Approved: February 17, 2003
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE.

The meeting was called to order by Chairman John Vratil at 10:00 a.m. on February 7, 2003, in Room 423-S of the Capitol.

All members were present except: Senator Allen (E)
Senator Oleen (E)

Committee staff present: Mike Heim, Kansas Legislative Research Department
Lisa Montgomery, Office of the Revisor of Statutes
Dee Woodson, Committee Secretary

Conferees appearing before the committee:
None

Others attending: see attached list

Chairman Vratil announced two sub-committee assignments and the bills to be covered by each. Senator Pugh will chair the first sub-committee with Senators Goodwin and Umbarger, and are assigned bills **SB 86**, **SB 87**, and **SB 137**. The second sub-committee will be chaired by Senator Schmidt with Senators Gilstrap and Donovan, and assigned bills **SB 20**, **SB 110**, and **HB 2032.** He stated that he would like the sub-committee to have a hearing on those bills in sub-committee, and then a written report from the sub-committees on their recommendations that will be distributed to all Judiciary Committee members. He reminded the Committee members that February 25 would be the last meeting date of the committee before turn-around unless Judiciary received special disposition from leadership.

Final Action on:
SB 29 - Corporation Code amendments
Chairman Vratil reviewed **SB 29**, and explained the controversial aspect of the bill concerned franchise fees which would allow a parent corporation to take as a credit the franchise fees paid by a subsidiary corporation. He stated that it wasn't known what the fiscal impact would be on the state, as currently there was no way to gather that information.

Following discussion, Senator Schmidt made a motion to remove from the bill the provisions related to parent/subsidiary franchise fees. The motion was seconded by Senator Haley. After further discussion, the Chair called for a vote on the motion, and the motion failed.

Senator Donovan made a motion to amend **SB 29** by reducing the $50,000 maximum fine for violating a Court Order to $25,000. The motion was seconded by Senator Haley, motion carried.

Senator Goodwin made a motion to pass **SB 29** out favorably as amended, seconded by Senator Donovan, and the motion carried.

SB 36 - Membership and duties of the judicial council
Chairman Vratil reviewed **SB 36**, and explained that it was generally a cleanup bill. Statutes have not been updated in a long time. The bill adds some new members to the Judicial Council. Randy Hearrell from the Kansas Judicial Council offered amendments to **SB 36.** The first amendment was to Section 1, to establish in statute that the Judicial Council shall be an independent agency in the judicial branch of government, shall submit its budget separately and may adopt its own pay plan and personnel rules. The other amendments were technical in nature: Section 4, page 2, line 33, striking the word "criminal" and striking the word "shall" and inserting "may" in line 23. (Attachment 1)

Senator Goodwin moved to make the amendments as presented, seconded by Senator Donovan, and the motion carried.

Following further discussion regarding adding another Senate member to the Judicial Council for balance, Senator Schmidt made a motion to amend **SB 36** by adding as a member of the Judicial Council the ranking minority member of the Senate Judiciary Committee. The motion was seconded by Senator Goodwin, and the motion carried.

MINUTES OF THE SENATE JUDICIARY COMMITTEE on February 7, 2003 in Room 123-S of the Capitol.

Senator Goodwin made a motion to pass **SB 36** out favorably as amended, seconded by Senator Gilstrap, and the motion carried.

SB 37 - Receipts from an interest in minerals and other natural resources pursuant to the uniform principal and income act

Chairman Vratil reviewed **SB 37**, and stated that it changes the allocation of royalties from 90% to principal and replaces it with 15%, which makes the allocation 15% to principal and 85% to interest with the passage of this bill. Senator Donovan moved to pass **SB 37** out favorably, seconded by Senator Schmidt, and the motion carried.

SB 38 - Annual report, filing of certain documents, franchise tax and business activities of certain business entities

Chairman Vratil reviewed **SB 38**, with clarifications given by Melissa Wangemann from the Secretary of State's Office. Senator Schmidt made a motion to amend the bill by using the NFIB proposed amendment of changing $2 to $1 per $1,000 of net worth with a minimum of $40 and a maximum of $5,000. The motion was seconded by Senator Donovan. After discussion and concerns expressed about the fiscal impact of this amendment, the Chair called for a vote on the motion to amend. The motion carried.

Senator Donovan moved to recommend this bill favorably as amended, seconded by Senator Schmidt, and the motion carried.

SB 48 - Appeal bonds in litigation involving signatories or successors of the tobacco litigation agreement

Chairman Vratil reviewed **SB 48** which places a maximum limit on an appeal bond of $25 million. He explained the current Kansas law which requires the judge to set the bond at 100% of the unsecured damages if a judgment is rendered unless there are certain findings made by the judge which are not commonly made.

After brief discussion, Senator Donovan moved to pass **SB 48** out favorably, seconded by Senator O'Connor, and the motion carried.

SB 35 - Criminal use or possession of body armor

Chairman Vratil reviewed SB 35. Senator Schmidt submitted a proposed balloon amendment, and explained that it included the KBI's recommended changes as well as Manny Barbaran's request that private security guards also be included. He added that this balloon should cover the request from Ron Hein on tribal law enforcement officers as well. (Attachment 2) Senator Schmidt made a motion to amend **SB 35** as outlined in his balloon amendment with the Revisor making technical changes. The motion was seconded by Senator Goodwin, and the motion carried.

Following Committee discussion, Senator Haley made a motion to make this a maliciouss act and to amend the provisions of **SB 137** into **SB 35.** The motion died for lack of a second.

Senator Schmidt moved to pass **SB 35** out favorably as amended, seconded by Senator O'Connor, and the motion carried.

SB 54 - Creating the crime of negligent homicide

Upon Senator Pugh's suggestion, the Chair postponed discussion and final action on **SB 54** until after the Committee heard the review of this proposed bill by a professor from the Kansas University Law School. Senator Pugh had requested some research information be provided on this issue by the Research Department staff which was distributed to the Committee. (Attachment 3)

The minutes of the February 3 and 4 meetings were approved on a motion by Senator O'Connor, seconded by Senator Schmidt, and the motion carried.

The meeting adjourned at 11:00 a.m. The next scheduled meeting is February 10, 2003.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Feb. 4, 2003

NAME	REPRESENTING
Kim Fowler	Judicial Branch
Becky Hazzell	Judicial Council
Ron Seeber	Hein Law Firm
[illegible]	KTLA
Barb Conrad	KTLA
[illegible]	KCDAA
M Hellebust	KSHI
Marilynn Ault	KCSDV
SCOTT SCHNEIDER	KADC
Fariba Pourarjan	SOS
Melissa Wangemann	Sec. of State
KEITH R LANDIS	CHRISTIAN SCIENCE COMMITTEE ON PUBLICATION FOR KANSAS

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MEMORANDUM

TO: **Senate Judiciary Committee**
FROM: **Kansas Judicial Council - Randy M. Hearrell**
DATE: **February 3, 2003**
RE: **Proposed Amendments to 2003 SB 36**

The following are proposed amendments to SB 36.

Section 1. A judicial council is hereby established and created which shall be an independent agency in the judicial branch of government, shall submit its budget separately and may adopt its own pay plan and personnel rules. The judicial council shall be composed of . . .

This proposed amendment places the Judicial Council in the Judicial Branch of government, but preserves independence. The Judicial Council currently follows Judicial Branch personnel rules but because the Judicial Branch was able to raise filing fees and has upgraded its pay plan, the Judicial Council currently cannot afford to follow its pay plan.

Section 4, page 2, line 33. The word "criminal" should be stricken because the Council's mission is "improving the administration of justice," (not just criminal justice).

Section 6. The striking of the word "only" on page 3, on line 23, may not accomplish the intended goal of allowing monies from the publication fee fund to be spent on general Judicial Council operations. Perhaps striking all of subsection (c) (lines 22-25) solves the problem or striking "shall" and inserting "may" in line 23.

Senate Judiciary
2-7-03
Attachment 1-1

Session of 2003

SENATE BILL No. 35

By Committee on Judiciary

1-21

Senate Judiciary
2-7-03
Attachment 2-1

AN ACT concerning crimes, criminal procedure and punishment
ating certain crimes involving use and possession of body armo
prescribing penalties therefor.

Be it enacted by the Legislature of the State of Kansas:

Section 1. (a) Criminal use of body armor is committing any offense classified as a person felony while wearing body armor.

~~(b) The provisions of this section shall not apply to: (1) A uniformed or properly identified state, county or city law enforcement officer, while such officer is engaged in the performance of such officer's duty; or~~

~~(2) a security officer, while such officer is engaged in the performance of such officer's duty.~~

(c) As used in this section: ~~(1)~~ "Body armor" means clothing or a device designed or intended to protect a person's body or a portion of a person's body from death or injury caused by a firearm; and

~~(2) "security officer" means a person lawfully employed to protect another person or to protect the property of another person.~~

(d) Criminal use of body armor is a severity level ~~7~~, person felony.

(e) The provisions of this section shall be part of and supplemental to the Kansas criminal code.

Sec. 2. (a) Criminal possession of body armor is possession, purchase, ownership or use of body armor by a person who has been convicted of an offense classified as a person felony.

(b) (1) The provisions of this section shall not apply to any person ~~who has been granted permission to possess, purchase, own or use body armor~~ as provided in this section.

(2) (A) A person who has been convicted of an offense classified as a person felony whose employment, livelihood or safety is dependent on such person's ability to possess, purchase, own or use body armor may petition the county sheriff of the county in which such person resides for written permission to possess, purchase, own or use body armor.

(B) The sheriff may grant a person who properly petitions the sheriff under this subsection written permission to possess, purchase, own or use body armor as provided in this section if the sheriff determines that the petitioner is likely to use body armor in a safe and lawful manner and has,

or any felony violation of the controlled substances act.

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whose Conviction has been expunged. pursuant to KSA 21-4619 and amendments thereto

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~~reasonable need for the protection provided by body armor.~~

(C) In making the determination required under this subsection, the sheriff must consider the petitioner's continued employment, the interests of justice and other circumstances justifying issuance of such written permission.

(D) The sheriff may restrict written permission issued to a petitioner under this section in any manner determined appropriate by the sheriff. If permission is restricted, the sheriff must state the restrictions in the permission document.

(E) Sheriffs shall exercise broad discretion in determining whether to issue written permission under this section. Nothing in this section requires a sheriff to issue written permission to any particular petitioner. The issuance of written permission under this section does not relieve any person or entity from criminal liability that might otherwise be imposed.

(F) A person who receives written permission from a sheriff pursuant to this section must have the written permission in such person's possession ~~when possessing, purchasing, owning or using body armor.~~

(3) A law enforcement agency may issue body armor to a person who is in the custody of a law enforcement agency or a local or state correctional facility or who is a witness to a crime for such witness or person's protection without a petition being filed under this subsection. If the law enforcement agency issues body armor to a person under this subsection, the law enforcement agency must document the reasons for issuing the body armor and retain a copy of that document as an official record. The law enforcement agency must issue written permission to the person under this subsection.

(c) As used in this section, "body armor" means the same as provided in section 1, and amendments thereto.

(d) Criminal possession of body armor is a severity level 8, person felony.

(e) The provisions of this section shall be part of and supplemental to the Kansas criminal code.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.

A MORE PRINCIPLED APPROACH TO CRIMINALIZING NEGLIGENCE: A PRESCRIPTION FOR THE LEGISLATURE

LESLIE YALOF GARFIELD*

Table of Contents

* Associate Professor of Law, Pace University School of Law. I gratefully acknowledge the thoughtful editorial assistance of Dean Michael B. Mushlin, Professor Stuart M. Madden, H. Douglas Garfield and Beth Turtz, and the research assistance of Kristina Hendricks and Andrew Diaz Matos. I would also like to thank Professors Audrey Rogers and Michelle S. Simon for their support and keen insights. I would especially like to thank my research assistant Michelle Fish for her professionalism and extreme dedication to this project and Professor Bennet L. Gershman for his invaluable and immeasurable support, encouragement, and advice.

I. INTRODUCTION

American society increasingly relies on technology and a faster pace to accomplish more tasks more quickly. Consequently, the hallmarks of our culture have become speed, efficiency, and technology. This phenomenon produces practical benefits, including higher productivity and a higher standard of living. However, these benefits are realized at some cost. Consider, for example, the following scenarios: a person is killed because the smoke detector upon which he relied to replace human vigilance was disabled;[1] a person is killed on a sidewalk when a fast-food employee rushes on a bicycle to make a delivery;[2] a motorist is killed when another driver is distracted while using a cellular telephone.[3] These examples illustrate the increased potential for harm that can result from careless conduct. This conduct is more likely to occur as society increasingly relies upon and emphasizes these hallmarks.

The potential for increased societal harm generated by the combination of technological reliance and an up-tempo lifestyle poses a challenge to the law. As persons consciously choose to sacrifice a measure of care to

1. *See* Janan Hanna, *Dismantling of Smoke Alarm Not Criminal, Jury Finds Aurora Man Not Guilty in Sister's Death*, CHI. TRIB., June 19, 1997, at 1. William Doyle disconnected the smoke detectors in his apartment because they were often activated as a result of his cigarette smoking and his cooking. *Id.* When his three-year-old sister died in a fire in the apartment, Doyle was charged with involuntary manslaughter. A jury found Doyle not guilty on the charge. However, Doyle was found guilty of the misdemeanor of child endangerment. *Id.*

2. *See* Tom Raftery, *Bicyclist Hits, Kills Man, 68*, N.Y. DAILY NEWS, Nov. 19, 1997, at 36 (reporting that a sixty-eight-year-old pedestrian was struck and killed by a take-out delivery person on a bicycle); *see also* Terry Pristin, *Question After a Fatal Bicycle Crash: At What Price Fast Food?*, N.Y. TIMES, Nov. 30, 1997, at 45. A businessman sustained serious injuries when he was knocked to the pavement by a food delivery person on a bicycle who "flew through the intersection." *Id.* The article noted that "[t]he potential hazards posed by cyclists on the city's crowded streets and sidewalks were thrown into sharp focus . . . by the death of a 68 year-old pedestrian who was struck on [a] sidewalk by a takeout-chicken delivery person." *Id.* "The Mayor ordered a police crackdown, and a member of the City Council called for stricter rules against reckless cyclists." *Id.*

3. *See* Selwyn Crawford, *$6.5 Million Is Awarded in Crash; Teen Driver Using Cell Phone Judged Responsible in Tot's Death*, DALLAS MORNING NEWS, May 21, 1997, at 29A. A teenage driver lost control of her van while answering her cellular phone. *Id.* As a result, she caused a traffic accident that resulted in the death of a three-year-old child. The accident also left the boy's father with severe brain damage and the boy's mother with minor injuries. The couple's daughter suffered a broken neck in the head-on collision. *Id.*

accomplish more tasks more quickly, the law, and particularly the criminal law, must assess whether it is necessary to adjust rules of conduct to the phenomenon of relaxed standards of care. Although criminal law has never been comfortable with punishing individuals for mere carelessness, the increased potential for technology-related accidents in our fast-paced culture makes it necessary to reexamine this reluctance and to question whether there are circumstances when lack of due care should be a sufficient predicate for invoking the sanctions of criminal law.

Societal protection has consistently been the paramount goal of modern criminal law.[4] Criminal punishment typically achieves such protection through its capacity to motivate people to conform to socially acceptable rules of behavior with threats of serious penalties for nonconformity.[5] This objective of deterring unacceptable behavior is most effective when individuals have the capacity to consciously choose the direction of their behavior, but it is less successful when free choice is absent or substantially

4. *See, e.g.*, OLIVER WENDELL HOLMES, JR., THE COMMON LAW 49 (1923); *see also* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW § 1.5, at 22 (2d ed. 1986). Punishment serves as a "weapon which society uses to prevent conduct which harms or threatens to harm" its interests. *Id.* The various interests that society seeks to protect include:

> protection from physical harm to the person; protection of property from loss, destruction or damage; protection of reputation from injury; safeguards against sexual immorality; protection of the government from injury or destruction; protection against interference with the administration of justice; protection of the public health; protection of the public peace and order; and the protection of other interests.

Id. at 22-23.

5. *See, e.g.*, Christopher T. Igielski, *Washington Defendants' New Right of Pre-Trial Flight*, 19 SEATTLE U. L. REV. 633, 633-34 (1996) (asserting that "from a historical and practical viewpoint, a foremost purpose of criminal law is to serve the interest of the state in maintaining an ordered society and deterring future crime"); Ronald J. Rychlak, *Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 TUL. L. REV. 299, 320-21 (1990). The article notes that

> [t]o maintain order in society, the legal system must not only provide for a safe society, it must also provide for a society that is satisfied with the workings of the system. The law-abiding populace must be assured that those who have done wrong are punished, and those who are innocent are protected.

Id.; Kevin G. McLean, Comment, *The Propriety of Imposing Joint and Several Restitutionary Liability as a Condition of a Criminal Offender's Probation*, 51 BROOK. L. REV. 809, 837 (1985) (contending that "[t]he primary purpose of the criminal law is to maintain social order through the prevention of conduct that society regards as harmful. . . . [T]he criminal law is designed to protect the interests of the public at large."); Kurt M. Zitzer, Comment, *Punitive Damages: A Cat's Clavicle in Modern Civil Law*, 22 J. MARSHALL L. REV. 657, 674 (1989) ("The function of criminal law is to protect the interests of society by maintaining established standards of conduct. Therefore, criminal law protects society's interests through the remedies of punishment and deterrence.").

diminished.[6] Punishing intentional or reckless behavior is commonly justified because individuals have chosen to engage in anti-social and morally blameworthy conduct.[7] Punishment for careless behavior is not justified unless society views negligent actors as sufficiently blameworthy. Society must also view the imposition of penal sanctions as a reasonable deterrent to the actor's conduct.[8]

Although criminal law traditionally has focused its sanctions on harmful activity produced intentionally or recklessly, some courts and legislators have recognized that negligent conduct could act as a basis for criminal liability.[9] Negligence was a basis for criminal liability during the Industrial Revolution, when hazardous conduct threatened society's safety and spawned new regulatory crimes.[10] Thus, negligent conduct that threatened health, welfare, and safety of food, drugs, housing, and working conditions became subject to criminal sanctions.[11] Later, courts allowed proof of

6. *See, e.g.*, Jerome Hall, *Negligent Behavior Should Be Excluded From Penal Liability*, 63 COLUM. L. REV. 632, 641 (1963) (asserting that the theory of deterrence is not relevant to negligent offenders since they have not "thought of their duty, their dangerous behavior, or any sanction"); *see infra* text accompanying notes 21-23.

7. *See, e.g.*, HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 62-70 (1968) (arguing that criminal culpability must be based on moral blameworthiness). Packer explained that in criminal law "there is the view that the only proper goal of the criminal process is the prevention of [conscious] antisocial behavior." *Id.* at 9. *See also* Tison v. Arizona, 481 U.S. 137, 149 (1987) (asserting that the retribution theory of punishment requires that a criminal sentence be directly related to a defendant's personal blameworthiness); Chief Constable v. Shimmen, 84 Q.B. 7, 9-11 (1986) (finding defendant who broke a window when demonstrating one of the kicks used in the Korean art of self-defense to be guilty of criminal damage by recklessness; although the defendant believed he had taken enough precautions to eliminate or minimize risk, "[h]e was aware of the kind of risk which would attend his act if he did not take adequate precautions"); Regina v. Faulkner, 13 L.R.-Cr. Cas. Res. 550, 555 (1877) (finding that defendant's conviction for arson was quashed for lack of *mens rea* since the requisite showing was "that the accused knew that the injury would be the probable result of his unlawful act, and yet did the act reckless of such consequences").

8. *See* discussion *infra* Part II.

9. *See* discussion *infra* Part III.

10. *See* Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 67 (1933) (maintaining that the development of crimes without a scienter requirement came into effect with the growing industrialization during the nineteenth century); *see also* Staples v. United States, 511 U.S. 600, 607 (1994) (noting that cases recognizing public welfare offenses "involve statutes that regulate potentially harmful or injurious items").

11. According to the public welfare doctrine, criminal prosecution can dispense with the necessity to show scienter in the enforcement of statutes that promote the public welfare. *See, e.g.*, United States v. Park, 421 U.S. 658 (1975) (affirming the criminal conviction of a corporate president for breach of his duty to use care to maintain the physical integrity of the corporation's food products); United States v. Dotterweich, 320 U.S. 277, 281 (1943) (noting that in areas subject to strong police regulation, the state may impose "the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger"); United States v. Balint, 258 U.S. 250, 252 (1922) ("Many instances of this are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of *mala in se*.").

ordinary negligence to establish criminal liability whenever a person caused harm by using any inherently dangerous instrument,[12] such as death by a firearm.[13] Other jurisdictions expanded this broadened use of negligence to include any conduct that involved dangerous objects or activities which are likely to cause death or serious bodily harm.[14] These cases conflict with the general principle that ordinary negligence, although actionable civilly, is not a sufficient ground for criminal liability.

The modern technological revolution, however, requires legislators and policymakers to reevaluate the traditional reluctance of criminal law to punish ordinary negligence and to broaden the scope of punishable conduct to include ordinary negligent conduct when such punishment will deter others. Part II of this article discusses the role of deterrence in furthering the overriding goal of criminal law—to protect society. It also answers critics who claim that negligent conduct is not capable of deterrence, and concludes that deterrence may be effective for any conduct when the legislature's expectation of individual conformity is reasonable. Part III notes instances in which jurisdictions have deviated from the general rule that requires proof of intentional or reckless conduct to impose criminal liability. This discussion focuses on those jurisdictions that have used ordinary negligence to find criminal liability when a person uses an inherently dangerous instrument, engages in an inherently dangerous activity, or engages in conduct that poses a threat of widespread public injury. Part IV analyzes the appropriateness of permitting punishment based on ordinary negligence and concludes that it is entirely responsible to adjust criminal sanctions to respond to a fast-paced and technologically reliant culture that consciously trades due care for greater and swifter achievements. Part IV also offers a model for legislatures to follow when evaluating the appropriateness of criminalizing negligent conduct. Following this model will assure

12. *See* State v. Dixon, 186 S.E. 531 (S.C. 1936) (announcing that "[t]here can be no question that it is the established rule . . . that one who causes the death of another by the negligent use of a deadly . . . instrumentality may be convicted of involuntary manslaughter"); *see also* discussion *infra* Part III.C.

13. *See* State v. Gilliam, 45 S.E. 6, 7 (S.C. 1903) (declaring that when a homicide occurs with a firearm, it will interpret the term "negligence" in the homicide statute to mean "a failure to use ordinary care"); *see also infra* notes 94-99 and accompanying text.

14. Conduct involving automobiles and drugs often threatens widespread public harm, as does conduct that violates environmental statutes. *See, e.g.*, State v. Bonier, 367 So. 2d 824, 825-26 (La. 1979) (defining "dangerous weapons" as those instrumentalities that, "in the manner used, [are] calculated or likely to produce death or great bodily harm"); *see also infra* notes 103-22, 134-70 and accompanying text.

that legislatures will limit punishment to instances when there is a reasonable expectation that criminal sanctions will serve as a deterrent to future harm. This article draws the conclusion that criminal law will not unfairly punish individuals and will provide prosecutors with enhanced tools to respond to dangerously careless conduct that could have been anticipated and averted.

II. THE THEORY OF DETERRENCE AS A MEANS TO PREVENT CRIMINALLY NEGLIGENT CONDUCT

Justice Holmes wrote that the true purpose of the criminal law is to coerce individuals to conform their behavior to societal norms.[15] Typically, society achieves this desired conformity through punishment.[16] Punishment,

15. *See* Oliver W. Holmes, Jr., *Theories of Punishment and the External Standard*, *in* CRIME, LAW AND SOCIETY 27, 32 (Abraham S. Goldstein & Joseph Goldstein eds., 1971) (suggesting that the real purpose of criminal law and punishment is simply to coerce individuals to conform their behavior to the social conventions). For a discussion of those interests that society seeks to protect through criminal law, see LAFAVE & SCOTT, *supra* note 4, § 1.5, at 22-23.

16. There are four generally accepted theories of punishment: retribution, rehabilitation, incapacitation and deterrence. Of these four theories, deterrence is the most appropriate theory on which to base punishment for negligent crimes.

According to the theory of retribution, punishment is assigned as a vehicle to obtain revenge for the harms that the criminal caused to society as a result of his or her crime. *See* LAFAVE & SCOTT, *supra* note 4, § 1.5(a)(6), at 25-27; *see also* SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 105 (6TH ED. 1995). JUSTIFICATION FOR THE RETRIBUTION THEORY OF PUNISHMENT IS THAT THE CRIMINAL DESERVES IT. LAFAVE & SCOTT, *supra* note 4, §1.5(a)(6), at 26. Since society places little emphasis on careless acts, retribution is not an appropriate theory on which to rely when punishing negligent conduct.

Under the theory of rehabilitation, the purpose of punishment is to reform the offender so that he can return to society as a law-abiding citizen. *See* LAFAVE & SCOTT, *supra* note 4, § 1.5(a)(3), at 24; KADISH & SCHULHOFER, *supra*, at 119-225. Rehabilitation is aimed at reforming the individual so that he or she will no longer desire or need to commit crimes. LAFAVE & SCOTT, *supra* note 4, § 1.5(a)(3), at 24. Arguably, negligent crimes are committed because of the actor's failure to exercise due care. To the extent that one can be taught not to exercise poor judgment, rehabilitation is appropriate. However, because it is difficult to rehabilitate one who was merely careless, this theory is an inappropriate one on which to punish a defendant for a negligent act.

Incapacitation requires removing the criminal from society for society's sake. *See* LAFAVE & SCOTT, *supra* note 4, § 1.5(a)(2), at 23-24; KADISH & SCHULHOFER, *supra*, at 126-30. Because incapacitation is designed to protect society from persons deemed dangerous because of their past criminal conduct, it is an inappropriate theory on which to base punishment of negligent conduct.

Negligent actors are rarely a threat to society. According to the theory of deterrence, punishment is a means of preventing future crimes. *See* LAFAVE & SCOTT, *supra* note 4, § 1.5(a)(1), (a)(4), at 23, 24-25; KADISH & SCHULHOFER, *supra*, at 115. Deterrence is divided into two categories: general deterrence and specific deterrence. LAFAVE & SCOTT, *supra* note 4, § 1.5(a)(1), (a)(4), at 23, 24-25. Under the theory of general deterrence, the judge sentences an individual to a particular sentence as a warning to citizens that they are subject to the same liberty restrictions if they commit the same crime. *Id.* at § 1.5(a)(4), at 24. "Punishment acts as a *general deterrent* insofar as the threat of punishment deters potential offenders in the general community." KADISH & SCHULHOFER, *supra*, at 115. Under the theory of specific deterrence, a judge assigns a particular sentence as a means of discouraging the individual from committing the crime again. LAFAVE & SCOTT, *supra* note 4, § 1.5(a)(1), at 23. For the reasons discussed above, general deterrence is the best theory on which to rely when punishing negligent conduct.

For a further discussion of the theories of punishment, see KADISH & SCHULHOFER, *supra*, at 102-31.

17. *See, e.g.*, JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 11-13 (J.H. Burns and H.L.A. Hart eds., 1970) (1823). In his explanation of the concept of "utility," Bentham wrote that

> [a] man may be said to be a partisan of the principle of utility, when the approbation or disapprobation he annexes to any action, or to any measure, is determined by, and proportioned to the tendency which he conceives it to have to augment or to diminish the happiness of the community: or in other words, to its conformity or unconformity to the laws or dictates of utility.
>
> Of an action that is conformable to the principle of utility, one may always say either that it is one that ought to be done, or at least that it is not one that ought not to be done. One may say also, that it is right it should be done; at least that it is not wrong it should be done: that it is a right action; at least that it is not a wrong action.

Id. at 13. If the utilitarian goal is general deterrence, for example, a particular offender will be punished—not necessarily because he is guilty but because "it is believed that his punishment will cause other people to forgo criminal conduct in the future. . . . Others are put on notice of the risks of wrongful conduct." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 2.03[2], at 5 (1987). Fear of punishment encourages them to alter their conduct accordingly. *Id.*

> The utilitarian view is forward-looking; it assesses punishment in terms of its [likelihood] to modify the future behavior of the criminal and . . . of others who might be tempted to commit crimes. In its essence, [the utilitarian view] sees man as a rational, pleasure-seeking creature who can be prevented from engaging in antisocial behavior by the prospect that the pain it brings him will more than cancel out the pleasure. It relies, in a word, on deterrence.

PACKER, *supra* note 7, at 11.

18. *See* United States v. Bergman, 416 F. Supp. 496, 499 (S.D.N.Y. 1976) (asserting that "the aim of *general deterrence* . . . [is] to discourage similar wrongdoing by others through a reminder that the law's warnings are real and that the grim consequence of imprisonment is likely to follow"); *see also* BENTHAM, *supra* note 17, at 158 (noting that "all

utilitarian theorists have argued, maintains societal order to the extent that it influences the future behavior of others.[17] The theory of general deterrence assumes that punishment for a particular offense will prevent others from engaging in similar conduct because they will consciously avoid painful consequences.[18] Under this theory, a judge assigns punishment to

an offender for committing a particular crime as a warning to others that they are subject to painful consequences if they commit the same act.[19]

punishment is mischief: all punishment in itself is evil. . . . [I]f it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil"). Bentham submits that punishment is inappropriate and groundless where the will cannot be deterred from any act. *Id.* at 161. Specifically, Bentham submits that punishment is inefficacious "[w]here the penal provision, though it were conveyed to a man's notice, *could produce no effect* on him, with respect to the preventing him from engaging in any act of the *sort* in question." *Id.* Thus, the goal of a criminal sanction is "to induce a man to choose always the least mischievous of two offenses; therefore *[w]here two offences come in competition, the punishment for the greater offence must be sufficient to induce a man to prefer the less.*" *Id.* at 168. *See also* Neal Kumar Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385, 2389 (1997). The conventional

> deterrence analysis has primarily focused on whether a particular penalty for a crime and the enforcement of the penalty will deter the commission of that crime. [The deterrent effect] turns on whether the penalty set is at an appropriate level to optimize deterrence — balancing the cost of the activity against the cost of enforcement.

Id.; Ashley Paige Duggar, Note, *Victim Impact Evidence In Capital Sentencing: A History of Incompatibility*, 23 AM. J. CRIM. L. 375, 400 (1996) ("Under the deterrence principle, society discourages participation in criminal activity through punishment. The theory is that a potential offender will not want to commit a crime when he knows he will suffer grave consequences."); *cf.* Katyal, *supra*, at 2390 (quoting CESARE BECCARIA, *On Crimes and Punishments*, *in* ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS 1, 21 (Richard Bellamy ed. & Richard Davies et al. trans., 1995)) ("If an equal punishment is laid down for two crimes which damage society unequally, men will not have a stronger deterrent against committing the greater crime if they find it more advantageous to do so.").

19. *See* DRESSLER, *supra* note 17, § 11.04, at 122-25; Herbert Packer, *Mens Rea and The Supreme Court*, 1962 SUP. CT. REV. 107 ("*Mens rea* is an important requirement, but it is not a constitutional requirement, except sometimes.").

It is constitutionally permissible to punish acts committed with ordinary negligence. The Supreme Court has consistently upheld challenges to statutes that permit punishment based on ordinary negligence or no lesser *mens rea*. *See generally* United States v. Staples, 511 U.S. 600 (1994); Morissette v. United States 342 U.S. 246 (1952); United States v. Dotterweich, 320 U.S. 277 (1943); United States v. Balint, 258 U.S. 250 (1922). The Industrial Revolution sparked the enactment of many public welfare laws, which permitted convictions based on ordinary negligence, or oftentimes, on strict liability. *See supra* notes 10-11 and accompanying text. In *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57 (1910), the Supreme Court discussed the constitutionality of strict liability offenses. The defendant argued that the statute under which he was convicted was unconstitutional since its criminal portion omitted intent as an element of the crime. *Id.* at 67. Specifically, the defendant alleged that the statute violated his Due Process rights. *Id.* at 68. Because the issue was not properly before the Court (it was not raised in the lower courts), the court quickly rejected, in dictum, the defendant's due process challenge. *Id.* at 68-70. The dictum later became the law in *United States v. Balint*, 258 U.S. 250 (1922).

The statute under which the defendant was convicted did not have an intent element, but it carried a penalty of imprisonment upon conviction. *Balint*, 258 U.S. at 251. The Court quickly reviewed the statute, cited *Shevlin-Carpenter*, and upheld the statute's constitutionality. *Id.* at 252-54. In *Morissette v. United States*, 342 U.S. 246 (1952), the Court finally expressed its respect for the concept of *mens rea* in criminal offenses. The Court distinguished public-welfare offenses from statutes that evolved from the common law. *Morissette*, 342 U.S. at 250-63. The Court observed that "wisely or not," legislatures usually dispense with *mens rea* in public-welfare offenses and that courts "not . . . without expressions of misgiving" had approved them. *Id.* at 256. In the case of more traditional offenses, however, the court noted that "mere omission . . . of any mention of intent will not be construed as eliminating that element from the [crime]." *Id.* at 263. As such, the holding in *Morissette* left sound the law of *Balint* regarding public welfare offenses. Furthermore, "it did not rule that legislatures could not abandon *mens rea* in common law based offenses; rather, it held that a requirement of *mens rea* would be presumed in the absence of a contrary legislative purpose." DRESSLER, *supra* note 17, § 11.04, at 123.

Through deterrence, therefore, "individuals who are tempted by a particular form of threatened behavior will . . . refrain from committing the offense because the pleasure they might obtain is more than offset by the risk of great unpleasantness communicated by a legal threat."[20]

The theory of deterrence rests on free will: one will weigh the criminal sanctions against the benefits derived from committing a particular crime.[21] The notion of conscious choice makes deterrence particularly appropriate for intentional crimes, since those who have time to reflect on the nature of their acts will also have time to reflect on the consequences of their acts.[22] Indeed, few dispute that the deterrence theory of punishment is optimal for intentional crimes.[23]

Whether the theory of deterrence can be applied to negligent conduct, however, has been the focus of considerable debate. Critics have argued that there is little deterrent value in punishing negligent acts since the actor is usually unaware of the risks attributable to his conduct.[24] Because deterrence rests on the premise that would-be offenders balance pain and pleasure, the negligent offender comprehends neither the dangerousness of his acts nor the potential for any sanction.[25] Professor Jerome Hall argued

20. FRANKLIN E. ZIMRING, CRIME AND DELINQUENCY ISSUES: PERSPECTIVES ON DETERRENCE 3 (1971).

21. *See* Hall, *supra* note 6, at 641.

22. *See* sources cited *supra* note 17.

23. *See* Daniel Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 344 (1996); Hall, *supra* note 6, at 637; Michelle H. Kalenstein, Comment, *Calculating Injustice: The Fixation on Punishment as Crime Control*, 27 HARV. C.R.-C.L. L. REV. 575, 655 (1992) (quoting Rep. William Hughes as saying, "the death penalty deters only intentional, knowing crimes and would therefore have no deterrent effect upon highly reckless conduct"); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 9 (5th ed. 1984) (explaining that punitive damages for intentional torts have the purpose of "deterring others from following the defendant's example").

24. *See* BENTHAM, *supra* note 17, at 161; DRESSLER, *supra* note 17, § 10.04, at 102-03. *See generally* Hall, *supra* note 6.

25. *See* BENTHAM, *supra* note 17, at 161. Bentham submits that punishment is inefficacious where an offender "intends not to engage, and thereby knows not that he is

that criminal law should not punish individuals for negligent conduct because "they have not in the least thought of their duty, their dangerous behavior, or any sanction." [26] He argued that the imposition of punishment would be meaningless.[27]

Professor Hall is concerned with the unfairness of punishing someone who causes inadvertent harm.[28] Justice Holmes, by contrast, maintained that there is great utility in punishing the inadvertent actor as an example to others.[29] According to Justice Holmes, it is entirely appropriate to "sacrifice

about to engage, in the *act* in which eventually he is about to engage." *Id.*

26. Hall, *supra* note 6, at 641. Professor Hall is not convinced that the purpose of deterrence is satisfied where one acts negligently. He recognizes that "[t]he theory of deterrence rests on the premise of rational utility, *i.e.*, that prospective offenders will weigh the evil of the sanction against the gain of the imagined crime." *Id.* He then points to the fact that this "goal" is inapplicable to those who act negligently, as such wrongdoers proceed without intent. *Id.* at 642.

> What could be more certain to undermine one's sense that it is important to avoid the intentional or reckless or negligent infliction of harm upon others than the knowledge that, if one inflicts harm, he may be punished even though he cannot be blamed for having done so? If we are to be held liable for what we cannot help doing, there is little incentive to avoid what we can help doing.

PACKER, *supra* note 7, at 65.

27. *See* Hall, *supra* note 6, at 643.

28. *See generally* Hall, *supra* note 6. Professor Hall maintains that punishing an individual is "a very serious matter[, and that n]o one should be subject to punishment unless he or she has clearly acted immorally, *i.e., voluntarily harmed someone*, and unless a criminal sanction is both suitable and effective." *Id.* at 636 (emphasis added). Professor Hall asserts that there is no evidence to support the assumption that negligent individuals "are improved or deterred by their punishment or that of other negligent" actors. *Id.* at 642; *see also* PACKER, *supra* note 7, at 65 ("If we are to be held liable for what we cannot help doing, there is little incentive to avoid what we can help doing. One may as well be hanged for a sheep as a lamb.").

29. Professor Hall fails to address the utility in punishing the inadvertent actor as an example to others. Professor Hall argues that "*voluntary* harm-doing is the essence of fault" and that "negligently caused damage, unlike voluntary wrongdoing, does not challenge the community's values as expressed in the penal law." Hall, *supra* note 6, at 635, 637. However, Professor Hall does not address the effects on the future wrongdoer. Specifically, he does not account for the potential deterrent effect that punishment of a negligent actor may have on a future similarly negligent individual. Punishing the accidental actor serves as a useful warning to others to be more careful in their activities, thereby reducing the number of accidentally inflicted social injuries. *See* Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731, 736-741 (1960).

> [I]t cannot be disputed that the threat of punishment necessarily deters. Even when an offender does not of his own accord realize that his conduct is wrongful, he can in many cases be made to take care. Coercion that causes the offender to pay attention can serve important social aims that would not be achieved by proscriptions that only come into effect when the transgressor recognizes the harm in his or her behavior.

State v. Hazelwood, 946 P.2d 875, 883 (Alaska 1997).

the individual so far as necessary,"[30] in order to "induce external conformity to the rule."[31] While this approach may appear harsh and unfair, its utility lies in its capacity to reduce societal harm by encouraging, through the fear of punishment, compliance with societal rules.[32] Thus, punishment for careless conduct will fortify notions that society discourages such conduct and will encourage people to take precautions to lessen the risks accompanying inadvertent behavior.[33]

It is not necessarily appropriate for the legislature to provide criminal sanctions against negligent wrongdoers in all instances.[34] When an actor merely engages in poor decision-making, there is nothing to alert the actor that he or she is making the wrong choice.[35] However, to the extent that

30. HOLMES, *supra* note 4, at 49. Justice Holmes viewed the criminal law as a means by which to shape social attitudes and mores. *Id.* He supported his theory of criminal law as protector by advocating punishment for simple negligence as a way to ensure that laws protect society to the fullest extent possible. *See id.* at 55-56. He provided an example:

> [I]f a workman on a house-top at mid-day knows that the space below him is a street in a great city, he knows facts from which a man of common understanding would infer that there were people passing below. He is therefore bound to draw that inference, or, in other words, is chargeable with knowledge of that fact also, whether he draws the inference or not. If, then, he throws down a heavy beam into the street, he does an act which a person of ordinary prudence would foresee is likely to cause death, or grievous bodily harm, and he is dealt with as if he foresaw it, whether he does so in fact or not.

Id.

31. *Id.* at 49. Justice Holmes observed that "when men live in society, a certain average of conduct, a sacrifice of individual peculiarities . . . is necessary to the general welfare." *Id.* at 108. Thus, we punish the negligent actor in order to coerce more cautious conduct by society in general. *Id.*

32. This position is very similar to the utilitarian position. The use of punishment serves to reduce crime because individuals usually act "rationally and hedonistically." *See* DRESSLER, *supra* note 17, § 2.03, at 5. As such, those individuals "will act to increase personal pleasure and to reduce personal pain. The would-be criminal, therefore, will balance the benefits that will accrue from criminal conduct . . . against the pain of punishment." *Id.* The actor "will avoid criminal activity if the . . . potential . . . punishment[] outweighs the potential pleasure." *Id.*

33. *See, e.g.*, *id.* at 64. If people are to be deterred from engaging in criminal conduct by the punishment of those who have done so in the past, the imposition of the punishment must be certain. *See id.* A source of uncertainty, however, arises when persons who have engaged in criminal conduct are permitted to present excuses. *See id.* This is so because it is possible that false excuses may be presented and believed. *See id.* "The prospect that this holds out to others who may be contemplating criminal conduct results in 'utilitarian losses'; therefore, the demands of utility require that excuses not be entertained." *Id.*; *see also* DRESSLER, *supra* note 17, § 9.02, at 70 (noting that "[a]lthough the threat of punishment cannot deter actors during their involuntary conduct, their punishment may induce other persons similarly situated to take precautions to reduce the risk that they will act involuntarily . . . or will cause harm to others if they act involuntarily").

34. *See, e.g.*, Hall, *supra* note 6, at 636.

35. *See supra* notes 24-27 and accompanying text.

punishing a negligent actor will put others on notice that such carelessness should be avoided, punishment may achieve the goal of deterrence.

Punishment for negligent conduct ceases to be appropriate when unfairness to the wrongdoer outweighs social utility.[36] It is the role of the legislature to determine where that point is reached, and the legislature should assign punishment to negligent crimes only when it can expect that punishment will assure individual conformity.[37] Thus, the challenge for legislatures is to balance the potential unfairness in criminalizing unintentional and unknowing behavior against the likelihood of successfully deterring harmful behavior.

III. LEGISLATIVE AND JUDICIAL SANCTION OF NEGLIGENT CONDUCT

Legislatures and courts generally disallow criminal punishment for careless conduct, absent proof of gross negligence.[38] Legislatures, through

36. "Unjust punishment is, in the end, useless punishment. It is useless both because it fails to prevent crime and because crime prevention is not the ultimate aim of the rule of law." PACKER, *supra* note 7, at 65. "If we are to be held liable for what we cannot help doing, there is little incentive to avoid what we can help doing." *Id.* Packer believes that "losses must be weighed against the damage that will be done to the criminal law as carrier of our shared morality unless its reach is limited to blameworthy acts." *Id.*

37. *See* State v. Hazelwood, 946 P.2d. 875, 883 (Alaska 1997).

38. *See, e.g.*, LAFAVE & SCOTT, *supra* note 4, § 3.7(b), at 235; *see also* Fitzgerald v. State, 20 So. 966 (Ala. 1896) (defining criminal negligence as "such a departure from what would be the conduct of an ordinarily careful and prudent man under the same circumstances as to furnish evidence of that indifference to consequences which in some offenses takes the place of criminal intent"). Negligence, understood as an attitude of carelessness toward the consequences of one's actions, is commonly recognized as a culpability-creating condition. *See* Anthony M. Dillof, *Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Statutes*, 91 NW. U. L. REV. 1015, 1027 (1997). There are alternative conceptions of criminal negligence. *See id.* Indeed, the nature of criminal negligence and the degree to which it properly supports liability have long been debated. *See, e.g.*, Larry Alexander, *Reconsidering the Relationship Among Voluntary Acts, Strict Liability, and Negligence in the Criminal Law*, 7 SOC. PHIL. & POL'Y 84 (1990); Hall, *supra* note 6, at 635-43; Kenneth W. Simons, *Culpability and Retributive Theory: The Problem Of Criminal Negligence*, 5 J. CONTEMP. L. ISSUES 365 (1994). Originally, both English law and American common law defined negligence as a failure to exercise ordinary care. *See* State v. Barnett, 63 S.E.2d 57, 59 (S.C. 1951). The purpose of the lesser standard of care was deterrence. *See* John L. Davis, *The Development of Negligence as a Basis For Liability in Criminal Homicide Cases*, 26 KY. L.J. 209, 223 (1939). Many believed that the threat of civil liability was insufficient to prevent individuals from acting carelessly. *See id.* Society would be protected from the danger of careless individuals if it imposed criminal sanctions on those who failed to act as a reasonable person would in a similar situation. *See id.* In *Rex v. Murphy*, 49 Ir. L. T. Rep. 15, 208 (1914), the court instructed the jury that when determining the guilt of the defendant it would have to ask, "Would a reasonable [person] have done what this man did?" *Id.* at 16, *quoted in* Davis, *supra*, at 222.

their capacity to draft statutes, are primarily responsible for defining criminal conduct.[39] Most penal codes require that the careless conduct be substantial and likely to yield grave harm on the premise that the likelihood of serious harm includes a duty to refrain from activities that would cause such harm.[40] However, legislatures occasionally permit punishment based on ordinary negligence, primarily when the conduct is extremely dangerous and may cause harm to a significant number of people.[41]

Concomitantly, these statutory enactments are subject to judicial review and interpretation.[42] In some instances, courts will review statutory language

Eventually, both English and American courts adopted a stricter standard of proof for gross negligence or reckless misconduct for a conviction based on negligent conduct. *Barnett*, 63 S.E.2d at 59; Davis, *supra*, at 222-23. The change was motivated by the conclusion of the Anglican Church that ordinary negligence was an insufficient ground for criminal conviction. *See* Davis, *supra* at 214. In addition, public opinion indicated a lack of support for criminal prosecution of an individual who failed to exercise ordinary due care because of a belief that the rule was too harsh. *Barnett*, 63 S.E.2d at 59; Davis, *supra* at 229. The courts concluded that basing criminal convictions on an error in human judgment is inhumane. State v. Young, 56 A. 471, 475 (N.J. 1903). The Model Penal Code validates punishing a grossly negligent actor in section 2.02(2)(d). It provides the following:

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

MODEL PENAL CODE §2.02(2)(d) (1985).

39. "'It is the legislature . . . which is to define a crime, and ordain its punishment.'" Dowling v. United States, 473 U.S. 207, 214 (1985) (quoting United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820)). The boundary between moral conduct and immoral conduct is generally defined by the legislature through the dictates of the applicable criminal law. As the branch most directly accountable to the people, only the legislature can validate the surrender of individual freedom that is necessary to form the social contract. The legislature, therefore, is the only legitimate institution for enforcing societal judgments through the penal law. *See generally* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985).

40. *See infra* Parts III.B-E.

41. *See* discussion *infra* Part III.E.

42. Although the legislature is primarily responsible for defining crimes, judicial intervention is often needed. The rule of lenity, which requires that penal statutes be strictly construed in favor of the defendant, developed in response to the "idea that courts should be reluctant to infer that a statute has wrought changes in rights, duties, and remedies beyond those that are effected by the statute's express terms." David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. Rev. 921, 935 (1992). Customarily, courts have looked to this rule when interpreting ambiguous criminal statutes. *See, e.g.*, United States v. Bass, 404 U.S. 336, 347 (1971) ("'[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'") (quoting Rewis v. United States, 401 U.S. 808, 812 (1971)). If the penal statute is unambiguous, then the rule of lenity is not

that requires criminal negligence and will interpret it to mean something less than gross negligence. Courts typically limit these instances to those in which the defendant engaged in conduct that was inherently dangerous or was likely to cause widespread public injury.[43]

Thus, while legislatures are primarily responsible for determining when ordinary negligent conduct should be punished, the judiciary has played an important role in defining the appropriate boundaries of such punishment. Judicial interpretations of legislation aimed at sanctioning negligent conduct illustrate the varied, and often inconsistent, application of this degree of intent. Although legislatures have sometimes made it clear that the conduct they seek to punish involves an intent level almost synonymous with tort negligence, a review of the evolution of criminal negligence and the judicial interpretation of criminal statutes illustrate that it is the courts which have created a somewhat categorical approach toward criminalizing ordinary negligent conduct.

A. The Origin and Development of Criminal Negligence

Ordinary negligence was sufficient for punishment in the early development of English criminal law.[44] Eventually, the Anglican Church concluded that it was unfair to punish, at least criminally, without some measure of personal blameworthiness.[45] The Church, therefore, pressured

applicable. *See* Beecham v. United States, 511 U.S. 368, 374 (1994).

43. *See infra* Parts III.C-E.

44. *See* DRESSLER, *supra* note 17, § 10.01, at 95. *See generally* Davis, *supra* note 38.

45. *See* Davis, *supra* note 38, at 214. At early common law, penalties were based on revenge. *See id.* at 209. The desire to extract such revenge arose whenever an individual was, in some way, linked to the injury of another. *See id.* Liability was founded on the end result, rather than on the intent or the negligence of the actor. *See id.* Thus, if *X* intentionally killed *Y*, *Y*'s relatives killed *X*. *See id.* Similarly, if *X* accidentally killed *Y*, *Y*'s relatives killed *X*. *See id.* "Still the blood feud must be satisfied. Vengeance must be had." *Id.*

Hence, since the twelfth century, individuals have paid for any act resulting in the death of another, regardless of their mental state. *See id.* For example, if a man requests that his friend accompany him, and the latter is then attacked by his enemies while accompanying the former, the man who made the request is held liable. *See id.* at 210. Payment was owed civilly to the family and owed criminally to the king. *See id.* Davis notes that if two men were working on a tree and it fell and killed only one of them, the tree was given to the deceased's kindred for them to wreak vengeance on. *See id.* However, Davis also explained that punishment for a felony is handled solely by the king. *See id.* at 213. Originally, then, criminal responsibility was based solely on proof of the *actus reus*—the actor's state of mind was irrelevant. Beginning in the thirteenth century, however, English courts recognized the importance of *mens rea* to criminal liability and developed a body of law pertaining to it. *See generally* Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1932).

the king to require proof that a defendant possessed some unacceptable mental state for any punishable crime.[46] By the sixteenth century, an individual could not be convicted of a crime absent proof of something more than ordinary negligence.[47] Eventually, Anglican courts expanded the requirement of proof of "some intent" to mean that a defendant could not be held criminally responsible absent proof of gross negligence.[48]

As the American colonies began to decide issues of law independent of each other and of the crown, some permitted punishment for ordinary negligence.[49] However, most colonies adopted the strong Anglican belief that individuals should not be punished without proof of something more than a mere accident.[50] Eventually, gross negligence became the minimum standard for criminal liability in the United States.[51]

> By the twentieth century the concept of *mens rea* was so deeply entrenched in Anglo-American common law that the United States Supreme Court could state that "[t]he contention that an injury can amount to a crime only when inflicted by [*mens rea*] is no provincial or transient notion. It is . . . universal and persistent in mature systems of law."

DRESSLER, *supra* note 17, § 10.01, at 95 (quoting Morissette v. United States, 342 U.S. 246, 250 (1952)).

46. *See* Davis, *supra* note 38, at 214.

47. *See id.* at 214-16.

48. *See id.* at 218. By the nineteenth century, the prevailing English rule was that "[a] person on whom the law imposes any duty or who has taken upon himself any duty tending to the preservation of life and who grossly neglects to perform that duty or performs it with gross negligence and therapy causes the death of another person is guilty of manslaughter." *Id.* at 220.

49. *See id* at 222. For example, in *Rex v. Murphy*, 49 Ir. L. T. REP. 15 (1914), the court ruled that the question for the jury was, "Would a reasonably careful milkman, reasonably sober, have done what this man did?" *Id.* at 16, *quoted in* Davis, *supra* note 38, at 222. This is more reminiscent of an ordinary negligence standard, as opposed to a gross negligence standard.

50. For example, in *Regina v. Finney*, 12 Cox's Crim. Cas. 625 (Oxford Cir. 1874), the court instructed the jury that "[t]o render a person liable for neglect of duty there must be such a degree of culpability as to amount to gross negligence on his part." *Id.* at 626; *see also* Tinline v. White Cross Ins. Ass'n, 3 K.B. 327, 330 (1921) ("The crime of manslaughter in a case like this consists in driving a motor-car with gross or reckless negligence. Ordinary negligence does not make a man liable for manslaughter."); Regina v. Noakes, 176 Eng. Rep. 849, 850 (Lewes Crown Ct. 1866) (indicating that a greater degree of negligence is required to convict of crime than for civil liability).

51. *See* Davis, *supra* note 38, at 224. In fact, the court in *State v. Young*, 56 A. 471, 475 (N.J. 1903), stated that "our law is so humane that no man will be adjudged to be a criminal who merely errs in judgment." Thus, the notion of criminal punishment requires that there be proof of gross negligence for intent to commit a crime, rather than a mere error in judgment. *See* Davis, *supra* note 38, at 224. The Model Penal Code also reflects this standard. *See* MODEL PENAL CODE § 2.02(2)(d) (1985).

By the end of the nineteenth century, a clear distinction had developed between the threshold mental state required for proof of a crime and that required for proof of a civil wrong.[52] Legislators continued to predicate minimum criminal punishment on "moral blameworthiness," which was equated with gross negligence.[53] However, an individual could be found civilly liable based on ordinary negligence.[54] In general, then, an individual who was merely careless and thereby committed an accident could only be punished monetarily; there was no threat of loss of liberty.[55]

Despite the pronouncement by most legislatures and courts that criminal liability requires more fault than the ordinary negligence that is sufficient for tort liability,[56] some states have retained the common law principle of

52. *See* Davis, *supra* note 38, at 219.

53. *See id.* "Gross negligence is the failure to exercise slight care." *Id.* When courts were asked to define the meaning of "slight care," they answered, "Slight care is that care which a person fails to exercise when he is guilty of gross negligence." *Id.*

54. "[Ordinary] negligence is the failure to use that care which the reasonably prudent man would use under the same or similar circumstances. . . . It is not reckless and wanton misconduct." *Id.*

55. *See* Roeder v. Fischer's Bakery, Inc., 188 N.E.2d 78, 80 (Ohio Ct. App. 1963) (involving an automobile negligence action for injuries in which the court held that violation of the reckless operation section of the code amounted only to prima facie negligence and not negligence per se); *see also* Bertrand v. Di Carlo, 304 A.2d 658, 660-61 (R.I. 1973) (involving a civil negligence action wherein plaintiffs sought recovery for fire damage to their property due to defendant's improper storing of flammable liquid).

56. *See, e.g.*, People v. Deskins, 927 P.2d 368, 375 (Colo. 1996); State v. Irvine, 52 So. 567, 571 (La. 1910); State v. Yarborough, 905 P.2d 209, 213 (N.M. Ct. App. 1995); People v. Angelo, 221 N.Y.S. 47 (1927). Today, courts and legislatures define criminal negligence broadly. Some jurisdictions define the threshold for criminal culpability as a failure to exercise due care. *See, e.g.*, Harless v. Oklahoma, 759 P.2d 225, 228 (Okla. Crim. App. 1988) (Parks, J., concurring) (noting that "the Legislature has defined criminal negligence as 'a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns'").

Several jurisdictions define criminal negligence as reckless, wanton, or flagrant conduct. *See, e.g.*, Jones v. State, 439 S.E.2d 645, 648 (Ga. 1994) (defining malice as the "presence of an actual intent to cause the particular harm produced, or the wanton and willful doing of an act with an awareness of a plain and strong likelihood that such harm may result") (emphasis omitted). A majority of courts follow the Model Penal Code definition, which defines criminal negligence as a failure to observe "a substantial and unjustifiable risk," such a failure of which is a "gross deviation from the standard of care that a reasonable person would" use in a similar circumstance. MODEL PENAL CODE § 2.02(2)(d) (1985); *see also* People v. Torres, 634 N.Y.S.2d 354, 355 (1995).

In *People v. Torres*, the court had to consider whether to dismiss an indictment against the defendant for criminally negligent homicide. 634 N.Y.S.2d at 355. Defendant left her two young children in a bathtub of running water. *Id.* at 354. She opened the faucet, allowing the water to run into the tub's open drain, and she warned the older child (three years old) not to block the drain. *Id.* Defendant left the room and when she returned three to five minutes later, she found her daughter floating in the water. *Id.* In New York, a

permitting punishment based on ordinary negligence.[57] Moreover, several jurisdictions have carved out exceptions to the majority rule.[58] These exceptions are generally limited to instances in which there is proof that a defendant carelessly handled an inherently dangerous instrument, carelessly engaged in an inherently dangerous activity,[59] or engaged in conduct that caused widespread public injury.[60] These jurisdictions recognize that when the consequences of a crime pose a more serious threat to the public, there is a greater justification to punish based on a lesser *mens rea*.[61]

B. Penal Codes That Define Criminal Negligence as a Failure to Exercise Due Care

Some state penal codes define minimum criminal culpability as a failure to exercise due care.[62] In these states, defendants often are successfully

person acts with criminal negligence 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 grave deviation from the standard of care that a reasonable person would exercise in the same situation." *Id.* at 355. The *Torres* court found that the defendant was not guilty of criminally negligent homicide, as her conduct did not constitute such a grave deviation from a reasonable standard of care. *Id.*

57. *See, e.g.*, People v. McKee, 166 N.W.2d 688, 690 (Mich. Ct. App. 1968) (permitting "conviction of one accused of causing death of another by negligent operation of a motor vehicle upon proof of ordinary negligence without proof of gross negligence, criminal intent[,] or culpability"); Chandler v. State, 146 P.2d 598 (Okla. Crim. App. 1944) (defining culpable or criminal negligence as the omission to do something that a reasonable or prudent person would do, or the doing of something that such person would not do under the circumstances surrounding the particular case).

58. *See infra* Part III.B.

59. *See infra* Parts III.C-D.

60. *See infra* Part III.E.

61. *See, e.g.*, LAFAVE & SCOTT, *supra* note 4, § 3.8, at 244 ("Other things being equal, the more serious the consequences to the public, the more likely the legislature meant to impose liability without regard to fault, and vice versa."). In addition, "the greater the possible punishment, the more likely some fault is required; and, conversely, the lighter the possible punishment, the more likely the legislature meant to impose liability without fault." *Id.*; *see also* Staples v. United States, 511 U.S. 600, 616-19 (1994) (reasoning that the harshness of the penalty is a relevant consideration in deciding whether Congress intended a strict liability crime); State v. Bash, 925 P.2d 978, 985 (Wash. 1996) (en banc).

Although states permit punishment for civil negligence, the burden of proof in criminal trials remains beyond a reasonable doubt. *See* Paterson v. New York, 432 U.S. 197 (1977). Moreover, as a general rule, a criminal cannot use defenses to charges for ordinary negligence, which are available to defendants in criminal trials. In tort law, a defendant may utilize comparative fault, contributory negligence or assumption of the risk doctrines in his or her own defense.

62. *See,* e.g, NEV. REV. STAT. § 193.018 (1997); OKLA. STAT. ANN. tit. 21, § 716

prosecuted for the types of accidents that might escape criminal prosecution in other jurisdictions.[63] *Harless v. State*[64] illustrates the Oklahoma legislature's willingness to punish actors for a lack of due care. In *Harless*, the defendant requested the court to instruct the jury that negligence means gross negligence.[65] However, the court upheld a jury instruction defining negligence as merely a failure to exercise due care.[66] At trial, the jury convicted the defendant of criminally negligent homicide for failing to seek medical care for her child.[67] Testimony indicated that the defendant left the victim at home with her husband, Tony Davis.[68] Upon returning, Davis told her that the child had fallen and had been accidentally scalded in burning water.[69] The defendant contended that she did not initially seek medical treatment for her child because Davis, who had "considerable first aid or paramedic training,"[70] expressed no cause for concern since the child did not show any unusual symptoms from his injuries.[71] She and Davis decided to treat the child's injuries themselves.[72] The defendant's son did not survive his injuries.[73]

The State charged the defendant with second-degree manslaughter, which required proof of criminal negligence.[74] At trial, the defendant argued against a conviction since she relied on Davis's paramedic treatment and the absence of visible injuries when deciding not to call for medical assistance.[75] The judge instructed the jury that criminal negligence means the "omission to do something which a reasonably careful person would do, or the lack of the usual and ordinary care and caution in the performance of an act usually

(West 1983); S.D. CODIFIED LAWS § 22-1-2(e) (Michie Supp. 1997).

63. *See, e.g.*, Harless v. State, 759 P.2d 225 (Okla. Crim. App. 1988).

64. *Id.*

65. *See id.* at 227.

66. *See id.*

67. *See id.* at 226-27.

68. *See id.* at 226. The defendant's husband, Tony Davis, although not the child's father, was a co-defendant. *See id.* He and the defendant were married shortly before the accident but had previously lived together for quite some time. *See id.* The week before the day of the accident, Davis was the child's primary caretaker. *See id.*

69. *See id.* Harless testified that Davis "told her about the child's fall and about his alleged accidental burning in hot bath water." *Id.*

70. *Id.* at 226-27.

71. *See id.* at 226.

72. *See id.* at 227. Four other doctors, however, testified that "the injuries were inconsistent with the explanations given by [the defendant] and Tony Davis." *Id.*

73. *See id.* at 226. Eric Harless "was pronounced dead, the cause of death being anoxic brain injury which resulted from a blunt injury to the abdomen." *Id.*

74. *See id.* at 227.

75. *See id.* at 226-27. In contrast, the prosecution presented testimony of four doctors, all of whom noted that the child's injuries were inconsistent with Davis's story. *See id.* at 227.

and ordinarily exercised by a person under similar circumstances and conditions."[76] The jury convicted the defendant, and she appealed, arguing that the judge should have defined criminal negligence as gross negligence rather than as ordinary negligence.[77]

The appellate court, citing the Oklahoma penal code's definition of criminal negligence, upheld the defendant's conviction.[78] In a concurring opinion, Judge Parks wrote that although the Oklahoma courts require a showing of ordinary negligence for a conviction of second-degree homicide,[79] he would prefer that the legislature change the definition of negligence to something more than ordinary negligence.[80] However, he acknowledged that the power to do so was reserved for the legislature.[81]

Despite Judge Parks's encouragement, which was echoed in a dissent by Judge Brett,[82] the Oklahoma legislature has not amended its criminal laws

76. *Id.* (citation omitted).

77. *See id.* at 226-27. The defendant contended that the definition of culpable negligence given by the trial judge was "based upon a tort showing of ordinary negligence." *Id.* at 227. She believed that the instruction was deficient and did not reflect the appropriate degree of negligence that was required for an imposition of criminal sanctions. *Id.* Her requested instruction at trial, defining culpable negligence, provided that "YOU ARE FURTHER INSTRUCTED that 'culpable negligence' is more than simple negligence. It is the failure to perform an act when the facts and circumstances justify certain action. It is negligence that evinces a carelessness and a recklessness amounting to a callous disregard for the life of the victim." *Id.*

78. *Id.* The court cited cases that upheld the definitional standard of culpable negligence that the trial court gave to the jury. *See id.* (citing Thompson v. State, 554 P.2d 105, 107-08 (Okla. Crim. App. 1976); Crossett v. State, 252 P.2d 150, 159 (Okla. Crim. App. 1952)). The court also noted that the appellant's requested instruction was improper for the crime of second-degree manslaughter, but it would have been an appropriate request for a second-degree murder charge. *See id.*

79. *See id.* at 228. He noted that "the Legislature has defined criminal negligence as 'a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns.'" *Id.*

80. *See id.* "[T]his writer would strongly urge the Legislature to reconsider the current statutory definition of criminal negligence . . . and enact a standard which specifically provides that the standard of care for criminal negligence is higher than mere tort negligence . . . ." *Id.*

81. *See id.* "[I] believe[] that culpable or criminal negligence should be specifically defined to require something more than mere ordinary or tort negligence . . . ." *Id.* "[T]his Court can[not] redefine criminal negligence without improperly encroaching on the province of the Legislature." *Id.*

82. *See id.* at 228-30. Judge Brett wrote that the defendant's conviction based on an ordinary negligence standard meant that the court was punishing her for "poor judgment." *See id.* at 230. The defendant's conduct, according to Judge Brett, did not meet the level of culpability required by what he believed was the appropriate definition of negligence. *See id.* Thus, he agreed with Judge Parks's concurrence insofar as it declared that the definition of culpable negligence was deficient. *See id.*

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to reflect the majority rule that gross negligence is the minimum culpability level.[83] South Dakota and Nevada are the only other states whose penal codes define the minimum *mens rea* for criminal liability as ordinary negligence.[84] Under their state penal codes, any individual who violates any negligence statute can be punished if he or she "import[s] a want of such attention to the nature or probable consequences of an act or omission as an ordinarily prudent person usually exercises in his own business."[85] In these few jurisdictions, the legislatures retain the historic principle that punishment is appropriate for any sanctioned conduct when a defendant fails to exercise due care and that proof of something more than tort negligence is unnecessary for conviction.[86] Defining negligence as ordinary negligence in the

83. *See* OKLA. STAT. ANN. tit. 21, § 716 (West 1983).

84. *See* NEV. REV. STAT. § 193.018 (1997); S.D. CODIFIED LAWS § 22-1-2(e) (Michie Supp. 1997).

85. NEV. REV. STAT. § 193.018; *see also* S.D. CODIFIED LAWS § 22-1-2(e) (Michie Supp. 1997) (defining "negligently," and all words derived therefrom, as a "want of attention to the nature or probable consequences of an act or omission which a prudent man ordinarily bestows in acting in his own concerns"); Ray v. State, 189 P.2d 620, 624 (Okla. Crim. App. 1948) (citations omitted) (defining "culpable negligence," as used in OKLA. STAT. ANN. tit. 21, § 716 (West 1983), as the "omission to do something which a reasonable and prudent person would do, or the doing of something which such person would not do under the circumstances surrounding the particular case").

86. A crime is conduct to which the legislature has assigned a penalty. Thus, "[l]egislatures decide what is and what is not a crime." William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 1 (1996); *see also* John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875, 1878 (1992). The legislature predicates criminalization of particular conduct based on public policy and social mores. Prior to 1952, when the Model Penal Code was enacted, states ordinarily enacted criminal laws when the need to do so arose. *See* DRESSLER, *supra* note 17, § 3.03 at 16. Laws were created to address sudden, sometimes passing, public perceptions of need. *See id.* The effect of these new "emergency" laws on the already existing criminal laws was often overlooked. *See id.* Thus, criminal statutory schemes were comprised of archaic, overlapping, and inconsistent laws. *See id.*

In addition, because of the sudden and hasty enactments of these laws, they were often incoherent and lacked justification. *See id.* at 16-17. In 1962, a completed draft of the Model Penal Code was handed down. *See id.* at 17. It was a "carefully drafted set of crimes, defenses, and general rules of criminal responsibility not entirely consistent with the common law." *Id.* Between 1962 and 1984, thirty-four states, which were influenced by the Model Penal Code, enacted completely new criminal codes. *See id.* The Model Penal Code is a useful tool for each state legislature that is attempting to codify criminal conduct. Legislatures wield enormous power in determining against whom and when the government may seek penal sanctions since they may choose which socially abhorrent behavior to criminalize. Since each legislature has the power to define its own crimes, there is no requirement that the criminal definition of a particular conduct be consistent throughout the country.

penal code casts a broad net for punishment purposes, and therefore, puts others on notice that even simple negligence is intolerable.

C. Penal Codes That Permit Punishment for a Failure to Use Due Care When Handling an Inherently Dangerous Instrument

Early on, in circumstances when the careless handling of dangerous weapons resulted in death, courts made an exception to the legislative requirement of gross negligence as the threshold for criminal behavior.[87] When the defendant's careless use of an inherently dangerous weapon resulted in death, courts interpreted the legislature's criminal negligence language to mean ordinary negligence.[88] In the early 1900s, courts expanded the exception to include instruments that are not inherently dangerous but can become dangerous with careless use, such as automobiles.[89] Today, courts have extended the principle beyond automobiles to include many benign instruments, the careless use of which is likely to result in death or serious bodily injury.[90]

Courts permit punishment based on ordinary negligence when the defendant's conduct involves an inherently dangerous instrument because they presume that a reasonable person is aware of the substantial and unjustifiable risk of harm that could result from the careless use of a potentially harmful instrument.[91] Courts note that the purpose of this exception is rooted in theories of deterrence.[92] "Even when an offender does

87. *See, e.g.*, Commonwealth v. Pierce, 138 Mass. 165, 178-80 (1884) (Holmes, J.); State v. McCalla, 85 S.E. 720 (S.C. 1915); State v. Causer, 70 S.E. 161, 161-62 (S.C. 1911); State v. Tucker, 68 S.E. 523, 524 (S.C. 1910); State v. Revels, 68 S.E. 523, 523 (S.C. 1910); State v. Gilliam, 45 S.E. 6, 7 (S.C. 1903) (ruling that one who causes the death of another "by the negligent use of a pistol or gun is guilty of [involuntary] manslaughter, unless the negligence is so wanton as to make the killing murder").

88. *See* sources cited *supra* note 87.

89. *See infra* notes 105-22 and accompanying text.

90. *See infra* notes 102, 104 and accompanying text.

91. *See, e.g.*, United States v. Zukrigl, 15 M.J. 798, 800-01 (A.C.M.R. 1983) (upholding conviction of negligent homicide for failure to ensure that soldiers engaged in a training exercise wore appropriate safety equipment); People v. Leffell, 249 Cal. Rptr. 906, 907, 913 (Cal. Ct. App. 1988) (upholding defendant's conviction for vehicular manslaughter); Cable v. Commonwealth, 415 S.E.2d 218, 221 (Va. 1992) (holding that an experienced hunter knew of probable results of his negligent act). *But see* People v. Traughber, 439 N.W.2d 231, 236-38 (Mich. 1989) (reversing the defendant's conviction of negligent homicide after deciding that he acted as an ordinarily prudent person would under similar circumstances).

92. *See, e.g.*, State v. Hazelwood, 946 P.2d 875, 883 (Alaska 1997). Explanations for objective fault crimes must have their origins in a theory of reasonable deterrence. *Id.*

> [I]t cannot be disputed that the threat of punishment necessarily deters. Even when an offender does not of his own accord realize that his conduct is wrongful, he can in many

not of his own accord realize that his conduct is wrongful, he can in many cases be made to take care."[93]

By lowering the level of required intent from gross negligence to civil negligence for crimes involving inherently dangerous instruments or activities, legislatures give prosecutors a lower hurdle for obtaining convictions. In *State v. Gilliam*,[94] the prosecution would have had difficulty proving that the defendant's mental awareness met a standard of gross negligence. In *Gilliam*, the defendant claimed to have accidentally fired a gun while he and his wife were playing.[95] A jury convicted the defendant of murder for his wife's death.[96] On appeal, the defendant argued that the trial judge erred when he instructed the jury that negligence in the manslaughter statute meant carelessness and not gross negligence.[97] The South Carolina Supreme Court rejected the defendant's argument and affirmed his conviction.[98]

The *Gilliam* court ruled that it would interpret the term "negligence" in a homicide statute to mean a failure to use ordinary care when death results from the careless use of a deadly weapon or instrument.[99] The *Gilliam* decision deviated from the general law in South Carolina that proof of gross negligence is a condition precedent to criminal punishment. Consequently, a conviction in the *Gilliam* case would allow the prosecution and the criminal system to use the defendant's punishment as a means to deter others from engaging in similar careless conduct. Thus, the *Gilliam* decision alerted South Carolinians that they must exercise, at a minimum, ordinary

cases be made to take care. Coercion that causes the offender to pay attention can serve important social aims that would not be achieved by proscriptions that only come into effect when the transgressor recognizes the harm in his or her behavior.

Id.

93. *Id.*

94. 45 S.E. 6 (S.C. 1903).

95. *Id.* at 7.

96. *Id.* at 6.

97. *See id.* at 7.

98. *See id.* at 7-8. The defendant argued that the trial judge erred when he instructed the jury that negligence in a manslaughter statute meant carelessness and not gross negligence. *Id.* at 7; *see also* State v. Goodson, 440 S.E.2d 370, 372 (S.C. 1994) (holding that failure to use ordinary care when handling a deadly weapon is inexcusable homicide).

99. *See Gilliam*, 45 S.E. at 7. South Carolina defines criminal negligence as "the reckless disregard of the safety of others. A person charged with the crime of involuntary manslaughter may be convicted only upon a showing of criminal negligence as defined in this section." S.C. CODE ANN. § 16-3-60 (Law Co-op. Supp. 1997). Criminal negligence, however, is not further defined in the section. *See id.*; *see also* DeLee v. Knight, 221 S.E.2d 844, 846 (S.C. 1975) (stating that "what constitutes criminal negligence depends on the facts and circumstances of each case"); State v. Addis, 186 S.E.2d 415, 418 (S.C. 1972) ("In determining whether one has acted negligently or criminally negligent all of the facts and circumstances must be considered.").

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care when engaged in the use of an inherently dangerous instrument or risk criminal prosecution.

Initially, courts limited inherently dangerous instruments to firearms.[100] Over time, however, the courts have expanded the definition[101] to include items that, when handled with care, might not necessarily be considered dangerous.[102] With this expanded definition, legislatures were allowed to circumvent their longstanding prohibition against punishment absent proof of gross negligence.

With the evolution of the automobile as a staple of mainstream society, states began to recognize the potential for gross and serious bodily injury.[103]

100. *See, e.g.*, United States v. Johnson, 931 F.2d 238, 238, 240-41 (3d Cir. 1991) (affirming district court's finding that the use of a firearm accompanied by verbal threats constituted aggravated assault).

101. "The term 'dangerous weapon' is not limited to those instrumentalities which are inherently dangerous, but includes any instrumentality 'which in the manner used, is calculated or likely to produce death or great bodily harm.'" State v. Bonier, 367 So. 2d 824, 826 (La. 1979). This doctrine is also well-demonstrated by the Federal Sentencing Guidelines which provide heightened punishment for crimes involving dangerous weapons, defined as "an instrument capable of inflicting death or serious bodily injury. Where an object that appeared to be a dangerous weapon was brandished, displayed, or possessed, treat the object as a dangerous weapon." U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 commentary at 1(d) (1996). Although not exemplifying independent criminal conduct, the intent and effect are the same: the use of inherently dangerous instruments will, in itself or as an exacerbating factor of another underlying crime, impose or heighten criminal liability.

102. *See, e.g.*, United States v. Reese, 2 F.3d 870, 876-77, 890, 894 (9th Cir. 1993) (beating victim with flashlight considered use of excessive force); United States v. Williams, 954 F.2d 204, 206 (4th Cir. 1992) (holding that a chair was a dangerous instrument); United States v. Slow Bear, 943 F.2d 836, 837 (8th Cir. 1991) (finding four-level sentencing enhancement for assault with a stick resembling a broomhandle); United States v. Young, 916 F.2d 147, 152-53 (4th Cir. 1990) (holding that a homemade knife was a dangerous weapon); United States v. Big Crow, 898 F.2d 1326, 1328 (8th Cir. 1990) (deeming firewood a dangerous weapon); State v. Bash, 925 P.2d 978, 981 (Wash. 1996) (en banc) (determining that dog was dangerous).

103. *See generally* W.J. Dunn, Annotation, *What Amounts to Negligence Within Meaning of Statutes Penalizing Negligent Homicide by Operation of a Motor Vehicle*, 20 A.L.R.3D 473 (1968). *See, e.g.*, People v. Pociask, 96 P.2d 788 (Cal. 1939); Rinehart v. People, 95 P.2d 10 (Colo. 1939); State v. Berkowitz, 186 A.2d 816 (Conn. App. Ct. 1962); Commonwealth v. Berggren, 496 N.E.2d 660 (Mass. 1986).

Defendants have been convicted under an ordinary negligence standard where they failed to maintain a proper lookout, drove while fatigued, or even when they improperly entered an intersection. *See, e.g.*, Rollins v. State, No. 14-94-00144-CR, 1996 WL 42040 (Tex. Crim. App. Feb. 1, 1996). In *Rollins*, the court instructed the jury as follows:

> Therefore, if you believe from the evidence beyond a reasonable doubt, that the defendant[] . . . did unlawfully cause the death of [the victim], by criminal negligence, namely, by failing to stop his vehicle as required by law at a duly and legally authorized and existing traffic control sign, . . . or by failing to maintain a proper lookout for the vehicle occupied by the [victim], or by failing to yield the right of way to the vehicle

As deaths from careless automobile use occurred with increasing frequency, courts and legislatures identified the need to deter future harm for failure to exercise ordinary care while operating a motor vehicle.[104] Thus, although automobiles were not invented when courts first adopted the inherently dangerous instrument exception to the requirement of proof of gross negligence, courts eventually expanded the category to include them.

In *State v. Barnett*,[105] the South Carolina Supreme Court concluded that ordinary negligence was sufficient for a homicide conviction resulting from the use of an automobile.[106] The court was concerned about deviating from

occupied by the [victim], and by any one or more of these acts caused his motor vehicle to collide with the motor vehicle occupied by the [victim] causing the death of the [victim], you will find the defendant guilty.

Id. at *2. As a general rule, "[w]here a statute penalizing negligent homicide by the operation of a motor vehicle describes the punishable misconduct in terms of 'negligence' without any modification or qualification being attached to such word, it has generally been recognized that the appropriate standard of culpability is ordinary negligence." Dunn, *supra*, at 476. *See generally* Kevin Cole, *Killings During Crime: Toward a Discriminating Theory of Strict Liability*, 28 AM. CRIM. L. REV. 73 (1990).

[I]t is a misdemeanor for a person to operate a motor vehicle while impaired by drugs or alcohol, but if this conduct causes the death of a human being, the offense in some jurisdictions is elevated to the status of homicide. Most jurisdictions treat vehicular homicide more severely than the misdemeanor of alcohol-impaired driving, even though the actions and mental states of the defendant may be equivalent or identical.

Id. at 76 n.8 (quoting David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL'Y 359, 362 (1985)); *see also* Myles A. Kauffman, *The Coming of Subsection (a)(5) of Pennsylvania's Drunk Driving Law: "A Statute with a Face Only a Prosecutor Could Love,"* 4 WIDENER J. PUB. L. 493 (1995); Katherine M. White, Note, *Drunk Driving as Second-Degree Murder in Michigan*, 41 WAYNE L. REV. 1433 (1995); Jeffrey F. Ghent, Annotation, *Validity and Construction of "Extreme Indifference" Murder Statute*, 7 A.L.R.5TH 758 (1992).

104. *See* sources cited *supra* note 103.

105. 63 S.E.2d 57 (S.C. 1951). The defendant "was convicted of involuntary manslaughter. . . . [and] it was alleged in the indictment that the homicide resulted from criminal negligence in the operation of an automobile." *Id.* at 57-58. The trial court charged the jury that ordinary negligence was sufficient for a conviction. *See id.* at 58. The defendant alleged that gross negligence or recklessness was the required showing for a conviction. *See id.* In rendering its decision, the court reviewed the principle behind reducing the appropriate level or required intent where accidents occur from the use of an inherently dangerous instrument. *See id.* at 58-61. The court concluded that "simple negligence causing the death of another is sufficient if the instrumentality is of such character that its negligent use under the surrounding circumstances is necessarily dangerous to human life or limb." *Id.* at 61. The court reasoned that the rule was appropriate because the failure to exercise "ordinary care in the handling of a dangerous instrumentality is the equivalent of culpable or gross negligence." *Id.*

106. *See id.* at 62; *see also* State v. Brown, 32 S.E.2d 825, 827 (S.C. 1945) (ruling "that one who uses an automobile on the highways without due care and caution (which is but negligence), and in violation of the statutes of the State, . . . and thereby causes the death

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South Carolina's general requirement that the minimum intent element for a conviction of involuntary manslaughter was gross negligence.[107] To resolve this conflict, the court defined an automobile as an inherently dangerous instrument, thereby enabling the prosecution to prove only ordinary negligence in homicide prosecutions resulting from the careless use of an automobile.[108] Although the court did not approve of punishment for ordinary negligence, it found punishment justified "in . . . light of the potential danger involved in the lawful act being performed."[109] This ruling confirms the willingness of courts to abrogate long-standing principles in the interest of deterring future harmful behavior.

Some legislatures, attempting to deter the harm that could result from careless automobile use, have codified the requirement that the prosecution needs only to prove ordinary negligence to convict in the case of an automobile accident.[110] For instance, Nebraska requires a driver to "exercise

of a person, is guilty of manslaughter"); State v. Staggs, 195 S.E. 130 (S.C. 1938) (holding that ordinary negligence is sufficient to sustain a verdict of involuntary manslaughter for the negligent handling of an automobile); State v. Hanahan, 96 S.E. 667, 668 (S.C. 1918) (ruling "that mere negligence is enough; that if a man is guilty of negligence in the handling of [an automobile], and death results from that negligence as a proximate result thereof, he is held guilty of manslaughter").

107. *See Barnett*, 63 S.E.2d at 60.

108. *Id.* at 61. The court analogized automobiles to firearms in that they both are likely to cause harm, absent due care. *See id.* at 60-61. Thus, the court reaffirmed the State's rule that (1) the prosecution need only prove simple negligence when a defendant is engaged in the use of an inherently dangerous instrument and (2) an automobile is included within the definition. *See id.* at 62. The court mentioned its dislike for the standard but recognized a change or modification was not within its province; rather, any change should come from the law-making body. *See id.*; *see also* State v. Dixon, 186 S.E. 531 (S.C. 1936).

In *Dixon*, the South Carolina Supreme Court considered, for the first time, the appropriate definition of negligence in a vehicular homicide case. 186 S.E. at 532-34. The defendant accidentally hit a telephone pole, killing one of his passengers. *See id.* at 531. At trial, the judge instructed the jury that it must convict the defendant of involuntary manslaughter if it found that the defendant acted with mere negligence while using a dangerous instrumentality or acted only with gross negligence. *Id.* at 531-32. The defendant was convicted and appealed, arguing that the judge incorrectly instructed the jury on the definition of negligence. *See id.* On appeal, the supreme court, after reviewing several cases involving the use of inherently dangerous instruments, held that an automobile was a deadly weapon or instrumentality, and therefore, ordinary negligence was sufficient to support the defendant's conviction. *See id.* at 532-33; *see also* Capra v. Ballarby, 405 P.2d 205, 207-08 (Colo. 1965) (finding that automobiles are inherently dangerous instruments).

109. *Barnett*, 63 S.E.2d at 59.

110. *See, e.g.*, CONN. GEN. STAT. ANN. § 14-222a (West Supp. 1998) ("Any person who, in consequence of the negligent operation of a motor vehicle, causes the death of another person shall be fined not more than one thousand dollars or imprisoned not more than six months or both."); MICH. COMP. LAWS ANN. § 750.324 (West 1997) ("Any person who, by the operation of any vehicle upon any highway . . . at an immoderate rate of speed

due care to avoid colliding with any pedestrian upon any roadway."[111] In *State v. Mattan,*[112] the defendant was convicted of "unintentionally causing the death of [a pedestrian] while operating a motor vehicle."[113] Evidence at trial established that heavy rain and snow obstructed the driver's vision prior to impact.[114] The jury convicted the defendant[115] under Nebraska Revised Statute section 39-644,[116] and on appeal, the defendant argued that the meaning of "due care" in the statute was unconstitutionally vague.[117] The Nebraska Supreme Court ruled that, according to the statute, "due care" equals ordinary negligence.[118] The court upheld the defendant's conviction since he violated his duty to maintain a proper lookout while driving.[119]

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or in a careless, reckless or negligent manner, but not wilfully or wantonly, shall cause the death of another, shall be guilty of a misdemeanor . . . ."); NEB. REV. STAT. § 60-6,109 (1993) (noting that "every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway").

111. NEB. REV. STAT. § 60-6,109 (1993).

112. 300 N.W.2d 810 (Neb. 1981).

113. *Id.* at 812.

114. *See id.* at 811. "It was overcast and dark at the time [of the accident] and traffic was heavy. Rain mixed with heavy snow was falling and the streets were 'slushy' but not slippery." *Id.* The defendant told a police officer that

> just as he got even with the crosswalk or shortly thereafter, he said he heard a thump. Then he said a split second later, he felt a bump on his tandem wheels. Then he said he had to pull down the street several feet, so he could see in his rear-view mirror as to see if and what he did hit. Then he said he saw the girl laying in the street, and so immediately, he pulled over to the curb, and got out.

Id.

115. *Id.* The court noted that "although the evidence was not as complete as it might have been, it was sufficient to permit [the jury] to find beyond a reasonable doubt that the defendant failed to exercise due care because he failed to see a pedestrian who was in plain sight." *Id.* at 812. The court pointed to the fact that the victim was "plainly visible to the eyewitness who saw the accident while she was walking on the sidewalk." *Id.* In addition, the court stated that after the defendant stopped his car, "he had no difficulty seeing the victim's body lying in the street." *Id.*

116. NEB. REV. STAT. § 39-644 (1981) was recodified as NEB. REV. STAT. § 60-6,109 (1993).

117. *See Mattan*, 300 N.W.2d at 811, 813.

118. *See id.* The court reasoned that the "definition of an act forbidden by statute, but not defined by it, may be ascertained by reference to the common law." *Id.* at 813 (citing State v. Eynon, 250 N.W.2d 658 (Neb. 1977)). "Due care is a well-understood term meaning the absence of negligence." *Id.* Therefore, "[t]he defendant's contention that [the meaning of 'due care'] is unconstitutionally vague is without merit." *Id.*

119. *See id.*

> The rule is well established in this state that a driver must keep a lookout so that he can see what is plainly visible in front of him, and a failure to do so is negligence as a matter of law. The presence of snow or other conditions which interfere with visibility require the driver to use care commensurate with the situation.

Thus, the Nebraska court concluded that anything less than ordinary care while driving is intolerable, thereby giving notice to others that they must exercise ordinary care to avoid punishment.[120]

Today, inherently dangerous instruments encompass more than automobiles and firearms.[121] The category of inherently dangerous instruments has been broadened to include many other objects that courts and legislatures have determined are likely to produce harm.[122] Permitting punishment based on proof of ordinary negligence for harm resulting from the use of an inherently dangerous instrument is imperative to deter dangerous behavior.

D. Penal Codes That Permit Punishment for a Failure to Exercise Due Care When Engaged in an Inherently Dangerous Activity

Proof that a defendant knew or should have known that he or she was engaged in an inherently dangerous activity likely to cause death or serious bodily harm has supported a conviction for criminally negligent homicide. In *People v. Cruciani,*[123] a New York court considered whether the defendant's act of injecting a fatal overdose of heroin into the body of another was an inherently dangerous act that supported indictments for second degree manslaughter and criminally negligent homicide.[124] Although the New York Penal Code defines criminal negligence as "fail[ing] to perceive a substantial and unjustifiable risk that [a harmful] result will

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Id. The court reasoned that since the evidence proved that the defendant did not see the pedestrian until after he hit her with his vehicle, the driver was not keeping a proper lookout, and thus failed to exercise due care. *See id.* at 812.

120. *See id.* at 813.

121. *See supra* notes 100-02 and accompanying text.

122. *See, e.g.*, People v. Cruciani, 334 N.Y.S.2d 515, 521-22 (Suffolk County Ct. 1972) (holding that a defendant can be convicted of criminally negligent homicide for injecting heroin into another if he knew or should have known that the heroin was likely to cause harm to the deceased); *see also supra* notes 101-02 and accompanying text for other inherently dangerous instruments and/or activities.

123. 334 N.Y.S.2d 515 (Suffolk County Ct. 1972).

124. *Id.* at 521-23. N.Y. PENAL LAW § 125.10 (McKinney 1998) provides that a "person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person." In *Cruciani*, the defendant, a heroin addict, assisted his friend, the deceased, in injecting heroin into her arm. *See* 334 N.Y.S.2d at 517. Specifically, when the deceased arrived at the defendant's home, she had been "high on 'downs,' and, as a matter of fact, 'she could not walk or talk straight.'" *Id.* The defendant left his apartment for a while, and upon his return, he found his friend trying to inject heroin into her arm with a syringe and needle. *See id.* When he noticed that the deceased was having difficulty, he "proceeded to assist her, and actually injected the heroin into her arm." *Id.* She subsequently died from an overdose. *See id.* at 518.

occur,"[125] an appellate court upheld the trial judge's instructions that permitted a conviction if the defendant knew or should have known that the injection could result in a drug overdose.[126]

The *Cruciani* decision illustrates that proof of conviction based on a lesser *mens rea* may be appropriate to ensure punishment for deterrence purposes.[127] The court cited staggering statistics regarding the dangers of heroin and wrote of its desire to curb future deaths resulting from drug abuse.[128] The court's analysis indicated a strong desire to extend the definition of criminal negligence to its outermost limits as a means to legally uphold the defendant's conviction.[129] Although the court was bound by the statutory definition of criminal negligence, the court wrote that proof of such negligence might be only slightly higher than simple negligence.[130]

In affirming the trial judge's instructions, the appellate court held that if a defendant engaged in an inherently dangerous activity, the prosecution could then prove a substantial and unjustifiable risk if the defendant knew or should have known that the activity could cause death.[131] The language

125. N.Y. PENAL LAW § 15.05(4) (McKinney 1998); *see also id.* § 125.10.

126. *See* People v. Cruciani, 353 N.Y.S.2d 811, 813 (N.Y. App. Div. 1974).

127. *See id.* at 812-13. The trial court noted that there were a number of factual findings that the jury had to consider in determining "whether the defendant's acts constituted a substantial and unjustifiable risk of death." *Cruciani*, 334 N.Y.S.2d at 523. The court enumerated the following seven issues:

> (1) Was the injection intravenous or subcutaneous?; (2) Was the deceased 'high' on barbiturates at the time the defendant injected her with heroin?; (3) Did [the] defendant know, or should he have known, under the circumstances, that the deceased was 'high' on barbiturates at the time of injecting her with heroin?; (4) Did the defendant supply the deceased with the heroin or the implements to administer the heroin?; (5) Did [the] defendant know, or should he have known, under the circumstances, the quantity or quality of heroin he was injecting into deceased's body?; (6) Did the defendant know, or should he have known, under the circumstances, whether the deceased had developed a tolerance for heroin?; [and] (7) Did the defendant know, or should he have known, under the circumstances, whether the quantity he injected was the deceased's regular dosage?

Id. The court then concluded that "the consumption of heroin in unknown strength is dangerous to human life, and the administering of such a drug is inherently dangerous and does carry a high probability that death will occur." *Id.*

128. *See id.* at 520-21. The court noted that "heroin is the single leading cause of death of adolescents and young adults from the ages of fifteen to thirty-five in the Metropolitan New York area." *Id.* at 520. Half of those deaths involve teenagers. *See id.* It further noted that heroin abuse accounts for one percent of the deaths among addicts per year. *See id.*

129. *See id.* at 521-23.

130. *See id.* "Where casual, or slight negligence ends, and gross negligence begins may be difficult to determine, but essentially the issue is predominantly one of fact and not of law." *Id.* at 522.

131. *See Cruciani*, 353 N.Y.S.2d at 812-13; *see also* People v. Hopkins, 226 P.2d 74, 76-77 (Cal. Ct. App. 1951).

"knew or should have known" is typically used when instructing the jury on ordinary negligence.[132] Where defendant's negligent activity is dangerous to the public, some jurisdictions will permit proof of ordinary negligence, or something just slightly higher than ordinary negligence, to ensure prosecution.[133]

132. *See, e.g.*, *Cruciani*, 353 N.Y.S.2d at 812-13. The court, in affirming the lower court, noted that

> the proof established that the risk of death is substantially increased when heroin is injected into the body at a time when the central nervous system is already depressed as the result of the consumption of barbiturates and that this was known by defendant. The jury could therefore find that defendant acted recklessly, since he was aware of and consciously disregarded a substantial and unjustifiable risk . . . .

Id. at 813 (emphasis omitted). Several other cases have held that the act of injecting heroin into another's body is an inherently dangerous act. *See, e.g.*, People v. Poindexter, 330 P.2d 763, 767 (Cal. 1958) (finding that "taking a shot of heroin was an act dangerous to human life"); Brown v. Commonwealth, 293 S.W. 975, 976-77 (Ky. 1927) (finding that decedent's death was caused by the careless administration of morphine).

133. *See* Beran v. State, 705 P.2d 1280, 1284 (Alaska Ct. App. 1985) (relying on proof of ordinary negligence unless otherwise noted by the legislature); Reynolds v. State, 655 P.2d 1313, 1315 (Alaska Ct. App. 1982) (requiring negligence to accompany defendant's conduct); Silver v. State, 79 S.E. 919, 920 (Ga. Ct. App. 1913) (noting the application of due caution and circumspection); People v. Datema, 533 N.W.2d 272, 277 (Mich. 1995) (premising involuntary manslaughter on criminal negligence); *Cruciani*, 353 N.Y.S.2d at 813 (permitting proof of recklessness). The United States Supreme Court has permitted proof of ordinary negligence in some cases to ensure prosecution:

> While the general rule at common law was that the *scienter* was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes even where the statutory definition did not in terms include it, there has been a modification in this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement. . . . [I]n the prohibition or punishment of particular acts, the State may in the maintenance of a public policy provide "that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance." Many instances of this are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of *mala in se*. . . . Again where one deals with others and his mere negligence may be dangerous to them, . . . the policy of the law may, in order to stimulate proper care, require the punishment of the negligent person though he be ignorant of the noxious character of what he sells.

United States v. Balint, 258 U.S. 250, 251-52 (1922) (citations omitted); *see also* United States v. International Minerals & Chem. Corp., 402 U.S. 558, 565 (1971) (citing *Balint* and noting that "where . . . dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation"). The inherently dangerous instrument doctrine is also used in civil law. *See, e.g.*, Pettingell v. Moede, 271 P.2d 1038, 1044 (Colo. 1954) (en banc) (stating in the jury

E. Penal Codes That Permit Punishment for a Failure to Exercise Due Care When Engaged in Conduct That Threatens Widespread Public Injury

Legislatures have carved out exceptions to the majority rule that criminal culpability should be predicated on gross negligence by statutorily defining the undesired harm in a regulatory crime or by statutorily defining a specific behavior that threatens widespread public injury.[134] When the statutory meaning of negligence is unclear, courts have followed suit by interpreting these statutes with a view toward facilitating successful prosecutions.[135] These exceptions are largely rooted in the legislative response to the Industrial Revolution when lawmakers found that the only way to deter certain harm was to define crimes in a way that would ensure successful prosecution.[136] Hence, legislatures began defining crimes without any mens rea element.[137] Today, some courts and legislatures have retreated from the notion of imposing punishment without a mental element and have included a *mens rea* of ordinary negligence in regulatory crimes.[138] By requiring proof of ordinary negligence, courts and legislatures have protected society from the harm that regulatory crimes seek to deter without permitting convictions absent any *mens rea.*

In *United States v. Frezzo Brothers, Inc.*,[139] the Third Circuit considered whether the Congress intended the negligence provision of the Clean Water Act[140] to mean ordinary negligence.[141] The government charged the defendants with violating the Act when pollutants appeared after heavy rain periods.[142] At trial, the judge instructed the jury that the defendants could be found guilty of violating the Act if they failed to use due care in discharging potential pollutants into the point source.[143] The jury convicted the defendants,[144] who on appeal argued that the judge erred by failing to require a special verdict to determine whether the violation was willful or

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instruction that "if defendant 'was conscious of his conduct' and knew or should have known that to continue therein would naturally and probably result in injury, he may be held liable. Such language is perfectly consistent with simple negligence.").

134. Public welfare offenses encompass a broad range of activities. These offenses include environmental violations, sexual exploitation of a minor, and animal neglect. *See, e.g.*, State v. White, 464 N.W.2d 585 (Minn. Ct. App. 1990) (concerning the sexual exploitation of a minor); State v. Marshall, 821 S.W.2d 550, 551-52 (Mo. Ct. App. 1991) (interpreting a statute concerning the protection of animals); William B. Johnson, Annotation, *Validity, Construction, and Application of State Hazardous Waste Regulations*, 86 A.L.R.4TH 401 (1991) (discussing an environmental statute that imposes criminal liability for ordinary negligence). Driving while intoxicated is also a public welfare offense. *See* Christopher H. Hall, Annotation, *Validity, Construction, and Application of Statutes Directly Proscribing Driving with Blood-Alcohol Level in Excess of Established Percentage*, 54 A.L.R.4TH 149 (1987). Finally, possession of an unregistered shotgun has been described as a public welfare offense. *See, e.g.*, State v. Hamlin, 497 So. 2d 1369 (La. 1986) (finding the state gun registration law constitutional).

135. For cases in which the defendant challenged the pertinent drunk driving statutes as being unconstitutionally vague, see Lovell v. State, 678 S.W.2d 318 (Ark. 1984); Roberts v. State, 329 So. 2d 296 (Fla. 1976); People v. Ziltz, 455 N.E.2d 70 (Ill. 1983); Finney v. State, 491 N.E.2d 1029 (Ind. Ct. App. 1986); State v. D'Agostino, 495 A.2d 915 (N.J. Super. Ct. Law Div. 1984); State v. Rose, 323 S.E.2d 339 (N.C. 1984); State v. Tanner, 472 N.E.2d 689 (Ohio 1984); State v. Abbot, 514 P.2d 355 (Or. Ct. App. 1973); Commonwealth v. Mikulan, 470 A.2d 1339 (Pa. 1983); State v. Franco, 639 P.2d 1320 (Wash. 1982) (en banc). In each case, the respective court upheld the constitutionality of the statute and the defendant's conviction.

136. During the mid-nineteenth century, in response to the Industrial Revolution and society's increasingly complex technology and social frenzy, a class of crimes emerged called public welfare crimes. *See* Sayre, *supra* note 10, at 56-67. Public welfare crimes were crimes in which there was a compelling need to protect society against harm. *See id.* Violation of these offenses could be proven absent any *mens rea* when the legislature found that there was a compelling need to protect society against harm. *See id.* at 61-62. The court and legislative responses rejected proof of some mental element for punishment in order to ensure deterrence. *See generally id.*

137. *See, e.g., id.* at 70-75.

138. *See, e.g.*, Clean Water Act, 33 U.S.C. §§ 1251-1376 (1982 & Supp. V 1987); Ocean Dumping Act, 33 U.S.C. §§ 1401-1445 (1982 & Supp. V 1987); Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j-10 (1982 & Supp. V 1987). *See generally* Eva M. Fromm, *Commanding Respect: Criminal Sanctions for Environmental Crimes*, 21 ST. MARY'S L.J. 821 nn.136-84 (1990). If certain provisions of the Clean Water Act are violated as a result of negligence, a first violation results in a misdemeanor conviction. *See* 33 U.S.C. § 1319(c)(1). A "negligence" conviction could result in a fine of up to $25,000 per day, or imprisonment for up to one year. *See id.*; *see also* Jeffrey Miller, Discourse on a Dead Duck: Decoding Strict Criminal Liability for Federal Public Welfare Offenses (Feb. 1998) (unpublished manuscript, on file at Pace University School of Law).

139. 602 F.2d 1123 (3d Cir. 1979).

140. 33 U.S.C. § 1319(c)(1).

141. *Frezzo Bros., Inc.*, 602 F.2d at 1129.

142. *See id.* at 1125. The government also alleged that the discharges were willful; it supported its claim by showing that the waste appeared at a time when there had been no rain. *See id.* at 1129. A county health department inspector noticed that manure waste was flowing into a nearby creek where there had not been any recorded rainfall. *See id.* at 1125. He began to investigate the defendants and went to their farm to inspect their existing water pollution abatement facilities. *See id.* The investigator returned two additional times, once following a morning of heavy rain. *See id.* During the first visit, the investigator brought several witnesses with him; they observed the holding tank overflowing into the stream. *See id.* James Frezzo admitted to the investigator that the "tank could control the water only 95% of the time." *Id.* After the second visit, samples were again drawn which showed high levels of pollutant concentration. *See id.* Upon completion of the investigation, the defendants were indicted for violations of the Clean Water Act. *Id.* at 1124-25. The enforcement provisions of the Act are contained in 33 U.S.C. § 1319.

143. *See* United States v. Frezzo Bros., Inc., 461 F. Supp. 266, 272 (E.D. Pa. 1978).

144. *Id.* at 268.

negligent.[145] The appellate court upheld the conviction and implied that a reasonable person would have known that there was a likelihood of spillage.[146] By upholding the conviction based upon the reasonableness standard,[147] the court warned the public to take caution when engaging in activities that are potentially hazardous to water sources. The application of an ordinary negligence standard permitted the prosecution greater leeway for conviction, thereby assuring more deterrent value in the defendant's punishment.[148]

State courts have also interpreted regulatory crimes to impose punishment based on proof of civil negligence. In *People v. Martin*,[149] the California Court of Appeals considered the appropriate definition of negligence for the California Hazardous Waste Control Act.[150] The defendant directed his employees to transport barrels containing waste.[151] During transportation, some barrels were accidentally smashed, and their contents spilled to the ground.[152] At trial, the judge instructed the jury that it could convict the defendant if it found that he "reasonably should have known that he was disposing or causing the disposal of or transporting or causing the transportation of hazardous waste."[153] The defendant argued that

145. *Frezzo Bros., Inc.*, 602 F.2d at 1129.

146. *See id.* The government did not institute a civil action before commencing criminal proceedings. This was common practice at the time. *See id.* at 1126.

147. *See id.* at 1129-30.

148. In *United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996), the Fifth circuit indicated that it would concur with the Third Circuit's decision in *Frezzo Brothers* reading "negligence" in the CWA to mean ordinary negligence. *Id.* at 386. In *Ahmad*, a federal jury convicted a defendant of "knowingly discharging a pollutant from a point source into a navigable water of the United States without a permit, in violation of 33 U.S.C. § 1317(d) and 33 U.S.C. § 1319(c)(2)(a)." *Id.* Evidence at trial showed that defendant's employees discharged contaminated fluid into a sanitary sewer system intake pond. *See id.* at 388. Over the defendant's objection, the judge instructed the jury on the count of knowingly discharging hazardous waste in violation of 33 U.S.C. § 1311(a) and 33 U.S.C. § 1319(c)(2)(a). *Id.* at 389. The Fifth Circuit had to consider whether the jury instructions adequately informed the jury that it could convict the defendant if the jury found that the defendant negligently left the pump in the hands of his employees. *See id.* at 389. The court found that the defendant would have acted only negligently if he "thought water, rather than gasoline, was being discharged." *Id.* at 393. Thus, he was only negligent if he was unaware that what he was discharging was a pollutant. *See id.* at 390. Thus, according to the court, the jury could have found the defendant guilty of negligently discharging contaminated fluid into a sanitary sewer system intake pond, even if he was unaware of the potential hazard, as long as a reasonable person would have been aware of the potential for harm. *See id.*

149. 259 Cal. Rptr. 770 (Cal. Ct. App. 1989).

150. The Act prohibits disposing of hazardous waste and "affixes criminal liability for violation of a standard of ordinary care." *See id.* at 771.

151. *See id.*

152. *See id.* at 772.

153. *Id.* at 776.

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the instruction allowed conviction based on proof of civil negligence and that California required proof of gross negligence for conviction of a crime.[154] In upholding the conviction, the court ruled that proof of civil negligence was permissible in this instance since violation of the Hazardous Waste Control Act is a regulatory crime.[155]

Some courts have followed the federal and state legislative lead and have held that "criminal convictions may be predicated on findings of simple or ordinary negligence only when the offense involves a heavily regulated commercial activity." Most recently, the Supreme Court of Alaska, in *State v. Hazelwood*,[156] upheld a conviction based on ordinary negligence for the negligent discharge of oil from the *Exxon Valdez* incident.[157] At trial, the judge instructed the jury on a civil negligence standard of culpability.[158] The defendant was convicted,[159] and on appeal, he argued that the court should have instructed the jury on a gross negligence standard.[160] The Supreme Court of Alaska upheld the instruction

154. *See id.* The defendant asked the court to instruct the jury that whether he "reasonably should have known" about the disposal or transportation "must be measured against a criminal negligence standard of care, *i.e.*, that the defendant exhibited a gross indifference to the consequences of his acts with a reckless, gross, or culpable departure from the ordinary standard of care, or with gross or reckless disregard for the consequences of his acts." *Id.*

155. *See id.* at 779. There is no doubt that the legislature in this instance "intended to impose criminal liability upon those who reasonably should have known they were transporting or disposing of hazardous waste at an unpermitted facility." *Id.* "We conclude that [the statute], although not a strict liability offense, is part of a regulatory scheme where it is permissible to find criminal liability based on the violation of a standard of ordinary care." *Id.*

156. 946 P.2d 875 (Alaska 1997).

157. *Id.* at 886. The captain of the *Exxon Valdez*, Joseph Hazelwood, ran his ship aground, eventually spilling eleven million gallons into Prince William Sound. *Id.* at 887. Further investigation revealed that Hazelwood was intoxicated at the time of the spill, and a jury convicted Hazelwood of negligent discharge of oil. *See Hazelwood*, 912 P.2d at 1277. The court of appeals reversed Hazelwood's conviction, holding that he should have been tried under a criminal negligence theory rather than a civil negligence standard of culpability. *Id.* at 1279-80. The Supreme Court subsequently reversed. *See Hazelwood*, 946 P.2d at 886.

158. *Hazelwood*, 912 P.2d at 1278. Over Hazelwood's objection, the court instructed the jury:

> A person acts "negligently" with respect to a result described by a provision of law defining an offense when the person fails to perceive an unjustifiable risk that the result will occur; the risk must be of such a nature and degree that the failure to perceive it constitutes a deviation from the standard of care that a reasonable person would observe in the situation.

Id.

159. *Id.* at 1268.

160. *See id.* at 1278-79. The court of appeals reversed on other grounds and did not address the issue of the appropriate standard of culpability. *See* Hazelwood v. State, 836

because it was essential to furthering an important public policy: deterrence of future oil spills.[161]

The *Hazelwood* court stated that criminal convictions might be predicated on findings of ordinary negligence when the offense involves a heavily regulated activity that can cause widespread serious harm.[162] Here, although the court did not expressly state that oil transportation is heavily regulated,[163] it maintained that the ordinary negligence standard was necessary to protect society from potential harm.[164] The court noted that

P.2d 943 (Alaska Ct. App. 1992). The supreme court reversed part of that decision and remanded the case to the court of appeals. *See* State v. Hazelwood, 866 P.2d 827 (Alaska 1993). On remand, the court of appeals again reversed Hazelwood's conviction — this time on the ground that Hazelwood should have been tried under a criminal negligence theory rather than the civil negligence standard of culpability. *See Hazelwood*, 912 P.2d at 1279. The court concluded that the unadorned use of the word "negligently" created an ambiguity as to whether the statute rested on criminal or ordinary negligence. *See id.* at 1278 n.15. It surveyed its past decisions and held that the imposition of criminal liability based on simple negligence is appropriate "only for offenses dealing with heavily regulated activities for which permits or licenses are required." *Id.* at 1279 (quoting Cole v. State, 828 P.2d 175, 178 (Alaska Ct. App. 1992)). The State subsequently petitioned for review, and the supreme court reversed. *Hazelwood*, 946 P.2d at 886.

161. *Hazelwood*, 946 P.2d at 883 (noting that "the threat of punishment for objective fault will deter people from conducting themselves in such a way as to create risk to others"). The court stated that

> it cannot be disputed that the threat of punishment necessarily deters. Even when an offender does not of his own accord realize that his conduct is wrongful, he can in many cases be made to take care. Coercion that causes the offender to pay attention can serve important social aims that would not be achieved by proscriptions that only come into effect when the transgressor recognizes the harm in his or her behavior.

Id. "Reasonable deterrence . . . is the basic principle of the due process balance between individual and societal interests." *Id.* at 884. "[T]he negligence standard is constitutionally permissible because it approximates what the due process guarantee aims at: an assurance that criminal penalties will be imposed only when the conduct at issue is something society can reasonably expect to deter." *Id.*

162. *See id.* at 877.

163. The court of appeals indicated that the incident involved a heavily regulated activity. *See Hazelwood*, 912 P.2d at 1279. Specifically, the court noted that "[a]lthough Hazelwood's conduct actually involved his participation in a commercial, heavily regulated activity for which he was required to be licensed, the statute under which [he] was convicted does not restrict itself to this type of commercial activity." *Id.* However, the supreme court did not address this issue and did not label oil transportation as a heavily regulated industry. *See generally Hazelwood*, 946 P.2d at 875-90.

164. *See id.* at 884-85. "The legislature made 'negligence' the standard of liability. Unadorned, this word is commonly understood to mean ordinary negligence, not criminal or gross negligence." *Id.* at 885. The term "negligence," the court noted, "always denotes ordinary, civil negligence." *Id.*

convictions based on strict liability should be permitted when the legislature's expectation of individual conformity is reasonable.[165]

Today, courts and legislatures are still somewhat uncomfortable with the concept of criminal punishment absent proof of gross negligence. Society's paramount interest in ensuring public protection, however, has permitted courts and legislatures to carve out exceptions to this principle.[166] Convictions based on proof of ordinary negligence are justified when potential harm is likely to occur and is likely to be grave, either because it is likely to cause death, serious bodily injury, or widespread public injury.[167] Courts and legislatures conclude that situations in which a defendant engages in an inherently dangerous activity or uses an inherently dangerous instrument justify convictions based on ordinary negligence.[168] The rationale for punishment in these instances is predicated on the utilitarian theory of deterrence.[169] Punishing individuals will put others on notice that society will not tolerate similar conduct.[170]

IV. PUNISHING NEGLIGENT CONDUCT

Commentators argue that it is inappropriate to punish actors absent proof of some mental awareness since the actor has not contemplated the forbidden act.[171] They assert that punishing ordinary negligent conduct results in over-criminalization[172] and that lowering the criminal law threshold to that of civil negligence may defeat the purpose of reserving the criminal law "for the most damaging wrongs and the most culpable defendants."[173]

165. *See id.* at 884. "This notion of a duty of reasonable social conformity undergirds the entire law of mens rea." *Id.*

> Within the confines of this understanding, we will defer to the legislature's directives. It appropriately decides what conduct is inherently wrongful to reasoning members of society and when the social interest requires enforcement without mens rea. However, for deference to be accorded, it must be reasonably apparent that the enactment was in exercise of such judgment. Strict liability cannot be applied simply to expedite punishment when there is no reasonable expectation of deterrence.

Id.

166. *See* discussion *supra* Part I.

167. *See* discussion *supra* Parts III.A, III.E.

168. *See* discussion *supra* Parts III.C, III.D.

169. *See* discussion *supra* Part III.A.

170. *See id.*

171. *See* Hall, *supra* note 6; *see also* PACKER, *supra* note 7; Coffee, *supra* note 86.

172. John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"? Reflections of the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 197 (1991). "[L]eading criminal scholars . . . have periodically warned of the danger of 'overcriminalization': namely, excessive reliance on the criminal sanction, particularly with respect to behavior that is not inherently morally culpable." *Id.*

173. Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal*

However, criminal law's goal to protect society necessitates that the legislature provide punishment for ordinary negligence in certain circumstances.[174] Thus, when legislatures find that criminalizing particular conduct will deter societal harm, it is possible to assign punishment to an individual without risking unnecessary criminalization or losing the stigma attached to criminal punishment.[175]

A. The Appropriate Boundaries for Punishing Negligent Conduct

1. An Answer to the Critics: It is Appropriate to Punish Ordinary Negligent Behavior

Justice Holmes advocated punishment for ordinary negligence as a way to ensure that laws protect society to the fullest possible extent.[176] However, jurisdictions are reluctant to provide criminal sanctions against individuals for mere carelessness. There is a prevailing view that punishing ordinary negligent behavior generally should be avoided for fear of placing unreasonable reliance on the criminal law to cure all potential societal ills.[177] To avoid such consequences, courts charged with interpreting the legislative intent of the word "negligence" often recognize that criminal negligence

and Civil Law, 101 YALE L.J. 1795, 1863 (1992).

174. *See infra* Part IV.A.1.

175. *See infra* Part IV.A.2.

176. *See* HOLMES, *supra* note 4, at 55-56.

> [I]f a workman on a house-top at mid-day knows that the space below him is a street in a great city, he knows facts from which a man of common understanding would infer that there were people passing below. He is therefore bound to draw that inference, or, in other words, is chargeable with knowledge of that fact also, whether he draws the inference or not. If, then, he throws down a heavy beam into the street, he does an act that a person of ordinary prudence would foresee is likely to cause death, or grievous bodily harm, and he is dealt with as if he foresaw it, whether he does so in fact or not.

Id. Herbert Packer, to some extent, agreed with Justice Holmes. He recognized that the chief purpose of the criminal law is to prevent or deter others from committing societal wrongs. *See* PACKER, *supra* note 7, at 9 (explaining that "there is the view that the only proper goal of the criminal process is the prevention of antisocial behavior"). Packer, however, was unwilling to adopt Justice Holmes's suggestion that the criminal law be based on a standard of due care. According to Packer, criminal culpability must be based on a higher standard, namely moral blameworthiness. *See id.* at 62-70.

177. *See, e.g.*, State v. Hazelwood, 946 P.2d 875, 878-79 (Alaska 1997); Thomas v. State, 85 S.E.2d 644, 645-46 (Ga. Ct. App. 1955); Shockley v. State, 82 S.E.2d 735, 736-37 (Ga. Ct. App. 1954); State v. Jones, 126 A.2d 273, 275-76 (Me. 1956); State v. Yarborough, 905 P.2d 209, 213 (N.M. Ct. App. 1995); People v. Cruciani, 334 N.Y.S.2d 515, 521-22 (Suffolk County Ct. 1972); State v. Wilson, 216 P.2d 630, 634 (Utah 1950); Horn v. State, 554 P.2d 1141, 1144 (Wyo. 1976).

requires the prosecution to prove something more than ordinary negligence.[178]

However, while the judicial presumption is generally against construing "negligence" in a criminal code as ordinary negligence, there may be instances when punishing such conduct achieves the goals of deterrence. Professor Hall, acknowledging that negligent behavior involves some element of conscious choice, advocates punishment if at "the time immediately related to the dangerous behavior in issue, . . . the defendant [has] knowledge, belief, or suspicion that he is endangering anything socially valued."[179] Other scholars, however, maintain that deterrence may be effective, even for negligence crimes.[180] According to Herbert Packer, deterrence "create[s] and reinforce[s] the conscious morality and the unconscious habitual controls of the law-abiding."[181]

Professor John Coffee, perhaps the most prominent opponent of criminalizing ordinary negligence, argues that "this blurring of the border between tort and crime predictably will result in injustice."[182] Professor Coffee makes the following three important assertions: (1) punishing ordinary negligent conduct will unfairly penalize a wrongdoer whose conduct should merely be sanctioned in a manner that makes the wronged party whole;[183] (2) punishing ordinary negligent conduct will "weaken the

178. *See, e.g.*, State v. Wilcoxon, 639 So. 2d 385, 388 (La. Ct. App. 1994); State v. Rock, 571 So. 2d 908, 909 (La. Ct. App. 1990); *Yarborough*, 905 P.2d at 216; Santillanes v. State, 849 P.2d 358, 366 (N.M. 1993); State v. McLaughlin, 621 A.2d 170, 174-76 (R.I. 1993); State v. Seibel, 471 N.W.2d 226, 234 n.11 (Wis. 1991).

179. Hall, *supra* note 6, at 634. Professor Hall maintains that when one acts negligently, he or she does not have "knowledge, belief, or suspicion that he is endangering anything socially valued." *Id.* He notes Justice Holmes's analogy that "even a dog understands the difference between being kicked and being stumbled over." *Id.*

180. *See, e.g.*, H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 134 (1968). Hart rebuts Professor Hall's assumption by stating that legal regulations can only operate through an offender's conscious reasoning:

> The connexion between the threat of punishment and subsequent good behaviour is not of the rationalistic kind pictured in the guiding-type of case. The threat of punishment is something which causes [the offender] to exert his faculties, rather than something which enters as a reason for conforming to the law when he is deliberating whether to break it or not. It is perhaps more like a goad than a guide. But there seems to me to be nothing disreputable in allowing the law to function in this way, and it is arguable that it functions in this way rather than in the rationalistic way more frequently than is generally allowed.

Id.

181. PACKER, *supra* note 7, at 65.

182. Coffee, *supra* note 172, at 193.

183. *See id.* at 193-94. Professor Coffee asserts that the "criminal law should generally not be used when society is unprepared to disregard the social utility of the defendant's behavior – that is, when it prefers to 'price' the behavior in question in order to force internalization of social costs. . . . [C]riminal liability for negligence is generally

efficacy of the criminal law as an instrument of social control;"[184] and (3) punishing ordinary negligence should occur in the courts where judges can consider the conduct at the sentencing stage.[185] His arguments, however, are substantially weakened when one considers the overriding benefit of punishing negligent conduct where a reasonable expectation of deterrence exists.

According to Professor Coffee, punishing conduct that historically has been sanctioned through tort law will result in injustice to the individual.[186] He argues that the legislature has attached financial sanctions to tort conduct, requiring defendants to redistribute some of their assets to the wronged party.[187] Defendants in a tort action must balance the financial penalty against the value of the wrong. In contrast, criminal punishment stigmatizes the individual, placing a larger punishment and perhaps a greater disincentive against engaging in the particular conduct. Individuals have come to rely on reasonable expectations regarding the financial sanction or criminal punishment of a particular act and will make decisions about their conduct accordingly.[188] Professor Coffee maintains that if society punishes conduct previously sanctioned financially, it will unfairly force the individual to act in his own self-interest and to evaluate his own costs prior to engaging in any conduct.[189]

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inappropriate." *Id.* at 194.

184. *Id.* at 193.

185. *Id.* at 194. "Neither legislative action nor constitutional challenge is likely to reverse the encroachment of the criminal law upon areas previously thought civil in character." *Id.* However, Coffee maintains that the sentencing stage provides courts with the ability to "draw a line between the enforcement of norms that were intended to price and those intended to prohibit." *Id.*

186. *See id.* at 239.

187. *Id.*

188. *See id.* at 225. "Characteristically, tort law prices, while criminal law prohibits." *Id.* at 194.

> Normally, when we think of the criminal law, we visualize it punishing intentional actions willfully engaged in by the defendant. . . . The negligent defendant is frequently engaged in activities that have social utility and, indeed, is the same person with whom the law of torts regularly deals. Hence, to the extent that these forms of misbehavior are considered "crimes," the law should "price" the misbehavior—that is, seek to force the defendant to internalize the costs it imposes on others.

Id. at 228.

189. *See id.* at 225. In these identifiable instances, sanctions should be limited to requiring the wrongdoer to repay the victim with financial penalties. *See id.* In contrast, criminal wrongs are those that society intends to prohibit. *See id.* "[P]ricing decisions cannot be made habitual." *Id.* Coffee argues that if individuals are punished for negligent acts, such individuals will be required to use Judge Hand's $B<PL$ analysis. *See id.* Such individuals will be forced to act in his or her own self-interest and would tend to exaggerate his or her own costs. *See id.*

Professor Coffee incorrectly frames his argument in terms of the defendant's private interest; he is primarily concerned with the ultimate harm to the wrongdoer. This is a sound argument from a civil law perspective since tort law is designed to make the wronged party whole.[190] However, Professor Coffee fails to consider that the defendant's best interests should be secondary to society's interest in being protected by the criminal law.[191] Punishing an individual often serves as a valuable deterrent.

Professor Coffee asserts that if the criminal law were to adopt Learned Hand's rule for tort liability,

> individuals would be asked to determine if the marginal benefit to them from not taking additional precautions equalled or exceeded the marginal expected costs that their conduct imposed on others. One suspects that individuals would tend to exaggerate their own costs and discount others' benefits; thus, by definition the decision would be self-interested.

Id. at 225. Relying on Professor Robert Cooter, Coffee notes the difference between tort punishment and criminal punishment. *See id.* at 226. Specifically, a penalty "inherently creates an abrupt, discontinuous jump in the costs the actor must incur when he violates the legal standard." *Id.* In contrast, the

> abrupt jump disappears when a pricing system is used because prices are continuous and thus bring costs and benefits into balance. . . . Society is better advised to use prices, not sanctions, when it has great difficulty in specifying the precise standard of precaution to be observed. This observation may help explain the historic reluctance of Anglo-American courts to criminalize negligence.

Id. at 226-27.

190. *See* Steven D. Smith, *The Critics and the "Crisis": A Reassessment of Current Conceptions of Tort Law*, 72 CORNELL L. REV. 765, 769 (1987) (asserting that "[c]ompensation's cardinal principle prescribes that injured plaintiffs should receive an amount necessary to make them 'whole,' that is, to restore them to the position they would have occupied but for the defendant's tortious conduct"); *see also* Peter A. Bell, *The Bell Tolls: Toward Full Tort Recovery for Psychic Injury*, 36 U. FLA. L. REV. 333, 393 (1984) ("The point of compensation in tort law is to put an injured plaintiff back in the same relative position that he occupied before he was injured.").

191. *See* United States v. Mancuso, 420 F.2d 556, 559 (2d Cir. 1970) (maintaining that the primary purpose of the criminal law "is to conform conduct to the norms expressed in that law"); *see also* Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 1-2 (arguing that society will criminalize a particular activity and attempt to shape individual preferences and behavior through punishment whenever the social benefits of doing so outweigh the social costs); Alon Harel, *Efficiency and Fairness in Criminal Law: The Case for a Criminal Law Principle of Comparative Fault*, 82 CAL. L. REV. 1181, 1229 (1994) (asserting that the criminal law directs its injunctions to society at large so that everyone benefits from the stability brought about by universal conformity with those norms); Note, *Felony Murder: A Tort Law Reconceptualization*, 99 HARV. L. REV. 1918, 1923 (1986) (noting that criminal punishment is the means by which an offender pays his debt to society). *See generally* LAFAVE & SCOTT, *supra* note 4, § 1.5, at 22 (discussing the various theories of punishment advanced to serve the purpose of the criminal law: to prevent certain undesirable conduct and, thus, to protect various interests of society).

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In the interest of minimizing threatened societal harms, the goals of criminal law at times mandate that society prohibit conduct that was previously punished by civil sanctions. While there is little retributive effect at the criminal level for defendants whose conduct involves ordinary negligence, punishment will communicate clearly to the community that such conduct is intolerable.

Professor Coffee's second assertion, that punishing ordinary negligent conduct will "weaken the efficacy of the criminal law as an instrument of social control,"[192] also fails to acknowledge the role of criminal law as an educator of society. Professor Coffee is concerned that is that "if the criminal law is overused, it will lose its distinctive stigma."[193] Professor Coffee correctly identifies the deterrent value that is served by the individual's fear of stigmatization, and he expresses concern that criminally punishing conduct that was previously punished by tort sanctions is sometimes appropriate since it may serve as a "system for public communication of values."[194] In fairness to those concerned with overcriminalization, punishing all conduct that was previously reserved for civil sanctions will dilute the power of the criminal law.

However, as Professor Coffee asserts, "new problems may arise for which the criminal law is the most effective instrument, but which involve behavior not historically considered blameworthy."[195] Thus, in contrast to his broad statement that punishing ordinary negligent conduct would "weaken the efficacy of the criminal law as an instrument of social control,"[196] there are indeed times when the social control may be advanced, rather than weakened, by so doing. It is necessary to sanction conduct that is a threat to public safety, even if the undesirable conduct may only be punished through the partial elimination of *mens rea*. Such sanctions will serve to deter others from committing the same wrongs.[197]

Professor Coffee's final assertion is that if one were to punish ordinary negligent conduct, this punishment would only be feasible at the sentencing stage.[198] Coffee argues that legislatures are inappropriate forums in which to assign punishment since they are reactive and respond hastily.[199]

192. Coffee, *supra* note 172, at 193.

193. *Id.* at 200-01. "Once everything wrongful is made criminal, society's ability to reserve special condemnation for some forms of misconduct is either lost or simply reduced to a matter of prosecutorial discretion." *Id.* at 201.

194. *Id.* at 194.

195. *Id.* at 200. "Modern technology, the growth of an information-based economy, and the rise of the regulatory state make it increasingly difficult to maintain that only the common law's traditional crimes merit the criminal sanction." *Id.*

196. *Id.* at 193.

197. *See id.* at 200.

198. *See id.* at 240-43.

199. *See id.* at 241. Professor Coffee also criticizes legislatures for their inherently political motivation and asserts that it is an inappropriate body to assign punishment to ordinary negligent behavior. *See id.* Professor Coffee also argues that prosecutors should not be permitted to decide who should be punished for a failure to exercise due care. *See id.* ("[F]or prosecutors to decide systematically not to prosecute what the legislature has deemed criminal is also a politically dangerous act, one that seems to undermine the legislature's position as the sovereign lawmaker."). *But see* Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 418-19 (1992) (surmising that the prosecutor has emerged as the central figure with the training and experience to administer crime control and crime prevention).

Professor Coffee correctly asserts that courts will not draw the line between appropriate and inappropriate instances in which to punish for ordinary negligence because, as the Supreme Court has consistently held, "a crime is anything which the legislature chooses to say it is." Coffee, *supra* note 172, at 240. In contrast, he maintains that juries are not the appropriate forums for drawing the distinction between punishment and tort sanctions absent some clear framework upon which to make the decision. *See id.* at 239 ("[T]he competence of juries to judge issues of social utility seems highly questionable. Nonetheless, to shift from pricing to prohibiting without framing some role for the jury as fact-finder might be thought to trivialize the constitutional safeguards surrounding the trial stage."); *see also* Steven I. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 NW. U. L. REV. 190, 190-91 (1990) (describing cases in which juries had difficulty comprehending the issues before them). *See generally* Pheobe A. Haddon, *Rethinking the Jury*, 3 WM. & MARY BILL RTS. J. 29 (1994).

200. Although the legislature is responsible primarily for defining crimes, there is often a need for judicial intervention. The rule of lenity, which requires that penal statutes be strictly construed in favor of the defendant, was developed in response to the "idea that courts should be reluctant to infer that a statute has wrought changes in rights, duties, and remedies beyond those that are affected by the statute's express terms." Shapiro, *supra* note 42, at 935. Customarily, courts have looked to this rule when interpreting ambiguous criminal statutes. *See, e.g.*, United States v. Bass, 404 U.S. 336, 347 (1971) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."). If the penal statute "is unambiguous, [then] the rule of lenity . . . is inapplicable." Beecham v. United States, 511 U.S. 368, 374 (1994).

201. "It is the legislature . . . which is to define a crime, and ordain its punishment." Dowling v. United States, 473 U.S. 207, 214 (1985) (quoting United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820)). The boundary between moral conduct and immoral conduct is generally defined by the legislature through the dictates of the applicable criminal law. As the branch most directly accountable to the people, only the legislature can validate the surrender of individual freedom that is necessary to the formation of the social contract. Therefore, the legislature is the only legitimate institution for enforcing societal judgments through the penal law. *See generally* Jeffries, *supra* note 39.

202. Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 41 B.U. L. REV. 201, 202 (1996) (noting that criminal punishment "serves a communicative

However, it is the role of the legislature to create laws and the role of the judiciary to assign punishment within particular boundaries. As society's lawmaking body, legislatures are primarily responsible[200] for ensuring an orderly society.[201] One way for the legislature to meet this goal is to identify and punish conduct that is morally reprehensible or against accepted social norms.[202] Concededly, since legislatures are reactive, they act in

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response to unforeseen consequences that create risk of great harm.[203] For example, legislatures and courts have criminalized the ordinary negligent conduct that is exhibited while driving an automobile.[204] Until the advent of the automobile, one could not foresee the harm that would result from driving. Such laws exemplify why a reactive legislature may be appropriate. A reactive legislature is essential to continue to protect society from unpredictable harms.

Professor Coffee's argument is also unclear because he fails to define "hasty" satisfactorily. Legislatures may enact legislation only after a lengthy consideration process.[205] However, in fairness to Professor Coffee, legislatures sometimes act randomly; thus, the criminal law is sometimes applied broadly and thoughtlessly. Courts, however, seem to act with similar randomness, deciding opinions on a case-by-case basis. When it is left to the judiciary to define inherently dangerous instruments or activities, there is a risk of disparity among various intermediate courts in a particular jurisdiction. Because of the potential for inconsistency, it is imperative that the legislature adopts a formula or principle to apply when criminalizing ordinary negligence.

2. A Prescription for the Legislature

The legislature should continue to limit punishment for ordinary negligence only to instances when it determines that the conduct is likely to threaten death, serious bodily injury, or widespread public injury. In other

function in our society, separating and labelling [sic] certain behavior as morally condemnable"); *see* Mann, *supra* note 173, at 1796-801 (describing the paradigms of criminal and civil law as punishment and compensation, respectively).

203. *See, e.g.*, Jim Jensen, *Bikers' Choice: Education, Freedom*, ROCKY MTN. NEWS (Denver), Jan. 30, 1998, at 16C (reporting that State Representative Bob Bacon "is considering adding ski helmets to his legislation calling for mandatory helmet usage" in response to the recent deaths of prominent celebrities); Wina Sturgeon, *Deadly Slopes; Safety: AMA Wants Helmet Requirement, But Would It Help? Safety: Would Helmets Prevent Deaths?*, SALT LAKE TRIB., Jan. 7, 1998, at A1 (reporting that the American Medical Association urges legislation requiring adults to wear ski helmets when skiing).

204. *See supra* notes 103-20 and accompanying text.

205. Prior to becoming a law, legislation must be introduced into the appropriate legislative body. The legislation, commonly referred to as a bill, must be considered in committee hearings and floor debates. Following recommendation from the appropriate committee, the bill is referred to the appropriate legislative body for consideration by all representatives of that body. If the full legislative body votes to enact the legislation, it is then referred to either the state's governor, or the President, who must sign the bill into law. *See generally* Robert F. Blomquist, *"To Stir Up Public Interest": Edmund S. Muskie and the U.S. Senate Special Subcommittee's Water Pollution Investigations and Legislative Activities, 1963-66 – A Case Study in Early Congressional Environmental Policy Development*, 22 COLUM. J. ENVTL. L. 1 (1997).

words, the legislature should criminalize ordinary negligence if (1) a significant portion of the population regularly engages in such conduct; (2) such conduct will cause harm to a significant portion of the population; and (3) a reasonable person should know that the conduct is likely to cause harm. This principle should guide all legislatures in formulating statutes and should guide all courts in interpreting them.[206]

Section one of this principle suggests that the legislature should punish conduct in which a large portion of society participates with some regularity. This section is meant to ensure that there is some deterrent value in the proposed criminal punishment. When few people engage in a particular conduct, punishment will not coerce a significant number of individuals to conform their behavior to societal norms.[207] By requiring the legislature to evaluate the frequency with which members of society engage in the conduct, section one limits punishment to instances where there is a reasonable expectation of deterrence.

Section two limits punishment to instances when the conduct is likely to cause harm to a significant portion of the population. Historically, legislatures and courts have permitted punishment based on ordinary negligent conduct when a defendant used an inherently dangerous instrument,[208] engaged in an inherently dangerous activity,[209] or was likely to cause widespread public injury.[210] Courts have justified criminal punishment based on ordinary negligence in these instances to guarantee a greater likelihood of successful prosecution.[211] Permitting punishment under these circumstances has historic roots in the Industrial Revolution, when

206. Since each legislature has the power to define its own crimes, there is no requirement that the criminal definition of a particular conduct must be consistent throughout the country. The federal government may not require uniformity among state legal systems. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). Consequently, state diversity in legislation is encouraged. *See* DRESSLER, *supra* note 17, § 4.03, at 23-24. Whatever limitations the Constitution imposes on the states with respect to "the administration of criminal justice" do not "concern . . . the powers of the States to define crime." Rochin v. California, 342 U.S. 165, 168 (1952).

Additionally, moral values, demographics, and public interests may vary from state to state. Individual states can proscribe criminal conduct in the manner they deem appropriate. For example, State *X* may deem prostitution morally reprehensible and make it a felony to engage in such conduct. On the other hand, State *Y* may not view the matter as a serious one and may not criminalize the conduct at all. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 3 (1971). Each state is autonomous; it is a territorial unit with a distinct general body of law. *See id.*

207. *See supra* text accompanying notes 34-37.

208. *See* discussion *supra* Part III.C.

209. *See* discussion *supra* Part III.D.

210. *See* discussion *supra* Part III.E.

211. *See supra* notes 134, 135 and accompanying text.

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lawmakers found that the only way to deter certain types of harm was to define crimes in a way that would ensure successful prosecution.[212] Section two allows the legislature to respond to future, unknown harms. It requires the legislature to evaluate the conduct it seeks to legislate and to consider whether it is similar to the historical exceptions.

Section three provides that the legislature should criminalize an actor's failure to use due care in instances that meet the requirements of sections one and two. By defining the intent element for these crimes as when a reasonable person should know that the conduct is likely to cause harm, section three becomes a vehicle whereby prosecutors are better equipped to convict individuals for careless crimes that cause significant or widespread harm.

When this principle is applied, it is easy to understand why it works. In *United States v. Frezzo Brothers, Inc.*,[213] the court defined the term "negligence" in the Clean Water Act as "ordinary negligence."[214] Consequently, the prosecution was able to convict the defendant of the crime.[215] *Frezzo* stood for the proposition that clean, safe water is of the utmost importance; therefore, individuals should take all reasonable precautions to avoid potential pollution or face punishment. Justified by the principle of deterrence, the defendant's punishment accomplished the goal of deterrence that the prosecution sought.

Likewise, the Nebraska legislature concluded that the potential for harm from careless automobile driving was paramount to concerns for the inadvertent individual.[216] In *State v. Mattan*,[217] the court upheld the defendant's conviction for failure to maintain a proper lookout while driving.[218] This decision was based on the legislative enactment of a rule that permitted punishment for negligent driving.[219] Although many would argue that punishment under these facts is unjustified since even the best drivers could do this, the legislature's decision to pave the way for criminal punishment was appropriate because of the significant societal interests at stake.

In *State v. Barnett*,[220] the court provided similar guidelines for the legislature in considering whether to punish particular conduct for failure to use due care. The court's findings fit squarely into the principle; therefore, the decision illustrates the proper boundaries by which courts and legislatures should limit punishment for careless conduct. In *Barnett*, the court considered the appropriate punishment for a driver's careless, and ultimately fatal, use of an automobile.[221] The South Carolina Supreme Court recognized the increasing frequency with which careless automobile fatalities were occurring.[222] With this recognition, the court met the requirements of section one.[223] The court was concerned that past decisions to treat automobiles as inherently dangerous weapons and to allow convictions based on ordinary negligence were too harsh.[224] However, after an exhaustive review of precedent, the majority concluded that society's need to punish the individual as a warning to others was paramount to preserving the historical presumption that punishment is reserved for morally culpable actors.[225] This finding illustrates that the court implicitly met the requirements of section two of the principle.[226] Because the court determined that increased automobile use was likely to cause significant harm, it permitted criminal punishment based on proof of ordinary negligence.[227] Thus, the *Barnett* decision complied with all three elements.

The determination of what should be deemed an inherently dangerous instrument is, arguably, better left to the legislature. The *Barnett* court's exhaustive analysis suggests that it would have preferred that the South Carolina legislature had made such a pronouncement.[228] Thus, the *Barnett* decision supports the contention that when a legislative or judicial body decides whether to permit punishment based on ordinary negligence and considers the above-enumerated factors, its decision is likely to be a sound, fair one that furthers the principles of criminal law.

Failure to adhere to the above-mentioned principle will result in unnecessary punishment. For instance, the Oklahoma penal code permits punishment for any act that causes harm upon a showing of ordinary negligence.[229] In *Harless v. State*,[230] the court punished the defendant for relying on her boyfriend, a paramedic, for a medical decision.[231] This reliance led to the death of her child.[232] Punishing the defendant in *Harless*

212. *See supra* notes 136-38 and accompanying text.
213. 602 F.2d 1123 (3d Cir. 1979).
214. *See id.* at 1128-30.
215. *See id.* at 1123.
216. *See generally* State v. Mattan, 300 N.W.2d 810 (Neb. 1981).
217. 300 N.W.2d 810 (Neb. 1981).
218. *Id.* at 811.
219. *See id.* at 813.
220. 63 S.E.2d 57 (S.C. 1951).

221. *See id.* at 62.
222. *See id.*
223. Section one requires proof that many people engage in a particular conduct so that punishment is limited to instances where there is meaningful deterrent value. *See supra* text accompanying notes 208-09.
224. *See Barnett*, 63 S.E.2d at 62. Although the court felt that the rule was too harsh, it recognized that the Legislature is the body that should change the law. *See id.*
225. *See id.*
226. *See supra* text accompanying notes 210-14.
227. *See id.* at 61.
228. *See generally id.*
229. *See* Harless v. State, 759 P.2d 225 (Okla. Crim. App. 1988).
230. *Id.*
231. *See id.* at 226-27.
232. *See id.*

did not further the necessary goal of deterrence since the defendant's conduct was merely an act of bad judgment. Individuals frequently engage in bad judgment; when they do, they are generally unaware of their conduct, its potential harm, or the punishment they might receive as a result of such conduct. Professor Hall argues that it is difficult to deter thoughtless crimes since those engaged in such crimes have not thought of "their dangerous behavior[] or any sanction[s]."[233] Bad judgment alone is unique, not widespread, and therefore, it is not suitable for deterrence purposes. Conversely, widespread acts of bad judgment resulting in substantial serious bodily injury or death should be criminalized.

The legislature and the courts can safeguard against over-criminalization by limiting punishment to instances when a significant number of people engage in identifiable conduct or when the conduct is likely to cause widespread injury. The legislature can and should define bad judgment in instances when enough people are engaging in the particular conduct. When a significant number of people are likely to engage in conduct known to be potentially harmful, it is appropriate to "sacrifice the individual"[234] for the greater good of protecting society.

B. Extending Punishment for Carelessness into the Twenty-First Century

As we approach the new millennium, the increased potential for technologically related accidents makes it essential for legislatures to expand the legislative umbrella to include new acts and actors. This will ensure that society remains relatively free from potential harm. New technological and safety advances have yielded seemingly protective instruments and activities that will cause great harm when used carelessly. Legislatures and judiciaries must identify the potentially fatal conduct in which a significant portion of the population regularly engages. They must also identify conduct that is likely to threaten a significant portion of the population. Finally, they must take the logical next step and criminalize the carelessness that results from such conduct as a means to deter others. Applying the principle to seemingly benign instruments will deter others from engaging in negligent conduct and will limit the resulting harm.

Use of a car phone, conduct in which a significant portion of the population regularly engages, is a fine example of conduct that threatens death or serious bodily injury. A recent study indicated that drivers who talk on car phones are thirty-four times more likely to have an accident than drivers who do not use car phones.[235] A report in the *New England Journal*

233. *See* Hall, *supra* note 6, at 241.

234. HOLMES, *supra* note 4, at 49.

235. Gil Griffin, *Dial 'S' For Sidetracked: Car Phones Get No Ringing Endorsements from Safety Researchers*, SAN DIEGO UNION & TRIB., July 29, 1997, at E1. The study was based on interviews with 100 drivers who had accidents within the last two years, and 100 drivers who had not had accidents in ten years. *See id.* Researchers noted that an individual who talks on the phone for more than fifty minutes per month while driving is five times more likely to have an accident than are drivers who do not use a car phone. *See id.* According to the researchers who conducted the study, using a telephone while driving can be as risky as driving while intoxicated. *See id.*

of Medicine confirms that use of a car phone is more likely to cause harm than driving above the speed limit.[236] Punishing the careless use of car phones would alert others that their failure to use due care could threaten their liberty. Thus, punishment in this instance would effectively decrease the amount of harm caused by the negligent use of car phones.[237]

In today's society, car phones are the first step toward using the car as an office. Cutting-edge technology also provides computers and faxes that operate in the car.[238] Lawmakers will thwart the purpose of criminal law as society's protector unless they enact statutes to prevent the harm that may result from distracted drivers who operate vehicles while trying to conduct business.

Legislatures should also identify and criminalize the failure to use, or the negligent use of, available safety devices. Punishment for such behavior will help protect society from unnecessary harm because it will serve as a deterrent to others. Under current law, few remedies exist to punish those who negligently maintain or use safety devices.

For example, in Illinois, the prosecution was unable to convict an individual whose careless maintenance of a smoke detector led to the death of a three-year-old child.[239] The defendant's carelessness did not rise to the necessary level of criminal culpability.[240] A jury considering this case determined that the defendant's failure to properly maintain his smoke alarm was not sufficient evidence of recklessness to convict under Illinois law.[241] Changing the law to permit a judge to instruct the jury on ordinary

236. *See* Malcolm Maclure & Murray A. Mittleman, *Cautions About Car Telephones and Collisions*, 336 NEW ENG. J. MED. 501 (1997); *see also* Leslie Keiling, *It's The Drivers, Not Car Phones, That Can Make Road Dangerous*, CHI. SUN-TIMES, Feb. 16, 1997, at 35.

237. Punishing the negligent use of car phones is preferable to a complete ban on the phones. Car phones, if used properly, can also serve as lifesavers. *See id.* For example, car phones are often used for emergency calls. *See id.* However, Representative Robert J. Bugielski from Chicago "has introduced legislation that would ban hands-on car phone use." *Id.* According to the medical journal, however, this will do little, if anything, to solve the problem since the number of accidents attributable to car phone use is more closely related to inattention than manual dexterity. *See id.* Punishing the careless use of car phones would permit and promote safe use of the phones without denying individuals the benefits that accompany car phones.

238. Marco R. della Cava, *Luxury-Car Makers Happily Cater to Any Whim*, USA TODAY, Feb. 16, 1998, at 3B.

239. *See* Hanna, *supra* note 1.

240. *See id.*

241. *See id.*

negligence would achieve the desired result of ensuring a conviction, thereby allowing punishment of this crime and serving as a deterrent to the careless use of safety devices.

Measuring the careless use of a smoke detector against the principle that legislatures should follow when criminalizing conduct based on ordinary negligence yields the proper result. After all, failure to properly maintain a smoke detector can cause death or serious bodily injury. Section one of the principle requires proof that a significant portion of the population regularly engages in such conduct.[242] In the United States, most homes are equipped with smoke detectors. Section two requires a legislative finding that significant harm will result from the negligent use of the instrument.[243] Smoke alarms are installed as a safety measure. Thus, the failure to properly maintain and use a safety device necessarily will result in a condition that is less safe than one in which the safety device is properly installed. Applying section three, a reasonable person should know that the failure to maintain a working smoke detector could result in harm.[244] It is entirely appropriate to punish the careless maintenance of smoke detectors since substantial harm may result therefrom, and there is a reasonable expectation that the punishment will deter others.

The past few decades have yielded a host of safety devices and technological advances which, when carelessly used or maintained, threaten the safety of a significant portion of the population. In addition to smoke detectors, society has come to rely on window-guards, child safety seats, and bicycle helmets to save them from potential dangers. Legislators have focused on the importance of installing and using these devices, often making it a strict liability offense for failure to install and use them.[245]

242. *See supra* text accompanying note 208-09.

243. *See supra* text accompanying notes 210-14.

244. *See supra* text accompanying note 208.

245. *See, e.g.*, People v. Nemadi, 531 N.Y.S.2d 693 (N.Y. Crim. Ct. 1988) (discussing city health and administrative code provisions that require the installation of window guards in apartments inhabited by children under the age of eleven on a strict liability basis). Several states have also enacted legislation requiring use of child safety seats. For example, Alabama provides:

> It is unlawful (1) For any person under the age of sixteen years to operate or be a passenger on a bicycle unless at all times the person wears a protective bicycle helmet of good fit fastened securely upon the head with the straps of the helmet. (2) For any person to operate a bicycle with a passenger who weighs less than forty pounds or is less than forty inches in height unless the passenger is properly seated in and adequately secured in a restraining seat.

ALA. CODE § 32-5A-283 (1997). Connecticut has a similar statute which provides:

> Any person who transports a child under the age of four years, weighing less than forty pounds, in a motor vehicle on the highways of this state shall provide and require the child to use a child restraint system approved pursuant to regulations adopted by the Department of Motor Vehicles . . . .

These regulations result in minimal financial penalties and do not attach significant punishment for improper maintenance.[246] The mere presence of a safety device, however, will not provide protection from harm. The safety device must be properly maintained to work. Failure to assign meaningful punishment to the failure to properly use or maintain safety devices will result in society's inability to use sanctions for such careless conduct as a deterrent to guard from future harm.[247]

V. CONCLUSION

The criminal law protects society from harm by punishing conduct for deterrent purposes and thereby alerting others that they must change their course of conduct to avoid criminal sanctions.[248] Although legal theorists and jurisprudential scholars generally support this theory of deterrence, some question the validity of punishing ordinary negligent conduct under any theory of punishment.[249] On balance, however, punishing ordinary negligent conduct as a means to promote greater societal safety outweighs the private interests of the individual. Justice Holmes supported this position, asserting that punishment of the individual is appropriate when it will induce others to conform to societal rules.[250]

Courts and legislatures have provided for punishment of ordinary negligent conduct when a defendant carelessly handles an inherently dangerous instrument, engages in an inherently dangerous activity, or causes widespread public harm.[251] Punishment in these instances is justified since the need for punishment as a deterrent is paramount to the rights of the

CONN. GEN. STAT. ANN. § 14-100(d) (West Supp. 1998).

246. *See supra* note 34-37 and accompanying text.

247. Criminalizing negligent misconduct that has a widespread potential for serious harm will affect the basis for tort recovery. It is widely held that the violation of a criminal statute may constitute negligence per se, relieving the plaintiff of the burden of proving negligence and shifting to the defendant the burden of showing an adequate excuse for such misconduct. *See* Keith v. Beard, 464 S.E.2d 633 (Ga. Ct. App. 1995); Martin v. Herzog, 126 N.E. 814 (N.Y. 1920); Ott v. Pittman, 463 S.E.2d 101 (S.C. Ct. App. 1995); RESTATEMENT (SECOND) OF TORTS § 286, 288A (1965). *But see* Young v. Butts, 685 N.E.2d 147, 151 (Ind. Ct. App. 1997) (violation of a motor vehicle statute is not negligence per se, rather it creates a rebuttable presumption of negligence, which can be overcome by evidence that the person who violated the statute acted reasonably). Expanding the criminal law to include additional substandard conduct, therefore, may enhance its deterrent effect since the criminalization may create an additional punitive sanction for the negligent individual. *See* Commonwealth v. Breighner, 684 A.2d 143, 148 (Pa. 1996) (where violation of a statute is negligence per se, "success in the criminal suit would be of great benefit in the civil suit.").

248. *See* discussion *supra* Part II; *see supra* notes 15-18, 20 and accompanying text.

249. *See supra* notes 24-27 and accompanying text.

250. *See supra* notes 29-31 and accompanying text.

251. *See* discussion *supra* Parts III.C-E.

individual. However, punishing careless conduct is not always appropriate and should only be permitted under certain circumstances since society must also ensure that the individual will remain free from punishment unless such punishment is essential to promoting public safety. Legislatures should limit criminal punishment to instances when there is a reasonable expectation that the prohibited conduct can be deterred. It is appropriate for legislatures to criminalize ordinary negligent conduct when (1) a significant portion of the population regularly engages in such conduct; (2) such conduct will cause harm to a significant portion of the population; and (3) a reasonable person would know that the conduct is likely to cause harm.

As society advances beyond the current frontiers of the technological revolution, we are increasingly prone to more distractions. While the new millennium offers the potential for new safety devices, technological advances, and activities involving equipment or substances yet to be discovered, careless use of these instruments or participation in particular activities involving these discoveries is likely to yield a significant type of harm against which criminal law must protect. However, when enacting new laws to prohibit specific negligent conduct, legislatures must be reasonably sure that new crimes do not result in an undue curtailment of the individual's rights.

Legislatures that enact new laws pursuant to the above-defined principle can remain confident that such laws will promote societal safety while avoiding unnecessary prosecution. Limiting criminal punishment to instances in which an actor failed to use due care and to situations when sections one and two of the above-defined principle have been met will set reasonable boundaries and will guard against the potential for unfair punishment. Indeed, following the principle will provide a logical approach toward criminalizing negligence.

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CHAOS, COMPLEXITY, AND COEVOLUTION: THE WEB OF LAW, MANAGEMENT THEORY, AND LAW RELATED SERVICES AT THE MILLENNIUM*

THOMAS EARL GEU**

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* The first two parts of this article are printed here. The remainder of this article, including the appendix, will be printed in the Fall 1998 issue of the *Tennessee Law Review*. *See* Thomas Earl Geu, *Chaos, Complexity, and Coevolution: The Web of Law, Management Theory, and Law Related Services at the Millennium* (pts. III-V), 66 TENN. L. REV. (forthcoming 1998).

** Professor, University of South Dakota School of Law. Professor Geu's earlier works on the subjects of this article include: Thomas Earl Geu, *The Tao of Jurisprudence: Chaos, Brain Science, Synchronicity, and the Law*, 61 TENN. L. REV. 933 (1994), and Thomas Earl Geu & Martha S. Davis, *Work: A Legal Analysis in the Context of the Changing Transnational Political Economy*, 63 U. CIN. L. REV. 1679 (1995).

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56.06 INVOLUNTARY MANSLAUGHTER

A. (The defendant is charged with the crime of involuntary manslaughter. The defendant pleads not guilty.)

B. (If you do not agree that the defendant is guilty of voluntary manslaughter, you should then consider the lesser included offense of involuntary manslaughter.)

To establish this charge, each of the following claims must be proved:

1. That the defendant unintentionally killed _____;

2. That it was done:

(a) recklessly;

or

(b) (while in the commission of) (while attempting to commit) (in flight from [committing] [attempting to commit]) _____;

or

(c) during the commission of a lawful act in an unlawful manner; and

3. That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.

Notes on Use

For authority, see K.S.A. 21-3404. Involuntary manslaughter is a severity level 5, person felony.

If the information charges involuntary manslaughter, omit paragraph B; but if the information charges a higher degree, omit paragraph A. See PIK 3d 68.09, Lesser Included Offenses, and 69.01, Murder in the First Degree With Lesser Included Offenses, for lead-in instructions on lesser included offenses. K.S.A. 21-3404(b) provides that a felony or a misdemeanor can serve as the basis for an involuntary manslaughter charge if the statute was enacted for the protection of

human life or safety and is not an inherently dangerous felony as defined in K.S.A. 21-3436. K.S.A. 8-1566 and 8-1568 are specifically cited as misdemeanors which were enacted for the protection of human life or safety.

The elements of this crime were modified effective July 1, 1993. For instructions under prior law, see PIK 2d 56.06, Involuntary Manslaughter.

Comment

See Comment to PIK 3d 56.01, Murder in the First Degree, on the duty of the trial court to instruct on lesser included offenses in homicide cases.

The use of excessive force may be found to be an "unlawful manner" of committing the "lawful act" of self-defense, and thereby supply an element of involuntary manslaughter. *State v. Gregory*, 218 Kan. 180, 542 P.2d 1051 (1975). *State v. Warren*, 5 Kan. App. 2d 754, 624 P.2d 476, *rev. denied* 229 Kan. 671 (1981).

In *State v. Collins*, 257 Kan. 408, 893 P.2d 217 (1995), the court ruled that Kansas does not recognize the crime of attempted involuntary manslaughter.

In *State v. Robinson*, 261 Kan. 865, 934 P.2d 38 (1997), the Supreme Court examined the difference between unintentional second degree murder (depraved heart murder) and reckless involuntary manslaughter. Depraved heart second degree murder requires a conscious disregard of the risk, sufficient under the circumstances to manifest extreme indifference to the value of human life. Recklessness that can be assimilated to purpose or knowledge is treated as depraved heart second degree murder, and less extreme recklessness is punished as manslaughter. Although indifference to the value of human life in general is often present in crimes prosecuted as depraved heart murder, extreme indifference to the value of one specific human life is enough to satisfy the elements of depraved heart second degree murder.

In *State v. Bailey*, 263 Kan. 685, 952 P.2d 1289 (1998), the Supreme Court affirmed a trial court's refusal to instruct the jury on reckless second degree murder and reckless involuntary manslaughter as lesser included offenses of first degree murder. The court reasoned that a defendant's actions in pointing a gun at an individual and pulling the trigger are intentional rather than reckless even if the defendant did not intend to kill the victim.

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Offense - Driving Under the Influence of Alcohol or Drugs, and 70.01-A, Traffic Offense - Alcohol Concentration .08 or More.

The Uniform Controlled Substances Act, which in 1972 replaced the Uniform Narcotic Drug Act and the act pertaining to Hypnotic, Somnifacient or Stimulating Drugs, defines the term "narcotic drug" in K.S.A. 65-4101(p). The definition includes the term "opium and opiate," and a detailed definition of "opiate" is provided in K.S.A. 65-4101(q). The terms "hypnotic drug," "somnifacient drug," and "stimulating drug" are not expressly defined in the statutes.

56.07 VEHICULAR HOMICIDE

The defendant is charged with the crime of vehicular homicide. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. **That the defendant unintentionally killed _____ by the operation of (an automobile) (an airplane) (a motorboat) (other motor vehicle);**
2. **That the defendant operated the vehicle in a manner which created an unreasonable risk of injury to the person or property of another; and**
3. **That the defendant operated the vehicle in a manner which constituted a material deviation from the standard of care which a reasonable person would observe under the same circumstances; and**
4. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3405. Vehicular homicide is a class A, person misdemeanor.

Comment

The gravamen of the offense prior to the 1972 amendment was simple negligence. However, the Court in *State v. Gordon*, 219 Kan. 643, 654, 549 P.2d 886 (1976), held that legislative intent contemplated "something more than simple negligence."

Where the homicide is unintentional and caused by the operation of a motor vehicle, the statute is concurrent with and controls the general statute on involuntary manslaughter, K.S.A. 21-3404. But, where the charge is involuntary manslaughter and the issue is whether or not the conduct of the accused was wanton, vehicular homicide would be a lesser included offense of involuntary

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manslaughter and the jury should be instructed thereon. *State v. Makin*, 223 Kan. 743, 576 P.2d 666 (1978); *State v. Choens*, 224 Kan. 402, 580 P.2d 1298 (1978). See PIK 3d 56.06, Involuntary Manslaughter.

Contributory negligence of the decedent is no defense. It is a circumstance to be considered along with all other evidence to determine whether the defendant's conduct was or was not the direct cause of decedent's death. The decedent's negligence may have been such a substantial factor in his death as to be itself the cause. *State v. Gordon*, supra.

In *State v. Boydston*, 4 Kan. App. 2d 540, 609 P.2d 224 (1980), the defendant requested an instruction that a material deviation lies between ordinary negligence and wanton conduct. The Court held it was not necessary to define a material deviation. Failure to yield the right of way, or to stop at a stop sign, or reckless driving are not lesser degrees of vehicular homicide as none of these offenses have elements which are necessary elements of this crime.

The misdemeanor-manslaughter rule has been abandoned in England, the Model Penal Code, and in a growing number of states.[97] Manslaughter is now committed in such jurisdictions, whether the act be lawful or unlawful, only if the death is caused recklessly or with criminal negligence.[98]

§ 169. Criminal negligence.

An unintended killing in the performance of a lawful act with criminal negligence constitutes involuntary manslaughter.[99]

Although basically this common law conception of the offense

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97. See ALI, Model Penal Code, § 201.3, Tent. Draft No. 9, Comment at 40–41 (1959).

98. See e.g., Me Rev Stats Ann, 17-A § 203(1) ("A person is guilty of manslaughter if that person: A. Recklessly, or with criminal negligence, causes the death of another human being."); Utah Code Ann, § 76-5-205(1) ("Criminal homicide constitutes manslaughter if the actor: (a) recklessly causes the death of another."); ALI, Model Penal Code, § 210.3(1) (1985) ("recklessly").

99. McDaniel v State (1908) 156 **Ala** 40, 46 So 988.

State v Sorensen (1969) 104 **Ariz** 503, 455 P2d 981.

State v Toczko (1990) 23 **Conn** App 502, 582 A2d 769 (conspiracy to commit manslaughter required logical impossibility that defendant intend that unintended death result, and hence trial judge's acceptance of jury's verdict on that charge was improper).

People v Tarpley (1972, 4th Dist) 8 **Ill** App 3d 960, 291 NE2d 262 (it is reckless to point a loaded gun at another).

People v Charles (1973, 1st Dist) 15 **Ill** App 3d (abstract) 973, 305 NE2d 570.

People v Bauman (1975, 1st Dist) 34 **Ill** App 3d 582, 340 NE2d 178.

People v Farmer (1977, 5th Dist) 50 **Ill** App 3d 111, 7 Ill Dec 892, 365 NE2d 177, appeal after remand (5th Dist) 91 Ill App 3d 262, 46 Ill Dec 726, 414 NE2d 779.

State v Wilbanks (1929) 168 **La** 861, 123 So 600.

State v Masino (1949) 216 **La** 352, 43 So 2d 685, 14 ALR2d 720.

Commonwealth v Hartwell (1880) 128 **Mass** 415.

State v Millin (1927) 318 **Mo** 553, 300 SW 694.

State v Studebaker (1933) 334 **Mo** 471, 66 SW2d 877.

State v Davis (1985, **Mo** App) 691 SW2d 333.

State v Weiner (1963) 41 **NJ** 21, 194 A2d 467.

State v Stitt (1908) 146 **NC** 643, 61 SE 566.

State v Tankersley (1916) 172 **NC** 955, 90 SE 781.

State v Schaeffer (1917) 96 **Ohio** St 215, 117 NE 220.

Clark v State (1924) 27 **Okla** Crim 11, 224 P 738.

State v Newberg (1929) 129 **Or** 564, 278 P 568, 63 ALR 1225.

Copeland v State (1926) 154 **Tenn** 7, 1 Smith 7, 285 SW 565, 49 ALR 605.

Roe v State (1962) 210 **Tenn** 282, 358 SW2d 308.

Gribble v State (1919) 85 **Tex** Crim 52, 210 SW 215, 3 ALR 1096.

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is still reflected in the law, the statutory pattern varies somewhat throughout the states. To illustrate: In California[1] and Idaho,[2] a defendant commits involuntary manslaughter when he causes the death of another in the performance of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection; in Florida, a defendant commits manslaughter when he causes the death of another with culpable negligence;[3] in Minnesota, a defendant commits manslaughter in the second degree when he causes the death of another by culpable negligence, by shooting him under the belief he is a deer or other animal, by setting a spring gun, snare, or other dangerous device, or by allowing an animal with vicious propensities to run at large;[4] in Maine, a defendant commits manslaughter when he causes the death of another recklessly or with criminal negligence;[5] in Colorado,[6] Utah,[7] and under the Model Penal Code,[8] a defendant commits manslaughter when he causes the death of another recklessly, and a defendant commits negligent homicide when he causes the death of another negligently; in Connecticut, a defendant commits manslaughter in the first degree when, under circumstances evincing an extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of such other

Goodman v Commonwealth (1929) 153 **Va** 943, 151 SE 168.

Beck v Commonwealth (1975) 216 **Va** 1, 216 SE2d 8.

State v Brubaker (1963) 62 **Wash** 2d 964, 385 P2d 318.

Annotations: Criminal liability for injury or death caused by operation of pleasure boat, 8 ALR4th 886.

Degree of homicide as affected by accused's religious or occult belief in harmlessness of ceremonial or ritualistic acts directly causing fatal injury, 78 ALR3d 1132.

Liability for injuries or death resulting from physical therapy, 53 ALR3d 1250.

1. Cal Penal Code, § 192(b).

2. Idaho Code, § 18-4006(2) ("in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection; or in the operation of any firearm or deadly weapon in a reckless, careless or negligent manner which produces death").

3. Fla Stats Ann, § 782.07.

4. Minn Stats Ann, § 609.205.

5. Me Rev Stats Ann, 17-A § 203(1)(A).

6. Colo Rev Stats, §§ 18-3-104(1)(a), 18-3-105.

7. Utah Code Ann, §§ 76-5-205(1)(a), 76-5-206.

8. ALI, Model Penal Code, §§ 210.3(1)(a), 210.4(1) (1985).

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person,[9] a defendant commits manslaughter in the second degree when he causes the death of another recklessly,[10] and a defendant commits criminally negligent homicide when he causes the death of another with criminal negligence.[11]

As illustrated above, many modern penal codes, following the lead of the Model Penal Code, have in effect subdivided common law involuntary manslaughter into two offenses: manslaughter and the lesser offense of negligent homicide. A "reckless"[12] killing is manslaughter, and a "negligent"[13] killing is negligent homicide. The difference between the terms "recklessly" and "negligently", as ordinarily defined in modern penal codes, is one of kind, rather than of degree. Each defendant creates a risk of harm. The reckless defendant is aware of the risk and disregards it; the negligent actor is not aware of the risk but should have been aware of it.[14] Moreover, as ordinarily defined, the terms "recklessness" and "negligence"—as well as such terms as criminal

9. Conn Gen Stats, § 53a-55(a)(3).

State v Knighton (1986) 7 **Conn** App 223, 508 A2d 772 (defendant's admission that homicide was intentional did not preclude charge of first-degree manslaughter or instruction on first-degree manslaughter as lesser included offense of murder, where jury could have found that defendant's course of conduct did not indicate an intent to kill or to cause serious physical injury but only indicated recklessness).

State v Pitt (1992) 28 **Conn** App 825, 612 A2d 60, app den 224 Conn 907, 615 A2d 1049 (instruction on first-degree manslaughter gave jury a clear understanding of aggravated form of recklessness required to support first-degree manslaughter conviction, despite court's failure to define statutory terms "extreme indifference to human life" and "grave risk of death").

10. Conn Gen Stats, § 53a-56(a)(1).

11. Conn Gen Stats, § 53a-58(a).

12. See e.g., Colo Rev Stats, § 18-1-501(8); Conn Gen Stats, § 53a-3(13); NH Rev Stats Ann, § 626:2(II)(c); NY Penal Law, § 15.05(3); Utah Code Ann, § 76-2-103(3); ALI, Model Penal Code, § 2.02(2)(c) (1985).

13. See e.g., Colo Rev Stats, § 18-1-501(3); Conn Gen Stats, § 53a-3(14); NH Rev Stats Ann, § 626:2(II)(d); NY Penal Law, § 15.05(4); Utah Code Ann, § 76-2-103(4); ALI, Model Penal Code, § 2.02(2)(d) (1985).

14. People v Kern (1990) 75 **NY**2d 638, 555 NYS2d 647, 554 NE2d 1235, post-conviction proceeding 147 Misc 2d 269, 556 NYS2d 215 and cert den 498 US 824, 112 L Ed 2d 50, 111 S Ct 77 (defendants were properly convicted of manslaughter for recklessly causing victim's death, where they were aware of the risk of death to victim whom they had chased out onto six-lane highway and they consciously disregarded that risk).

People v Boutin (1990) 75 **NY**2d 692, 556 NYS2d 1, 555 NE2d 253 (unexplained failure of driver to see vehicle with which he subsequently collided does not, without more, support conviction for criminally negligent homicide).

Allstate Ins. Co. v Zuk (1991) 78 **NY**2d 41, 571 NYS2d 429, 574 NE2d 1035.

People v Racine (1987, 3d Dept) 132 App Div 2d 899, 518 **NY**S2d 458.

negligence, culpable negligence, and gross negligence—are intended to connote deviations from reasonableness significantly greater in degree than the ordinary kinds of misfeasance which may suffice for civil purposes.[15]

People v Sands (1990, 4th Dept) 159 App Div 2d 984, 552 **NYS**2d 756 (manslaughter defendant was aware of and consciously disregarded risk that his passengers or other users of road might be killed as a result of his conduct, where he was knowingly driving mechanically deficient car while intoxicated, was driving at 75 to 80 miles per hour on a winding two-lane secondary road, failed to stop at stop sign, and attempted to negotiate a curve at high speed).

State v Tranby (1989, **ND**) 437 NW2d 817, cert den 493 US 841, 107 L Ed 2d 88, 110 S Ct 128 (evidence was sufficient to support verdict of criminally negligent homicide, where defendant, while intoxicated, took four members of his family out on river in small, relatively unstable boat when darkness was nearing, current was strong, and weather conditions were adverse, defendant did not place two infant passengers, who could not swim, into personal flotation devices, defendant's actions caused boat to capsize, and infants drowned).

15. See e.g., Colo Rev Stats, §§ 18-1-501(8), 18-1-501(3); Conn Gen Stats, §§ 53a-3(13), 53a-3(14); NH Rev Stats Ann, §§ 626:2(II)(c); 626:2(II)(d); NY Penal Law, §§ 15.05(3), 15.05(4); Utah Code Ann, §§ 76-2-103(3), 76-2-103(4); ALI, Model Penal Code, §§ 2.02(2)(c), 2.02(2)(d) (1985).

State v Sorensen (1969) 104 **Ariz** 503, 455 P2d 981.

Somers v Superior Court of Sacramento County (1973, 3rd Dist) 32 **Cal** App 3d 961, 108 Cal Rptr 630.

People v Wong (1973, 1st Dist) 35 **Cal** App 3d 812, 111 Cal Rptr 314.

People v Morales (1975, 4th Dist) 49 **Cal** App 3d 134, 122 Cal Rptr 157.

State v Brooks (1960) 187 **Kan** 46, 354 P2d 89.

State v Ritchie (1991, **La**) 590 So 2d 1139 (Conviction of defendant under portion of statute providing that any person who by operation of water craft in careless, reckless, or negligent manner who causes death of another is guilty of negligent homicide would be reversed, where trial court improperly instructed jury that under statute negligence was defined as ordinary negligence rather than criminal negligence. Statute requires reckless conduct in order to sustain conviction.).

State v Gibson (1968) 4 **Md** App 236, 242 A2d 575, affd 254 Md 399, 254 A2d 691.

People v Boutin (1990) 75 **NY**2d 692, 556 NYS2d 1, 555 NE2d 253.

People v McCart (1990, 4th Dept) 157 App Div 2d 194, 555 **NYS**2d 954, app den 76 NY2d 861, 560 NYS2d 1000, 561 NE2d 900.

Frey v State (1953) 97 **Okla** Crim 410, 265 P2d 502.

State v Lunt (1969) 106 **RI** 379, 260 A2d 149.

Roe v State (1962) 210 **Tenn** 282, 358 SW2d 308.

Tubman v Commonwealth (1986) 3 **Va** App 267, 348 SE2d 871.

State v Whatley (1933) 210 **Wis** 157, 245 NW 93, 99 ALR 749.

See also Commonwealth v Welansky (1944) 316 **Mass** 383, 55 NE2d 902 ("The words 'wanton' and 'reckless' are thus not merely rhetorical or vituperative expres-

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committed in "hot blood", but can be effected by the kind of mental trauma that caused defendant to brood over a period of time and then react violently, without apparent provocation).

3.

State v. Person, 236 Conn. 342, 673 A.2d 463 (1996) (expert testimony is not required to establish extreme emotional disturbance as a defense to murder).

People v. Domblewski, 238 A.D.2d 916, 661 N.Y.S.2d 128 (4th Dep't 1997), appeal denied, 90 N.Y.2d 904, 663 N.Y.S.2d 516, 686 N.E.2d 228 (1997).

People v. Gabriel, 241 A.D.2d 835, 661 N.Y.S.2d 306 (3d Dep't 1997), appeal denied, 91 N.Y.2d 892, 669 N.Y.S.2d 6, 691 N.E.2d 1032 (1998).

People v. Gonzalez, 249 A.D.2d 41, 670 N.Y.S.2d 849 (1st Dep't 1998).

§ 158 — Words and gestures

n. 35.

MacEwan v. State, 701 So. 2d 66 (Ala. Crim. App. 1997) (mere words, whether they consist of threatened future adultery, committed past adultery, or other language, no matter how abusive or insulting, will not reduce homicide from murder to manslaughter).

Bone v. State, 706 So. 2d 1291 (Ala. Crim. App. 1997) (although mere appearance of imminent assault may be sufficient to arouse "heat of passion," mere words or gestures will not reduce homicide from murder to manslaughter).

Madison v. State, 718 So. 2d 90 (Ala. Crim. App. 1997), aff'd, 718 So. 2d 104 (Ala. 1998) (mere words or gestures will not reduce homicide from murder to manslaughter).

State v Runningeagle (1993) 176 Ariz 59, 859 P2d 169, 137 Ariz Adv Rep 21, motion ... (Ariz) 1993 Ariz LEXIS 71 and cert den ... 126 L Ed 2d 574, 114 S Ct 609.

People v Hightower (1994, 5th Dist) 258 Ill App 3d 517, 196 Ill Dec 353, 629 NE2d 1197, app den 156 Ill 2d 562, 202 Ill Dec 926, 638 NE2d 1120.

State v. Haque, 1999 ME 30, 726 A.2d 205 (Me. 1999) (to reduce murder to manslaughter based on adequate provocation, mere words alone, however inflammatory or opprobrious, do not suffice).

Com. v. Niemic, 427 Mass. 718, 696 N.E.2d 117 (1998) (mere insulting words and threatening gestures alone with nothing else do not constitute adequate provocation to reduce a killing from murder to manslaughter).

State v. Jones, 979 S.W.2d 171 (Mo. 1998), cert. denied, 525 U.S. 1112, 119 S. Ct. 886, 142 L. Ed. 2d 785 (1999) (capital murder defendant, who killed his grandmother after she criticized him for his drinking and cocaine problems, was not entitled to jury instruction on voluntary manslaughter).

State v Jumpp (1993) 261 NJ Super 514, 619 A2d 602, certif den 134 NJ 474, 634 A2d 522.

State v Collins (1994, Cuyahoga Co) 97 Ohio App 3d 438, 646 NE2d 1142 (victim's words to assailant," what's up now, punk bitch?" did not warrant reduction in assailant's charge from murder to manslaughter).

n. 36.

State v Lowry (1993, SC) 434 SE2d 272 (trial court in murder prosecution erred in failing to instruct on voluntary manslaughter, where record supported theory that defendant shot and killed victim in response to heated argument and victim's conduct in raising his arms in what defendant could have interpreted as threatened assault).

§ 165 — Adultery, seduction

n. 77.

But see Speake v State (1992, Ala Crim App) 610 So 2d 1238, reh den, without op (Ala Crim App) 1992 Ala Crim App LEXIS 1720 and cert den, without op (Ala) 1992 Ala LEXIS 1592 (mere admissions of infidelity do not constitute legal provocation warranting reduction of offense from murder to voluntary manslaughter).

n. 80.

Com. v. LeClair, 429 Mass. 313, 708 N.E.2d 107 (1999) (sudden oral revelation of infidelity may be sufficient provocation to reduce murder to manslaughter).

State v. Cooley, 342 S.C. 63, 536 S.E.2d 666 (2000) (while adultery may, in some instances, serve as adequate provocation to warrant a voluntary manslaughter charge, spousal adultery is not a license to kill).

n. 82.

Com. v. LeClair, 429 Mass. 313, 708 N.E.2d 107 (1999).

III. INVOLUNTARY MANSLAUGHTER

§ 169 Criminal negligence

n. 99.

State v. Eversley, 706 So. 2d 1363 (Fla. Dist. Ct. App. 2d Dist. 1998), review granted, 718 So. 2d 167 (Fla. 1998).

Commonwealth v Long (1993) 425 Pa Super 170, 624 A2d 200, app den 535 Pa 645, 633 A2d 150 (evidence was sufficient to support defendant's convictions for involuntary manslaughter and homicide by watercraft where, when victim swam toward defendant's power boat and attempted to climb on board, defendant pulled boat away from him three times, defendant then made circles in water causing waves that swept over victim's head, and, when victim started screaming for help, defendant and his companions started throwing beer cans at victim and then sped away).

See also State v Gorman (1994, Me) 648 A2d 967 (Evidence was sufficient to support guilty verdict in non-jury trial on issues of criminal negligence and recklessness in connection with boat collision in which defendant's boat hit smaller boat, killing one person and seriously injuring another; because of planing, bow of defendant's boat was up in air, blocking his view as boat travelled some 400 yards, at 30 miles per hour, prior to striking other boat.); State v Pittera (1994) 139 NH 257, 651 A2d 931 (defendant was properly convicted of negligent homicide where jury could have found that reasonable person, in defendant's place, would have seen victim in water and avoided hitting him, and that defendant was traveling rapidly through cove area, containing numerous docks and adjacent to known swimming area, while watching shoreline).

n. 5.

State v. Brooks, 163 Vt. 245, 658 A.2d 22 (1995).

n. 14.

State v. Stanislaw, 153 Vt. 517, 573 A.2d 286 (1990).

State v. Brooks, 163 Vt. 245, 658 A.2d 22 (1995) (in jury instruction in involuntary manslaughter prosecution, trial court's use of term "reasonable person" instead of "law-abiding person", when describing standard for assessing the nature of the risk, did not amount to plain error).

n. 15.

State v. Brooks, 163 Vt. 245, 658 A.2d 22 (1995).

§ 170 — Vehicular homicide

n. 16.

Michel v. State, 752 So. 2d 6 (Fla. Dist. Ct. App. 5th Dist. 2000), review denied, 766 So. 2d 222 (Fla. 2000) (Defendant, who was owner/passenger of vehicle, could be convicted of vehicular homicide, even though he was not driving truck when accident occurred; defendant procured codefendant's aid in driving vehicle, while he sat in passenger seat, vehicle was being driven too slowly at night, without tail lights or brake lights.).

State v Dominguez (1992, Iowa) 482 NW2d 390 (in prosecution for vehicular manslaughter, trial judge properly refused to instruct that involuntary manslaughter was lesser included offense).

See also Nelson v. State, 224 Ga. App. 623, 481 S.E.2d 605 (1997) (in prosecution for driving improperly equipped vehicle, state was not required to prove guilty knowledge, where charge of driving improperly equipped vehicle was strict criminal liability motor vehicle safety statute, which could be violated without showing of mens rea or guilty knowledge).

Add after note 16:

With respect to the related offense of "drunken driving", it is ordinarily required or assumed that the conduct occur on a public highway. In some cases, however, the pertinent statute is construed to prohibit such conduct even on a privately owned road or field,[16.1] or parking lot.[16.2]

[16.1]Allen v. Girard, 155 Ariz. 134, 745 P.2d 192 (Ct. App. Div. 2 1987).

Sanders v. State, 312 Ark. 11, 846 S.W.2d 651, 52 A.L.R.5th 939 (1993) (defendant drove vehicle off privately owned road and into a ditch while intoxicated).

Fitch v. State, 313 Ark. 122, 853 S.W.2d 874 (1993).

Hill v. State, 315 Ark. 297, 868 S.W.2d 44 (1993).

People v. Malvitz, 11 Cal. App. 4th Supp. 9, 14 Cal. Rptr. 2d 698 (1992).

Goldstein v. State, 223 So. 2d 354 (Fla. Dist. Ct. App. 3d Dist. 1969).

Zink v. State, 448 So. 2d 1196 (Fla. Dist. Ct. App. 1st Dist. 1984).

State v. Watson, 71 Haw. 258, 787 P.2d 691 (1990).

City of Highland Park v. Block, 48 Ill. App. 3d 241, 6 Ill. Dec. 285, 362 N.E.2d 1107 (2d Dist. 1977).

