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MANSLAUGHTER BY MOTORISTS†

By James J. Robinson*

While a motorist, D, is driving an automobile on a city street or along a country highway, his car strikes another person, X, either directly or by collision with the vehicle in which X is riding, inflicting injuries from which X dies. Has D committed a homicide? If so, has he committed a homicide which is criminal?

The guilt or the innocence of D, under the criminal law of almost all of the states, of the federal government, and of England, is to be determined by considering the facts of the case with relation to five classifications of homicide which have been made by the common law. By consideration of the cases possible under the facts stated above it will be seen that the killing may be: (I) an intended homicide,—case 1, murder; case 2, voluntary manslaughter; or case 3, justifiable homicide; or (II) no homicide,—case 4, killing by accident, not by D; or (III) an unintended homicide,—case 5, excusable homicide by negligence; or case 6, involuntary manslaughter. These six cases include the classes of homicide at common law.1

Homicide, like manslaughter, by derivation as a word2 and historically as a legal term,3 means the killing of a man by a man. In order for homicide to be committed, therefore, a human being must do an act which causes the death of another human being. The act must be one which is directly and immediately connected with the death, and one but for which the person killed would not have died.4 In the case stated, therefore, D has committed a...

†See Chart, page 788.
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3Bracton, De Legibus et Consuetudinibus Angliae (1250-1256) f. 120b: Et est homicidium hominis occisio ab homine facta.
4Stephen, Digest of the Criminal Law (1877) 154.
homicide if he has done an act which has resulted in the death of X. If D has done such an act, the question then arises, is the resulting homicide a crime? The answer will be seen to depend upon whether or not D did the act with a criminal intent. If so, it is the distinguishing characteristics of that intent which will determine whether the crime committed by D was murder, voluntary manslaughter or involuntary manslaughter.

The guilt or the innocence of D, therefore, resolves itself into the two questions which are fundamental in any inquiry under the criminal law. First, with regard to the law—what physical acts and what mental intents or attitudes, when combined, are made crimes by the law which is applicable to the facts? Second, under the facts of this case,—did D do one or more of the physical acts, and did he have one or more of the mental intents which are, when combined, made criminal by the law? In order to answer these two fundamental questions, it is necessary first to determine what is the meaning or the use of the word "act," and what is the meaning or the use of the words "criminal intent," when used in definitions and in adjudications of crime.

A. The Act.

The criminal law is concerned primarily with acts. Its definitions of crimes and its adjudications of guilt begin with the act. What is an act? So far as the criminal law at least is concerned, the word "act" means a mentally self-directed physical movement by a human being. There are, therefore, two parts of an act, namely, the mental or psychological part, and the physical movement perceivable to a greater or less extent by one or more of the five senses. The act, in order to be an act, must originate in a human mind functioning competently, and it must be directed by that mind. The tree, the ship, the animal, the madman, the infant child, the somnambulist,—none of these, as Bracton and other legal writers clearly point out, although each is capable of physical movement, does an act having legal significance, for the reason that mental self-direction does not exist in such cases.

The second division of the act, the physical movement, commonly consists, in part at least, of the movement of part or all of the body. An act may be, therefore, one movement or a related group of movements. Each bodily movement in the operation

5Bracton, De Legibus et Consuetudinibus Angliae (1250-1256) f. 136b; 1 Austin, Lectures on Jurisprudence (1874) 292; Mercier, Criminal Responsibility (1926) 16, 56.
of an automobile, for example, is an act, and the whole coordinated movement and activity is, in common speech and understanding, called the act of driving the car. The scope and parts of an act are matters which arouse differences of opinion, but it seems clear that the physical movement part of an act, as dealt with in criminal law, usually includes three aspects or phases: (1) where the act begins—its origin; (2) what of the surrounding facts the act includes—its circumstances; and (3) where the act ends—its consequences. The criminal law must deal with acts not piece-meal but as significant units. Driving an automobile, to continue the example just given, therefore, must be dealt with as including the initial movements, the circumstances and the consequences which together constitute the driver's operation, by mind and body, of the automobile.

The authoritative and final determination of the use and meaning of the term act, and of the nature and extent of its two elements, does not rest with the writers on jurisprudence and the psychologists. That determination depends, from time to time and place to place, upon (1) what the law says the specific act element of the crime shall be; and upon (2) what the people as jurors and as citizens of general experience understand to be the proper application, limits and meaning of the term "act," as specified by the law, and as known to common speech and common experience. Common law and statute may state as the specified act, usually by verb or by infinitive, a simple act such as to sound a horn, or a complex or composite act such as to drive an automobile. Or the act penalized may be the killing of a human being by driving an automobile in an unlawful manner. It then becomes the duty of the judge and the juror to investigate the facts in hand and to determine at the outset whether those facts show the mental element and the physical movement which the lawmaker has specified as the act, the basic part of a crime.

B. THE CRIMINAL INTENT.

An act is not a crime unless it is accompanied by a criminal intent. This fundamental principle is sometimes stated in this form: a crime is an act plus a criminal intent. Criminal intent

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6Holmes, The Common Law (1881) 54, 91; Cf. Restatement, Torts (1934) sec. 2; Salmond, Jurisprudence (8th ed. 1930) 381, 383; Stroud, Mens Rea (1914) 2; Hales v. Petit, (1563) 1 Plowden 257; 1 Austin, Lectures on Jurisprudence (1874) 290, 293.

7A few offenses, of course, consist of a prohibited act alone, criminal intent not being required. Some offenses, moreover, consist of an omission
in general is the intent of the human being who is doing the act, to injure another human being by the act; or the intent to do an act by which another human being is likely to be injured. "A crime is not committed," says Bracton, "unless the intent (voluntas) to injure exists."

The criminal intent may be an intent to injure a certain person, or it may be an intent simply to do acts "under circumstances in which they will probably cause some harm which the law seeks to prevent." The test of the criminality of the intent of this latter type is "the degree of danger shown by experience to attend that act under those circumstances." The offender himself, therefore, may not recognize the fact that his intent to do the act in question is a criminal intent. It may therefore become necessary for a judge and a jury to inform him that his intent to do the act was a criminal intent, and that he is held criminally accountable for the consequences of his act. The consequences may in fact be abhorrent to him but that does not mean that he did not intend them. Criminal intent, therefore, including as it does both of the forms just described (full intent and imperfect intent), may be defined as a man-injuring frame of mind. This definition or description is a general one for homicides; and it often is supplemented by specific provisions of statutes.

The criminal intent is created or established by common law or by statute. Since it distinguishes the crime of which it is a part, it differs with each crime.

Criminal intent must not be confused with the mental self-direction element of the act. Both are mental, but the mental self-direction element of the act is mental viewed from the standpoint of looking into the mind itself as a physical or physiological mechanism; the criminal intent is mental viewed from the standpoint in the discharge of a prescribed legal duty, plus, probably in most cases, a criminal intent. Whether or not such an omission is an act, or whether such an offense is an exception to the general rule, is a question which need not be considered here.

9Bracton, De Legibus et Consuetudinibus Angliae (1250-1256) f. 136b: Crimen non contrahitur nisi voluntas nocendi intercedat.

10This intent is called "full intent" by Stroud, Mens Rea (1914) 6.

11Holmes, The Common Law (1881) 75. This intent is called "imperfect intention" by Stroud, Mens Rea (1914) 6. Bracton's type illustrations, as quoted infra, note 82, show that he included imperfect or indirect intent in his term voluntas, supra, note 8.

12Holmes, The Common Law (1881) 75.

13Compare the Roman law doctrine culpa lata, "non intellegere quod omnes intellegunt." Buckland and McNair, Roman Law and Common Law (1936) 198.

14Stroud, Mens Rea (1914) 3.
point of looking out from the mind as a source of social or anti-social conduct. The term "voluntary" often is used ambiguously to refer to both the mental self-direction element of the act and also the mental social-attitude element of the crime. The result of such confusion in a particular case often is that consideration is given solely either to the act or to the criminal intent, to the exclusion of the other element, as a part of the crime which is under consideration. For this reason, among others, it seems best not to speak of a "voluntary" act, but to restrict the use of the term "voluntary" to the criminal intent to which it properly belongs by derivation and by legal history.

Criminal intent must be kept distinct also from malice, and from motive. Malice sometimes means criminal intent, but in common speech at least it goes beyond intent. Motive is the desire prompting a man's conduct. It is often important in proving intention but it is distinct from intention.

Criminal intent is preferable, as a term, to mens rea, a term often used to mean criminal intent. This preference exists partly because there is a tendency in the courts to prefer the English words, and partly because of the varying interpretations of the term mens rea and of the Latin maxim of which it is a part.

In homicide cases, the criminal intent to kill a specific person is a distinguishing element of the crimes of murder and of voluntary manslaughter; the criminal intent to do an act likely to result in bodily harm to anyone is the distinguishing element of involuntary manslaughter. In each of the five type cases of actual homicide which are under consideration, the act, namely a killing, is the same act. Whether the crime in each type is murder, or voluntary manslaughter, or involuntary manslaughter depends, therefore, upon the criminal intent which the facts show to be present in each case.

The six classifications into which the case of D may fall will now be considered. Most of the cases of killing by automobile drivers are, of course, cases of involuntary manslaughter. That

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14 This confusion, in English cases, has been observed also by R. M. Jackson, in his article on Absolute Prohibition in Statutory Offenses, (1936) 6 Camb. L. J. 83, 91; and by J. W. C. Turner, in his article on The Mental Element in Crimes at Common Law, (1936) 6 Camb. L. J. 31, 37. And see text, infra, at notes 75, 79, 80, 120, 121.

15 Holmes, The Common Law (1881) 52.

16 Stroud, Mens Rea (1914) 4.

17 For example, uses of the terms mens rea and actus reus with which the writer and others are unable to agree are found in Stroud, Mens Rea (1914) 7, and in Turner, The Mental Element in Crimes at Common Law, (1936) 6 Camb. L. J. 31, 37.
type of homicide, therefore, will necessarily require the greatest amount of attention in this article. Other types of homicide, however, must be considered because (1) the case of D as stated at the beginning of the article may include them, and (2) they offer opportunities for comparative applications of many of the principles which are controlling principles in the law of involuntary manslaughter.

This study of the law of involuntary manslaughter is based upon its application in automobile cases because of the outstanding importance today of the automobile traffic problem. The law of involuntary manslaughter, however, is of equal importance in the other phases of modern life in which one person, by his conduct, may endanger the lives and safety of many others. The same legal principles are applicable, of course, in the operation of railroad trains, ships and airplanes, coal mines and various industrial and building enterprises.

The principles of the law which are considered in the six cases will be drawn from the common law, the statutes and the court decisions of the United States and of England.

I. INTENDED HOMICIDE

CASE 1. MURDER.

The facts:

_D drives an automobile against X, who is riding a bicycle on the highway, with intent to kill X, who dies of the injuries so inflicted._

The question to be determined upon these facts is whether or not D may be convicted of murder.

Murder is the unlawful killing of a human being with malice aforethought. This definition is the long-established definition of the common law, and it is likewise the present definition of the

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18In 1937, deaths arising from motor vehicle traffic accidents in the United States numbered 39,700; permanently disabled, 110,000. Occupational accident deaths, 19,000. The totals represented increases over the preceding year. Statistical Bureau, National Safety Council. For England the annual number of deaths in traffic accidents is set at 6,900. Griffith, Homicide on the King's Highway, (1937) 121 Nineteenth Century 522.


20Hale, The History of the Pleas of the Crown (1678) 449.
offense of murder as stated in modern statutes, such as the United States Code.\(^2\)

In making the application of the law defining the offense to the facts of the case stated, what does the government have to prove in order to convict D of the offense of murder? The government must prove first, that D did the act specified by the statute and second, that D had the criminal intent specified by the statute.

The act element of the crime, as defined at common law and by statute, is the killing of a person. The government must prove (1) that D killed X. In order to establish this fact, it will be necessary to be ready to prove, (a) that D's physical movements, as such, were under adequate mental self-direction, and (b) that D actually made one or more of a related group of physical movements leading to the death of X. In regard to (a), under the facts stated the evidence indicates, in the absence of any question to the contrary, that D's act was competently self-directed, so far as adequate mental control by D of his own physical movements was concerned. In regard to (b), namely, the physical movement element of the act, the facts stated show the following series of significant events which, at the time of the injury to X, made up this part of the act. The origin of the act consisted in D guiding his car toward the person riding the bicycle. The significant circumstances include the circumstances surrounding the collision of the automobile with the bicycle and its rider. The consequence was the resulting death of X. The act of homicide is established by the facts stated.

The criminal intent element of the crime of murder is malice aforethought. Malice aforethought is the intent of one human being to injure a certain other human being to the extent of taking, or of endangering, his life, without legal justification, excuse or mitigation.\(^2\) In view of the fact that this intent is directed against the life and safety of a specific human being, it is called "full" intent. It is because of the extreme culpability of this type of criminal intent, without mitigation, that murder always has been and now is punishable generally by death.

In order to prove that D committed the crime of murder the government must prove, (2) that D at the time of his act had the


\(^{22}\)Cf. Perkins, A Re-examination of Malice Aforethought, (1934) 43 Yale L. J. 537.
criminal intent which is specified by the legal definition of the crime of murder, namely malice aforethought. The facts stated show that D, with full and direct intent to kill X, drove the automobile against X and thereby inflicted the fatal injuries. The facts, moreover, fail to show any ground of justification, excuse, or mitigation. The criminal intent of malice aforethought is therefore established by the facts.

Since the act of killing and the kind of criminal intent required for murder were both proved as the facts of the case, D was properly convicted of murder.23

CASE 2. VOlUNTARY MANSLAUGHTER.

The facts:

While D is driving an automobile, X throws a rock through the windshield. The rock and broken glass cut D's face and hands. D, enraged, drives the car against X, who dies of the injuries so inflicted.

The question to be determined upon the facts stated is whether or not D may be convicted of voluntary manslaughter.

Manslaughter is the unlawful killing of a human being without malice. This is the definition of the common law, as stated by Hale and Blackstone. It is also the definition stated in modern codes.24

The term manslaughter, which is of Anglo-Saxon origin, and its Latin equivalent, homicide, were originally generic terms which included all forms of felonious homicide. By 1340 the worst kinds of homicide had come, in common usage, to be called murder. Between 1496 and 1547 a series of statutes established murder as the crime of killing "with malice aforethought." From this time on the crime of murder is separated definitely from other classes of homicide, and its history is mainly one concerning the interpretation of the term malice aforethought.25

The term manslaughter was not immediately applied solely to that form of homicide which was done without malice aforethought.

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22Another conviction of murder committed by automobile is People v. Brown, (1921) 53 Cal. App. 664, 200 Pac. 727. In this case the defendant in order to avoid arrest by an immigration officer at the Mexican border ran down and killed the officer. The case of State v. Peterson, (N.C. 1938) 194 S. E. 498, is probably the most recent of the few American cases in which a conviction of a drunken driver for second-degree murder has been affirmed. See (1936) 9 So. Cal. L. Rev. 145.


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It persisted in England as the general term for felonious killing through the sixteenth century, and it was in use in that sense in the American colonies in the seventeenth century.

The division of manslaughter into the two classes, voluntary and involuntary, is discussed later under Case 6.

In the offense of voluntary manslaughter, as in murder, the act specified is a killing of a human being. In voluntary manslaughter, as in murder, the criminal intent is a full intent without legal justification or excuse, to injure a certain other human being to the extent of taking, or of endangering, his life. The difference, however, between the two crimes is that the criminal intent in voluntary manslaughter is considered to be reduced in its criminal character by some legally recognized provocation.

In the case stated above, the facts given are that D was so angered by the wounds inflicted on him by X that he killed X in the “heat of passion.” With a full, though mitigated criminal intent, and a killing of X both proved, D was properly convicted of voluntary manslaughter.

CASE 3. JUSTIFIABLE HOMICIDE.

The facts:

While D is driving an automobile, X begins shooting at him. D, in reasonable defense of his own life and safety, drives the car against X, who dies of the injuries so inflicted.

This case requires slight consideration, because it has no special bearing on principles involved in the law of involuntary manslaughter, the principal subject of this article. The case is included, however, for the sake of completeness in the consideration of homicide, and because of the fact that self-defense is such a common, or one may say, popular, defense in homicide cases. The law of justifiable homicide has an interesting history, especially in its relationship to excusable homicide. In the case stated, if D should be indicted for the murder or for the manslaughter of X, D would have a good defense in that he killed X in self-defense. Although D did the act of killing X, and although D had the intent to kill X, if necessary, the intent was not a criminal

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27The Laws and Liberties of Massachusetts (1648) Capital Lawes, p. 5.
intent. His mental attitude was not primarily a man-injuring
frame of mind; his controlling intent was to save the life of a
human being, namely himself, under the necessity of the moment.
In killing X he is considered, moreover, to have served the ends
of criminal law by preventing the commission by X of a felony
dangerous to life.

II. No Homicide

Case 4. Killing by Accident.

The facts:
While D is driving an automobile,
1. X, in order to commit suicide, throws himself under the wheels
   of D's car, and thereby suffers injuries from which X dies; or
2. X, a child at play, runs against D's car and thereby suffers
   injuries from which X dies; or
3. D's automobile sustains a broken steering gear, and, without
   past or present fault of D, the car goes out of control and
   strikes X, who thereby suffers injuries from which X dies; or
4. M, another motorist, drives his car against D's car, thereby
   crowding or throwing D's car, without act or fault of D,
   against X, who thereby suffers injuries from which X dies.

The question in each of these four situations under Case 4 is
whether or not D may be convicted, upon the facts stated, of any
crime based on homicide.

A definition of accidental killing which may, in these cases,
be applied in a manner comparable to the application of the defini-
tions of the crimes based on homicide, is not provided
by the common law or by statute. Fundamental general principles of the
common law, however, may be applied and are adequate for decid-
ing the questions raised. The rule which is decisive of the ques-
tions is the rule that there is no crime unless there is both an act
and a criminal intent.

Did D, in any one of the four situations given above, do any
act which had as one of its parts or consequences the death of X?
Applying to the facts stated our analysis of an act, we first observe
that D, at the time of the fatal injuries to X in each situation, was
presumably capable of mental self-direction in whatever physical
movement he might make. It is clear, moreover, that he was
engaged likewise in the physical movement part of the act of
driving the car. But, on the facts, the legal consequences included
in that physical movement did not extend to and include the death of X. The death of X was the result of the intervention of acts of human agencies other than D, or of non-human agencies not directed by D. In other words, so far as D was concerned, there was no act—no homicide, in the strict sense of the Bracton definition—in any of the four situations. The death of X, under each hypothesis, was, as to D, a "pure" or true accident, that is, an experience which "fell to" the lot of D without active participation by him in bringing it about. It must be answered, therefore, that D did no act of which the death of X was a legal consequence.

A crime, as stated above, is an act plus a criminal intent. In cases where no act has been committed by the defendant, there can be no crime proved against him. To proceed to inquire about the existence and nature, in the pending case, of the other element of crime, namely the criminal intent, is immaterial and sometimes misleading; to say the least, it assumes, erroneously, that the defendant has done the act.

In an opinion delivered last year in the House of Lords in the case of Andrews v. Director of Public Prosecutions, there is an illustration of what seems, with due respect, to be an ignoring of the principle that where there is no act there is no question of criminal intent. The question at issue was the nature of the criminal intent required for involuntary manslaughter in automobile cases, and the failure to apply the principle just stated has contributed to the adverse criticism which the decision has aroused in England.

"It is perfectly possible," said Lord Atkin in the Andrews Case, "that a man may drive at a speed or in a manner dangerous to the public and cause death and yet not be guilty of manslaughter. . . . As an instance . . . a man might execute the dangerous manoeuvre of drawing out to pass a vehicle in front with another vehicle meeting him and be able to show that he would have succeeded in his calculated intention but for some increase in speed in the vehicles in front—a case very doubtful of manslaughter but very probably of dangerous driving."

In the instance stated, it would seem clear that the reason which would make a conviction of manslaughter very doubtful is the fact that the collision and death were not legal consequences of the

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29Bracton, De Legibus et Consuetudinibus Angliae (1250-1256) f. 120b.  
31Dean, Manslaughter and Dangerous Driving, (1937) 53 L. Quart. Rev. 380; and see page 306; (1937) 1 Journal of Criminal Law 422, 431; Davies, Manslaughter—Negligent Driving, (1937) 1 Modern L. Rev. 242.
act of the driver in question. What kept him from succeeding in his intention were the acts of the drivers of the vehicles in front in increasing their speed. It seems, also, that such a defendant should not be convicted on a prosecution for dangerous driving when the dangerous driving, if any, was the act, not of the defendant, but of some other driver or drivers. If it is "perfectly possible" that one may drive dangerously and thereby cause the death of another, and yet not be guilty of manslaughter, it is very desirable that, in the presentation of a proposition so difficult to accept, the possibility be illustrated by a case in which the driver is doing the driving which actually causes the death.

In each of the four situations presented under Case 4, it would seem clear that the killing of X was not the act of D, and that D was therefore not only not guilty of a criminal homicide, but that D had not even committed a homicide.

III. UNINTENDED HOMICIDE

CASE 5. EXCUSABLE HOMICIDE BY NEGLIGENCE.

The facts:

While D is driving an automobile he sees an object lying in the highway which he believes to be a bundle of clothing. He drives his car over the object. He then learns that the object is in fact a man, X, who has been struck by a passing car and left lying in the highway. X dies of the injuries inflicted by D's automobile.

The question to be determined upon these facts is whether or not D may be convicted of a criminal homicide.

It will be sufficient at this time to consider the facts stated on the basis of fundamental principles underlying the criminal law, without taking up the definition of any criminal offense.

First, with regard to the act, D did the act of driving his car over X and killing him. Clearly the killing was not an accident, as tested by the illustrations in Case 4. In the present case, D acted, and he acted with competent mental self-direction. D originated the physical movement, continued it through the circumstances stated, to the consequence of X's death, which was the conclusion of D's act in question. D did what he intended to do, namely, to run over the object lying in the highway.

The question, then, becomes solely one of criminal intent. D did not have a full intent because he did not intend to injure X.
He cannot, therefore, be guilty of intended homicide. Did he have an imperfect intent, namely, the intent to do an act dangerous to the lives and safety of others?

The question of the existence of an imperfect intent depends for its answer on the effect of D's mistake in thinking that X, as he lay in the highway, was merely a bundle of clothing. If D can establish satisfactorily that his mistake was reasonable under all of the circumstances, he can not be said to have had the criminal intent to drive his car in a manner dangerous to the life of X or of any other person. If the object had in fact been a bundle of clothing, it is apparent that D would have been doing nothing unlawful in driving the car over the bundle.

"The wrongful intent being the essence of every crime," says Bishop, "it necessarily follows that whenever one without fault or carelessness is misled concerning facts, and acts as he would be justified in doing were they what he believes them to be, he is legally innocent the same as he is innocent morally."

It is clear, therefore, that if D acted with reasonable regard for the rights of others, and without fault or carelessness, he did not have the imperfect intent in question. He would therefore be excused from liability for a criminal homicide.

If, on the other hand, the full facts showed that D acted unreasonably and without due regard for the life and safety of X, or of anyone else, in driving as he did, D may be convicted of the homicide requiring imperfect intent, namely, involuntary homicide. The definition of that crime by common law and by statute, and a consideration of the circumstances under which D may be guilty of it, are taken up in the next section, Case 6.

Even though D may not have had an imperfect criminal intent, as defined in the preceding paragraphs, his conduct with regard to X may have fallen below the standard of legal duty, which D owed X as a fellow human being, not to do acts which might cause X injury or loss. In other words, even if D were excused from liability for criminal homicide, and a fortiōri, if he should be held criminally liable, D may be liable in tort for negligent homicide in causing X's death. The test of D's liability would be whether or not his conduct with respect to X was that which an average rea-

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321 Bishop, Criminal Law (9th ed. 1923) 204.
32a This general legal duty is to be distinguished from a prescribed or special legal duty, based on contract or on a relationship established by common law or by statute. The omission to discharge a special legal duty may supply the criminal intent for involuntary manslaughter.
reasonable man would have shown under the circumstances. Stated more fully the test of his liability for negligence would be:

Did he omit to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or did he do something which the prudent and reasonable man would not do?33

If the jury, applying the test, should think that D acted as an average reasonable man would have acted under all the circumstances, they may find him not liable to pay damages in tort based upon the killing of X. If, however, they should find that he acted without due care, they would find him liable in tort. So far, however, as his criminal liability was concerned, this judgment in tort would be of no significance. Although liable in tort for negligence, he may be excused under the criminal law because of his mistake of fact, and his killing of X would then be an excusable homicide by negligence.

There is some relationship, however, between negligent tort and criminal involuntary manslaughter. This relationship will be discussed in the next section, Case 6.

**Case 6. Involuntary Manslaughter.**

The facts:

While D is driving an automobile, he starts to pass the car ahead of his own car, on a two-lane highway, at a point where the highway ascends a ridge. He is driving at a speed of sixty miles an hour. As he draws abreast of the car ahead, near the crest of the ridge, he strikes head-on a car driven by X, who is traveling lawfully in his proper lane. X is killed in the collision.

The question to be determined upon these facts is whether or not D may be convicted of involuntary manslaughter.

To state a general definition of involuntary manslaughter is almost an impossibility.34 Even for a particular jurisdiction, the definition is often a matter of uncertainty. The situation is due in part to the fact that the offense of manslaughter developed historically as a "catch-all" crime, into which were thrown all unlawful homicides which fell short of murder. It is called "the most elastic of crimes."35 Three of the results are that the definitions

35Kenny, Outlines of Criminal Law (15th ed. 1936) 141.
stated by common law and by statutes differ widely, are often not clearly or concisely stated, and are burdened with out-moded legal terminology.

A common law definition as applied in a recent motor manslaughter case is the following:

"Involuntary manslaughter is the unlawful killing of a human being unintentionally and without malice, express or implied, but in the commission of some unlawful act not amounting to a felony, or some lawful act in an unlawful or negligent manner." 36

One significant difference, among many differences between the various common law definitions of the crime of involuntary manslaughter, consists in the inclusion or the exclusion of the clause "in the commission of some lawful act in an unlawful manner." In the definitions given in the treatises on the criminal law, this clause is included, either exactly or substantially as stated, by some writers and it is not included by others. It is included by Bracton, Brill, Clark and Marshall, Kenny, Miller, Russell and Wharton. It is not stated as a part of the definition by Archbold, Bishop, Blackstone, Chitty, Coke, East, Harris and Wilshire, Hawkins, and Stephen. It is included by Corpus Juris33 and by Ruling Case Law. 34

The statutory definitions of the criminal offense of involuntary manslaughter, like the common law definitions, vary greatly. One prominent difference is again the inclusion or the exclusion of the

36 State v. Wheelock, (1933) 216 Iowa 1428, 250 N. W. 617, 619.
37 Bracton, De Legibus et Consuetudinibus Angliae (1250-1256) f. 120b. Of course the term "involuntary manslaughter" was not invented and established until more than five hundred years after Bracton wrote. See notes 80 and 82, infra.
38 Brill, Cyclopedia of Criminal Law (1923) 1116.
40 Kenny, Outlines of Criminal Law, (15th ed. 1936) 135, et seq.
41 Miller, Handbook of Criminal Law (1934) 285.
43 Wharton, Criminal Law (12th ed. 1932) 664.
44 Archbold, Summary of the Law . . . in Criminal Cases (Jervis 5 Am. ed. 1846), 488.
45 Bishop, A Treatise on Criminal Law, (9th ed. 1923) 562, 563.
46 Blackstone, Commentaries on the Laws of England, (Sharswood's ed. 1868), Book IV, 190, 191.
47 Chitty, Practical Treatise on the Criminal Law (1826) 729.
49 East, Pleas of the Crown (1806) 260, et seq.
50 Harris and Wilshire, Principles & Practice of Criminal Law, (15th ed. 1933) 196.
52 Stephen, Digest of the Criminal Law (1877) 392.
53 Corpus Juris 1148.
54 Ruling Case Law 784.
same clause, "the commission of some lawful act in an unlawful manner." The United States Code includes the clause, defining the offense as follows:

"Manslaughter is the unlawful killing of a human being without malice. It is of two kinds: Voluntary—upon a sudden quarrel or heat of passion. Involuntary—in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." 55

The statutes of at least seventeen of the states 56 and of Porto Rico and of the Canal Zone definitely include the clause.

The differences in the statutory definitions are no doubt due in part to the differences in the common law definitions. The offense of involuntary manslaughter is defined by statutes using the same terms as common law definitions, in the United States Code, 57 in the criminal codes of eighteen of the states, 58 of Porto Rico 59 and of the Canal Zone. 60 The definition of the offense is left to the common law by statutes which penalize involuntary manslaughter as a crime without defining it, in fifteen states, 61 and in the District of Columbia. 62 The shortest and most ancient form of the common law definitions of manslaughter, namely,
every unlawful homicide not amounting to murder, has been
enacted in words or in substance in three states,\(^6^3\) in Hawaii,\(^6^4\)
and in the Philippine Islands.\(^6^5\) Multiple degrees of manslaughter
and murder which cover the offense of involuntary manslaughter
as known to the common law have been enacted in ten states\(^6^6\)
and in Alaska.\(^6^7\) Kentucky does not have the common law offense
of involuntary manslaughter, but it has a statute establishing com-
mon law voluntary manslaughter, and a statutory offense called
unintentional killing.\(^6^8\) Texas since 1879 has had an offense
known as homicide by negligence, in two degrees, which has part
of the scope of the common law offense of involuntary man-
slaughter.\(^6^9\)

A new type of offense, commonly called negligent homicide, has
been created in thirteen states,\(^7^0\) in the District of Columbia,\(^7^1\) in
Canada\(^7^2\) and in England.\(^7^3\) It is designed principally to take
care of unlawful homicide by automobile drivers.

\(^6^3\)Florida, Comp. Laws 1927, sec. 7141; Missouri, Rev. Stat. 1929, sec.
3988; Ohio, Ann. Code (Throckmorton’s 1924) sec. 12404.
\(^6^4\)Hawaii, Rev. L. 1925, secs. 4119, 4120.
\(^6^5\) Philippine Islands, Penal Code 1930, art. 404.
\(^6^6\)The statutory offenses which seem to include the common law offense
of involuntary manslaughter are indicated below for each of the ten states:
Alabama: Manslaughter in first degree and in second degree. Code 1928,
sec. 4460. Kansas: Manslaughter in first degree, in third degree, and in
degree. Gen. Stat. (Corrick, 1935) secs. 21-407, 413, 414, 419,
420, 422, 423. Minnesota: Murder in third degree and manslaughter in
first degree and in second degree. Mason’s 1927 Minn. Stats. secs. 10070,
10073, 10074, 10077, 10078, 10086. New Hampshire: Manslaughter in first
New York: Manslaughter in first degree and in second degree. Criminal
and Penal Code (Gilbert, 1933) secs. 1049-1053. North Dakota: Man-
slaughter in first degree and in second degree. Comp. Laws 1913, secs. 9470,
9471, 9474, 9475, 9488, 9491. Oklahoma: Manslaughter in first
degree, in second degree. Comp. Stat. 1919, secs. 1740, 1745. South Dakota:
Murder in first degree and manslaughter in first degree and in second
degree. Comp. Laws 1929, secs. 4020, 4023, 4024. Washington: Murder
2392, 2393, 2395. Wisconsin: Murder in second degree and manslaughter
\(^6^7\)Alaska, Comp. Laws 1913, sec. 1886.
\(^6^8\)Kentucky, Stats. (Carroll 1936) Rev. secs. (Baldwin) 1150, 1151.
\(^6^9\)Texas, Stats. (Vernon 1926) Penal Code, arts. 1231, 1237, 1241.
\(^7^0\)California, Stats. 1935, p. 2141; Connecticut, Gen. Stat. Supp. 1931,
217; modified 1931, p. 624, 689; Minnesota, Laws 1937, p. 743; Nebraska,
Stats. 1919, p. 530; New Hampshire, Sp. Sess. 1930, p. 85; New Jersey,
Stats. 1935, p. 913; Ohio, Stats. 1935, p. 205; Oregon Laws 1937, p. 763;
\(^7^1\)D. C. (74th Cong. Ist Sess. 1935, p. 301).
\(^7^2\)Canada, Statutes 1930, p. 162, ch. 11, sec. 25.
\(^7^3\)England, 20 & 21 Geo. V, 1930, ch. 43, and 24 & 25 Geo. V, 1934,
ch. 50, sec. 34.
The penalty imposed for the offense now known as involuntary manslaughter by the early common law was death. At the present time in England the normal sentence for involuntary manslaughter is reported to be six months’ imprisonment. In the United States involuntary manslaughter is a felony, and the minimum penalty in many states is one year’s imprisonment; the maximum imprisonment as set in some states is twenty years. The penalties provided by the negligent homicide statutes are not appreciably lower than the penalties which are provided and imposed under the involuntary manslaughter statutes.

It is now necessary to consider the act and the criminal intent which are defined by the law of involuntary manslaughter. The federal statute, as set out above, will be used as the basis of this analysis.

A. THE ACT.

The act specified by the definition of the law as the act element of the offense of involuntary manslaughter is the act of killing a human being. In several of the new negligent homicide statutes, it should be observed that the act specified is not the killing of a human being, but it is the driving or the operating of an automobile in such a manner that death of a person results.

In applying the law defining the offense to the facts of the case stated, what does the state have to prove in order to convict D of the offense of involuntary manslaughter? The state must prove first, (1) that D did the act specified by the statute, namely, that D killed X. In order to establish this fact, it will be necessary for the state to be ready to prove, (a) that D’s physical movements, as such, were under adequate mental self-direction, and (b) that D actually made one or more of a related group of physical movements leading to the death of X. In regard to (a), under the facts stated the evidence indicates, in the absence of any question to the contrary, that D’s act was competently self-directed, so far as adequate mental control by D of his own physical movements was concerned. In regard to (b), the physical movement element of the act, the facts stated show the following series of significant events which, at the time of the injury to X, made up this part of the act. The origin of the act consisted in D accelerating his car and turning out to pass the car in front of him. The significant circumstances included the two-lane highway with the road ahead not visible to D because of the ridge, the fact that other moving

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Kenny, Outlines of Criminal Law (15th ed. 1936) 141.
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automobiles were on the road, and the collision of the automobile driven by D with the automobile driven by X. The consequence was the resulting death of X. The act or homicide is established by the facts stated.

B. THE CRIMINAL INTENT.

In addition to proving the act or homicide, the state must also prove, (2) that D had the criminal intent specified by the legal definition of the crime of involuntary manslaughter.

Before discussing the criminal intent specified by the definition in the statute, there must be a consideration of certain words of the statute which are sometimes mistakenly thought to be part of the definition of the criminal intent element of the crime of involuntary manslaughter. These words are unlawful, without malice and involuntary.

The first sentence of the statute quoted above,—“manslaughter is the unlawful killing of a human being without malice,”—is an introductory summary of the two elements of the offense, the act and the criminal intent. It indicates the historical and actual nature of the crime of manslaughter, namely, any unlawful killing which is not murder. The word unlawful serves simply to sum up the fact that the killing is contrary to the law as stated by the criminal intent clauses which follow in the legal definition of the crime, and that the killing is without legal justification or excuse. The expression without malice, in the same sentence, serves to distinguish the offense of manslaughter from murder. It does not mean that there is no criminal intent in involuntary manslaughter. It means that the criminal intent in involuntary

75Luther v. State, (1912) 177 Ind. 619, 626, 98 N. E. 640 quoting Aiken v. Holyoke St. Ry., (1903) 184 Mass. 269, 271, 68 N. E. 238: “The law is regardful of human life and personal safety, and if one is grossly and wantonly reckless in exposing others to danger it holds him to have intended the natural consequences of his act and treats him as guilty of a wilful and intentional wrong. It is no defense to a charge of manslaughter to show that, while grossly reckless, he did not actually intend to cause the death of his victim.” State v. Schutte, (1915) 87 N. J. L. 118, 93 Atl. 112: “...an intention to injure need not be specifically directed to the particular individual that was injured, but may be inferred in law from the consequences that are naturally to be apprehended as the result of the particular act, the doing of which was intentional. ‘The prisoner,’ said Lord Coleridge, Chief Justice, in Queen v. Martin, 8 Q. B. D. 54, ‘must be taken to have intended the natural consequence of that which he did. He acted unlawfully... not that he had any personal malice against the particular individual injured but in the sense of doing an act calculated to injure and by which others were, in fact, injured.’” State v. Moore, (1906) 129 Iowa 604, 106 N. W. 16: “Negligence and reckless indifference
manslaughter is different from that in murder and in voluntary manslaughter. The term malice, it must be remembered, is defined and used with numerous meanings. It is used here to mean that the killing is done without "any of those more guilty forms of malice which amount to Murderous Malice," in other words, "malice aforethought."

The expression involuntary as used in the statutory definition of the crime serves simply and solely to distinguish and to set apart that type of unlawful killing which is not murder and which is not voluntary manslaughter. It has, in effect, the same meaning as the term without malice, discussed above. The distinguishing difference between voluntary manslaughter and involuntary manslaughter is the difference in the criminal intent. The intent in both murder and voluntary manslaughter is the full intent to kill a specific individual. The term voluntary originated probably in Bracton's classification homicidium voluntate. The intent in involuntary manslaughter is an imperfect criminal intent. No collective term was established to denominate homicides not having a full intent until the term involuntary was introduced by Blackstone, merely as a term of classification but not necessarily of definition.

The term involuntary, therefore, as used in the statutory definition, "to the lives and safety of others will supply the intent for the purposes of the criminal law. It is a maxim of law that every sane person" is held "to intend the natural and necessary consequences of his voluntary act." Contra: State v. Wheelock, (1933) 216 Iowa 1428, 250 N. W. 617, quoting State v. Korth, (1928) 204 Iowa 1360, 217 N. W. 236, 237. "An intent to kill is not an essential element of the offense and its absence distinguishes it from voluntary manslaughter." An equally indefensible statement is quoted from Commonwealth v. Gill, note 120, infra.

The "unhappy term" involuntary manslaughter . . . "seems to be a creation of text books and judges, not statutory." Buckland and McNair, Roman Law and Common Law (1936) 198 ff. Blackstone, in his textbook, seems to cite Hale as his authority for the term. 2 Blackstone, Commentaries on the Laws of England, (Sharwood's ed. 1868), book IV, 190. The citation does not support Blackstone. 1 Hale, The History of the Pleas of the Crown (1678) 466, cf. 471. Blackstone has been accepted as the "creator" of the term as a name for the already long-existing offense. Cf. Bracton, note 82 infra.
statute, merely means "without full intent," and it does not fully or accurately characterize the criminal intent which is required in a particular individual in order that he be guilty of the crime. It is primarily and historically a name given to a particular class of crimes in order to contrast the one class, namely, involuntary manslaughter, with another class, namely voluntary manslaughter.

The criminal intent specified by the definition of the law as the criminal intent element of the offense of involuntary manslaughter must then be found in the following words: (a) in the commission of some unlawful act not amounting to a felony, or (b) in the commission of a lawful act which might produce death, in an unlawful manner or without due caution and circumspection.

The second branch (b) of this description of the criminal intent is, in effect, either a contradiction of terms or it is a repetition of the first branch (a). Its origin in English law is Bracton. In his classification of homicide, his third class is homicidium casu. He says, in regard to this class, "a distinction must be made whether the person was engaged in an undertaking of a lawful nature, or of an unlawful nature." 

Copying Bracton's words, some subsequent legal writers have continued this division to the present day. It has already been observed, however, that the majority of them do not include the second branch of the definition. It has been observed, likewise, that it appears in only a minority of the statutes now in force, including the federal statute which is now under consideration.

Although the second branch of the quoted definition of the criminal intent is not a part of the definition of involuntary manslaughter which is stated by most of the text writers and statutes, and although it has been severely criticized by Stephen and by

81 "A 'lawful act criminally performed' is a contradiction in terms." Stephen, Digest of the Criminal Law (1887) sec. 5, 391, 392. See also Pike, Comment on Death Caused by Drunken Driving, California Penal Code, (1936) 9 So. Cal. L. Rev. 142, 147.
82 Bracton, De Legibus et Consuetudinibus Angliae (1250-1256) l. 120b, 121. The quotation continues, "If unlawful, as if one threw a stone across a place through which men were accustomed to pass, or while one is chasing a horse or ox and another is killed by the ox or horse, and in cases of this sort, the homicide is charged to him. If in fact he was doing an act of a lawful sort, as if ... one were unloading a haywain or were cutting down a tree ... if he used such diligence as he could, namely by looking around and by shouting, but not too slowly or softly, but promptly and loudly, and so that if anyone were coming there he could run or save himself ... it (the homicide) is not charged to him. But if he does the act of a lawful sort and does not employ due diligence, it will be charged to him."
83 See notes 44 to 52 inclusive, supra.
84 See notes 55 and 56 supra.
others, it does require some attention. Originally, as Bracton's illustrations indicate, it was the negligent performance of the lawful act which supplied the criminal intent which made the unintended killing, done in the performance of the lawful act, a crime. Eventually courts and legal writers came to say that a lawful act was indeed an unlawful act if it were performed in a manner dangerous to the rights, safety or lives of human beings. In this way courts in jurisdictions having the second branch in their code have in effect reduced the confusing clause simply to the words, (b) in the commission of an unlawful act.

When the courts came to consider the act of driving automobiles they readily saw that such an act is emphatically an act "which might produce death." When, therefore, this lawful act is done "in an unlawful manner or without due caution and circumspection," the courts are ready to call it an "unlawful act" for the purpose of the intent required for involuntary manslaughter.

The criminal intent element of involuntary manslaughter as defined in the first branch of the statute is as follows: (a) In the commission of some unlawful act not amounting to a felony. It should be noted first that the term unlawful act does not mean the act of killing for which the defendant is being held for involuntary manslaughter. It means instead some unlawful act which the killer was doing, as for example, unlawfully driving an automobile, in the doing of which he caused the death of a human being. The words unlawful act as used in this clause formerly meant something far different from what they now mean as used in the cases. The words "unlawful act," in the early applications of the term in involuntary manslaughter, meant an act specifically made a crime by common law or by statute. The rule was that if a person was engaged in the commission of any act made unlawful by common law or by statute, and while so engaged killed another person without the full intent to do so, the killing was either mur-

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85 State v. Dorsey (1889) 118 Ind. 167, 169, 20 N. E. 777: "A lawful act done in an unlawful or negligent manner, is in law an unlawful act. . . . We do not mean to be understood as holding that every careless or negligent act whereby death ensues is a crime. . . . "To constitute manslaughter the act causing the death must be of such a character as to show a wanton or reckless disregard of the rights and safety of others, but not necessarily an act denounced by the statute as a specific crime." Commonwealth v. Hunt, (1842) 4 Metc. (Mass.) 111, 128: "We use the terms criminal or unlawful because it is manifest that many crimes are unlawful which are not punishable by indictment or other public prosecution."


der or manslaughter, depending simply upon whether the unlawful act was, respectively, a felony or a misdemeanor. This rule was the origin of the confusing phrase in the definition "not amounting to a felony." Coke, with no authority to support him, stated the rule that to kill any person without direct intention in the commission of any unlawful act was murder. Foster modified this rule by saying that an unintentional killing in the commission of an unlawful act amounting to a felony would be murder, but that if the unlawful act be a "bare trespass"—what we may call a misdemeanor—the offense would be manslaughter. Upon Foster's modification of the rule is based the phrase in the common law and statutory expression "an unlawful act not amounting to a felony," or in other words, an unlawful act which is a misdemeanor. But this 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, that the killing was the natural or necessary consequence of the subordinate act. Consequently the courts have brought the meaning of the first branch of the intent clause of the statute on involuntary manslaughter to a present day meaning which is the same as their present day interpretation of the second branch. In effect then, the second branch is a repetition of the first branch.

In order to determine the criminal intent element of involuntary manslaughter which is specified by one of the common law definitions of that crime, as it is stated and typified in the federal code, it has been necessary to examine certain words and clauses of the statute. First, it has been made apparent that three of the ex-

89Coke, Third Institute (1644) 56.
91Davis v. Com. (1928) 150 Va. 611, 143 S. E. 641: Held, that the unlawful character of the act is determined by the fact that it is performed in disregard of the lives and safety of others. The fact that it is unlawful by statute is not enough. Potter v. State (1904) 162 Ind. 213, 70 N. E. 129: Held, that mere doing of the prohibited act did not render the defendant guilty of involuntary manslaughter.
92Potter v. State, (1904) 162 Ind. 213, 216, 70 N. E. 129.
93The statute analyzed is one of the long form varieties of the common law definitions of involuntary manslaughter. The points considered, there-
pressions in the definition, namely, unlawful (killing), without malice and involuntary do not constitute any part of the criminal intent element of the crime. It has become apparent, therefore, that the statement of the criminal intent element, in the definition, must be found in one or both of the clauses beginning with the words "in the commission of" some act. Second, an examination of these two clauses demonstrates that each of them has come to mean, under modern decisions: in the commission of an unlawful act. The definition, moreover, of such unlawful act, as laid down by the courts, is found to be an act which is dangerous to the lives and safety of others.

The criminal intent element of the crime of involuntary manslaughter, therefore, is the intent to do an act, which is dangerous to the lives and safety of others. This statement of the criminal intent, however, is indefinite. It is not sufficiently specific to aid the jurors in deciding whether or not the defendant, in the particular case on trial, committed the crime of involuntary manslaughter. What tests can the court give the jurors which they can apply to the acts of the defendant, as testified to by the witnesses, and thereupon make their decision in regard to the existence of criminal intent?

Stating more fully the preceding question, in the trial of D on an indictment for involuntary manslaughter based upon the facts stated in this case, Case 6, what instructions shall the court give to the jury in order to assist them to decide whether or not D's act in driving the car as he did, under all of the circumstances, was an act dangerous enough to the lives and safety of others to warrant the jury in finding that D, in his intent to do such act, had the criminal intent necessary for involuntary manslaughter?

Facing this problem, many courts use the concept of negligence as their starting point. The reasons for this approach are clear. In the first place the word negligence is often applied in common speech to the conduct of a driver who is involved in an automobile collision. The judges, moreover, are accustomed to the use of negligence tests in civil cases. Historically, also, the term "due diligence" has a lineage dating back to Bracton.

Such courts often explain to the jury at the outset the test for civil liability according to the standard of the average reason-
able man. Immediately, however, the court warns the jury that civil negligence is not enough for a crime. Criminal law, it is pointed out, requires criminal intent in addition to the mere negligent conduct sufficient for a tort recovery. The question then becomes, how much "negligence" must there be to supply the criminal intent necessary for the crime of involuntary manslaughter?

It will be seen that if D’s contemplated act was such that he realized that its consequences were likely to be dangerous, or if it was such an act that he should have realized its dangerousness because the average reasonable and prudent man would have realized that fact, and if he nevertheless did the act, then he had the criminal intent required for manslaughter.

The words and tests which the courts use in answering the question of the existence of criminal intent fall principally, but with some overlapping and changing, into two groups. One group describes its tests in terms of negligent omissions to act. The other group describes its tests in terms of acts done recklessly.

In the first group, the negligence which is required in order that it may constitute criminal intent is described as "criminal," "culpable," or "gross." A statistical study on this point has been made of the two or three most recent decisions, to and including the year 1937, in cases of involuntary manslaughter, or of the corresponding offense, in the forty-nine American jurisdictions, and in England. This study discloses that the following terms appear in the number of jurisdictions stated: "criminal negligence," in fifteen jurisdictions; "culpable negligence," in sixteen jurisdictions; "gross negligence," in fifteen jurisdictions. The word "careless" appears in a few jurisdictions, used in the sense of "neg-

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94 See text at note 33 supra.
96 The tendency in the decisions is away from the negligent omission tests and toward the reckless act tests.
ligent," and in a few jurisdictions in combination with other terms. These words, criminal, culpable and gross, appear to be used more or less synonymously to mean negligence which is sufficiently above tort negligence to constitute the criminal intent required for involuntary manslaughter.

As an example of the "criminal negligence" tests laid down by the courts in this group, the following test, a judicially approved test in England, may be considered:

"In order to establish criminal liability the facts must be such that in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such a disregard for the life and safety of others as to amount to a crime against the state and conduct deserving of punishment."\(^{100}\)

The following tests, taken from American decisions, are perhaps more definite:

"And if the injury occasioned by the collision results in death, the culpable driver may be justly convicted of manslaughter if the collision was caused directly by such gross carelessness as to imply an indifference to consequences."\(^{102}\)

"The difficulty of attaining perfection in defining 'culpable negligence' is apparent, but it is agreed that the words necessarily imply something more than a lack of precaution or the exercise of ordinary care. An instruction to the jury merely in the words of the latter proposition is not sufficient; it should explain where-in the distinction exists. Ordinary negligence is based on the theory that a person charged with negligent conduct should have known the probable consequences of his act; culpable negligence rests on the assumption that he knew [is held to have known or should have known] the probable consequences, but was intentionally, recklessly or wantonly indifferent to the results."\(^{108}\)

Assuming that the court of the jurisdiction in which the indictment against D is filed should give the English instruction to the jury, or an instruction to the jury based on the foregoing American decisions, it would then be the task of the jury to apply the criminal negligence test to D's act in order to decide whether or not D under the facts stated and in evidence had the criminal intent required for the crime of involuntary manslaughter.


\(^{101}\)Rex v. Bateman, (1925) 19 Crim. App. 8, 94 L. J. K. B. 791.

\(^{102}\)Luther v. State, (1912) 177 Ind. 619, 624, 98 N. E. 640.

which is required for involuntary manslaughter is described as the doing of the act (for example, the driving of an automobile) in a specified manner, namely, “wantonly,” “wilfully,” or “recklessly.” In the statistical study of the decisions, to which reference has been made, the following terms, and the combinations of terms in which they appear, are found in the number of jurisdictions stated: “wanton,” in eleven jurisdictions;104 “wilful,” in six jurisdictions;105 “reckless,” in twenty-six jurisdictions;106 acts “in disregard of the lives and safety of others,” or in disregard of similar rights, in twenty jurisdictions;107 “careless and reckless,” in nine jurisdictions;108 and other combinations, among which is the combination “wilful, wanton and reckless” in three jurisdictions.109 These words appear to be used more or less synonymously in the decisions to describe a test of the conduct of a defendant in the following terms, namely, that he did not merely fail to realize danger, but that he both realized the danger and nevertheless chose to go ahead; or that he failed to realize the gravity of the danger as an average prudent man would have done, and went ahead and did the acts which included a fatal consequence.110

The test, therefore, of the second group may be called the reckless or dangerous act test. As an example of this test, as laid down by a court belonging to this general group, the following part of an instruction, which received judicial acceptance in Massachusetts, may be considered:

“In this case the burden of proof is on the Commonwealth to satisfy you that the conduct of the defendant . . . in failing to take proper means and precautions to ascertain if anyone else was using the highway and to ascertain the presence of anybody else on the highway, if his conduct is found by you to be wanton, reck-
less conduct in utter disregard and indifference to the rights of others... then the defendant is guilty of manslaughter." 111

Instructions or tests given in a recent Indiana trial, are as follows:

“...A person will not be permitted to do an act which jeopardizes the life and safety of another and then, upon plea of accident, escape liability for a homicide... resulting from his recklessness or careless act or conduct.”

“One may be guilty of involuntary manslaughter, if he conducts himself, in a given set of circumstances, with such wilful 112 disregard for the rights of others as to show a wanton recklessness as to the life and limb of other persons.” This and the preceding instruction are based on Minardo v. State, 113 and related cases.

The various terms applied as the test to be used in determining the presence or absence of criminal intent, namely, criminal or culpable or gross negligence, and wilful or wanton 114 or reckless 115 act, are brought by judicial decision to mean substantially this: a legally inexcusable disregard for the life and safety of others. 116

112 Wilful. “The running of a car at a high rate of speed is an act in which the will of the driver concurs, and hence is clearly a wilful act as distinguished from merely negligent conduct, when considered with respect to the state of mind of the offender, which is what the criminal law considers. ... The excessive rate of speed at which an automobile is driven is a product of the will of its driver and not the result of his mere inattention or negligence.” State v. Shutte, (1915) 87 N. J. L. 118, 93 Atl. 112.
113 (1932) 204 Ind. 422, 183 N. E. 548.
114 Wanton and wilful are terms frequently employed in the automobile guest statutes and they are therefore receiving increasing judicial attention. See Appelman, Wilful and Wanton Conduct in Automobile Guest Cases, (1937) 13 Ind. L. J. 131. Thomas v. Foody, (1936) 54 Ohio App. 423, 7 N. E. (2d) 820. Swan, J., says in Cusack v. Longaker, (C.C.A. 2nd Cir. 1938) 95 F. (2d) 304: “We doubt if it is helpful to attempt to define 'wilful' and 'wanton' separately in a charge to the jury. The phrase [wilful and wanton misconduct] as a whole is rhetorical and implies no more than excessively reprehensible conduct; such conduct as justifies an inference of consciousness that injury may probably result from the act done and a reckless disregard of consequences.” Judge Swan’s statement is a sound statement, also, of the legal definition, as presented in this article, of the criminal intent required for involuntary manslaughter. The provisions of the guest statutes, like the legal definitions of the intent required for the crime, are seen to be in need of less “rhetorical” language, and of more specific wording such as that of Judge Swan’s statement of the law.
115 The cases seldom contain what may be called “dictionary” definitions of the terms used. The following dictionary meanings may be considered for the purpose of comparing them, with regard either to contrast or to identity, with the legal usage of the terms: negligence, inadvertence, carelessness; reckless, realizing the possibility of harmful consequences, but going ahead with the act; wanton, foreseeing the probability of harmful consequences, but acting without regard for them; wilful, intentional, voluntary. The only definition of an “act” found in the cases examined is quoted from Webster, “to produce an effect.”
116 The crime sought to be proven was involuntary homicide, caused by
In view of the fact that these six adjectives, criminal, culpable and gross, and wilful, wanton and reckless are used by the courts as rhetorical expressions, and that each and all of them are used with substantially the one meaning, it would be well to select one of the words as the one most appropriate to express the test for the criminal intent and to use that word to the exclusion of the others. The word "reckless" is best suited for the purpose. It is the word which, as we have seen, is already in most general use by the courts. "Reckless," moreover, in common usage, by jurors and generally, means heedless of probable consequences. This meaning when applied to the endangering of human life is the criminal intent required for involuntary manslaughter. The word would therefore need no supplementary elaboration by the court, and it would therefore avoid the resulting dangers of the confusion of the required imperfect intent with negligence, with true accident and with full intent.

It is now the task of the jury to apply the tests in deciding whether or not D, under the circumstances stated and in evidence, had acted with an inexcusable disregard for the life and safety of others. If the jury find that he had so acted, they thereby find that he had the criminal intent required for the crime of involuntary manslaughter.

If the writer were on the jury in the case of State versus D, and were applying the test or tests used in the jurisdiction of trial, he would observe that D's act in its very origin of turning his car, at sixty miles an hour, into X's lane of traffic at a place where D could not see X coming and X could not see D coming, was unquestionably an act so dangerous to the life and safety of others that its performance was one in which D must have had the criminal intent required for involuntary manslaughter. D must have realized that his act of driving as he did at that time and place would endanger the life and safety of others, but he chose to do the act regardless of the danger. He intended, therefore, to do an act which was dangerous to the life and safety of others. His criminal intent, of course, was not a full criminal intent to kill X,
but it was an actual imperfect criminal intent, which was just as fatal to X as a full intent would have been.\textsuperscript{110a}

The automobile homicide participated in by motorist D and the unfortunate victim X now has been carried through six possible cases under the criminal law. In each case the act of D, if any, and the criminal intent of D, if any, have been investigated, both on the facts and also with regard to the application of the law to the facts.

\textbf{Conclusion}

The law of involuntary manslaughter and its application have been observed to be in a very confused and unsatisfactory state, both in the United States and in England. It is widely asserted by prosecuting attorneys and by judges in the United States, and by English officials, likewise, that it is extremely difficult to convict an automobile driver on a charge of involuntary manslaughter. In England the law, and especially ruling cases, are under severe criticism. One English writer calls upon the Law Revision Commission to overhaul the law of homicide to remove its "sophisms and evasions" for the sake of the "lives of thousands of road users very much at stake on our highways."\textsuperscript{117} Even the definition of the crime of involuntary manslaughter, as this article has shown, is indefinite, repetitious and burdened with words and clauses which are mere historic survivals, and which serve only to confuse and obstruct justice. The name of the offense furthermore, is a handicap. The word "involuntary," as has been seen,\textsuperscript{118} is merely a distinguishing name.\textsuperscript{119} But it is interpreted by defense counsel and sometimes even by courts\textsuperscript{120} to mean "unintentional" and therefore "accidental." The man who commits the crime of involuntary manslaughter does not do so "involuntarily," or "accidentally," or "unintentionally." To say that in committing involuntary manslaughter the offender does acts or kills in an involuntary manner is as misleading as it would be to say that the offender who commits grand larceny acts or steals in a grand manner. Such an un-

\textsuperscript{110a}See text at notes 7 to 13 inclusive, supra.

\textsuperscript{117}Davies, Manslaughter—Negligent Driving, (1937) 1 Modern Law Rev. 242.

\textsuperscript{118}See text at note 80.

\textsuperscript{119}The expression \textit{involuntary manslaughter}, like the "equally unhappy" term \textit{culpable negligence}, "seems to be a creation of text books and judges, not statutory." Buckland and McNair, Roman Law and Common Law (1936) 198 ff.

\textsuperscript{120}... for the fundamental element of involuntary manslaughter is that it must be unintentional, accidental, involuntary." Commonwealth v. Gill, (1935) 120 Pa. Super. 22, 35, 182 Atl. 103.
warranted interpretation in effect eliminates the defendant’s imperfect but real criminal intent, and even his act of driving his car into the fatal collision.\footnote{This extraordinary result was achieved in effect in State v. Wheeleock, (1933) 216 Iowa 1428, 250 N.W. 617.} Moreover, the word “manslaughter” has a brutal sound to some jurors, who therefore hesitate to fasten it on the defendant, who often makes a very good courtroom appearance. The use of the term “negligence” brings in again the idea that the defendant acted without criminal intent, and this impression on the jurors is often heightened by the court’s warning that mere civil negligence is not enough for a conviction.\footnote{English writers assert that the Bateman Case instruction fails to define negligence, and merely leaves the whole question to the jury without aid. See Davies, Manslaughter—Negligent Driving, (1937) I Modern L. Rev. 242; Turner, Mens Rea and Motorists, (1936) 5 Camb. L. J. 61. Defense counsel find the instruction very useful: Wild and Curtis-Bennett, King’s Counsel, (1938) 253.} In the United States, furthermore, the penalties prescribed for involuntary manslaughter often are considered by jurors, most of whom are themselves drivers of automobiles, to be too severe, especially if it appears that the deceased was perhaps at fault in the collision. At the trial of such cases, moreover, sharp conflicts in the evidence frequently arise, due to the facts that the deceased is not available as a witness, that the collision usually is accompanied by excitement which prevents accurate observation, and that adequate police investigation is not made.\footnote{Immediate scientific investigation of the facts in cases of automobile collisions is of fundamental importance in the proper administration of criminal law in these cases. Such investigation is described in the publications of the National Safety Council, of the Travelers Insurance Company, and of the Traffic Safety Institute of Northwestern University and the International Association of Chiefs of Police. See especially the Institute’s publication, Accident Prevention Bureaus in Municipal Police Departments (1937).} Finally, the question of civil damage suits and of recoveries on automobile insurance policies often add complicating factors.

Some of these difficulties can not be avoided. Others of them can be avoided. One of the efforts in the latter direction is the enactment of the negligent homicide statutes in various states, which are cited elsewhere.\footnote{See notes 70 to 73, inclusive, supra.} These statutes, in general, make the criminal act not the killing of a human being, but the driving, or the operation, of the automobile in a specified manner or with a specified result. They omit some of the troublesome clauses and words which appear in the common law and statutory definitions of involuntary manslaughter, including the name of the offense itself. Unfortunately, however, they have not, in general, been
fully successful. To begin with, the name given to the new offense includes the word "negligent," the term which is used with such ambiguity and confusion in the involuntary manslaughter definitions and cases. The new offense, moreover, usually is not related with sufficient definiteness in the definition to other criminal offenses of the particular jurisdiction. As a result, questions arise about overlapping, gaps and omissions, in relation to other statutes. There are uncertainties also with regard to repeals of previous legislation by implication. Finally, minimum penalties have not been sufficiently reduced.

The negligent homicide statutes are no doubt a valuable development in this field of the law, and are doing good service in various jurisdictions. As other jurisdictions, however, proceed to enact similar legislation, the following proposals would seem to be in point. It seems that a statute would be desirable which would, in one section, penalize as a misdemeanor, the "driving of a motor vehicle in a manner dangerous to the life and safety of others," and in a further section provide that if any person drives a motor vehicle in a manner dangerous to the life and safety of others and thereby causes the death of another person, he will be guilty of the offense of "homicide by dangerous driving." The degree of the dangerousness required for guilt would be, as under the present law, a question of fact for the jury, depending upon the circumstances of each case. Another section might provide that cases of homicide with full intent be excluded from the application of the statute. The penalty clauses should cover a considerable range, with moderate minimums of fine and of imprisonment, and with provisions for cumulative sentences in cases of multiple deaths or of other aggravated circumstances. Past and present experience shows that a conviction, with a sentence of even a month in jail in an appropriate case, is far better for the public interest than is an acquittal due to the refusal of the jury to inflict a penalty of imprisonment which is fixed by law at a minimum of one year; or, as in some statutes, the term may be one of eight or ten years.

General experience in involuntary manslaughter cases indicates, furthermore, that it should be made possible in appropriate cases, for a jury to bring in a verdict, or in case of trial by the court, for the court to make a finding, of guilt or acquittal of

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125 The English statute provides much lower penalties than the average American statute. 20 & 21 Geo. V (1930) ch. 43.
either the homicide by dangerous driving or the misdemeanor of dangerous driving, or of both. Statutory provision for such procedure, if necessary in the particular jurisdiction, would provide for it by joinder of counts, or by consolidation of indictments, and would provide further that guilt or acquittal upon one charge would have no bearing in point of law upon the other charge.126

A modernizing of the statutory definitions of involuntary manslaughter is seen to be desirable for most, if not all, of the American and English jurisdictions. Probably, however, such modernization should be undertaken in each jurisdiction only as part of a systematic, coherent and non-artificial codification of the law of criminal homicide. Pending such codification, nevertheless, the prevailing cheap regard for human life as evidenced by the great number of preventable and inexcusable fatal "accidents," calls for the enactment of special statutes to provide simply and directly for criminal homicides committed by dangerous acts and omissions in modern traffic and industry.

Prevention of killings in automobile traffic can be promoted in part by the modernization of the law of involuntary manslaughter. The contributions of education and the services of engineering in traffic safety are indeed important. It is nevertheless true that the whole process of saving lives in traffic, and in industry as well, rests fundamentally upon the law. In order to meet this responsibility today the successful administration of the law in the courts requires provisions of law which are clear, concise and fully capable of commanding respect.†

126Criticisms to the effect that a similar statutory provision permits illogical and therefore undesirable and perhaps unlawful results, are rejected by Judge Macnaghten in Rex v. Onyett, (1937) The Assizes, 1 Jour. Crim. Law 60.

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### Involuntary Manslaughter and Related Homicides at Common Law

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### 1. The Act
- A and B
- Mentally self-directed
- Physical movement

### 2. The Criminal Intent
- A With malice aforethought
- B In the commission of an unlawful act, that is, any act dangerous to life or safety of others, committed without intent to kill
- C In the omission of a special legal duty, endangering life or safety of others, omitted
  - a With intent to kill
  - b Without intent to kill

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*Full intent but with mitigation.*

**May amount to malice aforethought.*