

Lawson, Robert G. 1969. Criminal Law Revision in Kentucky: Kentucky Law Journal, 58, 242-274.

This interim report of the work of the Kentucky Crime Commission cites Wechler and the Model Penal Code fifteen times to delineate degrees of offense for homicide and assault. Lawson begins with a justification of the revision effort. "This effort is justifiable only if the existing law is defective and the 'revision will result in significant improvement in [criminal law] administration.'" (p. 242, cited to Neb. Law Rev.).

The laws are described as haphazard, overlapping, with gaps, and lacking unifying ideas. "[T]he statutes are nearly impossible to comprehend and literally engulfed with uncertainty of application. In addition, and *perhaps more significantly*, the possibility of inequitable treatment among offenders . . . exists in almost every major classification of offense." (emphasis added) The writer considers equitable treatment of the aggressor more significant than clarity of law. Citing the MPC, he claims the major infirmity of Kentucky's criminal law is sentencing "unsupported by principled rationale."

This article also explains the impact on statistical reporting of violent crime. For example, ". . . it is possible for any event, including mere words, to arouse an extreme mental or emotional disturbance sufficient in nature and degree to reduce murder to manslaughter." (p. 257). Can much of the variation in violence reported by the FBI and Department of Justice be explained by the redefining of crimes such as murder, assault, and rape? To advocate further protection for the predator, Lawson quotes comments from the MPC: "The question, in the end will be whether the actor's loss of self-control can be understood in terms that arouse sympathy enough to call for mitigation in the sentence." (MPC section 201.3, Comment 5 at 48 (Tent. Draft 9, 1959).

The writer also relies heavily upon the New York Penal Law (McKinney's 1967), citing to its degrees of crime ten times. Discussing Common Law Battery, Lawson states, "The New York statutes on assault have had the greatest influence." (p. 266, Footnote 74).

Although not identified in the article, the author Robert Lawson was Chair of the Kentucky Penal Code drafting project for the Kentucky Crime Commission. (Reported by Norman Lawson of the Kentucky Legislative Research Commission.)

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Special Comment

CRIMINAL LAW REVISION IN KENTUCKY: PART I — HOMICIDE AND ASSAULT

By ROBERT G. LAWSON*

INTRODUCTION

Whatever views one holds about the penal law, no one will question its importance in society. This is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. By the same token, penal law governs the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy. If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its toils. The law that carries such responsibilities should surely be as rational and just as law can be. Nowhere in the entire legal field is more at stake for the community or for the individual.¹

At the present time the Kentucky Commission on Law Enforcement and Crime Prevention and the Legislative Research Commission are jointly engaged in a project designed to revise the state's substantive criminal law. This effort is justifiable only if the existing law is defective and the "revision will result in significant improvement in [criminal law] administration."² A cursory examination of the criminal statutes, with no reference to case law, leaves not the slightest doubt as to the need for revision. Until now no major attempt at revision has ever been undertaken in this state. As a consequence, the statutes are devoid of organ-

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¹ Wechler, *The Challenge of a Model Penal Code*, 85 HARV. L. REV. 1097, 1098 (1952).

² Remington, *Criminal Law Revision, Codification v. Piecemeal Amendment*, 33 NEB. L. REV. 396, 397 (1954).

ization, haphazard in their coverage, with overlaps in some areas and gaps in others, and totally lacking in unifying ideas. For most of the major offenses, such as robbery,³ murder⁴ and manslaughter,⁵ the statutes do no more than establish sanctions. The difficult task of defining the crimes is left to the judiciary. With respect to the important general doctrines of criminal law, such as *mens rea*, causation, intoxication, complicity, and justification, the statutes hardly make mention. As a consequence of the combined effect of these deficiencies, the statutes are nearly impossible to comprehend and literally engulfed with uncertainty of application. In addition, and perhaps more significantly, the possibility of inequitable treatment among offenders engaging in similar conduct with similar mental states exists in almost every major classification of offense.

The task of revision must begin with a statement of existing principles and an identification and analysis of their deficiencies. It is toward this end that this article is directed. The selection of homicide and assault (bodily injury offenses) as subject matter is not solely, or even principally, because of the importance of these offenses to criminal jurisprudence. Rather it is because this subject matter, better than any other, serves to demonstrate vividly all of the following: (1) The evils that result from a piecemeal, patchwork enactment of criminal laws; (2) the need to eliminate obsolete offenses and useless distinctions that serve no purpose in separating criminal from non-criminal behavior; (3) the need to provide clarity and understanding to common law principles through codification; and (4) the advantages to the bench, bar and to society of a cohesive, well-defined code that describes criminal offenses by use of principles having broad, general application.

I. HOMICIDE

A. Introduction

The statutory portion of Kentucky's law of homicide may be divided into two parts. The first consists of three statutes which provide for the crimes of murder, voluntary manslaughter, and

³ KY. REV. STAT. [hereinafter cited as KRS] § 433.120(1) (1942).

⁴ KRS § 435.010 (1942).

⁵ KRS § 435.020 (1942); KRS § 435.022 (1962).

Voluntary manslaughter in the first and second degrees. Two of the three serve only to provide penalties for the common law offenses of murder and voluntary manslaughter. The third provides penalties for the two degrees of involuntary manslaughter and, in addition, attempts to describe the types of conduct constituting this offense. The second part consists of several statutes which denominate as murder, or a lesser homicide offense, the killing of a human being under some specially described circumstances. The limited application of each of these statutes is revealed by its title:

1. KRS 435.025—Death occurring as result of negligently operating motor vehicle (twelve months in county jail).
2. KRS 435.030—Homicide occurring in course of criminal syndicalism or sedition (life imprisonment or death).
3. KRS 435.040—Homicide occurring in course of abortion (two to twenty-one years or life or death).
4. KRS 435.050—Homicide occurring in course of stabbing, striking or shooting (one to six years).
5. KRS 435.060—Homicide or injury resulting from obstruction of road (life imprisonment or death).
6. KRS 435.070—Lynching or mob violence (life imprisonment or death).
7. KRS 435.190—Reckless shooting or throwing of missile into train, station, steamboat or motor vehicle (life imprisonment or death).
8. KRS 433.390—Displacing or damaging railroad track, switch or bridge (life imprisonment or death).

The role of these "special" statutory offenses must be considered as a preliminary matter to any thoughtful analysis of the need for revising the law of homicide.

The major infirmity of Kentucky's criminal law is the "proliferation of offenses or distinctions with respect to sentence unsupported by principled rationale."⁶ The "special" offenses existing in every category of crime are solely responsible for this infirmity, the consequences of which may be demonstrated by use of the following hypothetical situations:

⁶ MODEL PENAL CODE § 201.4, Comment 55 (Tent. Draft No. 9, 1959).

D-1, with no intention of causing death, shoots into an occupied motor vehicle and causes the death of *V-1*.

D-2, with no intention of causing death, shoots into a crowd of people and causes the death of *V-2*.

By all rational standards of measurement the criminal culpability of *D-1* is indistinguishable from that of *D-2*. Neither of the two consciously desired to cause anyone's death; each committed an act having an extremely high and unjustifiable risk of death; and each must have consciously disregarded that risk. Nevertheless, under existing homicide principles the two defendants would be afforded substantially different treatment. *D-1* would be convicted under KRS 435.190, a "special" homicide offense, and punished to the extent of life imprisonment or death. *D-2*, in the absence of a "special" statute to punish his conduct, would be convicted under a "general" homicide statute, most likely the one defining involuntary manslaughter in the first degree, and punished by confinement in a penitentiary for no more than fifteen years. A more grotesque consequence of the "special" crimes may be shown by comparing the treatment accorded the two defendants in the following situations:

D-3, intending to injure but not kill, shoots at *V-3* but misses his target completely.

D-4, intending to injure but not kill, shoots at *V-4* and causes an injury from which *V-4* dies.

Once again the culpable mental states of the two offenders are identical. Only the consequences of their acts are different, with *D-3*'s causing no actual harm and *D-4*'s causing the death of an innocent person. Under existing principles, *D-3* would be prosecuted for malicious shooting without wounding, a "general" offense, and assessed a term of imprisonment from two to twenty-one years. *D-4*, who acted with an identical intent and caused a much greater harm, would be prosecuted under KRS 435.050, one of the "special" homicide statutes, and punished by imprisonment from one to six years.

Differences in punitive sanctions without correlation to relevant differences in the criminal nature of conduct, exemplified by those of the preceding paragraph, are abundant in every class of crime. Such differences inevitably result in inequities

and injustice and must be eliminated if the criminal law is to be "as rational and just as law can be."⁷ Their elimination from the law of homicide can be achieved by fully and comprehensively defining the offenses of murder, voluntary manslaughter, involuntary manslaughter, and negligent homicide. Once this change is made, the "special" homicide offenses have no functional value and can be eliminated without difficulty.

B. Murder

Introduction: The American Law Institute's Model Penal Code provides for two instances in which criminal homicide constitutes murder: (1) When it is committed purposely or knowingly; and (2) when it is committed recklessly under circumstances manifesting extreme indifference to the value of human life.⁸ The first involves a homicide resulting from conduct of an actor whose conscious objective is to cause the death of another. The second involves an "unintentional" homicide (i.e., no conscious desire to cause death so substantial and unjustifiable as to reflect an indifference to human life indistinguishable from the indifference reflected by homicides committed "intentionally." Used in every major revision of criminal law that has occurred in recent years, this serves as an excellent frame of reference for a discussion of Kentucky's approach to the offense.

Our entire legislative contribution to the law of murder is contained in this provision: "Any person who commits willful murder shall be punished by confinement in the penitentiary for life, or by death."⁹ No attempt has been made to describe by statute the types of conduct punishable under this provision. That responsibility has been left to the Court of Appeals, and satisfied through the creation of several distinct types of "murder": (a) intentional murder; (b) killing of a police officer; (c) negligent murder; and (d) felony murder. All are in substantial need of revision.

Intentional Murder: Essential to the commission of this type of murder are only two elements, intent by a defendant to kill

⁷ Wechler, *supra* note 1.

⁸ MODEL PENAL CODE § 210.2 (1962).

⁹ KRS § 435.010 (1942).

(naturally without excuse, justification, or mitigating circumstances) and death of a victim. Unessential to its commission is an element of "malice," at least if used in the ordinary sense of "ill will." Although fully accepting this description of the crime, the Court of Appeals has persistently defined it as a killing done *willfully and with malice aforethought*, and has attached to these words the following meaning:

The word 'willful' . . . means intentional, not accidental. The phrase 'malice aforethought' means a predetermination to do the act of killing without legal excuse, and it is immaterial how suddenly or recently before the killing such determination was formed.¹⁰

With these definitions, this type of murder is limited to the situation where a defendant consciously desires or intends to cause the death of his victim.

Largely due to the requirement of "malice aforethought," this offense has not been as free of confusion as it should have been. At times the courts have interpreted this phrase to mean "ill will" and have attempted by judicial pronouncement to supply the element when it has not existed in fact. The consequences have been: (a) The development of such barren concepts as "express malice," "implied malice" and "inferred malice;" and (b) the confusion that is reflected in this statement by the Court of Appeals:

The evidences of express malice, as well as the fact from which malice may be implied, are easily recognized. Express malice usually manifests itself in previous or contemporaneous threats by the wrongdoer of death or harm to his intended victim, or declarations or acts indicative of his ill will toward, or desire to inflict injury upon him. Implied malice is such as arises or may be inferred from the intentional doing of an unlawful or wrongful purpose. For example, the use by one of a deadly weapon in the unlawful taking or attempted taking of human life, or in unlawful inflicting or intending to inflict, upon another bodily injury, is an act from which malice is implied or may be inferred. More broadly stated, malice

¹⁰ Combs v. Commonwealth, 112 S.W. 658, 660 (1908).

will be inferred from the intentional doing of any wrongful act which the perpetrator knows will necessarily cause injury to another, or which he intends shall cause injury to another, though such injury may not in fact result.¹¹

The changes needed in this offense are not in its substance but rather in the manner of its description. References to "malice aforethought," "willful," and the various types of "malice," should be eliminated and the offense defined so that triers of fact are left to decide only whether a defendant, at the time of his act, consciously desired to cause his victim's death.

Killing of a Police Officer: Except that the victims happened to be police officers, the cases involving this type of murder are indistinguishable from those of the preceding type. The origin of this offense is traceable to the requirement of "malice aforethought" and a notion, now discarded, that such requirement could be satisfied only by a showing of "ill-will." To supply this element when it is otherwise unavailable, use has been made of the victim's occupational status:

The officer is the minister of the law. He represents its majesty. His person is therefore clothed with a peculiar sanctity. An assault upon him, when properly engaged in the execution of his duty, is an assault upon the law; and if he be stricken down at such time, as was ruthlessly done in this instance, by one knowing him to be an officer, it is murder, *although the doer may not have any particular malice.*¹² (Emphasis added).

In the case containing this quotation, death resulted intentionally, *i.e.*, the accused intended to kill his victim. A similar state of mind can be found in all of the other cases of this type.¹³ As a consequence, this type of murder, as an independent basis of criminal liability, has absolutely no functional value. No legitimate purpose is served by having two separate offenses of murder, the only difference between them being the occupational status of the victims. If malice is deemed necessary for conviction, the process of reasoning use for "intentional" murder is equally ap-

plicable here. Malice can be inferred or implied from the intentional doing of a homicidal act. However, as indicated above, "malice," or "malice aforethought," should be eliminated as an element of murder. Along with its elimination, the killing of a police officer, as a distinct homicide offense, would also be eliminated.

Negligent Murder: The descriptive label for this offense is used to indicate nothing other than the absence of a desire on the part of an actor to achieve the consequences of his act. To be convicted of this offense, an accused must perform an act that is extremely dangerous to human life and must perform it with a conscious disregard of that danger. A typical case of this type is *Brown v. Commonwealth*,¹⁴ one in which the accused, without lawful reason, fired a gun into a crowded room and killed one of its occupants. Even though the defendant had no desire to kill, the Court of Appeals held his conduct sufficient for a murder conviction. A second case involving conduct representative of this crime is *Hill v. Commonwealth*.¹⁵ The accused in this case intentionally shot into a motor vehicle knowing it to be occupied. Once again this act was held to constitute murder even though the accused had no intention of causing death. With this ruling the Court of Appeals described the conduct constituting this offense as an act committed "in a reckless manner and without lawful excuse and without regard for human life."¹⁶

A more significant aspect of the *Hill* case, however, was a decision that in cases of this type, jurors should be instructed on the offense of voluntary manslaughter.¹⁷ The purpose of this ruling was apparently to enable juries to assess lower sanctions than are available for murder. For a conviction of this type of manslaughter, the death-causing conduct had to involve a great deviation from the standard of reasonable behavior. That deviation was most often described as "reckless and wanton carelessness."¹⁸ Labeled as "negligent voluntary manslaughter," this offense caused immense confusion, principally because the Court of Appeals failed to distinguish clearly between "gross negligence"

¹¹ *Burns v. Commonwealth*, 136 Ky. 468, 476-77, 124 S.W. 409, 412 (1910).

¹² *Dilger v. Commonwealth*, 88 Ky. 550, 581, 11 S.W. 651, 653 (1889).

¹³ *See, e.g., Bircham v. Commonwealth*, 288 S.W.2d 1008 (Ky. 1951); *El-liott v. Commonwealth*, 290 Ky. 502, 161 S.W.2d 633 (Ky. 1941).

¹⁴ 13 Ky. L. Rptr. 372, 17 S.W. 220 (1891).

¹⁵ 239 Ky. 646, 40 S.W.2d 261 (1931).

¹⁶ *Id.* at 650, 40 S.W.2d at 261-62.

¹⁷ *Accord Ewing v. Commonwealth*, 129 Ky. 237, 111 S.W. 353 (1908).

¹⁸ *See, e.g., Sizemore v. Commonwealth*, 347 S.W.2d 77 (Ky. 1961); *Smith v. Commonwealth*, 113 Ky. 532, 118 S.W. 368 (1909).

(which sufficed for the offense of involuntary manslaughter) and "wanton and reckless carelessness," occasionally used the terms interchangeably,¹⁹ and, finally ruled that the standard for measuring criminality of a defendant's conduct was dependent upon the type of death-causing instrumentality used to commit the offense. The latter was stated as follows:

As applied to fire arms and other deadly weapons it is sometimes said that their use must have been 'grossly careless or grossly negligent' in order to constitute the crime of voluntary manslaughter. But as applied to an automobile or other instrumentality which is dangerous to life only when improperly handled, the grade or degree of carelessness or negligence is higher than those terms are ordinarily understood to mean. So it has been generally declared to be necessary to establish 'reckless and wanton carelessness.'²⁰

Because of the confusion and difficulty that engulfed this offense (negligent voluntary manslaughter), only one conclusion about it can be made with certainty. It ultimately replaced in its entirety the offense of negligent murder.

Then in 1962 the Kentucky legislature created the statutory offenses of involuntary manslaughter in the first and second degrees, using the term "wantonness" to describe the former and "recklessness" to describe the latter.²¹ Following the creation of these offenses, the Court of Appeals ruled that the crime of voluntary manslaughter could no longer be used to impose punitive sanctions upon an individual who had "unintentionally" caused the death of another.²² Homicides resulting from "wanton or reckless" conduct, after this decision, had to be prosecuted under the involuntary manslaughter statute. This is the present state of the law, meaning that conduct which originally constituted negligent murder now constitutes involuntary manslaughter in the first degree.

The issue to be faced in considering a revision of this law is whether conduct containing the following elements is

¹⁹ See, *Jones v. Commonwealth*, 213 Ky. 356, 281 S.W. 165 (1926).

²⁰ *Newcomb v. Commonwealth*, 276 Ky. 362, 364-65, 124 S.W.2d 486, 487 (1939).

²¹ KRS § 435.022 (1962).

²² *Hemphill v. Commonwealth*, 379 S.W.2d 223 (Ky. 1964); *Lambert v. Commonwealth*, 377 S.W.2d 76 (Ky. 1964).

sufficient for a conviction of murder: (a) A substantial and unjustifiable risk that death will occur; (b) a conscious disregard of that risk by an actor; and (c) a gross deviation from conduct that a reasonable person would observe. Stated differently, and perhaps more meaningfully, the issue is whether to reinstate the principles established by the Court of Appeals in *Brown v. Commonwealth* and *Hill v. Commonwealth*. An affirmative answer to this question necessarily reflects a judgment that the culpable mental state of a person who acts with extreme recklessness is not significantly different from the culpable mental state of a person who commits an intentional homicide. Such a judgment is reflected in the provisions of the Model Penal Code,²³ as well as those of most recent criminal law revisions:²⁴

[T]here is a kind of reckless homicide that cannot fairly be distinguished . . . from homicides committed [intentionally]. Recklessness . . . pre-supposes an awareness of the creation of substantial homicidal risk, a risk too great to be deemed justifiable by any valid purpose that the actor's conduct serves. Since risk, however, is a matter of degree and the motives for risk creation may be infinite in variation, some formula is needed to identify the case where recklessness should be assimilated to [intention]. The conception that the draft employs is that of extreme indifference to the value of human life. *The significance of [intention] is that, cases of provocation apart, it demonstrates precisely such indifference.*²⁵ (Emphasis Added).

The soundness of this judgment would seem to demand reinstatement of the offense once known as "negligent murder."

Felony Murder: The doctrine of "felony murder" is usually described as follows:

Homicide is murder if the death ensues in consequence of the perpetration or attempted perpetration of some other felony unless such other felony was not dangerous of itself

²³ MODEL PENAL CODE § 210.2 (1962).

²⁴ E.g., ILLINOIS CRIMINAL CODE of 1961 § 9-1 (Smith-Hurd 1964); NEW YORK PENAL LAW § 125.25 (McKinney's 1967); PROPOSED DELAWARE CRIMINAL CODE § 412 (Governor's Committee for Revision of the Criminal Law 1967); PROPOSED MICHIGAN REVISED CRIMINAL CODE § 2006 (Special Committee of the Michigan State Bar for the Revision of Criminal Code 1967).

²⁵ MODEL PENAL CODE § 201.2, Comment 29 (Tent. Draft No. 9, 1959).

and the method of its perpetration or attempt did not appear to involve any appreciable human risk.²⁶

Its principal application has been to two types of cases, one involving a death that is caused accidentally, the other involving a death that results from an act of a felon other than the defendant, *i.e.* one of his accomplices in the underlying felony. In re-examining this doctrine, most of the new statutes have made or proposed substantial changes in its substance. The approaches of the New York Penal Law and the Model Penal Code have been most influential.

Under the former, a death resulting during the commission of a felony can form the basis of a conviction for murder of all the participants in that felony.²⁷ In the adoption of this approach, some important limitations were attached to traditional felony murder. For example, the homicide victim must be a non-participant in the underlying felony; and the death in issue must occur in furtherance of, in the course, or in flight from, one of a short list of specifically enumerated violent felonies.²⁸ In addition, the New York statute provides a means by which a defendant in a felony murder case may prove that he did not possess sufficient culpability for a conviction of murder. By establishing affirmatively that he had nothing at all to do with the homicidal act, was not armed, had no reason to believe any other participant was armed, and had no reason to believe any participant intended to engage in conduct likely to cause death or serious injury, a defendant may relieve himself of responsibility for the homicide.²⁹

The approach of the Model Penal Code to felony murder starts with this proposition:

[I]t is indefensible to use the sanctions that the law employs to deal with murder, unless there is at least a finding that the actor's conduct manifested an extreme indifference to the value of human life.³⁰

²⁶R. PERKINS, CRIMINAL LAW 36 (1957).

²⁷NEW YORK PENAL LAW § 125.25(3) (McKinney's 1967).

²⁸The offenses which bring the doctrine into operation are "robbery, burglary, kidnapping, arson, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, escape in the first degree, or escape in the second degree." *Id.*

²⁹NEW YORK PENAL LAW § 125.25(3) (McKinney's 1967).

³⁰MODEL PENAL CODE § 201.2, Comment 39 (Tent. Draft No. 9, 1959).

From this point, the Code converts the felony murder doctrine into a principle of procedural law by creating a presumption that is phrased something like this: If a homicide occurs during the commission of, or escape from, robbery, forcible rape, arson, burglary, kidnapping or felonious escape, it shall be presumed to have been committed "recklessly under circumstances manifesting extreme indifference to the value of human life."³¹ (As indicated earlier, recklessness of this degree is sufficient for a conviction of murder.) This presumption is clearly applicable to all of the participants of the underlying felony. Its procedural function, however, is not clear. Apparently it is intended to impose upon an accused the burden of persuading a jury that he was not acting with "recklessness manifesting extreme indifference to human life." Notwithstanding this uncertainty, the general intent of the Code is clear. Before an accused can be convicted of murder for a death resulting from commission of a felony, his conduct in committing that felony must be found to have constituted extreme recklessness toward human life.

A third approach to felony murder, preferable to the preceding ones, is like that of the Model Penal Code except that no use is made of the Code's presumption. This change reflects a judgment that the fact of a defendant's involvement in a felony is an insufficient reason for altering the usual burden of proof in a criminal case. The most significant accomplishment of this approach is the abandonment of "felony-murder" as an independent basis for establishing an offense of homicide. Criminal responsibility for deaths occurring in the course of felonies are measured, like all homicides, by use of general principles. If a defendant's participation in a felony from which a death results is found to constitute extreme recklessness manifesting indifference to human life, he is guilty of murder; if found to constitute recklessness not manifesting such indifference, he is guilty of a lesser homicide offense. And if his participation is found to be accompanied by no culpable mental state with respect to the death, he is not guilty of a homicide offense. If adopted, how would this approach affect existing law?

In answering this question, it is necessary to distinguish cases which have incorrectly or unnecessarily applied the felony murder

³¹MODEL PENAL CODE § 210.2(1)(b) (1962).

doctrine from those which have correctly applied it. Of the first type, one of the earliest cases is *Commonwealth v. Reddick*.³² In this case, the accused burglarized and intentionally burned a hotel. Three deaths occurred as a result of the fire. In affirming a conviction of the defendant for murder, the Court of Appeals relied upon the felony-murder doctrine. Despite the fact that this death-causing act constituted an independent felony, reliance on the doctrine in this situation was unnecessary. The act involved in *Reddick* is indistinguishable from an act of shooting into an occupied building or automobile without intent to kill, which was sufficient under Kentucky law at the time of this decision to constitute *negligent* murder. In other words, a homicide like that in *Reddick* should be treated as murder not because a defendant's act is illegal (*i.e.*, a felony) but rather because his act is "so extremely dangerous as to make it wantonly disregarding of the lives of others."³³ Another case that is frequently but incorrectly cited as a felony murder decision is *Williams v. Commonwealth*.³⁴ In this case the accused, acting alone, shot and killed a person he was attempting to rob. All of the evidence indicated an intentional killing. Yet, in describing the type of jury instructions that should have been given, the Court of Appeals said that a murder conviction is appropriate if the act resulting in death is committed by a defendant while attempting or intending to commit a robbery. Once again there was no need to resort to the felony murder doctrine. An intentional killing, without excuse, justification or mitigating circumstances, is murder without regard to the existence or non-existence of an independent felony.

After eliminating the cases which make an unnecessary use of this doctrine, only three Kentucky cases are left.³⁵ All three have similar factual settings. In each case the underlying felony was robbery, an offense which by nature is potentially dangerous to human life. In each of the three the defendant had at least

³² 17 Ky. L. Rptr. 1020, 33 S.W. 416 (1895). *Accord* *Whitfield v. Commonwealth*, 278 Ky. 111, 128 S.W.2d 208 (1939) (the death in issue resulted from arson of a building; however, the death was "unintentional").

³³ Moreland, *A Suggested Homicide Statute for Kentucky*, 41 Ky. L.J. 139, 149-50 (1952).

³⁴ 258 Ky. 830, 81 S.W.2d 893 (1935).

³⁵ *Martin v. Commonwealth*, 361 S.W.2d 654 (Ky. 1962); *Simpson v. Commonwealth*, 293 Ky. 831, 170 S.W.2d 869 (1943); *Marion v. Commonwealth*, 269 Ky. 729, 108 S.W.2d 721 (1937).

one accomplice to the robbery. And, most significantly, the act directly resulting in homicide was committed in each instance by a felony participant other than the accused in the murder case. Because of this combination of circumstances, it was not possible to convict these defendants of "intentional" murder or "negligent" murder. For convictions of this offense (murder), it was necessary to transfer intent and malice from the robberies to the homicides, a procedure that was described as follows:

Although the accused may not have had the intention of taking a life, malice in respect to such homicide may be implied or inferred on the ground that the killing was done while the person who did the act was engaged in the commission of some other felony or in an attempt to perpetrate some offense of that grade. The turpitude of the act contemplated is by implication of law transferred to the homicide which actually is committed so as to make the latter offense a killing with malice, contrary to the real fact of the case as it appears in evidence.³⁶

Elimination of the felony murder doctrine as an independent basis for a conviction of murder does not mean that conduct like that of the last three cases can never constitute murder. It means only that such conduct does not automatically constitute murder. If an accused's participation in a violent felony is deemed from all of the surrounding circumstances to constitute "recklessness manifesting an extreme indifference to human life," he can be convicted of murder even though the homicide results "unintentionally" or at the hands of an accomplice. This result would follow not because a death occurred during the commission of a violent crime but rather because the defendant's mental state in reference to that death is sufficiently culpable to warrant imposition of the most severe penal sanctions available in the law of homicide. As stated by the drafters of the Model Penal Code, "[T]he result may not differ often under such a formulation from that which would be reached under the present rule. But what is more important is that a conviction on this basis rests upon sound ground."³⁷

³⁶ *Tarrence v. Commonwealth*, 265 S.W.2d 40, 50-51 (Ky. 1953), quoting 26 AM. JR. *Homicide* §§ 188, 309 (1940).

³⁷ MODEL PENAL CODE § 201.2, Comment 4 at 39 (Tent. Draft No. 9 1959).

C. Voluntary Manslaughter

This offense has generally been described as "an intentional homicide committed in a sudden rage of passion engendered by adequate provocation and not the result of malice conceived before the provocation."³⁸ With no significant changes in substance the offense has been defined in this state as an intentional killing in sudden affray or in sudden heat of passion and upon provocation ordinarily calculated to excite passion beyond control.³⁹ Following is an additional description of these elements by the Court of Appeals:

As the degree of passion engendered must be such as would cause the ordinary man of fair, average disposition to act rashly, so must the provocation be of a character that would have created that passion in a man of ordinary and average disposition. The law does not exact of us the cool, sedate, and deliberate mien of some men. Neither does it sanction or permit us to act as does the unusually excitable, impulsive, or rash man. We are all to be measured and judged by what the average, ordinary man does under similar circumstances.⁴⁰

Following the lead of the Model Penal Code,⁴¹ most modern statutes⁴² have made substantial changes in the definition of this crime. The most significant has been an abandonment of the requirement that a homicide occur "in sudden heat of passion upon adequate provocation" in favor of a more liberal, more flexible concept phrased in this language: "under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse."⁴³ The obvious purpose of this change is to broaden the circumstances which serve to mitigate homi-

³⁸ R. PERKINS, *supra* note 26, at 42.

³⁹ *E.g.*, Cottrell v. Commonwealth, 271 Ky. 52, 111 S.W.2d 445 (1937); Hanna v. Commonwealth, 242 Ky. 584, 46 S.W.2d 1098 (1932); Miller v. Commonwealth, 163 Ky. 246, 173 S.W. 761 (1915); Massie v. Commonwealth, 15 Ky. L. Rptr. 562, 24 S.W. 611 (1894).

⁴⁰ McHargue v. Commonwealth, 231 Ky. 82, 88, 21 S.W.2d 115, 117-18 (1929).

⁴¹ MODEL PENAL CODE § 210.3 (1962).

⁴² *E.g.*, ILL. CRIM. CODE § (Smith-Hurd 1964); NEW YORK PENAL LAW § 125.20 (McKinney's 1967); PROPOSED DEL. CRIM. CODE §§ 411, 414 (Governor's Committee for Revision of the Criminal Law, 1967); PROPOSED MICH. REV. CRIM. CODE § 2005 (special Committee of Michigan State Bar for the Revision of the Criminal Code, 1967).

⁴³ MODEL PENAL CODE § 210.3 (1962).

cides committed intentionally. With the substituted concept, mitigating circumstances are not restricted to those which constitute provocation "in the ordinary meaning of the term, *i.e.*, an injury, injustice or affront perpetrated by the deceased upon the actor."⁴⁴ In others words, it is possible for any event, including mere words, to arouse an extreme mental or emotional disturbance sufficient in nature and degree to reduce murder to manslaughter. A second important change accomplished by modern statutes is the addition of a subjective element to the test for determining the mitigation issue. As indicated above, the standard of measurement is still an objective one, *i.e.*, is there a "reasonable explanation or excuse" for the mental or emotional disturbance? But in making that determination, triers of fact are required to place themselves in a defendant's position as he believed it to be at the time of his act. This is intended to liberalize the common law requirement that "the provocation must be of a nature calculated to inflame the passions of the ordinary reasonable man."⁴⁵

Of importance at least equal to these changes in descriptive language is a change in general direction that is reflected in the modern approach to this offense. Past efforts with this crime have been directed toward developing categories of particular types of provocation that suffice to mitigate. Modern efforts have been directed toward the development of a flexible standard for assessing mitigating circumstances, with an accompanying acknowledgement that the responsibility for deciding this issue must be left largely for the jury. Justification for this approach was put this way by the drafters of the Model Penal Code:

There will be room for argument as to the reasonableness of the explanations or excuses offered; we think again that argument is needed in these terms. *The question, in the end will be whether the actor's loss of self-control can be understood in terms that arouse sympathy enough to call for mitigation in the sentence. That seems to us the issue to be faced.*⁴⁶

⁴⁴ MODEL PENAL CODE § 201.3, Comment 5 at 46 (Tent. Draft No. 9, 1959).

⁴⁵ R. PERKINS, *supra* note 26, at 44.

⁴⁶ MODEL PENAL CODE § 201.3, Comment 5 at 48 (Tent. Draft No. 9, 1959). (Emphasis added)

D. Involuntary Manslaughter and Negligent Homicide

For many years, the offense of involuntary manslaughter was a common law misdemeanor in Kentucky,⁴⁷ undefined by statute and committed through conduct of no greater culpability than ordinary civil negligence. The *mens rea* was labeled as "carelessness" or "negligence" and defined in this way:

The words "carelessly" and "negligently" mean the absence of ordinary care, and "ordinary care" means such care as an ordinarily prudent person would exercise for his own protection, under circumstances similar to those described in this case.⁴⁸

In 1951 the Court of Appeals changed its position on this point, expressly overruled prior decisions, and held that an accused could not be convicted of involuntary manslaughter (still an undefined misdemeanor) unless his conduct constituted "gross negligence,"⁴⁹ defined by the Court as a "failure to exercise slight care."⁵⁰ Shortly after this decision, and apparently in response to it, the Kentucky legislature enacted KRS 435.025, which created the offense of homicide through negligent operation of a motor vehicle. As interpreted by the Court of Appeals, this statute served to reinstate, in part, "ordinary negligence" as the culpable mental state for involuntary manslaughter.⁵¹ Thus, following its enactment, Kentucky had two types of involuntary manslaughter, one of which was a common law crime based upon *gross negligence* and the other a statutory offense based upon *ordinary negligence*. The latter could be committed only when the death-causing instrumentality happened to be a motor vehicle.

At this point in history, common law involuntary manslaughter was codified through enactment of the following statute:

KRS 435.022: (1) Any person who causes the death of a human being by an act creating such extreme risk of death

⁴⁷ See *Held v. Commonwealth*, 183 Ky. 209, 208 S.W. 772 (1919); *Speaks v. Commonwealth*, 149 Ky. 393, 149 S.W. 850 (1912).

⁴⁸ *Jones v. Commonwealth*, 213 Ky. 356, 361, 281 S.W. 164, 167 (1926).

⁴⁹ *Mayre v. Commonwealth*, 240 S.W.2d 852 (Ky. 1951).

⁵⁰ *Id.* at 855.

⁵¹ *Kelly v. Commonwealth*, 267 S.W.2d 538 (Ky. 1954).

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 guilty of involuntary manslaughter in the first degree and shall be confined in the penitentiary for not less than one nor more than fifteen years.

(2) 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 guilty of involuntary manslaughter in the second degree and 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.

With the division of this offense into degrees, it was necessary for the Court of Appeals to distinguish between the two types of death-causing conduct described in the enactment. Although the two significant terms, "wanton" and "reckless," at one time had been interpreted as legal equivalents,⁵² the Court provided the following distinction:

A wanton act is a wrongful act done on purpose in complete disregard of the rights of others. The actor must have conscious knowledge of the probable consequences and a complete disregard for them. Reckless conduct displays an indifference to the rights of others and an indifference as to whether wrong or injury will result from the act done. Recklessness involves thoughtlessness while wanton conduct involves actual knowledge of the probable results and complete disregard for those results.⁵³

With these definitions the law of involuntary manslaughter, as it presently exists, was finalized, and may be summarized as follows:

1. Unintentional deaths resulting from what was previously called "reckless and wanton" conduct, and previously treated as "negligent murder" or "negligent voluntary manslaughter," are now treated as involuntary manslaughter in the first degree

⁵² *Jones v. Commonwealth*, 213 Ky. 356, 281 S.W. 164 (1926). "[T]he words 'reckless' and 'wanton' mean utterly careless, having no regard for consequences or for the safety of others, yet without malice." *Id.* at 361, 281 S.W. at 167.

⁵³ *Lambert v. Commonwealth*, 377 S.W.2d 76, 79 (Ky. 1964); *accord*, *Smith v. Commonwealth*, 424 S.W.2d 835 (Ky. 1968).

(penalty of from one to fifteen years). "Wantonness" is designated as the culpable mental state for this offense.

2. Unintentional deaths resulting from what was previously called "gross negligence," and treated as common law involuntary manslaughter, are now treated as involuntary manslaughter in the second degree (penalty of one year in jail, \$500 fine, or both), with the requisite type of conduct now being entitled "recklessness."

3. Unintentional deaths resulting from the negligent operation of a motor vehicle, the requisite type of conduct being "ordinary negligence," constitutes an offense under KRS 435.025 (penalty of one year in jail).

4. Unintentional deaths resulting from "ordinary negligence" not involving the use of a motor vehicle cannot be the subject matter of a criminal homicide.

To focus upon the problems with these offenses (involuntary manslaughter and negligent homicide) reference is made once again to the approach taken by modern codes. Their most significant achievement has been elimination of the confusion that has resulted from the use of such terms as "wanton," "reckless," "careless," "gross negligence" and "ordinary negligence." The culpable mental states for "unintentional" homicide offenses have been reduced to only two, "recklessness" and "criminal negligence," and have been fully and uniformly defined in all of the codes:

"Recklessly." A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. . . .

"Criminal negligence." A person acts with criminal negligence with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross

deviation from the standard of care that a reasonable person would observe in the situation.⁵⁴

As indicated by these definitions, neither "recklessness" nor "criminal negligence" may be used to impose criminal sanctions for homicide unless the following elements are shown to exist: (a) A substantial and unjustifiable risk that death is likely to result from the conduct in issue; and (b) a gross deviation from the standard of conduct that a reasonable person would observe in the situation. Once these two elements are established, the conduct in issue constitutes "recklessness" if the actor is aware of the risk and consciously disregards it, or "criminal negligence" if he fails to perceive the risk. In other words, reckless conduct involves a state of awareness while criminally negligent conduct involves the creation of risk inadvertently. The adoption of these definitions for use in describing "unintentional" homicide offenses would substantially improve this aspect of existing homicide law.

In addition to matters of description and definition, two significant differences in substance exist between Kentucky's approach to "unintentional" homicide and the approach reflected in modern revisions. The first involves "unintentional" homicide of the highest degree. As indicated above, conduct that previously constituted "negligent murder" in Kentucky (e.g., shooting into a crowd, an occupied building, or an occupied automobile) is now treated as involuntary manslaughter in the first degree. In every statute that has been enacted or proposed since the Model Penal Code, such conduct has been equated with "intentional" homicides and punished as murder.⁵⁵ The second substantive difference involves the lowest degree of "unintentional" homicide. In Kentucky criminal sanctions are imposed for a death resulting from the negligent operation of a motor vehicle. All of the modern revisions have made two changes in this offense, as it is defined and applied in this state. None has limited its application to vehicular deaths, on the

⁵⁴ NEW YORK PENAL LAW § 15.05 (McKinney's 1967); accord, ILL. CRIM. CODE § 4-6, 4-7 (Smith-Hurd 1964); MODEL PENAL CODE § 2.02 (1962); PROPOSED DEL. CRIM. CODE § 100 (Governor's Committee for the Revision of the Criminal Law, 1967); PROPOSED MICH. REV. CRIM. CODE § 305 (Special Committee of the Michigan State Bar for the Revision of the Criminal Law, 1967).

⁵⁵ See note 24 *supra*.

theory that such a limitation creates a distinction without a reason.⁵⁶ What rationale can possibly exist for distinguishing between a homicide that results from the negligent use of a vehicle and one that results from the negligent use of a weapon? In addition, none of the modern statutes allows for the imposition of criminal sanctions on the basis of "ordinary negligence":

His [the negligent offender's] culpability, though obviously less than that of the reckless offender, is appreciably greater than that required for ordinary civil negligence by virtue of the "substantial and unjustifiable" character of the risk involved and the factor of "gross deviation" from the ordinary standard of care.⁵⁷

Elimination of this culpable mental state as a basis of criminality reflects these judgments: (a) that in the absence of moral fault the only reason for imposing punitive sanctions is to influence individual conduct; and (b) that the "ordinarily" inadvertent actor cannot be influenced by threatened sanctions.

II. ASSAULT

A. Introduction

Common law assault is usually defined as "(1) an attempt to commit a battery, or (2) an unlawful act which places another in reasonable apprehension of receiving an immediate battery."⁵⁸ Kentucky's definition of the offense is not very different. It may be committed through an attempt to commit a battery:

An assault is an attempt, or effort with force and violence to do a corporal hurt to another, by striking at him in striking distance, with or without a weapon, though the party striking misses his aim.⁵⁹

And it may be committed through conduct which places another in reasonable apprehension of immediate harm:

⁵⁶ See MODEL PENAL CODE § 201.4, Comment 2 at 55 (Tent. Draft No. 9, 1959).

⁵⁷ NEW YORK PENAL LAW § 15.05, Commentary 23 (McKinney's 1967).

⁵⁸ R. PERKINS, *supra* note 26, at 86.

⁵⁹ Commonwealth v. Remley, 257 Ky. 209, 210, 77 S.W.2d 784 (1934), quoting J. ROBERSON, CRIMINAL LAW AND PROCEDURE § (2d Ed. 1927).

An assault is an unlawful offer of corporal injury to another by force, or force unlawfully directed toward the person of another, under such circumstances as create a well-founded fear of immediate peril.⁶⁰

Through the years this offense has been relatively free of difficulty, except for a problem that may be demonstrated by use of the following hypothetical situation: *D*, with an unloaded weapon which he knows to be unloaded, points toward *V* in a threatening manner. *V*, not knowing the condition of the weapon, reasonably believes himself to be in danger of immediate harm. Intent on the part of *D* and reasonable apprehension of immediate physical injury by *V* are present. Thus, simple assault, as defined above, has been committed. But in some of the more recent cases, the Court of Appeals has added to the offense a requirement that the offer of violence occur under circumstances which "denote at the time an intention to do it *coupled with the present ability* to carry such intention into effect."⁶¹ (Emphasis added.) With this requirement added, *D*'s conduct does not constitute common law assault, a result that is inconsistent with the reason for the offense. The pain and anxiety of a victim that result from an *apparent ability* to inflict harm are indistinguishable from the pain and anxiety that result from an actual ability to inflict harm. In recognition of this inconsistency, all of the modern statutes have eliminated "present ability" as an element of this offense.⁶²

In the discussion which follows, "assault," as a criminal law concept, is given a meaning considerably broader than that enunciated in the preceding paragraphs. Consistent with most modern statutes, the term is used to represent all offenses involving the infliction of actual physical injury upon the person of another. Used in this sense, assault becomes a companion of homicide since both are so-called "result" offenses. Bodily injury is the prohibited result of the former and death is the prohibited result of the latter. A revision of assault to provide for all circumstances in which bodily injury may be criminally

⁶⁰ Jackson v. Commonwealth, 247 S.W.2d 52, 53 (Ky. 1952).

⁶¹ May v. Commonwealth, 285 S.W.2d 160, 163 (Ky. 1955).

⁶² E.g., ILL. CRIM. CODE § 12.1 (Smith-Hurd 1964); NEW YORK PENAL LAW § 120.15 (McKinney's 1967).

inflicted upon another must start with an analysis of the following existing offenses:

1. *Common law battery* (twelve months in jail and \$5000 fine).
2. KRS 435.170(1)—Malicious and willful shooting and wounding with intent to kill (two to twenty-one years).
3. KRS 435.170(2)—Malicious and willful cutting, striking or stabbing with a deadly weapon with intent to kill (two to twenty-one years).
4. KRS 435.170(3)—Malicious and willful administering of poison to another who does not die (two to twenty-one years).
5. KRS 435.180—Shooting, wounding or cutting in sudden affray or heat and passion, without previous malice (six to twelve months in jail and \$500 fine).
6. KRS 435.190(2)—Reckless shooting or throwing of missile into train, station, steamboat or motor vehicle (one to five years).

The crimes that are defined by this law overabound with inequities. Most have resulted from inadequate legislative definitions and from a failure to grade bodily injury offenses in accordance with some rational principle. Elimination of these inequities must be the principal objective of a revision of the law of assault.

B. *Common Law Battery*

This offense is usually defined as "the unlawful application of force to the person of another."⁶³ No significant change has been made in this definition by the Kentucky Court of Appeals: "[A] battery is any unlawful touching of the person of another, either by the aggressor himself or by any substance set in motion by him."⁶⁴ In discussing the types of force that are "unlawful" within this definition, it is necessary to distinguish between "intentional" force and "unintentional" force, a distinction not unlike that which exists in the law of homicide. As to the first type, the Court of Appeals has declared that such force constitutes the

offense of battery if inflicted with "a hostile intent,"⁶⁵ with "malice,"⁶⁶ or with "ill will."⁶⁷ On other occasions, however, the Court has said that the offense may be committed "upon the spur of the moment, without previous malice and without previous purpose so to do."⁶⁸ On still other occasions, the Court has stated that malice is a requirement of battery but that it "may be presumed from the very nature of the act."⁶⁹ Upon careful analysis it becomes quite clear that these declarations constitute nothing more than a complicated statement of a simple principle, namely, that force resulting from a conscious objective or purpose of an actor is "unlawful" within the common law definition of battery. The problems that exist with this offense are identical to those that exist with "intentional" murder. Their solution is also identical. References to such terms as "hostile intent," "malice" and "ill will" should be eliminated and the triers of fact left to decide only whether an accused consciously desired to inflict bodily injury upon his victim.

In addition to "intentional" applications of force, common law battery under existing law prohibits certain unintentionally inflicted force. One of the most significant cases involving "unintentional" battery is *Senters v. Commonwealth*.⁷⁰ In this case, evidence indicated that the victims of an alleged offense were walking alongside a highway at night a few feet off the pavement. Without seeing or hearing the defendant's approach, they were struck by his automobile and injured. On earlier occasions the Court of Appeals had treated conduct such as this as common law battery by reasoning that the requisite intent for the offense could be inferred from the willful doing of a reckless act.⁷¹ In the *Senters* case, the Court took a more direct approach by ruling that the offense can be committed through an act of *gross negligence*, defined by the Court as a "failure to exercise slight care under the circumstances."⁷² Unlike homicide, common law battery is an offense of only one degree. Consequently, no need

⁶⁵ *Burnett v. Commonwealth*, 284 S.W.2d 654 (Ky. 1955).

⁶⁶ *Sigler v. Ralph*, 417 S.W.2d 239, 241 (Ky. 1967); *Senters v. Commonwealth*, 275 S.W.2d 786, 787 (Ky. 1955).

⁶⁷ *Senters v. Commonwealth*, 275 S.W.2d 786, 787 (Ky. 1955).

⁶⁸ *Urban v. Commonwealth*, 196 Ky. 770, 775, 245 S.W. 511, 513 (1922).

⁶⁹ *Senters v. Commonwealth*, 275 S.W.2d 786, 787 (Ky. 1955).

⁷⁰ *Id.*

⁷¹ *See, e.g., Lyons v. Commonwealth*, 176 Ky. 657, 197 S.W. 387 (1917).

⁷² 275 S.W.2d at 788 (Ky. 1955).

⁶³ R. PERKINS, *supra* note 26, at 80.

⁶⁴ *Senters v. Commonwealth*, 275 S.W.2d 786, 787 (Ky. 1955).

has existed for a distinction between acts that may be characterized as "wanton or reckless" and those that may be characterized as "grossly negligent." The decision in *Senters* that acts of the latter type are sufficient for an offense of battery necessarily means that acts of the former type, possessing a greater degree of criminal culpability, are also sufficient for the offense.⁷³ It would seem to mean, in addition, that "ordinary negligence" in the civil law sense is insufficient.

The greatest fault with "unintentional" battery under existing law is the absence of any basis for grading an offender's conduct in accordance with the potential dangerousness of his act and the extent of actual bodily harm caused. No distinction is made, for example, between the criminality of an offender who "recklessly" shoots into a crowd and causes serious physical injury and one who drives an automobile with "gross-negligence" and causes only slight injury. Despite significant differences in their mental state and the consequences of their acts, both offenders are guilty of the same offense and punishable potentially to the same extent. In revising the law of assault, modern statutes have eliminated this defect by dividing the offense of assault (meaning by this bodily injury crime) into degrees and grading the criminality of "unintentional" conduct according to the culpable mental state of the actor and the seriousness of the injury he causes.⁷⁴ If the culpable mental state is "extreme recklessness" and the injury great, the degree of assault will be high and the punishment severe; if the culpable mental state is "criminal negligence" and the injury slight, the degree will be low and the punishment lenient. To make distinctions such as these in the

⁷³ In a later case, *Bentley v. Commonwealth*, 354 S.W.2d 495 (Ky. 1962), the Court of Appeals declared that "a shooting and wounding through either gross negligence or recklessness and wanton conduct . . . is an assault and battery." *Id.* at 496.

⁷⁴ The New York statutes on assault have had the greatest influence. In these statutes "unintentional" assault is broken down into three degrees. The first degree is committed when a defendant causes a "serious physical injury" through conduct constituting "extreme recklessness;" the second degree is committed when a "serious physical injury" is caused "recklessly" by means of a deadly weapon or dangerous weapon; and the third degree is committed when "physical injury" is caused "recklessly" or through "criminal negligence" by use of a deadly weapon or dangerous instrument. NEW YORK PENAL LAW §§ 120.00-120.10 (McKinney's 1967). Delaware and Michigan, in their proposed codes, have adopted the New York approach to this offense. See PROPOSED DEL. CRIM. CODE §§ 404-406 (Governor's Committee for Revision of the Criminal Law, 1967); PROPOSED MICH. REV. CRIM. CODE §§ 2101-2103 (Special Committee of the Michigan State Bar for the Revision of the Criminal Law, 1967).

law of homicide, as we do in this state, but not in the law of assault is indefensible. The major objectives of the two classifications of crime are not significantly different. One seeks to inhibit the infliction of death upon human beings, the other seeks to inhibit the infliction of bodily injury.

C. KRS 435.170(1)

Any person shall be confined in the penitentiary for not less than two nor more than twenty-one years who:

(1) Willfully and maliciously . . . shoots at another without wounding him, or shoots at and wounds another with intent to kill him so that he does not die from the wound, or wounds a person other than the person shot at so that he does not die from the wound.

The conduct prohibited by this provision was previously punishable as common law battery or attempted murder, both of which have identical sanctions (a maximum jail sentence of twelve months, five thousand dollars fine, or both).⁷⁵ A desire to provide penalties more appropriate to the seriousness of such conduct stimulated the creation of this statutory offense. In satisfying its objective, the legislature managed to provide additional confusion and difficulty to the already confused and difficult doctrine of *mens rea*. Mentioned as *apparently* distinctive elements of this offense are three culpable mental states, "willfully," "maliciously," and "intent to kill." As defined by the Court of Appeals, the first (willfulness) means intentionally, not accidentally, and the second (malice), a synonym for "malice aforethought," means a predetermination to do an act, with the suddenness of the predetermination being insignificant.⁷⁶ The third (intent to kill) means a conscious desire to cause the death of another. The relationship of the three has been explained by the Court of Appeals as follows:

[T]he words 'with intention to kill him' modify only the words 'shoot at and wound another,' and do not modify or refer in any way to the words 'shoot at another without wounding.' In other words, the statute creates two offenses;

⁷⁵ KRS 431.075 (1950).

⁷⁶ *Combs v. Commonwealth*, 33 Ky. L. Rptr. 1058, 1060, 112 S.W. 658, 660 (1908).

one of willfully and maliciously shooting at another without wounding, in which case the intent to kill is not a part of the offense, and the other of shooting at and wounding another with intention to kill him, in which event the intent to kill is an essential element of the crime.⁷⁷

As a consequence of this interpretation, a number of inequities are possible. For example, the same criminal sanctions (two to twenty-one years imprisonment) are provided for the situations which follow, although criminal culpability of the two offenders differs tremendously:

D-1 shoots at *V-1* with intent to kill. The bullet strikes *V-1* in the head and causes serious injury. *D-2* shoots at *V-2* with intent to hit his foot, completely misses and causes no injury.

An even more interesting comparison can be made between the conduct of *D-2* and that contained in the following hypothetical:

D-3, intending to injure but not kill, shoots at *V-3* and causes an injury from which *V-3* dies.

As indicated in the first part of this article, *D-3's* conduct violates a special homicide statute⁷⁸ and is punishable to the extent of imprisonment for a period of one to six years. This means that if *D-2*, rather than missing his target and causing no injury, had shot his victim and caused death, his potential sanction would have been reduced from two-to-twenty-one years to one-to-six years, a result having a well-concealed rationale. Additional inequities are possible under this statute because of its restricted application to the act of "shooting a gun." For example, the following situation is not statutorily prohibited and would have to be treated as attempted murder or common law battery:

D-4 plants a bomb in *V-4's* automobile with intent to kill him. The bomb explodes, does not cause the death of *V-4*, but causes serious physical injury.

In every significant way this conduct is indistinguishable from that of *D-1* above. Because of the shortcomings of the statute,

⁷⁷ *Keys v. Commonwealth*, 260 Ky. 465, 467, 86 S.W.2d 121, 121-22 (1935).

⁷⁸ KRS 435.050 (1942).

however, the two offenders must receive substantially different treatment under the criminal law.

The major problem with this statute is that it attempts to use a single criminal offense to deal with several significantly different types of deviant behavior. A revision of assault must be directed toward elimination of this problem. Specifically, two substantial changes should be made. First, the offense of assault should be treated exclusively as a "result" offense, its essential element consisting of bodily injury to another person. Acts of violence directed toward another but not causing injury should be treated separately.⁷⁹ Secondly, all acts performed with intent to cause death, even if injury results, should be excluded from the "assault" provisions and treated as a part of the law of "criminal attempt to commit crime."⁸⁰ By doing this, every act committed with an intention of causing death, without regard to whether or not bodily injury has resulted, can be prosecuted as attempted murder and sanctioned in accordance with the extreme dangerousness of character reflected by such intent.

D. KRS 435.170(2) and (3)

Any person shall be confined in the penitentiary for not less than two nor more than twenty-one years who:

(2) Willfully and maliciously cuts, strikes, or stabs another with a knife or other deadly weapon with intent to kill, if the person stabbed, cut or bruised does not die from the wound; or

(3) Willfully and maliciously administers poison to another, if the person poisoned does not die from the poisoning.

The reason for enactment of these provisions is identical to that which stimulated the immediately preceding one: "By this

⁷⁹ "Since actual 'physical injury' is a requisite of assault, and the crime is not established by an unsuccessful attempt to cause such, the crime of attempted assault becomes a meaningful one, at least with respect to the intentional forms of assault. For example, one who with intent to cause serious physical injury swipes at another with a knife is guilty of first degree assault if he succeeds . . . but only of an attempt to commit that crime if he fails." NEW YORK PENAL LAW, Art. 120, Practice Commentary at 194 (McKinney's 1967).

⁸⁰ "Assaults will be treated as attempts. . . . This creates no problem in the case of aggravated assaults, such, for example, as assaults with intent to kill, rape or rob. They will be dealt with as attempted murder, attempted rape, or attempted robbery, or as bodily injury [crime] where such occurs. It will be clear under the attempt Section of the Code that, as most courts now agree, an assault with intent to commit a crime amounts to an attempt to commit the crime." MODEL PENAL CODE § 201.10, Comment 82 (Tent. Draft No. 9, 1959).

state, the common law misdemeanor of assault and battery is made a felony where it is accompanied by an intent to kill, but not otherwise."⁸¹ Most of the problems that exist with the "shooting assault" exist with the offenses defined by these provisions. The most serious is this: A serious bodily injury inflicted with a knife, and with an intent to kill, carries a major penalty of twenty-one years imprisonment. The same injury inflicted with the same intent but by some means other than a "knife or other deadly weapon" constitutes common law battery or attempted murder. As stated above, both of the latter are punishable by imprisonment for a period not to exceed twelve months. As a consequence of this statutory restriction, the Court of Appeals, on numerous occasions, has treated assault with intent to kill as common law battery because the instrumentalities used to inflict injury happened to be fists, hands, or feet, none of which has been held to constitute a "deadly weapon."⁸²

As indicated in the preceding section, conduct that is accompanied by an intention to kill, *i.e.*, a conscious desire to cause death, indicates something significant to the criminal law about the person engaging in that conduct. Without regard to the occurrence or non-occurrence of injury and without regard to the instrumentality used by such person, his intention indicates an immediate need for the rehabilitative services of the correction system. To satisfy this need and, at the same time, minimize the possibility of inequitable treatment of offenders, it is essential that the offense of attempted murder be segregated from offenses involving bodily injury and that it be defined so that an offender's state of mind becomes the critical issue.

E. KRS 435.180

Any person who . . . in a sudden affray or in sudden heat and passion, without previous malice . . . shoots at without wounding, or shoots and wounds another person, or wounds a person other than the person shot at, . . . or, in like manner, cuts, thrusts or stabs any other person with a knife or other deadly weapon, without killing that person,

⁸¹ Helton v. Commonwealth, 244 S.W.2d 762, 766 (Ky. 1951).

⁸² *E.g.*, Charles v. Commonwealth, 321 S.W.2d 253 (Ky. 1959); Crumbaugh v. Commonwealth, 259 S.W.2d 67 (Ky. 1953); Reed v. Commonwealth, 248 S.W.2d 911 (Ky. 1952).

shall be fined not . . . more than five hundred dollars, or imprisoned for not less than six nor more than twelve months, or both.

The purpose of this statute is to provide in the law of assault the same mitigating factor that exists in the law of homicide. It applies only to "intentional" bodily injury offenses and then only to the extent of reducing sanctions. The language used to describe the mitigating factor is almost identical to that used by the Court of Appeals to describe mitigation for voluntary manslaughter.⁸³ Like the preceding ones, this offense has a major weakness that results from a legislative limitation upon its application having no real significance to a description of the offense. When this statute is construed in light of a companion statute, KRS 435.170, it is apparent that the former was enacted to provide mitigation for the offense created by the latter, which includes assaults resulting from "shooting," "wounding," "stabbing" and "striking." In drafting the mitigation statute, however, the legislature limited its application to assaults involving "shooting," "cutting," "thrusting" and "stabbing."

Because of the difference in this language, several indefensible decisions have been made. For example, in one case the offender had injured his victim by striking him with a poker and with large blocks of coal. Charged with willful and malicious striking and wounding with intent to kill, he sought an instruction under KRS 435.180 for mitigation of the offense. In affirming a refusal of the instruction, the Court of Appeals stated that:

The word "strike" appearing in KRS 435.170(2) is not included in KRS 435.180. Therefore the latter section does not cover the lower degree of the offense of *striking* with a deadly weapon with an intent to kill.⁸⁴

A similar decision was made in a case in which the bodily injury was inflicted by use of a tobacco hook⁸⁵ and in another in which the injury was inflicted by use of a club.⁸⁶ The defect reflected by these cases can be eliminated by making the availability of mitigation dependent upon the state of mind of an offender

⁸³ See text at notes 38-46, *supra*.

⁸⁴ Reed v. Commonwealth, 248 S.W.2d 911, 1913 (Ky. 1952).

⁸⁵ Burgess v. Commonwealth, 176 Ky. 326, 195 S.W. 445 (1917).

⁸⁶ Cruise v. Commonwealth, 226 Ky. 831, 11 S.W.2d 925 (1928).

rather than upon the means by which he causes bodily injury. If he causes an injury *intentionally* and can establish that he acted under the influence of an "extreme emotional disturbance for which there is a reasonable explanation or excuse," he should be entitled to the benefit of mitigation.⁸⁷

F. KRS 435.190

(1) Any person who recklessly throws a stone or other missile at or into, or shoots at or into, any railroad engine or cars attached to the engine, passenger coach, any station or station platform occupied by any person, at or into any motor vehicle, stationary or traveling upon any public highway in this state, shall be fined not less than one hundred dollars nor more than five hundred dollars, or imprisoned for not less than six nor more than twelve months.

(2) If the missile thrown or the shot fired was calculated to produce death or great bodily harm, and any person on or in the engine, cars, coach, station, station platform or motor vehicle is injured or wounded the person so throwing or shooting shall be confined in the penitentiary for not less than one nor more than five years. . . .

In the limited situations described in this statute, the legislature has created a statutory battery based upon "reckless conduct calculated to produce death or great bodily harm." With such conduct sufficient for common law battery, the legislature's purpose in creating the offense was again to provide for a greater penalty than is otherwise available. The difficulty encountered by the courts with this statute has involved another statute, KRS 435.170(4), which creates the "greater offense" of "willfully and maliciously" throwing a missile or shooting at or into the very same structures mentioned in the quoted statute.⁸⁸

⁸⁷ The same reasons that exist in the law of homicide for liberalizing the standard of measurement for the adequacy of mitigating circumstances also exist in the law of assault. A discussion of the standard used in modern statutes is contained in an earlier part of this article.

⁸⁸ KRS 435.170(4) (1942) provides as follows:

Any person shall be confined in the penitentiary for not less than two nor more than twenty-one years who:

(4) Willfully and maliciously shoots at or into, or throws a stone or dangerous or deadly missile at or into, any railroad engine or cars attached to the engine, passenger coach, station, station platform, steamboat or motor vehicle occupied by any person, or any dwelling house, storehouse or any building where people live or frequent for pleasure or business. . . .

Despite the fact that physical injury to another is not a requirement for its commission, the latter supports greater sanctions than the former, two-to-twenty-one years as compared with one-to-five years. Justification for this difference must be found, if at all, in the apparent distinction that exists between the *mens rea* requirements of the two statutes, "willfully and maliciously" for one and "recklessly but calculated to produce death or great bodily harm" for the other.

On the surface a substantial difference between these two mental states seems to exist. Willfulness and maliciousness connote "intentional" conduct, while recklessness connotes "unintentional" conduct. But a careful analysis of the cases applying these two statutes reveals rather pointedly that the distinction between the two is more apparent than real. Two very similar cases serve to demonstrate. In the first,⁸⁹ the accused had thrown a bottle at an occupied automobile. The bottle struck the vehicle without causing injury to any of its occupants. He was prosecuted for the "greater offense" of willfully and maliciously throwing a missile at an occupied vehicle. In the second case,⁹⁰ the defendant's act was virtually identical to that of the first, at least in so far as criminal culpability is concerned. While in one car and being chased by the police in another, he threw a block of wood into the highway. The police car wrecked and one of its occupants was injured. The defendant was tried for the "lesser offense" of "recklessly causing an injury by throwing a missile at an occupied motor vehicle." The Court of Appeals approved both prosecutions, apparently by looking at the conduct of the two defendants from different viewpoints. The first defendant's mental state was viewed with respect to his *act* and found to be willful and malicious. The second defendant's state of mind was viewed with respect to the *consequences of his act* and found to constitute recklessness. By ignoring the injury which resulted in the second case and viewing the defendant's state of mind in relation to his *act*, he too could have been convicted of the "greater offense" of willfully and maliciously throwing at a vehicle. The irrationality of this can be more vividly demonstrated hypothetically: *D*, having no intention to kill or cause injury,

⁸⁹ Harrison v. Commonwealth, 373 S.W.2d 156 (Ky. 1963).

⁹⁰ Cook v. Commonwealth, 401 S.W.2d 51 (Ky. 1966).

but fully aware of the risk thereof, consciously shoots into an occupied automobile and causes serious injury to an occupant. His conduct is violative of KRS 190(2) and punishable to the extent of five years imprisonment. At the same time, if the occupant's injury is ignored, the defendant's conduct also violates KRS 435.170(4). Under this statute, it is punishable to the extent of twenty-one years imprisonment, certainly a discordant result. Remedy of this situation, more typical than atypical in the Kentucky statutes, requires two general changes of direction. First of all the host of largely undefined mental states used throughout the statutes should be eliminated and replaced with a few mental states, fully and carefully defined by the legislature. Secondly, all criminal offenses should be defined by use of principles having general application.

Notes

"A WANTON GOSPELLER" CRIES OUT FOR REPEAL OF THE SUNDAY CLOSING LAW

Kentucky's Sunday closing law¹ led a peaceful life for the first hundred and fifty years of its existence. Then, with the advent of the fifties and the sixties, the once peaceful existence came to an abrupt end. These two decades have witnessed a tremendous amount of confusion, discontent and litigation. Kentucky is not alone in this conflict, as witnessed by similar confusion and litigation that has taken place in almost every state and on the national level. This note, therefore, will endeavor to look at this conflict, its history, its attacks, the attacks that have evolved and finally a remedy to this conflict. At the outset, it is pointed out that this note will look at the general nature of the conflict present in all the states, but the major emphasis will be on the conflict that has arisen in Kentucky.

The passage of time as expressed in the history of man can lead to greater depths of reasoning and understanding. The wisdom gained by such an excursion through history can be used to correct

¹ KY. REV. STAT. [hereinafter referred to as KRS] § 436.160 (1962). The text reads as follows:

(1) Any person who works on Sunday at his own or at any other occupation or employs any other person, in labor or other business, whether for profit or amusement, unless his work or the employment of others is in the course of ordinary household duties, work of necessity or charity or work required in the maintenance or operation of a public service or public utility plant or system, shall be fined not less than two dollars nor more than fifty dollars. The employment of every person employed in violation of this subsection shall be deemed as a separate offense.

(2) Persons who are members of a religious society which observes as a Sabbath any other day in the week than Sunday shall not be liable to the Penalty prescribed in subsection (1) of this section, if they observe as a Sabbath one day in each seven.

(3) Subsection (1) of this section shall not apply to amateur sports, athletic games, operation of moving picture shows, chautauquas, filling stations or opera.

(4) Any person who holds any boxing or wrestling match or exhibition on Sunday shall be fined not less than ten dollars nor more than one hundred dollars.

(5) Any person licensed to keep, or any person controlling a billiard, pigeonhole or pool table who permits any game to be played on it on Sunday shall be fined not less than twenty-five dollars nor more than sixty dollars, and forfeit his billard pigeon-hole or pool table license if he holds such a license.

(6) Any person who hunts game, with a gun or dogs, on Sunday shall be fined not less than five dollars nor more than fifty dollars.