of mental deficiency, though not sufficient to come within the legal tests of insanity, and so not sufficient to entitle the defendant to a *complete acquittal*, should nevertheless serve to mitigate the offense and reduce it to *voluntary manslaughter*.¹⁵⁵ Several reasons are offered for the acceptance of such mitigation. One is that such borderline types should be less severely punished than sane persons. While such persons are not insane according to the generally accepted legal test of insanity, they are definitely less capable of controlling themselves than normal persons. It is argued that individuals with a substantial mental deficiency, though legally sane, should receive less punishment than normal persons.

Tied in with this reasoning is the current national and international unrest and dissatisfaction with the legal test of insanity. *Durham v. United States*,¹⁵⁶ which in 1954 decided that a defendant was insane "if his unlawful act was the product of mental disease or mental defect" may have been a sport case at the time but it has been almost literally followed in the insanity

¹⁵³ Homicide Act, 5 & 6 Eliz. 2, c. 11, §2 (1957).

¹⁵⁴ Weihofen, *Mental Disorder as a Criminal Defense* 175 (1954).

¹⁵⁵ Diminished responsibility is also used in some states which divide murder into degrees to reduce first degree intentional murder with premeditation to second degree murder. See Keedy, *A Problem of First Degree Murder: Fisher v. United States*, 99 U. Pa. L. Rev. 267 (1950).

The doctrine has also been rejected in some states. The count is about two to one in favor of acceptance. See Weihofen, *Mental Disorder as a Criminal Defense* 184-85 (1954) (listing states).

¹⁵⁶ 214 F.2d 862 (D.C. Cir. 1954).

provision of the Model Penal Code.¹⁵⁷ Various states are bound to be influenced by both of these sources. Psychologists and psychiatrists who have to work with lawyers and courts in administering the legal test of insanity have long been critical of it. There are those who, while not altogether satisfied with the current legal test, yet feel unable at the present time to improve upon it considering all the problems involved.¹⁵⁸ Such persons welcome the growing tendency to reduce intentional murder to voluntary manslaughter as a means of softening somewhat the legal test of insanity and also as an experiment which may lead to a broadening of the legal test itself. It may well be doubted whether the legal test of insanity will be changed in states like Kentucky for some years. This reducing device might bridge the gap until a later possible expansion of the legal test.

As stated earlier in the discussion, several Kentucky decisions have accepted the doctrine that diminished mental responsibility will reduce a willful murder to voluntary manslaughter. In the first of these cases, *Rogers v. Commonwealth*,¹⁵⁹ a conviction of murder was reversed because of the trial court's failure to give an instruction on voluntary manslaughter. The court said that the mental condition of the accused "whether feeble-minded or otherwise" was a factor to be taken into consideration by the jury in determining whether the malice requisite for murder existed at the time of the homicide. Three years later, in *Mangrum v. Commonwealth*,¹⁶⁰ the lower court instructed the jury that if they believed the defendant insane to acquit him but if they believed from the evidence that he was "of weak or feeble mind they should consider that fact in determining the degree of his guilt." Under the instruction he was convicted of voluntary manslaughter and the appellate court affirmed the conviction.

The only exception to the doctrine in Kentucky is the next case in the series, *Perciful v. Commonwealth*,¹⁶¹ where the court followed the historic rule that the law does not take cognizance of anything less than complete insanity as a defense or mitigation. Said the court: "As insanity excuses altogether, it is at once appar-

¹⁵⁷ Model Penal Code §4.01(1) (Tent. Draft No. 1, 1953).

¹⁵⁸ See Moreland, *Mental Responsibility and the Criminal Law—A Defense*, 45 Ky. L.J. 215 (1956).

¹⁵⁹ 96 Ky. 24, 27 S.W. 813 (1894).

¹⁶⁰ 19 Ky. L. Rep. 94, 39 S.W. 703 (Ct. App. 1897).

¹⁶¹ 202 Ky. 673, 279 S.W. 1062 (1925).

ent that proof of insanity other than drunkenness would not authorize a manslaughter conviction."¹⁶² Apparently the court was not advised of the two previous decisions allowing mental deficiency less than insanity to reduce willful murder to voluntary manslaughter.

Horn v. Commonwealth,¹⁶³ the last case in the series, reverts to the prevailing Kentucky view that a disordered mental condition, less than legal insanity, that substantially interferes with the defendant's ability to have the willfulness requisite for murder may reduce an intentional killing to manslaughter. So there is substantial support in Kentucky decisions for the doctrine.

(4) Drunkenness

The fourth part of the recommended provision on voluntary manslaughter concerns drunkenness as a ground for reducing willful murder to voluntary manslaughter and is worded as follows:

(d) the person who committed the killing or was a party to it was at the time so intoxicated as to be unable to form the willfulness requisite for murder.

This suggested provision follows a number of Kentucky cases, e.g., *Long v. Commonwealth*,¹⁶⁴ *Lee v. Commonwealth*,¹⁶⁵ and *Henderson v. Commonwealth*,¹⁶⁶ that hold that the defendant's drunkenness may reduce the offense from willful murder to voluntary manslaughter. Gregory's text on Kentucky criminal procedure reaches the same conclusion.¹⁶⁷

As stated in the discussion, *supra* at pages 91-93, there are two rationalizations for a reduction on account of drunkenness, (1) that the drunkenness may prevent the accused from having the intention (willfulness) requisite for murder, and (2) that it may

¹⁶² *Id.* at 678, 279 S.W. at 1064 (1925). The court is in error in linking insanity with drunkenness. Drunkenness is not insanity unless the drinking has led to insanity in fact. While drunkenness is not a defense to crime, in crimes requiring specific intent (as in assault with intent to kill) the prosecution cannot make out the crime if the accused is too drunk to have the specific intent required for the offense. That is the way drunkenness less than insanity operates as a complete defense. A leading case is the English one, *Director of Pub. Prosecutions v. Beard* [1920] A.C. 479.

¹⁶³ 292 Ky. 587, 591-92, 167 S.W.2d 58, 60-61 (1943) (a "condition," however produced, may negate malice).

¹⁶⁴ 262 S.W.2d 809 (Ky. 1953).

¹⁶⁵ 329 S.W.2d 57 (Ky. 1959). See also *Jones v. Commonwealth*, 311 S.W.2d 190 (Ky. 1958); *Pash v. Commonwealth*, 146 Ky. 390, 142 S.W. 700 (1912).

¹⁶⁶ 24 Ky. L. Rep. 1985, 72 S.W. 781 (Ct. App. 1903).

¹⁶⁷ Gregory, *Criminal Law, Procedure and Forms* §94 (1918).

create a situation where the mind is more easily inflamed than that of an ordinary man and so he might have heat of passion (provocation) Kentucky cases accept the reasoning in the first category and so it has been incorporated in the proposed provision.

Summary and Recapitulation

Gathering together the four parts of the proposed provision on voluntary manslaughter, it reads as follows:

Sec. Voluntary Manslaughter. An unlawful homicide, which would otherwise be willful murder, shall constitute voluntary manslaughter when:

(a) committed in sudden affray¹⁶⁸ or heat of passion immediately caused by a provocation sufficient to deprive a reasonable man of his self-control and power of cool reflection. Sudden affray or provocation shall not reduce a homicide to voluntary manslaughter if the jury finds that the sudden affray or provocation raised no heat of passion in the offender in fact or that his blood had actually cooled.

(b) the homicide would be in defense of self, of another person, or of habitation were it not for the fact that the offender was at fault in bringing on the difficulty, or in erroneously and unreasonably believing that his life or the life of another was in danger, or in using greater force than was reasonably necessary

(c) the person who committed the killing or was a party to it was at the time suffering from such abnormality of mind, although not legally insane, whether arising from a condition of retarded development of mind or any inherent causes or induced by disease or injury, as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.

(d) the person who committed the killing or was a party to it was at the time so intoxicated as to be unable to form the willfulness requisite for murder.

This voluntary manslaughter provision in four parts is an attempt to codify existing Kentucky law on the offense except as to the negligent voluntary manslaughter. Every effort has been made to eliminate this impossible offense from Kentucky law. It is believed that this has been accomplished and that this legis-

¹⁶⁸ Sudden affray does not fit easily in the provocation category so is often added as an additional category. Note 145 *supra*; Pennington v. Commonwealth, 244 S.W.2d 407, 409 (Ky. 1961).

lative definition would make it clear that voluntary manslaughter could occur *only* in the case of a willful (intentional) killing.

Part (a) of the definition is intended as a codification of common law provocation and is believed to be a codification of existing Kentucky law. As stated in the discussion, the law as to provocation as a reducing agent is being changed and extended. This definition leaves an opportunity for the courts to extend the law in accordance with trends in other states, if it is deemed desirable to do so.

Part (b) is intended also as a codification of the common law and of Kentucky decisions. Imperfect defense of self, of another person, or of habitation and similar situations as a basis for a conviction of voluntary manslaughter has a long history and is recognized in other jurisdictions. Part (c), embodying mental deficiency less than legal insanity as a ground for reducing a willful killing, has been recognized in several Kentucky decisions, and other states that have examined the doctrine have accepted it by a two to one majority. It softens the legal test of insanity, which is under strong national and international pressure, and furnishes a most valuable device for cautious experimentation in fringe cases of mental disorder. Part (d) embodies the Kentucky rule that intoxication of the accused will serve to reduce a willful murder to voluntary manslaughter if it renders him incapable of forming the willfulness (intention) requisite for murder. The rule, buttressed upon somewhat strained reasoning, is found in several other states as well as in Kentucky and in England.

b. Alternate provision.

As stated above, the study group has decided to recommend an alternate provision which might be incorporated in the voluntary manslaughter section in lieu of the four part provision in definition form discussed above. The study group recommends as this alternate provision a recodification of the present voluntary manslaughter provision, KRS 435.020, which reads as follows:

Voluntary manslaughter. Any person who commits voluntary manslaughter shall be confined in the penitentiary for not less than two nor more than twenty-one years.

This provision contains no definition of the offense and the Kentucky courts use the common law definition.

The study group would prefer adoption of the four part definition form provision because it clarifies the law and presents it simply and more clearly. Since the study group takes the position that each of these parts is declaratory of Kentucky law the same result could be reached under either recommendation.

But, while the study group prefers the provision in definition form, it realizes that there may be those who might object to the wording of some of the parts and so defeat the adoption of the entire act. Therefore the recommendation is in alternative form so that if those who might present the proposed act to the legislature deemed it wise the alternate rather than the recommended definition may be used.

C. *Involuntary (unintentional) manslaughter*

Involuntary manslaughter is distinguished from voluntary manslaughter in that involuntary manslaughter is an *unintended* unlawful killing of a human being. A number of unintentional homicides were murder at common law but other unintentional killings were involuntary manslaughter.

Involuntary manslaughter at common law embraced two closely related, not always distinguishable offenses. The first was an unintentional killing resulting from a *lawful* act, done without due caution and circumspection. This was the negligent manslaughter. The second and closely allied offense was an unintended homicide resulting from an *unlawful* act which was not a felony¹⁶⁹. This was commonly called the *misdeemeanor* manslaughter, although a civil wrong might satisfy the requisite unlawful act. Both principles are now generally interpreted as requiring an act dangerous to life or limb, so there is an overlap in their application, but they had an independent development until about ninety years ago. These two fundamental categories¹⁷⁰ forming the basis of the law of involuntary manslaughter will now be discussed in turn.

¹⁶⁹ 1 East, Pleas of the Crown 255-71 (1803); Foster, Crown Law 258-65 (2d ed. 1791).

¹⁷⁰ The common law also recognized an additional category on both the murder and manslaughter levels, homicide in resisting arrest. But as pointed out in Hall, *The Substantive Law of Crimes—1887-1936*, 50 Harv. L. Rev. 616, 642 (1937), this doctrine has so lost favor as to be out of the law. It is now interpreted in terms of negligence. *E.g.*, Hubbard v. Commonwealth, 304 Ky. 818, 202 S.W.2d 634 (1947) (murder).

(a) *The Negligent Manslaughter*

The negligent manslaughter, as the name implies, is an involuntary manslaughter arising out of criminal negligence on the manslaughter level. A higher degree of negligence is required for the negligent murder. This crime presents two important problems. The first is the *kind of standard* to be employed in determining criminal negligence on the manslaughter level. The modern cases are uniform on this point; the standard employed is that of the conduct of a reasonable man under the circumstances. This is called the objective standard of care.¹⁷¹ The defendant cannot hide behind his personal (subjective) belief that his standard of conduct was not dangerous. He must measure up to the standard of what the community considers to be dangerous conduct.

The second problem raised by the negligent manslaughter is the *degree of negligence* required for conviction and how to describe it. Practically all jurisdictions require more than ordinary negligence; generally it is stated that the degree of negligence is reached when the conduct of the accused creates such an unreasonable risk of danger as to be recklessly disregarding of human life and safety under the circumstances. This description makes the required degree of negligence synonymous with recklessness.¹⁷²

The Current Situation in Kentucky

Kentucky has no involuntary manslaughter statute. The crime is punished in this state as a common law misdemeanor and since there is no statutory penalty for the crime it is punishable under KRS 431.075. This statute will be quoted for it applies to *all* common law crimes for which there is no statutory penalty

Common law offenses, penalties for. Any person convicted of a common law offense the penalty for which is not otherwise provided by statute shall be imprisoned in the county jail for a term not exceeding twelve months or fined a sum not exceeding five thousand dollars or both.¹⁷³

¹⁷¹ Moreland, *The Law of Homicide* 127-32 (1952).

¹⁷² *Id.* at 133-41. A leading case on the point is the recent English one, *Andrews v. Director of Pub. Prosecutions*, [1937] A.C. 576; see Model Penal Code §201.3(1)(a) (Tent. Draft No. 9, 1959).

¹⁷³ KRS 431.075.

It is immediately manifest that this punishment is too lenient for some cases of negligent involuntary manslaughter. The negligent *voluntary* manslaughter, that impossible crime, takes care of such cases as well as those which in other states would be negligent murder. The recategorization of that offense is the biggest problem in a reform of Kentucky homicide law

The decisions having to do with involuntary manslaughter, as such, were in confusion in Kentucky prior to the recent case of *Marye v. Commonwealth*.¹⁷⁴ There were some decisions which seemed to indicate that more than ordinary negligence was required for a conviction of involuntary manslaughter but other cases seemed to hold that ordinary negligence was sufficient. At any rate that particular matter was definitely cleared up in the *Marye* case.

Marye unintentionally killed two persons while driving his father's automobile. The lower court instructed the jury that Marye would be guilty of involuntary manslaughter if he "carelessly and negligently" ran the automobile against the deceased persons causing their deaths. The jury found Marye guilty on each count; he had been indicted on two counts for involuntary manslaughter, one for each person killed. The appellate court reversed the conviction, holding that the instructions permitted a conviction based upon *ordinary* negligence and that more than ordinary negligence, namely *gross* negligence, was required. Gross negligence, it should be pointed out, is an outmoded phrase in defining the negligence requisite for involuntary manslaughter. The court defined gross negligence as the failure to exercise *slight care*. As an editorial writer of the time pointed out, "slight care is practically no care at all."¹⁷⁵ Most courts today, as previously pointed out, use the term reckless to define the negligence required for involuntary manslaughter. But Kentucky continues to use gross negligence to define the degree of negligence required for the crime.¹⁷⁶

The trouble is that the voluntary negligent manslaughter¹⁷⁷ has pre-empted the use of the word reckless for describing the negligence requisite for involuntary manslaughter in this state.

¹⁷⁴ *Marye v. Commonwealth*, 240 S.W.2d 852 (Ky. 1951).

¹⁷⁵ *Lexington Leader*, November 13, 1951, p. 4.

¹⁷⁶ *Marye v. Commonwealth*, 240 S.W.2d 852 (Ky. 1951).

¹⁷⁷ Pp. 97-100 *supra*.

Current Kentucky cases are consistent in using reckless and/or wanton to define this impossible crime.¹⁷⁸

Summation:

It has been shown that Kentucky law presents serious problems on both the voluntary and involuntary manslaughter levels. There should be no negligent *voluntary* manslaughter, but there is in Kentucky and it is defined as an unlawful homicide resulting from wanton and/or reckless conduct. Only one other state has been found that has this impossible crime. Furthermore the crime has pre-empted the word reckless, which is the term ordinarily used to define the negligence requisite for involuntary manslaughter. Unhappily, the Kentucky courts define the negligence required for involuntary manslaughter as gross negligence. Gross negligence is an out-moded term no longer used in criminal law¹⁷⁹ The Kentucky Court of Appeals defines gross negligence as want of slight care, which for all practical purposes is no care at all. The situation is serious but the matter is so firmly entrenched in decision law that only legislative action will correct it.

(b) The Misdemeanor-Manslaughter

If a person unintentionally commits a homicide while in the commission of a felony, he is guilty of murder at common law¹⁸⁰ The crime, usually designated as the felony-murder, survives as a common law crime in Kentucky,¹⁸¹ although there are contrary decisions. Similarly, where one while in the commission of an unlawful act not amounting to a felony unintentionally kills another, it is involuntary manslaughter at common law, and this is called the misdemeanor-manslaughter. The principle, like the felony murder, finds ample support in the Kentucky cases. However; the crime is punished as a common law misdemeanor rather than as involuntary manslaughter¹⁸² as in other states.

Originally, as in the case of the felony murder, the rule operated automatically. If it was shown that the accused was

¹⁷⁸ E.g., *Little v. Commonwealth*, 344 S.W.2d 619 (Ky. 1961); *Mullins v. Commonwealth*, 269 S.W.2d 713 (Ky. 1954); *Marye v. Commonwealth*, 240 S.W.2d 852 (Ky. 1951).

¹⁷⁹ And rarely in civil actions. It is an ambiguous phrase which has been almost wholly discarded.

¹⁸¹ Cases cited note 58 *supra*.

¹⁸² For an attempted rationalization of why the crime is punished as a common law misdemeanor in Kentucky see Note, 39 Ky. L.J. 351 (1951).

engaged in the commission of a misdemeanor, or even of a mere civil wrong at the time of the unintended homicide, he was guilty of manslaughter.¹⁸³ Later the law developed that the unlawful act out of which the killing arose must be *malum in se* and not merely *malum prohibitum*. For a while the phrase *malum in se* was interpreted to mean dangerous in itself, but it was later interpreted to mean morally or socially dangerous in itself. Under such an interpretation one who attempted to commit suicide in a hundred acre field and unintentionally killed a tramp asleep in a nearby clump of bushes would be guilty of manslaughter since attempted suicide, a common law misdemeanor, is a morally reprehensible offense.

About ninety years ago a tendency toward a return to the early meaning of the phrase became apparent. This arose first on the murder level in a series of vitriolic attacks by Judge Stephen culminating in his historic decision in *Regina v. Serne*¹⁸⁴ that a person accused of murder would not be guilty under the felony murder rule unless the felony out of which the homicide arose was dangerous in itself. This fortunate return to the early meaning of the doctrine had its parallel on the misdemeanor manslaughter level in the leading case of *Regina v. Franklin*.¹⁸⁵ Since these two cases the law in England has been that the basic test is the amount of danger in the act causing the death rather than its lawfulness or unlawfulness.¹⁸⁶

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

[The] phrase not amounting to a felony is not of much present day importance, because courts have ruled that it is not the fact that the subordinate act, either misdemeanor or felony, is prohibited by statute, but that it is the characteristics of the prohibited subordinate act that make the unintended killing a crime. If the subordinate act is dangerous to the lives and safety of others, then a killing, though unintended, which occurs in the commission of the subordinate act is a criminal homicide, provided, of course,

¹⁸³ Moreland, *The Law of Homicide* 186 (1952).

¹⁸⁴ [1887] 16 Cox Crim. Cas. 311.

¹⁸⁵ [1883] 15 Cox Crim. Cas. 163.

¹⁸⁶ Moreland, *The Law of Homicide* 222 (1952).

that the killing was the natural or necessary consequence of the subordinate act.¹⁸⁷

Stated in this way, the misdemeanor manslaughter is practically synonymous with the negligent manslaughter, and that is the current opinion.¹⁸⁸ The test in all such cases then becomes the usual criterion for criminal negligence on the manslaughter level: did the conduct of the accused amount to reckless disregard for human life and safety under the circumstances?¹⁸⁹

The language used in many of the Kentucky misdemeanor manslaughter cases would seem to indicate a blind following of the historic rule that an unintentional homicide occurring in the course of an unlawful act less than a felony is necessarily manslaughter, even though there was no danger involved in the act. For example, the Kentucky Court of Appeals said in a recent opinion:

Involuntary manslaughter is the killing of another in doing some unlawful act not amounting to a felony and *not likely to endanger human life* and without intention to kill, or the killing of another while doing a lawful act in an unlawful or negligent manner, where the negligence is such as to indicate a disregard for human life.¹⁹⁰ (Emphasis added.)

Does the Kentucky Court of Appeals really intend to say that a killing occurring in the commission of an unlawful act not likely to endanger human life is involuntary manslaughter?

William Rice in a recent study of the Kentucky misdemeanor manslaughter cases¹⁹¹ comes to the conclusion that, while the language used by the court would seem to go that far, the *facts* in practically all of the cases where such language is used show sufficient negligence to warrant a conviction on that ground. He concludes that "whether Kentucky, or indeed most any court

¹⁸⁷ Robinson, *Manslaughter by Motorists*, 22 Min. L. Rev. 755 (1938). See generally *id.* at 774.

¹⁸⁸ E.g., Model Penal Code §201.3(1)(a) (Tent. Draft No. 9, 1959), which eliminates the misdemeanor manslaughter category and makes "recklessness" the test for the *negligent* manslaughter.

¹⁸⁹ See the discussion of the negligent manslaughter, p. 113 *supra*; Moreland, *The Law of Homicide* 195 (1952); Model Penal Code §201.3(1)(a) (Tent. Draft No. 9, 1959).

¹⁹⁰ *Middleton v. Commonwealth*, 304 Ky. 784, 785, 202 S.W.2d 610, 611 (1947) (citing similar cases).

¹⁹¹ Note, 41 Ky. L.J. 94 (1952).

will convict of involuntary manslaughter on the sole ground that the homicidal act was committed in the perpetration of an unlawful act where there is no negligence is doubtful."¹⁹²

The oft-repeated rule of the court on this matter is most unfortunate. The rule is outmoded and unsound and may lead to a result of injustice in a particular case at any time. The doctrine should be rephrased to conform to the present consensus of judicial opinion that a homicide occurring in the course of a misdemeanor is not involuntary manslaughter unless the misdemeanor is sufficiently dangerous in itself to cause the defendant's act to be criminally negligent.

(c) *Homicide resulting from an act creating such an extreme risk of death or great bodily injury as to manifest a wanton indifference to human life, as involuntary manslaughter in the first degree.*

The discussion of involuntary manslaughter up to this point would seem to indicate that the recommended statutory definition of the offense would embrace the two closely related common law offenses, the negligent manslaughter and the misdemeanor manslaughter. It would further appear that the recommended provision would adopt the current opinion that the misdemeanor manslaughter is practically synonymous with the negligent manslaughter, so that the recommended test in all involuntary manslaughter cases would be the usual criterion for criminal negligence on the manslaughter level: did the conduct of the accused amount to reckless disregard for human life and safety under the circumstances?¹⁹³

But such is not to be the case. Such a provision *would* represent modern thinking as to involuntary manslaughter, as illustrated by the provision defining the crime in the Model Penal Code of the American Law Institute. However, those who have worked upon the recommended Homicide Act have come to a conclusion which involves the addition of unintended homicides arising out of wanton negligence to the involuntary manslaughter provision.

Such a deviation from the Model Code definition and the prevailing situation in practically all other states, most of which

¹⁹² *Id.* at 96.

¹⁹³ See pp. 116-17 *supra*.

retain the negligent murder,¹⁹⁴ is occasioned in part by the attempt to eliminate that impossible crime, the negligent voluntary manslaughter, by moving cases which are negligent murder in most other states into the involuntary manslaughter category. This is done by suggesting that involuntary manslaughter shall be divided into two degrees: (1) involuntary manslaughter in the first degree, requiring an act creating such extreme risk of death or great bodily injury as to manifest a wanton indifference to the value of human life according to the standard of conduct of a reasonable man under the circumstances, and (2) involuntary manslaughter in the second degree requiring recklessness only.

It is of course intended that real meaning be given the word wanton in the definition of involuntary manslaughter in the first degree for otherwise the purpose of adding it to the customary definition of involuntary manslaughter would be defeated. For example, it is not intended that it be interpreted as synonymous with "reckless," the word used in defining involuntary manslaughter in the second degree. The two words are *not* synonyms, although sometimes carelessly and loosely used as such, as in the current definition of negligent *voluntary* manslaughter in Kentucky.¹⁹⁵ One of the most satisfactory definitions of wantonness is found in the dictionary where it is defined as "arrogant recklessness."¹⁹⁶ Recklessness is the word that is most commonly used in describing the behavior required for the negligent involuntary manslaughter. The addition of the adjective "arrogant" is indicative of the "still higher degree" of danger and the "depraved mind"¹⁹⁷ commonly required in other jurisdictions for murder.¹⁹⁸ It is intended that the use of the phrase "wanton indifference to the value of human life" in the definition of involuntary manslaughter in the first degree shall serve to bring those cases which would be negligent murder in other jurisdictions, and which are presently negligent *voluntary* manslaughter in Kentucky, into the coverage of the *involuntary* manslaughter in the first degree provision recommended in the proposed act.

¹⁹⁴ Moreland, *The Law of Homicide* ch. 13 at 213-17 (1952).

¹⁹⁵ See *Marye v. Commonwealth*, 240 S.W.2d 852 (Ky. 1951).

¹⁹⁶ Webster, *New International Dictionary* 2871 (2d ed. 1934).

¹⁹⁷ See pp. 67-68 *supra*.

¹⁹⁸ Moreland, *A Rationale of Criminal Negligence* 63-65 (1944); Moreland, *The Law of Homicide* 33-34 (1952); see Tincher, *Proposed Statutory Reform of Negligent Homicide in Kentucky*, 30 Ky. L.J. 341, 356 n.84 (1942).

The desire to eliminate the negligent voluntary manslaughter and other reasons which have prompted inclusion of the second degree involuntary manslaughter provision in the proposed act will now be discussed in more detail.

(1) The desire to eliminate the negligent voluntary manslaughter.

As has been stated, a primary objective of those who have worked upon the recommended Homicide Act is the elimination of the negligent voluntary manslaughter. As pointed out in the discussion *supra*, the crime is a contradiction in terms, since a negligent act is never a voluntary (willful) one, no matter how great the negligence.

There is a division of case authority as to whether the common law negligent murder survives in this state.¹⁹⁹ Those judges who repudiated the placing of this common law offense upon the murder level apparently thought that the penalty for involuntary manslaughter, where such an unintended killing would naturally fall, was too lenient, so the offense of voluntary negligent manslaughter was created to take care of such cases.²⁰⁰

Faulty reasoning supported the placing of such cases in the voluntary manslaughter category. One was the argument that one *intends* the natural and probable consequences of his acts. It is true that such a proposition, somewhat shaky at its best, appears in the law of homicide on the *intentional murder* level. But the rule is never applied unless the result is *practically certain* to follow from the act,²⁰¹ as when, for example, one fires a gun into a crowd of people. There a *result* of death or grievous bodily harm to someone is practically certain and if a killing occurs the crime may be *intended murder*. Not so in the negligence cases. There the result is never practically certain (if it is negligence) and the offense is never intended.

It is believed that the best explanation for the creation of the negligent voluntary manslaughter is, as suggested, that it was

¹⁹⁹ See pp. 67-75 *supra* and authorities cited.

²⁰⁰ Common law negligent murder may also be prosecuted as a common law offense (murder) under KRS 431.075 but the punishment provided by this statute is so lenient as to make the offense of little value as a practical matter. Ordinarily the prosecutor will attempt to get a conviction of voluntary manslaughter where the punishment runs, in the discretion of the jury, from two to twenty-one years.

²⁰¹ Moreland, *The Law of Homicide* 18-19 (1952); pp. 97-98 *supra*.

an attempt to reach a proper result as to the *punishment* in such cases. Not willing to convict such offenders of common law negligent murder, yet believing that the penalty for involuntary manslaughter was too lenient, the judiciary created the new offense, which in a way solved the problem of punishment, since it permitted the jury in its discretion to give a punishment ranging from two to twenty-one years, but created a preposterous technical situation by placing the crime in the voluntary manslaughter category

But whatever the reasoning that led to the creation of the negligent voluntary manslaughter may have been, the offense *was* created and it presents a situation that should be corrected. The proposed act recommends placing such cases in the involuntary manslaughter category. Such homicides *are* unintended killings and so to label them *involuntary* manslaughter is perfectly reasonable. However, the fact remains that placing such homicides in the involuntary manslaughter category does reduce such offenses from murder to involuntary manslaughter, the wisdom of which might be questioned.

(2) Various additional factors making the reduction desirable.

The negligent murder is unpopular in Kentucky. There has always been a split of authority in the state as to the survival of the common law negligent murder.²⁰² The only statutory murder in the state is willful murder.²⁰³ The Kentucky Legislature made its position clear as to the common law negligent murder when it promulgated KRS 431.075. That statute, which makes a prosecution for a negligent murder highly improbable because of the small punishment it provides, indicates that the Kentucky Legislature considered the negligent murder concept unwise public policy.

The fact that this offense is punished as murder in almost every other state and that it is embodied in the current Homicide Act promulgated by the American Law Institute²⁰⁴ has naturally been a source of considerable concern to those who are recommending that the offense be placed in the involuntary man-

²⁰² Pp. 67-75 *supra*.

²⁰³ KRS 435.010.

²⁰⁴ Model Penal Code §201.2(1)(b) (Tent. Draft No. 9, 1959).

slaughter category This concern is increased by the fact that in some states, including New York²⁰⁵ for example, the offense may incur a statutory penalty of murder *in the first degree*. But, while this is true, prosecutions of the offense under state murder statutes are not very common and convictions of murder exceedingly rare. An examination of the Sixth Decennial Digest of the American Digest System for the ten-year period, 1946-1956, verifies this conclusion. Compilers of casebooks on criminal law are still able to find cases where the accused was convicted of murder in some degree, but these decisions are gradually becoming scarcer.

Does this mean that the offense is a mere historic survivor and continued in state statutes without a re-examination of its present day desirability? More importantly, may one pursue the same line of thought and question whether the offense was incorporated in the current draft of the Model Penal Code without sufficient consideration of the wisdom of such categorization?

It is believed that a negative answer should be given to such questions. The offense is still alive and it still has utility. Occasionally the facts of a particular homicide indicate conduct so very dangerous and so callous and extremely indifferent to human life and safety as to warrant the punishment reserved for murder.²⁰⁶ One may go further and say that if he were drafting a homicide act for any other state but Kentucky, he would incorporate the offense in the murder category. Where the great majority of states solve a problem in a particular way, there is a strong urge to do likewise.

But this act is not being prepared for use in any state other than Kentucky. While Kentucky stands almost alone, the state has made it clear by statute and by decision that she does not support the punishment of the negligent murder as murder, but as manslaughter. That manifest state public policy is decisive on the matter, it is believed. At any rate it has been the decisive factor to those working on the proposed act.

It should be added however that while existing Kentucky policy and law have been the decisive factors in incorporating the common law negligent murder in the involuntary manslaughter

²⁰⁵ N.Y. Penal Law §1044.

²⁰⁶ E.g., Collings, *Negligent Murder—Some Stateside Footnotes to Director of Public Prosecutions v. Smith*, 49 Cal. L. Rev. 254 (1961).

division of the proposed act, an additional factor has been the fact that the group working upon the act is somewhat hesitant to reactivate the offense.²⁰⁷ This offense is, after all, *unintentional* and there is a certain hesitancy to punish the offense with penalties reserved for murder, regardless of what is done in other states. Five persons worked upon the proposed act. One of these was strongly opposed to incorporating the negligent murder in the act on the ground that an unintended killing should not be punished as murder. Another member of the group took a strong position for the incorporation of the negligent murder in the act on the ground that it was a common law offense, was incorporated in practically all state homicide acts, and that certain unintended wantonly negligent killings merited that high degree of punishment. In the end the group of five voted four to one to continue punishing the offense as manslaughter. The net result is that unintended homicides arising out of wanton negligence, now punished in the state as negligent voluntary manslaughter would be punished under the act as involuntary manslaughter in the first degree thus creating a technically correct label for such offenses, since they are, in fact, unintended (involuntary)

(3) The desire to eliminate the felony willful murder.

There is an unfortunate line of decisions in Kentucky which give credence to an impossible crime, the felony willful murder.²⁰⁸ This crime is on its face a contradiction in terms, because the felony murder is an unintentional homicide, not a willful one. Apparently the Kentucky courts coined the offense when they repudiated the common law felony murder. The punishment for involuntary manslaughter, a year in the county jail or a fine of 5000 dollars or both, was considered too small for such a killing so the courts created the new offense, the felony willful murder, which has a punishment of confinement for life or death under Kentucky's willful murder statute, KRS 431.010.

The crime, like the negligent voluntary manslaughter, should be weeded out of the law. However, the offense is so firmly embedded in the cases that it is believed that there would be little hope that the courts would repudiate it by overruling the doc-

²⁰⁷ There are a number of distinguished American and English authorities who have rejected the notion of negligent murder. *Id.* at 268.

²⁰⁸ Pp. 83-84 *supra*.

trine. Not only would the courts have to repudiate cases like *Tarrance v. Commonwealth*²⁰⁹ and similar decisions supporting the doctrine^{209a} but the punishment for common law felony murder or involuntary manslaughter would *still* be, under KRS 431.075, a maximum of one year confinement or a fine of 5000 dollars, or both, an insufficient punishment for such an offense as the common law felony murder.

It is believed that the proposed new offense, involuntary manslaughter in the first degree, offers a solution to the problem. This solution is buttressed upon the following reasoning. As pointed out in the foregoing discussion at pages 75-76, the felony murder doctrine exists today only if the felony out of which the killing arose was extremely dangerous to life and limb and likely in itself to cause death. How dangerous? So extremely dangerous as to make the act wantonly indifferent to the lives and safety of others.²¹⁰ Thus, today, the conduct required for the *felony* murder is the same as that required for the *negligent* murder.

And therein lies the solution to the felony willful murder in Kentucky. This paper has gone to considerable length to develop the proposition that the common law negligent murder (currently punished as negligent voluntary manslaughter in Kentucky) should be punished under a proposed involuntary manslaughter in the first degree statute, which defines the new offense in terms commonly used in other states to describe the negligent murder. It is now proposed to punish the common law felony murder (currently punished as felony willful murder in Kentucky) under the same recommended involuntary manslaughter in the first degree statute since the definition of the felony murder has become parallel with the definition of the negligent murder in current thinking and modern cases.

(d) *The problem of punishment for manslaughter—voluntary and involuntary.*

The problem of punishment for both voluntary and involuntary manslaughter remains to be solved. At the present time the punishment for voluntary manslaughter under KRS 435.020 is

²⁰⁹ 265 S.W.2d 40 (Ky. 1953).

^{209a} Cases cited notes 77-80 *supra*.

²¹⁰ See cases cited note 55 *supra*.

confinement in the penitentiary for not less than two nor more than twenty-one years; the proposed Act recommends no change.

Involuntary manslaughter is not a statutory offense in Kentucky but a common law misdemeanor, the punishment for which under KRS 431.075 is imprisonment in the county jail for a term not exceeding twelve months or by a fine not exceeding 5000 dollars, or both. However, the crime of involuntary manslaughter, as proposed in the Homicide Act, includes not only those offenses now punished under KRS 431.075, but in addition homicides arising out of wanton negligence now punished under KRS 435.020 as negligent voluntary manslaughter by confinement in the penitentiary for not less than two nor more than twenty-one years. So it is immediately seen that the proposed involuntary manslaughter provision is an enlarged, consolidated one incorporating *existing* punishments ranging all the way from a minimum of a fine to a maximum of twenty-one years in the penitentiary

Alternate methods of handling the punishment for the enlarged offense are possible. One method is to provide a punishment for the crime of involuntary manslaughter to range all the way from a minimum of a fine, let us say, to whatever maximum imprisonment is deemed desirable. The jury would fix the punishment to be given in a particular case within the bounds of the broad scale prescribed. One objection to this method is that a jury might punish involuntary manslaughter by a penalty far in excess of the present punishment.

The other method of handling the problem of punishment under the proposed enlarged involuntary manslaughter statute would be to divide the offense into first and second degrees providing for each degree the minimum and maximum punishment.

It has been determined to divide the crime into two degrees. Involuntary manslaughter in the first degree will encompass the unintentional homicide arising out of an act creating such an extreme risk of death or great bodily injury as to manifest a wanton indifference to human life and safety according to the standard of conduct of a reasonable man under the circumstances. Involuntary manslaughter in the first degree could be punishable by confinement in the penitentiary for not less than two nor more than fifteen years. This punishment is suggestive and might

be changed in the discretion of those who give further consideration to the problem. It will be noted that the maximum punishment suggested, fifteen years, is six years less than the possible maximum punishment possible for the existing negligent voluntary manslaughter, and that the proposed categorization includes possible extreme cases which would be negligent voluntary manslaughter under existing Kentucky law. However, it is thought that the maximum punishment for involuntary manslaughter should not be as great as the maximum of twenty-one years provided for voluntary manslaughter.

It is recommended that involuntary manslaughter in the second degree be made an unintentional homicide arising out of an act showing reckless disregard for human life and safety. It is suggested that the punishment prescribed for that offense be confinement in the county jail for a period not exceeding one year or a fine not exceeding 5000 dollars or both. This is the existing punishment for involuntary manslaughter under KRS 431.075.

Recapitulation of Suggested Punishment for Voluntary and Involuntary Manslaughter

A. Voluntary manslaughter. Confinement in the penitentiary for not less than two nor more than twenty-one years.

B. Involuntary Manslaughter.

(1) Involuntary manslaughter in the first degree. Confinement in the penitentiary for not less than two nor more than fifteen years.

(2) Involuntary manslaughter in the second degree. Imprisonment in the county jail for a term not exceeding twelve months or a fine not exceeding five thousand dollars, or both.

In conclusion, it should be emphasized that existing penalties for manslaughter, voluntary and involuntary, vary widely in the different states. Typical maxima for manslaughter (where the offense is not divided into voluntary and involuntary divisions), or voluntary or first degree manslaughter where those crimes are separated, are 10-20 years imprisonment. Minima, if any, are typically short, such as one year. Involuntary manslaughter or second degree manslaughter, where those crimes are separated, is typically punishable by a maximum of 5 years or less.²¹¹ Thus

²¹¹ The following footnote, taken from the Model Penal Code §201.3, com-
(Continued on next page)

it is apparent that individuals, like the states, will vary widely as to the penalties for manslaughter, particularly where it includes, as in the recommended Homicide Act, what in other jurisdictions is ordinarily punished as negligent murder. Those who have worked upon the act have followed existing Kentucky law on the matter so far as seemed possible.

III. PROPOSED HOMICIDE ACT

The group which has studied the homicide laws of Kentucky recommends the adoption of the following Homicide Act:

Murder. Any person who commits willful murder shall be punished by confinement in the penitentiary for life, or for a minimum of twenty years before becoming eligible for parole, or by death.

Comment: These recommendations change existing Kentucky law in only one particular—three instead of two choices of punishment are provided. At present the jury has a choice between life imprisonment and death. As pointed out in an editorial in the Courier Journal on February 16, 1960, juries are often reluctant to give a death sentence, while for offenses which shock the

(Footnote continued from preceding page)
 ment at 49 (Tent. Draft No. 9, 1959), is presented as a categorization of the punishment provided for manslaughter in the various states:

A tabulation of existing provisions:

[Sentence]	[No. of States]	[Sentence]	[No. of States]
5-21	1	1-14	1
5-20	1	1-12	1
5-15	1	1-10	10
4-Life	2	1-8	2
2-30	1	1-5	2
2-21	2	4 mos.-20	1
2-10	1	0-Life	1
2-7	1	0-30	1
1-30	1	0-20	5
1-21	1	0-15	3
1-15	1	0-10	4
1-20	2	0-1	1

Involuntary manslaughter or second degree manslaughter, where those crimes are separated, is typically punished by a maximum of five years or less.

[Sentence]	[No. of States]	[Sentence]	[No. of States]
3-5	1	0-15	2
1-5	1	0-10	1
1-3	1	0-5	3
3 mos.-3	1	0-4	2
0-20	1	0-8	3
		0-1	4

Under the Wisconsin reckless homicide statute, the maximum imprisonment is five years, and there is no minimum.

community a life sentence, which can end in eight years by parole under 439.110(3), sometimes sets off a public outcry. So a death sentence may be deemed too severe, and a life sentence, subject to parole in eight years, too lenient. As suggested in the editorial, a third choice of a minimum of twenty years before possibility of parole would fill this gap and give the jury a much needed additional choice.

Voluntary Manslaughter

- (1) An unlawful homicide, which would otherwise be willful murder, shall constitute voluntary manslaughter when:
 - (a) committed in sudden affray or heat of passion immediately caused by a provocation sufficient to deprive a reasonable man of his self-control and power of cool reflection
 - (b) the homicide would be in defense of self, of another person, or of habitation were it not for the fact that the offender was at fault in bringing on the difficulty, or in erroneously and unreasonably believing that his life or the life of another was in danger, or in using greater force than was reasonably necessary
 - (c) the person who committed the killing or was a party to it was at the time suffering from such abnormality of mind, although not legally insane, whether arising from a condition of retarded development of mind or any inherent causes or induced by disease or injury, as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing
 - (d) the person who committed the killing or was a party to it was at the time so intoxicated as to be unable to form the willfulness requisite for murder
- (2) any person who commits voluntary manslaughter shall be confined in the penitentiary for not less than two nor more than twenty-one years

Comment: This four part voluntary manslaughter provision in an attempt to codify existing Kentucky law except for the negligent, voluntary manslaughter. The offense which is now called negligent, voluntary manslaughter is transferred to the involuntary manslaughter provision. If the plan has been achieved, a voluntary manslaughter can occur under the proposed act in the case of a willful (intentional) killing only

Part (a) of the definition is intended as a codification of the common law as to provocation and is believed to be a codification of existing Kentucky law²¹² The law as to provocation as a reducing agent is being extended in a number of jurisdictions. This definition, it is believed, allows the courts, if they desire, to follow the trend of these jurisdictions.

Part (b) is intended also as a codification of the common law, supported by Kentucky decision. Imperfect defense of self, of another, or of habitation as a basis for a conviction of voluntary manslaughter has a long history and is recognized in other jurisdictions. Part (c) softens the legal test of insanity, which is under strong national and international pressure, and furnishes a most valuable device for cautious experimentation in fringe cases of mental disorder. The provision is taken from the new English act of 1959. Part (d) is a codification of the rule found in a number of Kentucky cases that intoxication of the accused will serve to reduce willful murder to voluntary manslaughter if it renders him incapable of forming the willfulness (intention) requisite for murder.

One reason for including Parts (b), (c), and (d) in the proposed provision, aside from their own intrinsic value, is to assist in making clear the legislative intent that negligent voluntary manslaughter is abolished by the act. Kentucky cases supporting the offense are no longer to be followed by the courts.

An alternate voluntary manslaughter provision is also presented.

Voluntary manslaughter. Any person who commits voluntary manslaughter shall be confined in the penitentiary for not less than two nor more than twenty-one years.

Comment: This is a recodification of KRS 435.020. While the study group prefers the four part, definition form provision it realizes that there may be objection to the wording in some of the parts which could defeat the whole act in the legislature. This alternate is suggested for such a contingency

The punishment for voluntary manslaughter remains unchanged under the proposed Act.

²¹² Sudden affray does not fit easily in the provocation category so is often added as an additional category. Note 145 *supra*; Pennington v. Commonwealth, 344 S.W.2d 407, 409 (Ky. 1961).

Involuntary manslaughter.

Involuntary manslaughter in the first degree. Any person who causes the death of a human being by an act creating such extreme risk of death or great bodily injury as to manifest a wanton indifference to the value of human life according to the standard of conduct of a reasonable man under the circumstances shall be confined in the penitentiary for not less than two nor more than fifteen years.

Involuntary manslaughter in the second degree. Any person who causes the death of a human being by reckless conduct according to the standard of conduct of a reasonable man under the circumstances shall be imprisoned in the county jail for a term not exceeding twelve months or fined a sum not exceeding five thousand dollars or both.

Comment: It is intended that the definition of involuntary manslaughter in the first degree include what would be negligent murder in most other states. Three principal factors have caused the inclusion of the common law negligent murder situations in the involuntary manslaughter in the first degree provision: (1) a desire to eliminate the negligent voluntary manslaughter from Kentucky law, (2) the belief that regardless of the situation in most other states, neither the Legislature nor Kentucky courts favor the crime of negligent murder, but believe the offense should be no more than manslaughter even where the negligence is of high degree, and (3) a hope that the courts will now repudiate the felony willful murder and divert such cases to the new involuntary manslaughter in the first degree category since such cases are really *unintentional* felony homicide situations where the test of liability should be extreme danger in the felonious act, not willfulness.

The punishment for involuntary manslaughter in the first degree is merely a suggestion, and is less than the present punishment for negligent voluntary manslaughter, the offense for which the provision is primarily intended.

Involuntary manslaughter in the second degree embraces those cases now punished as common law involuntary manslaughter. By using the phrase "reckless conduct"²¹³ in the proposed

²¹³ It should be noted that the Model Code uses the one word "recklessly" to define the negligence requisite for manslaughter (the Model Code also incorporates the negligent murder). Model Penal Code §201(1)(a) (Tent. Draft No. 9, 1959). "Reckless conduct," the phrase used in this proposed provision, is taken

(Continued on next page)

provision, the phrase employed by most other jurisdictions and the Model Penal Code, it is hoped that the definition of the negligence required for common law involuntary manslaughter will be more clear than the one currently used by the Court of Appeals.²¹⁴

The proposed punishment is the same as the existing one, imprisonment in the county jail for a term not exceeding twelve months or a fine not exceeding five thousand dollars, or both. It is believed that juries and the public generally do not subscribe to a punishment greater than this for a negligent homicide on this level.

Proposed Homicide Act in Compact Form

In order that the reader may see the entire act in compact form with no comments it is presented below:

Murder. Any person who commits willful murder shall be punished by confinement in the penitentiary for life, or for a minimum of twenty years before becoming eligible for parole, or by death.

Voluntary Manslaughter. (1) An unlawful homicide, which would otherwise be willful murder, shall constitute voluntary manslaughter when:

- (a) committed in sudden affray or heat of passion immediately caused by a provocation sufficient to deprive a reasonable man of his self-control and power of cool reflection
- (b) the homicide would be in defense of self, of another person, or of habitation were it not for the fact that the offender was at fault in bringing on the difficulty, or in erroneously and unreasonably believing that his life or the life of another was in danger, or in using greater force than was reasonably necessary
- (c) the person who committed the killing or was a party to it was at the time suffering from such abnormality of mind, although not legally insane, whether arising from a condition of retarded development of mind or any inherent causes or induced by disease or injury, as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing

(Footnote continued from preceding page)

from the new Wisconsin Criminal Code, which uses no description other than this phrase. Wis. Stat. Ann §940.06 (1958). "Recklessly" or "reckless conduct" is now commonly used to describe this offense. Compare KRS 435.010 which uses the one word "willful" to describe intentional murder.

²¹⁴ See pp. 123-24 *supra*.

- (d) the person who committed the killing or was a party to it was at the time so intoxicated as to be unable to form the willfulness requisite for murder
- (2) any person who commits voluntary manslaughter shall be confined in the penitentiary for not less than two nor more than twenty-one years

[Voluntary manslaughter. Any person who commits voluntary manslaughter shall be confined in the penitentiary for not less than two nor more than twenty-one years.] (This is the alternate provision.)

Involuntary manslaughter.

Involuntary manslaughter in the first degree. Any person who causes the death of a human being by an act creating such extreme risk of death or great bodily injury as to manifest a wanton indifference to the value of human life according to the standard of conduct of a reasonable man under the circumstances shall be confined in the penitentiary for not less than two nor more than fifteen years.²¹⁵

Involuntary manslaughter in the second degree. Any person who causes the death of a human being by reckless conduct according to the standard of conduct of a reasonable man under the circumstances shall be imprisoned in the county jail for a term not exceeding twelve months or fined a sum not exceeding five thousand dollars or both.

²¹⁵ When the 1962 Kentucky Legislature adopted this provision (KRS 435.022) the minimum imprisonment was reduced from two years to one year.

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