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THE OTHER TRAGEDY OF VEHICULAR RELATED DEATHS IN OHIO'S CRIMINAL STATUTES

I. INTRODUCTION

Ohio's vehicular homicide related statutes¹ and involuntary manslaughter statute² overlap substantially. The homicide statutes consist of aggravated vehicular homicide and vehicular homicide. Aggravated vehicular homicide is a *felony* arising from the reckless operation of a motor vehicle.³ Vehicular homicide is a *misdemeanor* arising from the negligent operation of a motor vehicle.⁴ Causing the death of another while committing either a *felony* or a *misdemeanor* gives rise to involuntary manslaughter.⁵ The involuntary manslaughter statute does not exclude vehicular related deaths from its coverage. Consequently, the driver of a vehicle involved in an accident resulting in another's death can be charged with all three offenses, acquitted of the vehicular related homicides and yet, stand convicted of involuntary manslaughter.⁶

This overlap has resulted in the application of involuntary manslaughter rather than the vehicular homicide statutes, even though the resulting death was proximately caused by the operation of a motor vehicle.⁷ As a result, both the aggravated vehicular homicide and vehicular homicide statutes become nugatory statutes. The Ohio legislature, in enacting the vehicular related homicide statutes, provided a means of responding to the tragic loss of lives resulting from automobile acci-

1. OHIO REV. CODE ANN. § 2903.06 (Baldwin Supp. 1990) (aggravated vehicular homicide); *id.* § 2903.07 (vehicular homicide).

2. *Id.* § 2903.04 (Baldwin 1986).

3. *Id.* § 2903.06 (Baldwin Supp. 1990).

4. *Id.* § 2903.07.

5. *Id.* § 2903.04 (Baldwin 1986). The statute provides:

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

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

Id.

6. *State v. Lacy*, No. H-86-2 (Ohio Ct. App. Nov. 21, 1986) (LEXIS, Ohio library, App file); *State v. Centers*, No. 9380 (Ohio Ct. App. May 19, 1986) (LEXIS, Ohio library, App file); *State v. White*, No. 85-958 (Ohio Ct. App. Mar. 13, 1986); *State v. Davis*, 13 Ohio App. 3d 265, 469 N.E.2d 83 (1983).

7. *E.g.*, *State v. Chippendale*, 52 Ohio St. 3d 118, 556 N.E.2d 1134 (1990); *State v. Centers*, No. 9380 (Ohio Ct. App. May 19, 1986) (LEXIS, Ohio library, App file); *State v. Davis*, 13 Ohio App. 3d 265, 469 N.E.2d 83 (1983).

dents.⁸ These statutes were expressly designed to punish those who recklessly or negligently operate a motor vehicle and cause another's death.⁹ If a jury acquits the accused of either of those offenses, punishment is not warranted. Thus, by displacing these statutes with a conviction of involuntary manslaughter for the same conduct, the courts are not acting consistently with that purpose. The legislature essentially carved out from the involuntary manslaughter statute specific offenses and corresponding penalties for deaths caused by the operation of a motor vehicle. Although the breadth of the involuntary manslaughter statute can include vehicular related deaths,¹⁰ it should not be applied in that manner as either the main offense or a lesser included offense to aggravated vehicular homicide or vehicular homicide.

The other tragedy of vehicular related deaths under Ohio's criminal statutes occurs when there is a conviction and penalties are imposed for involuntary manslaughter where reckless or negligent conduct cannot be established to prove a violation of either section 2903.06 or 2903.07. The involuntary manslaughter penalties are harsher than the corresponding penalties for aggravated vehicular homicide and vehicular homicide.¹¹ Therefore, those convicted of involuntary manslaughter,

8. In 1970 there were 2,488 deaths as a result of motor vehicles accidents and 2,336 in 1972. UNITED STATES DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 600 (1976) (chart 1004).

9. §§ 2903.06-.07 (Baldwin Supp. 1990); see also OHIO LEGIS. SERV. COMM'N, PROPOSED OHIO CRIMINAL CODE 76, 77 (1971). This proposed code was the final report of the Technical Committee to Study Ohio Criminal Laws and Procedures [hereinafter The Technical Committee] and was made available to the public at the time of issuance. The Technical Committee was appointed by the Legislative Service Commission.

10. The death of another proximately caused by a person committing a misdemeanor traffic offense can give rise to involuntary manslaughter. § 2903.04 (Baldwin 1986).

11. Involuntary manslaughter based on a *felony*, a violation of section 2903.04(A), is an *aggravated felony* of the first degree. *Id.* § 2903.04(C). An aggravated felony of the first degree is punishable by a mandatory minimum of five years imprisonment with a maximum term of twenty-five years. *Id.* § 2929.11(B)(1)(a). Involuntary manslaughter based on a *misdemeanor*, a violation of section 2903.04(B), is an *aggravated felony* of the third degree. *Id.* § 2903.04(C). An aggravated felony of the third degree is punishable by a minimum of two years and a maximum of ten years imprisonment. *Id.* § 2929.11(B)(3)(a).

Aggravated vehicular homicide is a *felony* of the third degree. *Id.* § 2903.06(B) (Baldwin Supp. 1990). From 1974 until 1989, when section 2903.06(B) was amended, aggravated vehicular homicide was a *felony* of the fourth degree carrying a maximum penalty of five years. *Id.* §§ 2903.06(B), 2929.11(B)(7) (Baldwin 1986).

Vehicular homicide is a *misdemeanor* of the first degree. *Id.* § 2903.07(B) (Baldwin Supp. 1990). Imprisonment for a misdemeanor of the first degree cannot exceed six months. *Id.* § 2929.21(B)(1) (Baldwin 1986).

Thus, if the underlying conduct resulting in the vehicular related death was reckless (aggravated vehicular homicide), the range of imprisonment is two to ten years, and if the underlying conduct was negligent (vehicular homicide), imprisonment could not exceed six months. However, if the underlying conduct was neither reckless nor negligent, but a *misdemeanor* was committed, an individual could still be imprisoned up to ten years for a conviction of involuntary

and not aggravated or vehicular homicide, for a vehicular related death are serving prison terms inconsistent with the penalties that Ohio's elected representatives deemed appropriate for the underlying conduct.

This article proposes that the offense of involuntary manslaughter should not apply to vehicular related deaths for four reasons. First, if the involuntary manslaughter statute is used in conjunction with vehicular related deaths it renders the aggravated vehicular homicide and vehicular homicide statutes useless.¹² Second, imposing a prison term under the involuntary manslaughter statute on an individual who caused a fatal car accident distorts the criminal penalty structure.¹³ Third, sentencing individuals who have been acquitted of aggravated vehicular homicide (recklessness) or vehicular homicide (negligence) under the involuntary manslaughter statute serves none of the underlying purposes for punishment in our criminal system.¹⁴ Finally, the use of the involuntary manslaughter statute for vehicular related deaths provides unlimited prosecutorial discretion because of the statute's pervasive scope.¹⁵

This article identifies three possible options available to the Ohio General Assembly to rectify the problems caused by the overlap of sections 2903.04 and 2903.06-.07. The first legislative option is to limit involuntary manslaughter charges to deaths caused by conduct other than the operation of a motor vehicle. A second option is to repeal the vehicular related homicide statutes and the involuntary manslaughter statute and replace them with a manslaughter statute based on differing culpable mental states. The last option is to restructure the penalties associated with the three existing statutes, giving involuntary manslaughter involving vehicular death the lowest penalty.

Absent a legislative amendment, an Ohio court's immediate response to these problems should be to require a finding of either reckless or negligent operation of a motor vehicle before an individual is *criminally* sanctioned for causing another's death. However, if the Ohio

manslaughter.

In most traffic accidents the individual at fault is given a traffic citation which is usually for a minor misdemeanor offense. The traffic laws encompass sections 4511.01 through 4511.99. With the exception of approximately five divisions, a first offense involving these laws is a minor misdemeanor. *Id.* § 4511.99 (Baldwin Supp. 1990). Generally, the five exceptions are: drunk driving (§ 4511.19 (Baldwin Supp. 1990)); driving with a suspended license (§ 4511.192 (Baldwin Supp. 1990)); drag racing on public roads (§ 4511.251 (Baldwin 1983)); placing injurious material on the highway (§ 4511.74 (Baldwin 1983)); and failure to provide ignition interlock devices on vehicles used by persons with restricted driving privileges (§ 4511.83 (Baldwin Supp. 1990)). *Id.* § 4511.99(A)-(B) (Baldwin Supp. 1990).

12. See *infra* text accompanying notes 74-126.

13. See *infra* text accompanying notes 127-50.

14. See *infra* text accompanying notes 151-68.

15. See *infra* text accompanying notes 169-82.

legislature fails to act and the courts insist on applying involuntary manslaughter, the statute should be narrowly construed and resulting penalties should be narrowly applied.

These proposals are based on: (1) the fact that the Ohio General Assembly has acted in this area by enacting the vehicular homicide related statutes; (2) "legislative history;"¹⁶ (3) statutory construction principles; and (4) the overall inconsistencies that result in the absence of corrective action.

II. BACKGROUND

A. Historical Development of Vehicular Related Crimes

In 1974, the Ohio General Assembly revised and recodified Ohio's criminal law,¹⁷ which was the first comprehensive revision of the criminal laws since 1815.¹⁸ The 1974 revision enacted, for the first time, separate statutes entitled "aggravated vehicular homicide"¹⁹ and "vehicular homicide."²⁰ The pertinent provisions of section 2903.06, aggravated vehicular homicide, provide:

(A) No person, while operating or participating in the operation of

16. References to "legislative history" are used loosely throughout this article. Ohio does not have a formal requirement that a legislative history be kept. The Legislative Service Commission [hereinafter LSC], whose sole function is to serve the Ohio General Assembly collects the legislators' bill files for microfilming. Those microfilms contain versions of bills which were not enacted and are available for reference purposes at libraries which have purchased the LSC's bill film. Telephone interview with Barbara Laughn, Ohio Legislative Service Commission. For information regarding bill analyses prepared by the LSC, see *infra* note 18.

17. H. No. 511, 1971-1972 Ohio Laws (pt. II) 1866. Although this bill was passed December, 1972, the effective date for most sections of the bill was January 1, 1974. *Id.* at 2035. See generally Goldsmith, *Involuntary Manslaughter: Review and Commentary on Ohio Law*, 40 OHIO ST. L.J. 569 (1979).

18. "The Act was not merely a recodification, but a comprehensive revision of the entire substantive criminal law of Ohio, the first since 1815." *In re Fox*, 60 Ohio Misc. 31, 33 (C.P. 1979). Similar information was also contained in the LSC's analysis of House Bill 511 for the 109th General Assembly. The analysis stated that "[a]lthough there have been interim recodifications and revisions of the criminal law, there has been no complete revision since 1815, to which date (or to as early as 1788) a major portion of Ohio's criminal statutes can trace their origin." OHIO LEGIS. SERV. COMM'N, 109th General Assembly, H. No. 511 analysis (microfilm). The LSC prepares analyses of bills, which are designed to assist members of the General Assembly by placing before them nutshell versions of the various bills put to a vote for enactment. These analyses are not properly termed "legislative history" but are microfilmed for the convenience of the public and available at purchasing libraries. Telephone interview with Barbara Laughn, Ohio Legislative Service Commission.

19. H. No. 511, *supra* note 17, § 2903.06, at 1901-02. This section was repealed and amended by a subsequent Act prior to the 1974 effective date of House Bill 511. H. No. 716, 1973 Ohio Laws (pt. I) 1929 (codified as amended at OHIO REV. CODE ANN. § 2903.06 (Baldwin Supp. 1990)).

20. H. No. 511, *supra* note 17, § 2903.07, at 1902. The original enactment of this section was also repealed and amended. H. No. 716, *supra* note 19, at 1929 (codified as amended at OHIO REV. CODE ANN. § 2903.07 (Baldwin Supp. 1990)).

a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall *recklessly* cause the death of another.

(B) Whoever violates this section is guilty of aggravated vehicular homicide, a felony of the fourth degree.²¹

The pertinent provisions of section 2903.07, vehicular homicide, provide:

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

(B) Whoever violates this section is guilty of vehicular homicide, a misdemeanor of the first degree.²²

The 1974 recodification was not the first, but rather the third time the Ohio General Assembly had segregated vehicular related homicides in the criminal code. A manslaughter offense provided the first recognition of criminal responsibility for traffic related deaths and the motor vehicle regulations the second. The historical development of the manslaughter offense and the General Assembly's switch from the criminal code to the motor vehicle regulations for sanctioning vehicle related deaths provide some insight into the enactment of the current vehicular homicide related statutes.

The manslaughter provision of the 1835 Ohio Code was limited to the commission of unlawful acts without malice that led unintentionally to another's death.²³ This particular manslaughter provision remained in the Code until 1877.²⁴

In 1935, the Ohio legislature classified manslaughter into first and second degrees.²⁵ Manslaughter in the first degree involved the unlawful killing of another without malice, thus, retaining the same language as the manslaughter statutes in effect from 1877 until 1935.²⁶ Manslaughter in the second degree involved the unlawful and unintentional killing of another while violating any state law, including traffic regula-

21. OHIO REV. CODE ANN. § 2903.06(A)-(B) (Baldwin Supp. 1990) (emphasis added).

22. *Id.* § 2903.07(A)-(B) (emphasis added).

23. 1835 Statutes of Ohio (Chase), ch. 830, § 3, at 1724.

24. Act of May 5, 1877, ch. 3, § 4, 1877 Ohio Laws 240, 244. This amendment deleted "commission of an unlawful act" and changed the basis of the manslaughter offense to "[w]hoever unlawfully kills another" without malice. *Id.*

25. S. No. 290, §§ 12404, 12404-1, 1935 Ohio Laws 205 (repealed S. No. 29, 1941 Ohio Laws 766, 804-05).

26. *Id.* § 12404. The first degree manslaughter statute provided, "[w]hoever unlawfully kills another, except in the manner described in the next five preceding sections, is guilty of manslaughter in the first degree, and shall be imprisoned in the penitentiary not less than one year nor more than twenty years." *Id.* Basically, the "five preceding sections" dealt with crimes of malice.

tions.²⁷ Although this was the first time that the Ohio manslaughter offense specifically provided for deaths caused by operation of a vehicle, Ohio courts had interpreted the pre-1935 manslaughter statutes to include deaths proximately caused by the use of a motor vehicle.²⁸ In 1941, the General Assembly passed the Uniform Traffic Act which had the effect of removing the manslaughter in the second degree offense from section 12404-1 and designating it as section 6307-18.²⁹

In 1967, homicide by vehicle in the first degree was enacted (section 4511.181) and second degree manslaughter, section 4511.18 was amended to homicide by vehicle in the second degree.³⁰ There was no specific reference to vehicle related deaths in chapter 29, the criminal section of the Code.³¹ First degree homicide by vehicle applied where a death proximately resulted from: (1) driving under the influence, (2) reckless operation, (3) drag racing, or (4) reckless operation off the street.³² Each of these causes involved some level of reckless conduct. A charge of second degree homicide by vehicle resulted from a death proximately caused by a violation of any traffic regulation, except those specified for first degree homicide by vehicle.³³

27. *Id.* § 12404-1. The second degree manslaughter statute provided:

Whoever shall unlawfully and unintentionally kill another while engaged in the violation of any law of this state applying to the use or regulation of traffic on, over or across the roads or highways shall be guilty of manslaughter in the second degree and shall be fined not to exceed five hundred (\$500.00) dollars or imprisoned in the county jail or workhouse not less than thirty days nor more than six months, or both, or imprisoned in the penitentiary not less than one year nor more than twenty years.

Id.

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

29. S. No. 29, 1941 Ohio Laws 766, 804-05. Although section 12404-1 was repealed by this Act, replacement section 6307-18 was virtually identical. Compare S. No. 290, § 12404-1, 1935 Ohio Laws 205 with S. No. 29, *supra*, at 774. Apparently the General Assembly merely chose to remove second degree manslaughter from the criminal section and incorporate it in the motor vehicle section. First degree manslaughter was not repealed. It remained part of the codification of criminal offenses as section 12404.

In 1953, the Ohio General Assembly passed legislation recodifying the General Code into the Ohio Revised Code. H. No. 1, 1953-1954 Ohio Laws 7. Section 12404, first degree manslaughter was recodified as section 2901.06 and section 6307-18, second degree manslaughter, was recodified as 4511.18. The text of these statutes was not altered by House bill 1 and section 2901.06 was not amended prior to its repeal in 1973 by House Bill 511. H. No. 511, *supra* note 17, at 2032, 2034.

30. S. No. 37, 1967-1968 Ohio Laws (pt. II-III) 2128. Prior to this amendment section 4511.18 was entitled second degree manslaughter. For the text of the amendment and enactment, see S. No. 37, *supra* (pt. I), at 1631-32.

31. Goldsmith, *supra* note 17, at 598.

32. 1967-1968 Ohio Laws (pt. I) 1632. Each of the enumerated causes were separate traffic violations: (1) driving under the influence—section 4511.19; (2) reckless operation—section 4511.20; (3) drag racing—section 4511.251; and (4) reckless operation off the street—section 4511.201.

33. 1967-1968 Ohio Laws (pt. I) 1631-32.

The 1974 revision of the Ohio criminal code deleted the first and second degree homicide by vehicle statutes from chapter 4511. In their place, the Ohio legislature enacted the criminal offenses of aggravated vehicular homicide and vehicular homicide and added sections 2903.06 and 2903.07, respectfully, to chapter 29.³⁴ The involuntary manslaughter statute was enacted as part of the 1974 revision and was based on either a felony or misdemeanor as the proximate cause of another's death.³⁵

By 1983, the titles of sections 2903.06 and 2903.07 were changed. Section 2903.06 became "Aggravated vehicular homicide; effects upon penalties of being under influence of alcohol or drug abuse; repeat offenders."³⁶ The title to section 2903.07, relating to vehicular homicide, was similarly changed.³⁷ The statutory language added to both sections consisted of the effect a finding of alcohol or drug use would have on the sentencing for a conviction of either offense. Nevertheless, the underlying conduct remained "reckless" for aggravated vehicular homicide and "negligent" for vehicular homicide.³⁸

In 1989, section 2903.06 underwent one revision and section 2903.07 was amended twice.³⁹ In the first amendment, the substantive changes to both sections were minor.⁴⁰ More significantly, aggravated vehicular homicide, a felony of the fourth degree, was later amended in 1989 to an aggravated felony of the third degree.⁴¹

B. "Legislative Intent"⁴² of Vehicular Related Crimes

Since the 1974 revision and recodification of the criminal statutes

34. H. No. 511, *supra* note 17, at 1901 (amended by H. No. 716, *supra* note 19, at 1929) (codified as amended at §§ 2903.06-.07 (Baldwin Supp. 1990)). Chapter 29 of the Ohio Revised Code contains the classification of all crimes.

35. H. No. 511, *supra* note 17, at 1901 (codified as amended at § 2903.04 (Baldwin 1986)). The first degree manslaughter offense of "unlawful killing" was replaced by involuntary manslaughter.

36. S. No. 432, 1982 Ohio Legis. Serv. 500, 501 (Baldwin) (codified as amended at OHIO REV. CODE ANN. § 2903.06 (Baldwin Supp. 1990)).

37. *Id.* (codified as amended at OHIO REV. CODE ANN. § 2903.07 (Baldwin Supp. 1990)).

38. *Id.*

39. OHIO REV. CODE ANN. §§ 2903.06-.07 (Baldwin Supp. 1990).

40. H. No. 381, 1989 Ohio Legis. Serv. 366, 372 (Baldwin) (replaced "offender's operators or chauffeurs license" with "offender's driver's or commercial driver's license").

41. S. No. 49, 1989 Ohio Legis. Serv. 621 (Baldwin) (codified as amended at OHIO REV. CODE ANN. § 2903.06 (Baldwin Supp. 1990)).

42. For a discussion of the legislative history of Ohio law, see *supra* note 16. Although a formal legislative history does not exist in Ohio, reference to extrinsic materials is beneficial in interpreting statutes. These extrinsic materials consist of proposed versions of enacted bills which are not readily accessible. See *supra* note 16. In addition, the final report of the Technical Committee appointed to revise Ohio's criminal law is a valuable resource for determining legislative intent. This report was published by the Ohio LSC. OHIO LEGIS. SERV. COMM'N, *supra* note 9. It is a maxim of statutory construction that legislative intent gleaned from extrinsic material can not

was so extensive, the Technical Committee in its final report prepared a detailed set of comments.⁴³ The final report contains the text of each proposed statute and the comments which provide general explanations for each section, discussing the law as it existed and the effect of the proposed changes. The Technical Committee's exact wording of the proposed involuntary manslaughter and vehicular related homicide statutes as included in House Bill 511, in its original form.

The Technical Committee's comments to section 2903.06, aggravated vehicular homicide, state that the statute expands the existing law by including "the whole spectrum of reckless conduct in i[t]s purview, rather than basing liability on the violation of specific laws."⁴⁴ In accordance with section 2903.06, the prosecution would have to prove beyond a reasonable doubt that the conduct of the defendant was reckless, regardless of the motor vehicle regulation which had been violated.⁴⁵ For example, a defendant may be cited for operating a vehicle in wanton disregard of the safety of others under section 4511.20.⁴⁶ However, for guilt of aggravated vehicular homicide to be assessed under section 2903.06, the jury would be required to determine whether the defendant had driven recklessly.

Regardless of the "reckless driving" label on the traffic citation, the legislature intended that the criminal charge of aggravated vehicular homicide be determined by the criminal section's definition of "reckless." "A person acts recklessly when with heedless indifference to the consequences he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature."⁴⁷ The Technical Committee's recodification comments addressed the definition of reckless:

reckless conduct is defined in proposed section 2901.22 (culpable mental states) in the sense of rashness or heedless indifference to consequences. This is *not* equivalent to reckless operation as defined in existing section 4511.20 of the Revised Code, which involves a lack of due regard for the

be interpreted in a manner that essentially nullifies a statute. 2A N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 48.01 (4th ed. 1984). Thus, limitations exist on the use of bills which were not enacted and committee reports, for determining legislative intent.

43. OHIO LEGIS. SERV. COMM'N, *supra* note 9.

44. *Id.* at 76; see also § 2903.06 commentary (Baldwin Supp. 1990). The existing law to which the Technical Committee referred was section 4911.181, first degree homicide by vehicle for deaths resulting from drag racing, driving recklessly or driving while intoxicated. OHIO LEGIS. SERV. COMM'N, *supra* note 9, at 76.

45. The beyond a reasonable doubt standard of proof is mandated by statute. OHIO REV. CODE ANN. § 2901.05 (Baldwin 1986).

46. *Id.* § 4511.20 (Baldwin 1983). Wanton is not statutorily defined.

47. *Id.* § 2901.22(C) (Baldwin 1986).

safety of persons or property.⁴⁸

The distinction intended was a reckless mental state as opposed to reckless operation.⁴⁹ In the absence of a reckless mental state, the driver would not be guilty of aggravated vehicular homicide.

The Ohio legislature expanded the criminal scope for vehicular related deaths, yet limited the strict liability effect associated with the repealed homicide by vehicle statutes. Any conduct involving the operation of a motor vehicle can give rise to a charge of aggravated vehicular homicide, but only if that conduct is deemed reckless will it give rise to a conviction. A mere violation of a specific traffic regulation is no longer enough to convict someone of aggravated vehicular homicide. By enacting section 2903.06 to replace section 4911.181, the General Assembly intended that only those persons who were found to have caused the death of another by recklessly operating their vehicle be subject to the penal code. "[T]he proposed offense [aggravated vehicular homicide] does not predicate liability on the violation of a safety statute, but on recklessness."⁵⁰

The Technical Committee's proposed vehicular homicide statute, section 2903.07, required a finding of negligence rather than recklessness.⁵¹ For the purposes of vehicular homicide, section 2901.22(D) of the Ohio Revised Code defines negligent conduct as: "[a] person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature."⁵² The LSC's 1973 commentary following this statutory section in the Ohio Revised Code distinguished criminal negligence from civil negligence:

Although the definition of "negligence" in the new code is structured similarly to the definition of ordinary negligence used in tort law, it defines a higher degree of negligence than ordinary negligence. For one to be negligent under this section he must be guilty of a substantial departure from due care, whereas ordinary negligence merely requires a fail-

48. OHIO LEGIS. SERV. COMM'N, *supra* note 9, at 76. Section 4511.20 was amended, effective March, 1983 and "willful or wanton disregard" was substituted for "without due regard for." S. No. 432, *supra* note 36, at 508. Section 4511.20 is referred to as the reckless operation statute. *E.g.*, *State v. Earlenbaugh*, 18 Ohio St. 3d 19, 22, 479 N.E.2d 846, 849 (1985).

49. Section 4511.20 was amended, effective 1983, to "willful or wanton disregard." S. No. 432, *supra* note 36, at 500.

50. OHIO LEGIS. SERV. COMM'N, *supra* note 9, at 76. Through two revisions of House Bill 511 there were no amendments to the proposed aggravated vehicular homicide offense, which became enacted law.

51. *Id.* at 76-77. The statute was enacted in accordance with the proposed language. H. No. 511, *supra* note 17, § 2903.07, at 1902 (codified as amended at § 2903.07 (Baldwin Supp. 1990)).

52. OHIO REV. CODE ANN. § 2901.22(D) (Baldwin 1986).

ure to exercise due care.⁵³

In most states, negligent conduct is a higher standard in the criminal context than negligence giving rise to civil liability.⁵⁴ The vehicular homicide statute, that requires a finding of criminal negligence, is a lesser included offense of aggravated vehicular homicide.⁵⁵ Aggravated vehicular homicide requires a finding of recklessness which is a higher standard than negligence in the criminal context.⁵⁶

The Technical Committee's comments to proposed section 2903.07 are insightful. The comments state that "the offense [of vehicular homicide] is based on the negligence of the operator, *rather than* upon his violation of a rule governing the operation of the vehicle involved."⁵⁷ This requires a finding of negligence regardless of whether the defendant violated any specific traffic regulations. As in the aggravated vehicular homicide statute, this statute limits and expands the prior offense of second degree homicide by vehicle. Any traffic violation resulting in another's death, except those associated with first degree homicide by vehicle, was per se second degree homicide by vehicle under the 1967 statute.

The 1974 vehicular homicide statute encompassed all operations of a motor vehicle that proximately caused the death of another. However, that alone will not lead to a conviction. The individual charged with vehicular homicide must be adjudged to have acted negligently to be convicted, a limitation not present in the 1967 statute.⁵⁸ Thus, it is possible for an individual to be guilty of vehicular homicide by driving negligently without having violated any traffic regulations. The expansion resulting from the 1974 revision is that now a culpable mental state is the sole basis of the offense. Violation of a traffic regulation is no longer a required element.

53. *Id.* § 2901.22 commentary.

54. 2 W. LAFAVE & A. SCOTT, *SUBSTANTIVE CRIMINAL LAW* § 7.12 (1986).

55. "[W]here it would be possible for the same evidence to prove both a greater offense and a lesser offense depending solely upon the culpable mental state of the accused, the lesser offense is a lesser included offense of the greater offense" *State v. Banks*, 31 Ohio App. 3d 57, 63, 508 N.E.2d 986, 993 (1986). *State v. Chippendale*, 52 Ohio St. 3d 118, 119 (1990) (referring to vehicular homicide as a lesser included offense of aggravated vehicular homicide); see OHIO LEGIS. SERV. COMM'N, *supra* note 9, at 77 ("Proposed [vehicular homicide] is a lesser included offense to proposed . . . Aggravated vehicular homicide."). "When the indictment or information charges an offense, including different degrees, or if other offenses are included within the offense charged, the jury may find the defendant not guilty of the degree charged but guilty of an inferior degree thereof or lesser included offense." § 2945.74 (Baldwin 1986).

56. Compare § 2901.22(C) (Baldwin 1986) ("perversely disregards a known risk") with *id.* § 2901.22(D) ("fails to perceive or avoid a risk").

57. OHIO LEGIS. SERV. COMM'N, *supra* note 9, at 77 (emphasis added). The proposed vehicular homicide offense became law without revision.

58. OHIO REV. CODE ANN. § 2903.07 commentary (Baldwin 1986).

On balance though, the requirement of a finding of negligence is a sounder approach to assessing a term of imprisonment than the *per se* approach. Accidents do happen. This premise is supported by the fact that a defendant must have the requisite mental state to be guilty of killing another in a traffic accident. The LSC's commentary following the definition of "negligence," in the Ohio Revised Code, clearly recognizes the concept of "accident" without fault by distinguishing vehicular homicide "negligence" from "ordinary negligence."⁵⁹ Accidents caused by "ordinary negligence" are not punishable under Ohio's criminal laws.

In addition, the Technical Committee's comments to the recodification, referring to prior law, provide that a "[v]iolation of a traffic law . . . may or may not amount to negligence—if the law states a specific rule of conduct, its violation is negligence *per se*."⁶⁰ This comment and the preceding one support the interpretation that the offense was intended to be based solely on the operator's negligence.⁶¹ If the violation of a motor vehicle regulation resulted in negligence *per se*, it would preclude the jury from determining whether the conduct which resulted in death was negligent conduct. Under prior law, section 4511.18, second degree homicide by vehicle, violating any traffic regulation and proximately causing the death of another, resulted in an automatic conviction.⁶² Vehicular homicide was proposed and enacted as a complete reversal of second degree homicide by vehicle which House Bill 511 repealed.⁶³ The plain meaning of the vehicular homicide statute, consistent with its "legislative history," requires a finding of negligence in order for guilt to be assessed.

C. "Legislative Intent" of Involuntary Manslaughter in Connection with Traffic Fatalities

The Technical Committee's proposed section 2903.03(A)-(D) set forth the crime of manslaughter which provided that:

(A) No person, while under extreme emotional stress for which there is reasonable explanation or excuse, shall knowingly cause the death of another. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the offender's situation at the time of the offense, under circumstances as he believed them to be.

59. *Id.* § 2901.22 commentary.

60. OHIO LEGIS. SERV. COMM'N, *supra* note 9, at 77.

61. See *supra* text accompanying note 57.

62. This is the identical effect application of involuntary manslaughter has when used in connection with traffic fatalities. See *infra* text accompanying notes 76-80.

63. H. No. 511, *supra* note 17, at 2033-34.

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

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

(D) Whoever violates this section is guilty of manslaughter, a felony of the third degree.⁶⁴

Division C was the only provision that did not specify a culpable mental state. However, "offense of violence" was defined in proposed section 2901.01(I).⁶⁵ Each offense of violence is premised on a violation of another crime. For example, commission of a battery under proposed section 2903.13 requires infliction of reckless or negligent harm and is defined as an offense of violence.⁶⁶ In essence, one could not be convicted under proposed section 2903.03(C) without a finding of culpability. The comments to this section state, "[d]ivision (C) is silent on the question of culpability, but strict liability is not imposed because the culpable mental state required for commission of the offense of violence involved would apply."⁶⁷ The original House Bill 511 contained the identical statutory language as proposed section 2903.03.⁶⁸ In Substitute House Bill 511, the first revision to House Bill 511, the original manslaughter provision was divided into two statutory crimes, manslaughter (section 2903.03) and involuntary manslaughter (section 2903.04). Substitute House Bill 511 provided:

Sec. 2903.03 (A) No person, while under extreme emotional stress brought on by serious provocation reasonably sufficient to incite him into using deadly force, shall knowingly cause the death of another.

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

Sec. 2903.04 (A) No person shall recklessly cause the death of another. An offense under section 2903.06 of the revised code does not constitute an offense under this section.

(B) Whoever violates this section is guilty of involuntary manslaughter, a felony of the third degree.⁶⁹

Divisions (A) and (C) of the original bill were deleted. The General

64. OHIO LEGIS. SERV. COMM'N, *supra* note 9, at 73.

65. *Id.* at 19.

66. *Id.* at 19, 80.

67. *Id.* at 74.

68. The original bill is in a bound volume at the Ohio Supreme Court library and the text of the statute is also found in the Technical Committee's final report published by the Ohio LSC. See *id.* at 73.

69. Sub. H. No. 511 (available on microfilm from a library which has purchased the Ohio

LSC's bill film, discussed at *supra* note 16).

Assembly did not enact Substitute House Bill 511 and instead enacted Amended Substitute House Bill 511, the second revision to House Bill 511.⁷⁰ The involuntary manslaughter statute enacted by the General Assembly in 1973 by the passage of Amended Substitute House Bill 511 is identical to current section 2903.04(A)-(B).⁷¹

The proposed manslaughter statute specifically excluded the proposed aggravated and vehicular homicide statutes from its coverage. The exclusionary language was not included in the enacted versions of manslaughter and involuntary manslaughter. However, the enacted statutes constituted a wholesale change from the proposed law. The Technical Committee did not propose an involuntary manslaughter statute. Furthermore, the proposed manslaughter statute was premised on culpable mental states, an aspect which is glaringly absent from the General Assembly's enactment. Section 2903.04 is premised solely on the commission of either a misdemeanor or felony. Despite the Technical Committee's recommendations to depart from "unlawfully killing another" as the basis for manslaughter, the General Assembly basically retained the existing law.⁷²

The comments relating to the two proposed vehicular homicide offenses do not explicitly state whether involuntary manslaughter has any application to traffic fatalities. However, the Technical Committee envisioned a completely different structure for manslaughter which did not include involuntary manslaughter and based guilt on specific mental states. In addition the proposed manslaughter statute did not apply to the vehicular related homicide offenses, thus it would have been redundant to exclude manslaughter from those sections. Therefore, the existence of the exclusionary language in the proposed manslaughter offense and the lack of exclusionary language from the proposed vehicular homicide offenses have no bearing on legislative intent. The only clear legislative intent is that the General Assembly rejected a manslaughter statute based on the existence of a specific mental state. The overlap of the involuntary manslaughter and vehicular related homicide statutes cannot be resolved on the basis of the legislature's deletion of the exclusionary language contained in the proposed

70. H. No. 511, *supra* note 17, at 1901.

71. Compare *id.* with § 2903.04 (Baldwin 1986). Section (C) originally provided that misdemeanor involuntary manslaughter was a felony of the third degree which was subsequently amended to an aggravated felony of the third degree. S. No. 199, 1982 Legis. Serv. 363, 369 (Baldwin).

72. First degree manslaughter constituted the unlawful killing of another. This statute was repealed, effective 1973, by House bill 511. See *supra* notes 29, 32. Killing someone during the commission of a misdemeanor or felony is virtually synonymous with "unlawful killing," yet perhaps a little less ambiguous. For a discussion of the Technical Committee's emphasis on culpability in drafting the proposed criminal code, see *infra* note 74.

manslaughter statute.

Nevertheless, by drafting separate sections for vehicular related deaths, it would appear that the Ohio legislature intended to make aggravated vehicular homicide and vehicular homicide distinct offenses from involuntary manslaughter. More significantly, it is apparent that the Ohio legislature intended for individuals to be punished for fatalities proximately caused by their operation of a motor vehicle only if they possessed the requisite culpable mental state, either recklessness or negligence.

III. INVOLUNTARY MANSLAUGHTER AND VEHICULAR RELATED DEATHS

Involuntary manslaughter, aggravated vehicular homicide and vehicular homicide are three separate crimes, with vehicular homicide a lesser included offense of aggravated vehicular homicide.⁷³ If the jury is unable to conclude that the defendant acted recklessly, they may find that he acted negligently. In the absence of either a reckless or negligent mental state, the prosecution should not be allowed to also submit the offense of involuntary manslaughter to the jury for a death involving a motor vehicle. The four reasons for this conclusion are discussed separately in subsection A of this section. Section IV proposes legislative and judicial solutions to the problems raised in section III.

A. Application of Involuntary Manslaughter Renders the Aggravated Vehicular Homicide and Vehicular Homicide Statutes Nugatory

The Ohio legislature segregated vehicular homicide and aggravated vehicular homicide from involuntary manslaughter and negligent homicide as separate criminal offenses. As evidenced by the legislative history of these two statutes, the Ohio General Assembly intended that convictions for deaths resulting from the operation of a motor vehicle depend upon a specific mental state.⁷⁴ The Ohio legislature repealed the first and second degree homicide by vehicle offenses which did not

73. OHIO REV. CODE ANN. § 2903.04 (Baldwin 1986) (involuntary manslaughter); *Id.* § 2903.06 (Baldwin Supp. 1990) (aggravated vehicular homicide); *id.* § 2903.07 (vehicular homicide).

74. The Ohio LSC's analysis for House Bill 511, outlining the proposed revisions to the criminal code, stated:

Two vehicular homicide offenses are included, both dealing with killing another while operating a motor vehicle, motorcycle, locomotive, watercraft, or aircraft. The difference between the two is that the aggravated offense is committed recklessly, while the less serious offense is committed negligently. Existing law connects the offense to killing another as the result of violating various traffic laws, rather than on the recklessness or negligence of the offender.

OHIO LEGIS. SERV. COMM'N, 109th General Assembly, H. No. 511 analysis (available on microfilm from purchasing libraries; discussed *supra* note 18).

require a culpable mental state.⁷⁵ If the Ohio legislature was satisfied with those statutes, it would not have enacted the two current offenses.

Involuntary manslaughter results from the commission of any felony or misdemeanor which causes the death of another.⁷⁶ Violation of most of the traffic regulations enacted under chapter 4511 are minor misdemeanors.⁷⁷ Therefore, a violation of most traffic regulations would result in an involuntary manslaughter charge if the violation proximately caused another's death. Yet, at the time of recodification first and second degree homicide were statutory crimes which collectively resulted from the violation of *any* traffic regulation that proximately caused the death of another. These statutes were repealed and replaced by aggravated and vehicular homicide. Consequently, there was no purpose for enacting the aggravated vehicular homicide and vehicular homicide statutes. The state simply could have charged anyone who killed another by violating a traffic regulation with involuntary manslaughter and accomplished the same ends.⁷⁸ However, there is a sharp distinction in the means employed by the current statutes to reach the end result of a criminal conviction. Involuntary manslaughter does not require any culpable mental state and essentially results in strict criminal liability.⁷⁹

75. H. No. 511, *supra* note 17, at 2033-34 (repealing §§ 4511.18, 4511.181).

76. § 2903.04 (Baldwin 1986).

77. § 4511.99 (Baldwin Supp. 1990) (penalty provisions for traffic offenses); *see supra* note 11.

78. In the alternative, the General Assembly could have retained the first and second degree homicide by vehicle statutes in its recodification.

79. All that is necessary is proof that the defendant violated a traffic regulation and proof of the victim's death. In revising Ohio's criminal laws, the Technical Committee stated in the introductory portion of its final report:

It has been said that the rule that conduct is not criminal unless the perpetrator has the *mens rea*, the guilty mind, is the hallmark of civilized law. . . . Following current trends in criminal code revision, the Technical Committee has distilled culpable mental states into four degrees—purpose, knowledge, recklessness, and negligence—which it considers as the linchpins of the entire proposed code.

The fundamental rule that, generally, a person is not guilty of a criminal offense unless he not only did the prohibited act but had a certain guilty state of mind when he did it, is codified by the proposed code. In addition, with respect to those offenses for which a culpable mental state is not specified, the code provides a uniform rule for imposing strict liability, or for establishing an appropriate degree of culpability where legislative intent to impose strict liability is not readily apparent.

The definitions of purpose, knowledge, recklessness, and negligence are the keystone of the proposed criminal code, and every offense was drafted with them consciously in mind. Nearly every offense has a culpable mental state attached to at least one element, and in those offenses which do not specify culpability, the Committee has taken pains to show that strict liability is intended.

OHIO LEGIS. SERV. COMM'N, *supra* note 9, at x.

By proposing a manslaughter statute based on specific mental states the Technical Committee

The courts should be aware of this distinction in the means and give deference to the legislature, who must have drafted sections 2903.06 and 2903.07 for the purpose of governing vehicular related homicides. As a result, someone who kills another while operating a motor vehicle should be charged under the vehicular related homicide statutes and not involuntary manslaughter.

A defendant cannot be *convicted* for separate offenses based on the identical underlying conduct.⁸⁰ Thus, a defendant could not be convicted of both aggravated vehicular homicide and involuntary manslaughter for the death of another which resulted from reckless operation of a motor vehicle. Yet, in numerous situations an individual charged with aggravated vehicular homicide or vehicular homicide could also be *charged* with involuntary manslaughter.⁸¹ These situations could arise because conduct which serves as the basis of a charge of either reckless or negligent operation of a motor vehicle often is the result of a traffic violation, most of which are classified as minor misdemeanors.⁸²

The Ohio courts are applying involuntary manslaughter and disregarding the vehicular related homicide statutes.⁸³ The effect of misapplying and misinterpreting these statutes is to render the aggravated vehicular homicide and vehicular homicide statutes nugatory. For example, in *State v. Centers*,⁸⁴ the defendant crossed over the center line of a highway and struck a vehicle traveling in the opposite direction. The driver of the other vehicle was killed in the accident.⁸⁵ The defendant was charged with aggravated vehicular homicide, vehicular homicide and involuntary manslaughter. The underlying misdemeanor for the charge of involuntary manslaughter was Ohio Revised Code section 4511.25, prohibiting drivers from crossing over the center line of a highway with traffic traveling in opposite directions.⁸⁶

Mr. Centers was acquitted of aggravated vehicular homicide and

tee did not intend to impose strict liability. However, the General Assembly rejected the proposed manslaughter offense and enacted an involuntary manslaughter statute devoid of any requisite mental state.

80. § 2941.25(A) (Baldwin 1986). The statute provides that, "[w]here the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one." *Id.*

81. See cases cited *supra* note 6.

82. See *supra* note 11.

83. *E.g.*, *State v. Chippendale*, 52 Ohio St. 3d 118, 556 N.E.2d 1134 (1990); *State v. Centers*, No. 9380 (Ohio Ct. App. May 19, 1986) (LEXIS, Ohio library, App file); *State v. Davis*, 13 Ohio App. 3d 265, 469 N.E.2d 83 (1983).

84. No. 9380 (Ohio Ct. App. May 19, 1986) (LEXIS, Ohio library, App file).

85. *Id.*

86. *Id.*

vehicular homicide because the jury did not believe that by crossing over the center line, Mr. Centers acted recklessly or negligently.⁸⁷ However, the court allowed the prosecution to submit the offense of involuntary manslaughter to the jury. Mr. Centers was convicted of involuntary manslaughter based upon the language of that statute that "[n]o person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a misdemeanor."⁸⁸ Tragically, Mr. Centers did kill someone while committing the misdemeanor of crossing over the center line.⁸⁹ However, since the jury found that his conduct was neither reckless nor negligent, he should not have been convicted of any criminal offenses. Given this result, the state could have prosecuted Mr. Centers under involuntary manslaughter alone. In effect, the vehicular homicide related statutes were rendered useless, a tragedy for Mr. Centers.

*State v. Davis*⁹⁰ is another example of an Ohio court rendering the vehicular homicide related statutes useless by applying the involuntary manslaughter statute. In *Davis*, the defendant's vehicle collided head-on with another vehicle, killing a passenger. Defendant Davis was charged with aggravated vehicular homicide and involuntary manslaughter.⁹¹ The involuntary manslaughter charge was based on three misdemeanors: (1) driving while under the influence; (2) reckless operation; and (3) driving left of center.⁹² The jury found that the defendant's conduct did not constitute recklessness or negligence and acquitted him of aggravated vehicular homicide and its lesser included offense of vehicular homicide. However, the jury convicted him of involuntary manslaughter without specifying which of the three underlying misdemeanors he violated.⁹³

Mr. Davis based his appeal of the involuntary manslaughter conviction on the lack of sufficient evidence necessary to support a viola-

87. *Id.*

88. *Id.* (quoting OHIO REV. CODE ANN. § 2903.04(B) (Baldwin 1986)); OHIO REV. CODE ANN. § 2903.04(C) (Baldwin 1986) ("Whoever violates this section is guilty of involuntary manslaughter.").

89. The interesting twist to this case is that violation of section 4511.25, crossing the center line, is a misdemeanor punishable by a one-hundred dollar fine. OHIO REV. CODE ANN. §§ 4511.99(D), 2929.21(D) (Baldwin Supp. 1990).

90. 13 Ohio App. 3d 265, 469 N.E.2d 83 (1983).

91. *Id.* at 266, 469 N.E.2d at 84.

92. *Id.* at 266-67, 469 N.E.2d at 86. All three of these misdemeanors are found in chapter 45, the motor vehicle regulations: (1) driving while under the influence—section 4511.19; (2) reckless operation—section 4511.20; and (3) driving left of center—section 4511.25. Reckless operation and driving left of center are minor misdemeanors. § 4511.99(D) (Baldwin Supp. 1990). Section 4511.20 was amended, effective 1983, substituting "willful or wanton disregard on the highways" for "without due regard for." S. No. 432, *supra* note 36, at 508.

93. 13 Ohio App. 3d at 268, 469 N.E.2d at 86.

tion of any of the three misdemeanors.⁹⁴ The Clark County Court of Appeals determined that there was sufficient evidence for the jury to find that the defendant had violated each of the misdemeanors.⁹⁵ This conclusion is inconsistent with the jury's finding that the defendant was not guilty of aggravated vehicular homicide or vehicular homicide. If the jury had found, based on the evidence, that the defendant was driving while under the influence, it would seem that the same evidence would establish that the defendant had acted recklessly or at the very least, negligently.⁹⁶ The second misdemeanor, reckless operation, if proven would probably have resulted in a conviction under aggravated vehicular homicide as well. In all likelihood, the jury did not convict Mr. Davis of involuntary manslaughter for either driving under the influence or reckless operation.

Crossing the center line is the only misdemeanor of the three Mr. Davis was charged with which probably was the basis for the jury's conviction. Mr. Davis was southbound and the vehicle he struck was traveling north. Mr. Davis testified that he was not sure which side of the road he was on at the time of impact.⁹⁷ Given this evidence, it was possible for the jury to conclude that either the victim or the defendant crossed the center line. Since crossing the center line is a misdemeanor⁹⁸ and the commission of that misdemeanor resulted in another's death, it is the most probable basis for the jury's conviction on involuntary manslaughter. The fundamental flaw in the outcome of Mr. Davis' case was that his conviction was not linked to the culpable mental states of either recklessness or negligence as provided by the Ohio General Assembly.

As the *Centers* and *Davis* cases demonstrate, there is no reason to retain aggravated vehicular homicide or vehicular homicide in the Ohio criminal code. The Ohio General Assembly in 1974, however, did enact the vehicular related homicide statutes. Arguably, the legislature must have determined that these statutes would serve a purpose in the enforcement of laws and the shaping of societal conduct. Presumably, that purpose is to punish reckless or negligent operation of a motor vehicle which results in the death of another. Involuntary manslaughter

94. *Id.* at 267, 469 N.E.2d at 86.

95. *Id.* at 268, 469 N.E.2d at 86.

96. *See, e.g.,* State v. Kavlich, 33 Ohio App. 3d 240, 245, 515 N.E.2d 652, 656 (1986) (driving under the influence constituted recklessness for aggravated vehicular homicide conviction); State v. Stinson, 21 Ohio App. 3d 14, 16, 486 N.E.2d 831, 834 (1984) (aggravated vehicular conviction upheld based on evidence of driving under the influence). Based on these examples, driving under the influence, likewise would constitute negligence since recklessness is a higher standard.

97. 13 Ohio App. 3d at 268, 469 N.E.2d at 86.

98. Ohio Rev. Code Ann. § 4511.25 (Baldwin 1983).

should not apply to deaths resulting from the operation of a motor vehicle because of the overriding effect it has on the plain language and purpose of the vehicular homicide related statutes. Since the courts have no authority to repeal the vehicular related homicide statutes, their decisions should not produce that effect.⁹⁹

Each statute should be interpreted in a manner which gives effect to its provisions.¹⁰⁰ There is a presumption that the legislature enacted each statute with good reason and would have repealed any statute which it intended to be nullified.¹⁰¹ In the situation where there are statutes with overlapping provisions, these should be interpreted, if possible, so as to give effect to both.¹⁰² If effect cannot be given to both statutes, then the specific statute governs over the general statute.¹⁰³

Section 1.51 of Ohio's General Provisions, entitled "Special or local provision prevails over general; exception," states:

If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.¹⁰⁴

In accordance with section 1.51, both aggravated vehicular homicide and vehicular homicide should prevail over involuntary manslaughter. A conviction under the vehicular homicide statutes can only occur when death is proximately caused by reckless or negligent operation of a motor vehicle.¹⁰⁵ These statutes are specific in scope. In contrast, involuntary manslaughter is a general statute which arises when the resulting death was proximately caused by committing or attempting to commit a felony or misdemeanor.¹⁰⁶ The violation of a traffic regulation

99. *E.g.*, *State v. Chippendale*, 52 Ohio St. 3d 118, 556 N.E.2d 1134 (1990); *State v. Centers*, No. 9380 (Ohio Ct. App. May 19, 1986) (LEXIS, Ohio library, App file); *State v. Davis*, 13 Ohio App. 3d 265, 469 N.E.2d 83 (1983).

100. 2A N. SINGER, *supra* note 42, § 46.06. "A statute should be construed so that affect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant" *Id.* (footnotes omitted).

101. *See* 1A *id.* § 23.09.

102. 2A *id.* § 51.05.

103. *Id.*; *State v. Chippendale*, 52 Ohio St. 3d. 118, 120, 556 N.E. 2d. 1134, 1136 (1990). ("It is a well-established principle of statutory construction that specific statutory provisions prevail over conflicting general statutes.")

104. OHIO REV. CODE ANN. § 1.51 (Baldwin 1986).

105. § 2903.06-.07 (Baldwin Supp. 1990).

106. § 2903.04 (Baldwin 1986). The Ohio Supreme Court has stated, "R.C. 2903.04(B), which pertains to the commission of a misdemeanor that proximately causes the death of another, is a general provision. On the other hand, R.C. 2903.06 and 2903.07, which pertain to recklessly or negligently causing the death of another while operating a specified vehicle, are special provisions."

is only a small portion of the conduct which would fall within the purview of involuntary manslaughter.¹⁰⁷ The fact that the legislature enacted the specific statutes governing traffic related homicides establishes that their manifest intent was not for the general statute to prevail.

The Warren County Court of Appeals reached this conclusion in *State v. Chippendale*¹⁰⁸ and reversed the defendant's conviction for involuntary manslaughter. After attempting to stop at a stop sign, defendant's vehicle collided with another vehicle traveling through the intersection. A passenger in the other vehicle was killed as a result of the impact.¹⁰⁹ The defendant was indicted for aggravated vehicular homicide, vehicular homicide, and involuntary manslaughter. The underlying misdemeanor for the involuntary manslaughter charge resulted from driving while under the influence. However, at the accident site the police did not administer a sobriety test, even though the defendant admitted that he had been drinking. The jury acquitted the defendant of aggravated vehicular homicide but convicted him of involuntary manslaughter and vehicular homicide, the lesser included offense. He was sentenced on the involuntary manslaughter charge.¹¹⁰

The court held that the statutory crime of involuntary manslaughter did not encompass deaths resulting from the violation of any traffic laws classified as misdemeanors.¹¹¹ It limited the state to bringing charges under either the aggravated vehicular homicide or vehicular homicide statute. In its opinion the court cited *State v. Volpe*¹¹² and quoted Ohio Revised Code section 1.51 to support its proposition that the rules of statutory construction require that the specific statutes of aggravated and vehicular homicide govern over the general statute of

sions." *State v. Chippendale*, 52 Ohio St. 3d 118, 121, 556 N.E.2d 1134, 1137 (1990) (footnotes omitted).

107. The chapters on crimes include homicide and assault; kidnapping and extortion; arson and related offenses; robbery, burglary and trespass; offenses against the public peace; offenses against the family; and drug offenses. These separate chapters contain statutes classified as felonies and misdemeanors. Aside from the criminal statutes, and traffic laws, violation of other statutory provisions are classified as felonies and misdemeanors which could serve as the basis for an involuntary manslaughter charge. *E.g.* § 3737.99(B) (Baldwin Supp. 1990) (section 3737.51 a knowing violation of state fire code is a first degree misdemeanor); *id.* § 3743.99(C) (Baldwin 1989) (discharging fireworks in violation of section 3743.65(B) is a first degree misdemeanor); *id.* § 3734.99 (A) (Baldwin Supp. 1990) (a violation of section 3734.03 (Baldwin Supp. 1990), burning or dumping solid wastes, results in a felony charge).

108. No. 88-07-054 (Ohio Ct. App. Mar. 6, 1989) (LEXIS, Ohio library, App file), *reversed*, 52 Ohio St. 3d 118, 556 N.E.2d 1134 (1990).

109. *Id.*

110. *Id.*

111. *Id.*

112. 38 Ohio St. 3d 191, 527 N.E.2d 818 (1988).

involuntary manslaughter.¹¹³

The state's argument was based on the *Davis* decision which concluded that involuntary manslaughter was applicable since the General Assembly deleted the language of the bill that would have made it inapplicable. The *Davis* court stated:

The legislative history of the involuntary manslaughter provision reveals the House Bill as originally submitted imposed liability for the death of another through the commission of any offense other than aggravated vehicular homicide or vehicular homicide.

The legislature in enacting the final involuntary manslaughter provision rejected this language.

Thus, the legislature was given the opportunity to exclude vehicular deaths from the involuntary manslaughter statute and chose not to do so. It is our opinion this clearly speaks of the legislature's intent to permit a charge of manslaughter against persons involved in vehicular fatalities despite the more specific provisions for aggravated vehicular and vehicular homicide.¹¹⁴

The *Davis* court's opinion was based on a quotation from the Goldsmith article,¹¹⁵ which the court cited as the language of the involuntary manslaughter provision in Substitute House bill 511. However, the language the court quoted is not from the involuntary manslaughter offense contained in Substitute House bill 511.¹¹⁶ The quoted language was taken from the substitute bill, but defined negligent homicide, section 2903.05(B), in its amended form. This proposed amendment to negligent homicide resembled division (C) of the proposed involuntary manslaughter offense in the original House Bill 511.¹¹⁷ The *Davis* court

113. *Chippendale*, No. 88-07-054 (LEXIS, Ohio library, App file).

114. *Davis*, 13 Ohio App. 3d at 269-70, 469 N.E.2d at 88.

115. Goldsmith, *supra* note 9.

116. Compare *supra* text accompanying note 69 with *Davis*, 13 Ohio App. 3d at 269-70, 469 N.E.2d at 88.

117. Compare *supra* text accompanying note 64 (§ 2903.03(C) with "(B) No person shall cause the death of another by committing any offense. An offense under 2903.06 or 2903.07 of the Revised Code does not constitute an offense under this division." Sub. H. No. 511, § 2903.05 (available on microfilm from a library which has purchased the Ohio LSC's bill film, discussed at *supra* note 18). Division (C) of the proposed involuntary manslaughter offense was limited to an offense of violence. See *supra* text accompanying notes 64-67. Division (C) was deleted from the amended involuntary manslaughter section contained in Substitute House Bill 511. See *supra* text accompanying notes 69-70. The enacted language of section 2903.05, negligent homicide, is limited to "negligently caus[ing] the death of another by means of a deadly weapon or dangerous ordinance." H. No. 511, *supra* note 17, § 2903.05, at 1901 (codified as amended at § 2903.05 (Baldwin 1986)).

Both the original House Bill 511 and Substitute House bill 511 contained language excluding aggravated vehicular homicide from involuntary manslaughter. See *supra* text accompanying
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carelessly cited the legislative history of negligent homicide to support its position that the legislative history of involuntary manslaughter indicates that the General Assembly endorsed the application of involuntary manslaughter to vehicular related homicides. In addition to the court's inaccurate rendition of legislative history, the court failed to point out that the General Assembly enacted a manslaughter statute fundamentally different than the one it attempts to quote. There is no foundation for the *Davis* court's conclusion based on legislative history.¹¹⁸

In responding to the state's reliance on *Davis*, the *Chippendale* court traced the historical development of the 1974 involuntary manslaughter statute and cited the Goldsmith article as the source of legislative history. Fortunately the court reached the right decision by precluding the application of involuntary manslaughter.

Unfortunately, the Ohio Supreme Court reversed the Warren County Court of Appeals decision in *Chippendale*.¹¹⁹ The court began its analysis with, "[i]t is a well-established principle of statutory construction that specific statutory provisions prevail over conflicting general statutes."¹²⁰ The Ohio Supreme Court, using section 1.51, determined that involuntary manslaughter is a general provision and aggravated vehicular and vehicular homicide were special provisions.¹²¹ The court then determined that involuntary manslaughter and the vehicular related homicides were allied offenses,¹²² making section 1.51 applicable.

In applying section 1.51 the court first looked to the exception that "[i]f the conflict between the provisions is irreconcilable, the special . . . provision prevails as an exception to the general provision, *unless* . . . the manifest intent is that the general provision prevail."¹²³ By undertaking this analysis the court recognized the irreconcilability between involuntary manslaughter and the vehicular related homicide

notes 64, 69. The *Davis* court may have been attempting to quote this exclusionary language as the basis of its reasoning. However, if the court had accurately referenced the legislative history of involuntary manslaughter it would have been of little value since the General Assembly enacted an involuntary manslaughter statute that bears no resemblance to its legislative history. Therefore, it is an unsound conclusion that the deletion of the exclusionary language represents the General Assembly's intent. See *supra* text accompanying notes 71-73. The General Assembly deleted the entire proposed offense to which the exclusionary language related.

118. See *supra* text accompanying notes 71-73.

119. 52 Ohio St. 3d 118, 556 N.E.2d 1134 (1990).

120. *Id.* at 120, 556 N.E.2d at 1136.

121. *Id.* at 121, 556 N.E.2d at 1137.

122. *Id.* Allied offenses are offenses in which "the elements of the offenses [must] correspond to such a degree that the commission of one crime will result in the commission of the other." *Id.* at 120 (quoting *Newark v. Vazirani*, 48 Ohio St. 3d 81, 549 N.E.2d 520 (1990)).

123. OHIO REV. CODE ANN. § 1.51 (Baldwin 1986) (emphasis added).

statutes. "[W]here a general and a special provision cover the same conduct, the legislature may *expressly mandate* that such provisions are to run coextensively."¹²⁴ Relying on *Davis* and the Goldsmith article, the court concluded that legislative history manifested the intent that one could be charged with involuntary manslaughter for traffic fatalities. Thus, the mistakes made by the *Davis* court in attempting to identify legislative history were compounded. The entire basis of the court's holding rests on inaccurate references to the informal legislative history of involuntary manslaughter which is inapplicable. This, the court contends is manifest intent of an express mandate.

In his article, Mr. Goldsmith cited earlier versions of House Bill 511 which were never enacted.¹²⁵ The *Davis* and *Chippendale* courts based their decisions, relying on Mr. Goldsmith's analysis of legislative history. The danger in such a practice is apparent and reliance on one individual's interpretation of what they read should not be referred to as "legislative history." Although proposed versions of bills are not easily accessible for historical reference,¹²⁶ courts who base decisions on legislative history must refer to the actual documents to avoid erroneous conclusions. Corrective action is required to avoid further nullification of the aggravated vehicular homicide and vehicular homicide statutes.

B. Application of Involuntary Manslaughter Instead of the Vehicular Homicide Related Statutes Distorts the Penalty Structure

In addition to the nugatory effect caused by the overlap of all three statutes to the same conduct, the penalty for violating each indicates that the Ohio legislature did not intend that an individual be charged with involuntary manslaughter for causing the death of another by operation of a motor vehicle. Aggravated vehicular homicide is an aggravated felony of the third degree.¹²⁷ Vehicular homicide is a misdemeanor of the first degree,¹²⁸ which is punishable by not more than six months in prison.¹²⁹

Involuntary manslaughter based on the commission of a misdemeanor carries a more severe penalty than vehicular homicide and an identical penalty to aggravated vehicular homicide. Involuntary manslaughter is an aggravated felony of the third degree only if the under-

124. *Chippendale*, 52 Ohio St. at 122, 556 N.E.2d at 1138.

125. Goldsmith, *supra* note 17, at 572 n.27, 573 n.31.

126. *See supra* note 16.

127. § 2903.06(B) (Baldwin Supp. 1990).

128. *Id.* § 2903.07(B).

129. *Id.* § 2929.21(B)(1) (Baldwin 1986).

lying act constitutes a misdemeanor offense.¹³⁰ Aggravated vehicular homicide and misdemeanor involuntary manslaughter are third degree aggravated felonies punishable by at least two years in prison with a maximum sentence of ten years.¹³¹

Although a defendant can be charged with all three offenses, and a jury could find him guilty of all three, he can be sentenced for only one of those offenses.¹³² However, the prosecution can choose from which of the allied offenses a sentence should be imposed.¹³³ Involuntary manslaughter based on the commission of a misdemeanor currently carries the same penalty as aggravated vehicular homicide.¹³⁴ Therefore, imposing sentence for the involuntary manslaughter conviction is unnecessary where there is also a conviction for aggravated vehicular homicide for the same underlying conduct. Prior to the 1989 amendment to section 2903.06, involuntary manslaughter carried the harshest penalty and was the offense often chosen by the prosecution.¹³⁵ With the 1989 revision, the disparity in penalties was lessened, but not fully alleviated. Moreover, imposing a sentence for involuntary manslaughter where there is a conviction for vehicular homicide would be inappropriate given the inconsistent sentences for each.¹³⁶

In contrast to the vehicular statutes, application of involuntary manslaughter to conduct resulting in vehicular related deaths does not require a showing of any mental state. The maximum sentence assessable under the vehicular homicide statutes is ten years, but only if the operation of the motor vehicle was reckless. More realistically, the maximum sentence would be six months because violation of a traffic offense would probably amount to negligent conduct more often than recklessness. However, the *minimum* sentence for involuntary manslaughter based on a misdemeanor is two years. Although the imprisonment terms are identical for aggravated vehicular homicide and involuntary manslaughter based on a misdemeanor, the involuntary manslaughter charge is easier to prove. If the prosecution can not prove

130. *Id.* § 2903.04(C). Involuntary manslaughter based on a felony is an aggravated felony of the first degree, punishable by at least five years in prison with a maximum sentence of twenty-five years. *Id.* § 2929.11(B)(1)(a).

131. *Id.* § 2929.11(B)(3)(a).

132. *Id.* § 2941.25.

133. There are no traffic offenses which if violated would result in a felony. Most traffic offenses are minor misdemeanors. § 4511.99 (Baldwin Supp. 1990); see *supra* note 11.

134. Both are third degree aggravated felonies carrying a minimum sentence of two years and a maximum of ten years. See *supra* note 11.

135. See *supra* note 11.

136. The *maximum* imprisonment term for vehicular homicide is six months as compared to a *minimum* term of two years for involuntary manslaughter based on a misdemeanor. Compare § 2929.21(B)(1) (Baldwin 1986) with *id.* § 2929.11(B)(3)(a).

aggravated vehicular homicide then the two year minimum/ten year maximum sentence is unwarranted. It should not become warranted if the jury is left with little alternative but to convict on involuntary manslaughter because there was a per se violation of a traffic regulation. This conclusion is particularly appropriate where the jury acquits a defendant of vehicular homicide. If the conduct was not negligent, making the six month maximum sentence inapplicable, even the *minimum* sentence of two years for involuntary manslaughter likewise should be inapplicable.

This problem is illustrated in *State v. Centers*.¹³⁷ Mr. Centers, by crossing over the center line, violated section 4511.25. The statute is classified as a *minor* misdemeanor and a violation of it is punishable by a one hundred dollar fine.¹³⁸ Mr. Centers could have faced a maximum sentence of five years imprisonment for aggravated vehicular homicide if the jury found that by crossing over the center line he acted recklessly. He could have faced a maximum sentence of six months if the jury found that his conduct was negligent and convicted him of the lesser included offense of vehicular homicide.¹³⁹

However, the jury acquitted Mr. Centers of both aggravated vehicular homicide and vehicular homicide, but convicted him of involuntary manslaughter.¹⁴⁰ As a result, Mr. Centers was sentenced to ten years in prison, despite the jury's finding that he had not acted recklessly or negligently.¹⁴¹ This sentence was twice as long as the maximum term he would have had to serve if he had acted recklessly.

Although Mr. Centers' conduct was deemed by the jury less blameworthy than someone acting in a reckless or negligent manner, his sentence fails to reflect that fact. In the absence of a culpable mental state, the penalty for causing the death of another while operating a motor vehicle should be less severe, rather than more severe. Therefore, the ten year sentence he received does not correlate to the jury's findings of fact. Mr. Centers would have been better off if the jury had found that he acted recklessly.

Differing penalties for separate offenses involving general and specific statutes led the Ohio Supreme Court in *State v. Volpe*¹⁴² to conclude that the two statutes were irreconcilable. The court analyzed the relationship between a specific statute prohibiting forms of gambling and a general statute prohibiting possession of enumerated items for

137. No. 9380 (Ohio Ct. App. May 19, 1986) (LEXIS, Ohio library, App file).

138. § 4511.99(E) (Baldwin Supp. 1990) (emphasis added).

139. *Centers*, No. 9380 (LEXIS, Ohio library, App file).

140. *Id.*

141. *Id.*

142. 38 Ohio St. 3d 191, 527 N.E.2d 818 (1988).

criminal use.¹⁴³ The court concluded that since the statutes were irreconcilable, section 1.51 of the Ohio code provides that the specific statute should govern.¹⁴⁴

The same conclusion is unavoidable upon analysis of the relationship between the vehicular homicide statutes and the involuntary manslaughter statute. These statutes are likewise irreconcilable. Effect cannot be given to both because it would result in a disparate penalties for one set of circumstances, which could support both a vehicular homicide offense and involuntary manslaughter offense.

For instance, in *State v. Torres*,¹⁴⁵ the defendant appealed his conviction and consecutive sentences for aggravated vehicular homicide and involuntary manslaughter.¹⁴⁶ Torres was sentenced three to five years for aggravated vehicular homicide and five to ten years for involuntary manslaughter.¹⁴⁷ The Lorain County Court of Appeals found that the aggravated vehicular homicide and involuntary manslaughter convictions, both based on the misdemeanor of driving while under the influence, were allied offenses.¹⁴⁸ Each crime required proof of the same elements. Therefore, the court held that the defendant could not be sentenced under both statutes.¹⁴⁹ However, the court reversed the conviction for aggravated vehicular homicide and affirmed the conviction and lengthier sentence for involuntary manslaughter.¹⁵⁰

It is inequitable for an individual to be acquitted of both aggravated and vehicular homicide and then be convicted of involuntary manslaughter. If an individual has not acted recklessly or negligently while operating a motor vehicle, then his conduct is not the type that should result in restraint of liberty, despite the fact that another individual was killed. This type of conduct is what society is willing to label as accidental and any resulting liability is limited to the civil context.

C. An Involuntary Manslaughter Conviction Absent Reckless or Negligent Conduct Serves No Punitive Purpose

The main purpose underlying the criminal law process is to direct societal conduct, mainly through prohibitions, for the benefit of the entire community.¹⁵¹ The aim is to protect society by punishing conduct that is undesirable and contrary to communal responsibility as defined

143. *Id.* at 193, 527 N.E.2d at 820-21.

144. *Id.* at 194, 527 N.E.2d at 821.

145. 31 Ohio App. 3d 118, 508 N.E.2d 970 (1986).

146. *Id.* at 118, 508 N.E.2d at 971.

147. *Id.* at 118-19, 508 N.E.2d at 971.

148. *Id.* at 120, 508 N.E.2d at 973.

149. *Id.*

150. *Id.* at 121, 508 N.E.2d at 973.

151. Hart, 23 LAW & CONTEMP. PROBS. 401, 403 (1958).

by the law.¹⁵² Imposition of punishment is an attempt to encourage individuals to act in a certain manner within the societal norms.¹⁵³ There are four theories of punishment: incapacitation, deterrence, rehabilitation and retribution.¹⁵⁴ Each theory attempts to accomplish a different purpose. The first three theories are based on a utilitarian justification, that punishment serves a useful purpose.¹⁵⁵ The justification for retribution is that the punishment is deserved based on the egregiousness of the crime committed.¹⁵⁶

Incapacitation accomplishes the purpose of protecting society. Individuals who are imprisoned are those who would present a risk to society because they have demonstrated their inability to function in accordance with societal norms.¹⁵⁷

Deterrence is divided into two categories, special/individual and general prevention.¹⁵⁸ Special/individual deterrence is directed to individual criminals. If the criminal is subject to a punishment which causes him hardship, the hope is that he will refrain from further engaging in similar criminal behavior.¹⁵⁹ In contrast to special/individual deterrence, general deterrence focuses on others, rather than the individual criminal. The principle is that by punishing one individual for criminal behavior, others will refrain from engaging in similar behavior in order to avoid the same consequences.¹⁶⁰ There is an educational element to general deterrence which seeks to inform society of what constitutes desirable and undesirable conduct by publicizing penalties imposed upon those convicted of a crime.¹⁶¹

The purpose of rehabilitation is to provide a criminal with treatment which will enable him to return to society. Rehabilitation is employed when the cause of the abnormal conduct can be identified and treated effectively.¹⁶² This theory seeks to help the individual rather than punish him. Society also benefits because the determination is made that the individual undergoing rehabilitation can become a valua-

152. W. LAFAYE & A. SCOTT, *supra* note 54, § 1.5, at 30; Hart, *supra* note 151, at 410; see also E. PUTTHAMMER, ADMINISTRATION OF CRIMINAL LAW 2-5 (recognizing the limitations of criminal law in accomplishing its goals).

153. See *id.* W. LAFAYE & A. SCOTT, *supra* note 54, § 1.5, at 30-31.

154. *Id.* § 1.5(a), at 31-36; see also Hart, *supra* note 151, at 409 (arguing that criminal law should focus on ways of elevating acceptance of social responsibility rather than condemnation).

155. See P. ROBINSON, FUNDAMENTALS OF CRIMINAL LAW 22 (1988).

156. See *id.* at 22-23.

157. W. LAFAYE & A. SCOTT, *supra* note 54, § 1.5(a)(2).

158. *Id.* §§ 1.5(a)(1), (4).

159. *Id.* § 1.5(a)(1).

160. *Id.* § 1.5(a)(4).

161. See *id.* § 1.5(a)(5).

162. *Id.* § 1.5(a)(3).

ble member of society and should be returned to the community.¹⁶³

The final theory of punishment, retribution, is based on revenge. Individuals who have caused a victim to suffer are likewise subjected to suffering.¹⁶⁴ The criminal is deprived of life or liberty because his conduct was so contrary to an ordered society that a retributive punishment is imposed to demonstrate society's collective outrage.¹⁶⁵

Retribution is the only theory of punishment which could have any modicum of application to conduct which is accidental and free of reckless or negligent aspects.¹⁶⁶ Yet, retribution is unwarranted against one whose conduct resulted in unintended harm and was not so disruptive of an ordered society to call for revenge.¹⁶⁷ Incapacitation, deterrence, or rehabilitation, likewise would be ineffective. There is no guaranteed method of protecting society against accidents. Therefore, incapacitating orderly members of society who have caused a traffic accident would not decrease any risks to the safety of society. Accidents consist of inadvertent actions; thus, individual members of society cannot alter their behavior based on any punishment they or others might receive.

It has been urged that inadvertent negligence is not a sufficient basis for criminal conviction, both on the utilitarian ground that threatened sanctions cannot influence the inadvertent actor and on the moral ground that criminal punishment should be reserved for cases involving conscious fault. The utilitarian argument is that the inadvertent actor by definition does not perceive the risks of his conduct, and thus cannot be deterred from risk creation. The moral argument is that the legitimacy of criminal condemnation is premised upon personal accountability of the sort that is usually and properly measured by an estimate of the actor's willingness consciously to violate clearly established societal norms. Those who hold this view argue that the actor who does not perceive the risks associated with his conduct presents a moral situation different in kind from that of the actor who knows exactly what he is doing and what risks he is running and who nevertheless makes a conscious

163. *Id.*

164. *Id.* § 1.5(a)(6).

165. *Id.*; see *Reflections on the Proposed Ohio Law of Homicide*, 33 OHIO ST. L.J. (arguing that retribution alone is an ineffective form of punishment for homicide offenses because any sentence in excess of deterring undermines the penal system's goal of preventing harm).

166. The other three theories focus on correcting a conscious decision to engage in illegal conduct.

167. *Cf.* E. PUTTHAMMER, *supra* note 152, at 8 (arguing that retribution is insidious to the concept of criminal justice because it does not serve to guide human conduct). In *State v. Montecalvo*, No. 89 CA 004653 (Ohio Ct. App. Sept. 5, 1990) (LEXIS, Ohio library, App file), a paramedic responding to an emergency struck and killed a driver of another vehicle while proceeding through a red light. The paramedic was acquitted of aggravated vehicular homicide, yet convicted of involuntary manslaughter based on the minor misdemeanor of the failure of emergency vehicles to proceed cautiously past red or stop signal.

choice condemned by the penal law.¹⁶⁸

Generally, accidents are unforeseen events with unintended results. The Ohio legislature did not intend for individuals to be imprisoned as the result of accidental conduct involving motor vehicles. Both aggravated vehicular homicide and vehicular homicide require a culpable mental state. If the jury finds that the requisite mental state is lacking then punishment should not be imposed. The result is that this conduct should be remedied, if possible, by civil liability.

D. The Application of Involuntary Manslaughter Provides Unlimited Prosecutorial Discretion

In *State v. Chippendale*,¹⁶⁹ the Warren County Court of Appeals reversed the jury's verdict against the defendant for involuntary manslaughter.¹⁷⁰ The defendant was involved in a traffic accident which proximately caused the death of a passenger in the vehicle he struck. The court held that the special provisions of aggravated and vehicular homicide prevail over the general provision of involuntary manslaughter.

The appellate court also questioned the application of the involuntary manslaughter statute to traffic related deaths for two additional reasons. The first was the prosecutorial discretion that would be employed in deciding which misdemeanors would provide a basis for the offense.¹⁷¹ The language of the involuntary manslaughter statute authorizes prosecution based on any felony or misdemeanor,¹⁷² and the courts have allowed involuntary manslaughter charges to be based on minor misdemeanors.¹⁷³ The second reason was the extent to which the severity of the tragedy would impact a prosecutor's decision to charge a particular individual with involuntary manslaughter.¹⁷⁴ For instance, the state might be more likely to prosecute when a child has been killed as opposed to an adult, or when a police officer has been killed as opposed to a vagrant. The appellate court stated:

[W]ithout any established standards for deciding when to indict for in-

168. MODEL PENAL CODE § 210.4 comment 3 (1980) (footnote omitted).

169. No. 88-07-054 (Ohio Ct. App. Mar. 6, 1989) (LEXIS, Ohio library, App file), *rev'd*, 52 Ohio St. 3d 118, 556 N.E.2d 1134 (1990).

170. *Id.*

171. *Id.*

172. See OHIO REV. CODE ANN. § 2903.04(A)-(B) (Baldwin 1986).

173. E.g., *State v. Montecalvo*, No. 89 CA004653 (Ohio Ct. App. Sept. 5, 1990) (LEXIS, Ohio library, App file) (failure of emergency vehicles to proceed cautiously past red or stop signal); *Centers*, No. 9380 (LEXIS, Ohio Library, App file) (crossing the center line). *But see Montecalvo*, No. 89 CA004653 (LEXIS, Ohio library, App file) (Cacioppo, J., dissenting) (Involuntary manslaughter should not be based on minor misdemeanors).

174. *Chippendale*, No. 88-07-054 (LEXIS, Ohio library, App file).

voluntary manslaughter, the danger exists that prosecutors may engage in selective prosecution and indict on involuntary manslaughter charges those individuals involved in vehicular deaths where the underlying conduct or the victim is of a particularly sensitive nature or the circumstances surrounding the accident make a strong emotional appeal to public opinion.¹⁷⁵

Mr. Chippendale was sentenced to serve six months in prison on the involuntary manslaughter conviction.¹⁷⁶ Involuntary manslaughter based on a misdemeanor is an aggravated felony of the third degree which carries a minimum sentence of two years imprisonment.¹⁷⁷ The vehicular homicide offense of which defendant was also convicted is a first degree misdemeanor carrying a maximum penalty of six months. Though sentenced for involuntary manslaughter, his prison term was more consistent with the penalty for vehicular homicide. On the opposite extreme, Mr. Centers, who was acquitted of both aggravated vehicular homicide and vehicular homicide, was sentenced to serve ten years in prison for involuntary manslaughter.¹⁷⁸ Yet, Mr. Chippendale's conduct which led to the homicide convictions was driving while under the influence.¹⁷⁹ Mr. Centers, however, had merely crossed over the center line of the highway.¹⁸⁰ The difference in the punishments imposed upon Mr. Centers and Mr. Chippendale may be explained by examining the victims of each accident. In the *Chippendale* case, a pregnant passenger in the vehicle he struck was killed, though the child survived.¹⁸¹ However, when Mr. Centers accidentally crossed the center line, the oncoming vehicle happened to be driven by a police officer, who died as a result.¹⁸²

IV. PROPOSED SOLUTIONS TO THE PROBLEMS ARISING FROM APPLICATION OF INVOLUNTARY MANSLAUGHTER

A. Amend the Involuntary Manslaughter Statute

The most expeditious way of resolving the redundancy and inequities that arise from application of involuntary manslaughter to vehicular related fatalities is for the General Assembly to amend section 2903.04. The amendment should explicitly exclude traffic fatalities

175. *Id.*

176. *Id.*

177. OHIO REV. CODE ANN. §§ 2903.04(C), 2929.11 (B)(3)(a).

178. *Centers*, No. 9380 (LEXIS, Ohio library, App file).

179. *Chippendale*, No. 88-07-054 (LEXIS, Ohio library, App file).

180. *Centers*, No. 9380 (LEXIS, Ohio library, App file).

181. *Chippendale*, No. 88-07-054 (LEXIS, Ohio library, App file).

182. *Centers*, No. 9380 (LEXIS, Ohio library, App file).

from the statutory crime of involuntary manslaughter.¹⁸³ The General Assembly implicitly provided such an exclusion by enacting sections 2903.06 and 2903.07. However, in the absence of explicit language the courts' range of interpretation is widened and the results have magnified the inherent inequities caused by the overlap.¹⁸⁴

For example, Michigan's classification of crimes also contains an overlap between a manslaughter statute¹⁸⁵ and a negligent homicide statute, that only applies to the operation of a vehicle.¹⁸⁶ However, despite the overlap these statutes do not contain the problems associated with Ohio's statutory scheme. Both statutes can be applied in a manner that gives effect to each.

The statutory manslaughter crime is not defined, but according to the common law, it encompasses both voluntary and involuntary manslaughter.¹⁸⁷ Common law involuntary manslaughter consists of grossly negligent conduct.¹⁸⁸ Therefore an individual who kills another while driving in a grossly negligent manner is guilty of manslaughter. Negligent homicide consists of careless, reckless, or negligent operation of a motor vehicle that results in the death of another.¹⁸⁹ Each of these statutes is based on the culpable mental state of the individual charged with the offense. Negligent homicide is a lesser included offense of manslaughter.¹⁹⁰ The prosecution could submit both offenses to the

183. For a discussion of the Technical Committee's proposed *manslaughter* statute that contained such exclusionary language, although fundamentally different than the involuntary manslaughter statute enacted by the General Assembly, see *supra* notes 64-69 and accompanying text. See, e.g., MINN. STAT. ANN. § 609.21 (West Supp. 1990) (criminal vehicular homicide covers deaths "not constituting murder or manslaughter").

184. E.g., *State v. Chippendale*, 52 Ohio St. 3d 118, 556 N.E.2d 1134 (1990); *State v. Centers*, No. 9380 (Ohio Ct. App. May 19, 1986) (LEXIS, Ohio library, App file); *State v. Davis*, 13 Ohio App. 3d 265, 469 N.E.2d 83 (1983).

185. MICH. COMP. LAWS ANN. § 750.321 (West 1968).

186. *Id.* § 750.324.

187. *People v. Richardson*, 409 Mich. 126, 293 N.W.2d 332 (1980). "Our manslaughter statute does not define that offense, but instead incorporates the common-law definition. There are two categories of manslaughter at common law: voluntary and involuntary." *Id.* at 134 n.8, 293 N.W.2d at 335 n.8 (citations omitted).

188. *People v. Rettelle*, 173 Mich. App 196, 199, 433 N.W.2d 401, 403 (1988) ("Involuntary manslaughter occurs when death results from negligence which is gross, wanton or wilful . . ."); *People v. Sealy*, 136 Mich. App. 168, 172, 356 N.W.2d 614, 616 (1984). ("To convict of involuntary manslaughter, a defendant must have been grossly negligent.").

189. MICH. COMP. LAWS ANN. § 750.324 (West 1968). The statute provides:

Any person who, by the operation of any vehicle upon any highway or upon any other property, public or private, at an immoderate rate of speed 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 . . .

Id.

190. *Id.* § 750.325; *People v. McIntosh*, 400 Mich. 1, 252 N.W.2d 779 (1977). The Michigan Supreme Court stated:

Manslaughter committed with a motor vehicle is not separately defined as a crime by

jury, and if they were unable to find the defendant's conduct grossly negligent, they might find that the defendant's conduct met a lesser standard of careless, reckless or negligent conduct.¹⁹¹ Although both reckless and negligent conduct form the basis of the lesser included offense of negligent homicide, Michigan's manslaughter and negligent homicide statutes govern conduct similar to Ohio's aggravated vehicular homicide and vehicular homicide statutes. The legislative intent is the same; two distinct standards must be met for two distinct crimes with two distinct penalties.¹⁹² In Michigan, manslaughter is a felony, punishable by a maximum of fifteen years imprisonment.¹⁹³ Negligent homicide is a misdemeanor punishable by a maximum of two years imprisonment.¹⁹⁴ The two Michigan statutes both govern deaths caused by the operation of a motor vehicle and, yet, work in conjunction with one another. There are no inconsistencies. Negligent homicide requires a lower standard than the greater offense of manslaughter, and thus, results in a lesser penalty. Neither statute has as its basis simply the violation of a traffic regulation.

Ohio's aggravated vehicular homicide and vehicular homicide statutes likewise work in conjunction with one another. It is only when involuntary manslaughter is also included that inconsistencies and inequities arise.

the common law or by statute. There is only the general crime of manslaughter which may, of course, be committed with a motor vehicle.

....

We believe the better view is that manslaughter committed with a motor vehicle does not have to be formally pled in an information charging murder in order for the jury to consider negligent homicide as a possible lesser offense. Prospectively from the date of this decision, if the jurors are or should be permitted to consider manslaughter committed with a motor vehicle, then pursuant to MCLA 750.325; MSA 28.557, they also should be permitted to consider negligent homicide. This view preserves the legislative link between the two crimes, does not conflict with practical considerations and promotes, rather than hinders, the purpose for which the statute was enacted.

Id. at 5, 7 (citations omitted).

191. MICH. COMP. LAWS ANN. § 750.325 provides:

The crime of negligent homicide shall be deemed to be included within every crime of manslaughter charged to have been committed in the operation of any vehicle, and in any case where a defendant is charged with manslaughter committed in the operation of any vehicle, if the jury shall find the defendant not guilty of the crime of manslaughter, it may render a verdict of guilty of negligent homicide.

192. The standard for manslaughter by operation of a vehicle is gross negligence. *Sealy*, 136 Mich. App. at 172. The standards for negligent homicide are carelessness, recklessness or negligence. MICH. COMP. LAWS ANN. § 750.324.

193. MICH. COMP. LAWS ANN. § 750.321.

194. *Id.* § 750.324.

B. Repeal and Replace the Vehicular Related Statutes and Involuntary Manslaughter Statute

The more effective way of dealing with the overlap would be to reclassify the criminal offenses in chapter 2903 into a criminal homicide statute. To accomplish this, it would be necessary to repeal the involuntary manslaughter, aggravated vehicular homicide, vehicular homicide statutes, along with the remaining statutes currently in that chapter.

Prior to 1974, Ohio's involuntary manslaughter offense was based on the commission of an unlawful act.¹⁹⁵ The state judiciary struggled with the parameters of "unlawful act."¹⁹⁶ The involuntary manslaughter statute was revised, consistent with its current language when the Ohio General Assembly recodified Ohio's criminal code.¹⁹⁷ The legislature clarified the ambiguity by deleting "unlawful act" and basing the offense on either the commission of a felony or misdemeanor.

There is a modern trend of displacing the "unlawful act" element of involuntary manslaughter with criminal negligence.¹⁹⁸ In Ohio, "unlawful act" was not displaced by "criminal negligence," but replaced with the commission of either a felony or misdemeanor.¹⁹⁹ However, the element of negligence is used in two places in chapter 2903, which governs homicide and assault. This chapter, which contains the involuntary manslaughter statute and vehicular and aggravated vehicular homicide statutes, also contains a negligent homicide statute.²⁰⁰ Furthermore, criminal negligence is one of the necessary mental states for

195. See *supra* notes 23-34 and accompanying text.

196. See, e.g., *State v. O'Mara*, 105 Ohio St. 94, 136 N.E. 885 (1922) (violation of city ordinance may be an unlawful act within definition of manslaughter); *Black v. State*, 103 Ohio St. 434, 133 N.E. 195 (1921) (shooting at a target within city limits is not an unlawful act within definition of manslaughter even if it results in a death).

197. Compare OHIO LEGIS. SERV. COMM'N, *supra* note 9, § 2903.03, at 73 with § 2903.04 (Baldwin 1986).

198. For a listing of the states which currently base involuntary manslaughter on "unlawful act," see *infra* note 206.

199. This does not represent a very significant change because the commission of either a felony or misdemeanor is unlawful. The manslaughter statute proposed by The Technical Committee did displace the "unlawful act" basis of the crime with the culpable mental states of knowingly and recklessly. OHIO LEGIS. SERV. COMM'N, *supra* note 9, at 73. In addition, a third division of the manslaughter statute was based on the commission of an offense of violence, thus proof of the requisite mental state of the offense committed would have been necessary for a conviction. *Id.* For the text of the Technical Committee's proposed manslaughter statute, see text accompanying note 64.

200. OHIO REV. CODE ANN. § 2903.05 (Baldwin 1986). The statute provides that "[n]o person shall negligently cause the death of another by means of a deadly weapon or dangerous ordinance as defined in section 2923.11 of the Revised Code." *Id.* The definition of dangerous ordinance generally relates to certain firearms and explosives. *Id.* § 2923.11(K) (Baldwin Supp. 1990).

deaths resulting from the operation of motor vehicles.²⁰¹

The Model Penal Code, drafted in 1962, suggests a criminal homicide statute which can form the basis for murder, manslaughter, or negligent homicide.²⁰² A conviction for criminal homicide results from either purposely, knowingly, recklessly, or negligently causing someone's death.²⁰³ If the defendant purposely or knowingly causes one's death, he is charged with murder; reckless homicide gives rise to manslaughter, and negligently causing someone's death is negligent homicide.²⁰⁴ There is no provision for an involuntary manslaughter offense based on the commission of a misdemeanor. Each criminal classification of criminal homicide—murder, manslaughter, and negligent homicide—requires a culpable mental state, the least of which is negligence. Section 2.02(2)(d) of the Model Penal Code specifies a higher standard of negligence than that of the reasonable person standard. Negligent homicide involves an awareness "of a substantial and unjustifiable risk that the material element exists or will result from his conduct."²⁰⁵

Ohio is one of at least ten states which retains an involuntary manslaughter offense based on an unlawful act; commission of a felony or misdemeanor.²⁰⁶ This statute essentially results in strict criminal liability.

It dispenses with proof of culpability and imposes liability for a serious crime without reference to the actor's state of mind. This result is not only morally unjustified, but it also operates quite inequitably among individuals. Application of the rule in the context of traffic offense illustrates the point. Speed limits are in part set to prevent accidents dangerous to life. Occasionally, speeding causes the death of another in circumstances in which the actor was unaware of the risk of death and indeed cannot be judged negligent with respect thereto. Subjecting such a driver, who is engaged in behavior so like many others, to a severe prison term introduces an unfair haphazardness to criminal punish-

201. *Id.* § 2903.07(A).

202. MODEL PENAL CODE § 210.1(2) (1980).

203. *Id.* § 210.1(1).

204. *Id.* § 210.2(1)(a) (murder); *id.* § 210.3(1)(a) (manslaughter); *id.* § 210.4(1) (negligent homicide).

205. *Id.* § 2.02(2)(d) ("a gross deviation from the standard of care that a reasonable person would observe").

206. The other nine states include: GA. CODE ANN. § 16-5-3 (1988) ("unlawful act"); IND. CODE ANN. § 35-42-1-4 (West 1986) (commission of a felony or misdemeanor); IOWA CODE ANN. § 707.5 (West 1979) (commission of "public offense" or "act"); KAN. STAT. ANN. § 21-3404 (1988) ("unlawful act" or lawful act in "unlawful manner"); LA. REV. STAT. ANN. § 14:31 (West 1986) (engaged in perpetuation of felony or intentional misdemeanor); MINN. STAT. ANN. § 609.20 (West Supp. 1990) (commission of misdemeanor or gross misdemeanor); NEB. REV. STAT. § 28.305 (1989) ("unlawful act"); N.M. STAT. ANN. § 30-2-3 (B) (1984) ("unlawful act"); OKLA. STAT. ANN. tit. 21, § 711 (West 1983).

ment. . . . [T]he Model Code rejects any form of strict liability in the law of homicide.²⁰⁷

Even though the Ohio General Assembly has not yet rejected strict liability for the statutory crime of involuntary manslaughter, traffic related offenses should not form the basis for the underlying misdemeanor. Traffic related fatalities involving either negligent or reckless operation of a motor vehicle are classified as vehicular or aggravated vehicular homicides.

Kentucky's applicable statutes, which are classified into three crimes, provide another example. The greater offense is manslaughter in the first degree, which requires a showing of intent.²⁰⁸ It is a class B felony, punishable by ten to twenty years imprisonment.²⁰⁹ Next in degree of severity is manslaughter in the second degree, which consists of wantonly causing the death of another.²¹⁰ It is a class C felony punishable by five to ten years in prison.²¹¹ The third offense is reckless homicide which arises when one recklessly causes the death of another.²¹² Reckless homicide is a class D felony punishable by one to five years in prison.²¹³ The culpable mental state for each of these crimes varies, with reckless conduct constituting the least of the offenses, as supported by its corresponding penalty. These three statutes work together consistently and do not result in the tragedies caused by the Ohio statutory scheme.

If Mr. Centers had been charged under either the Michigan or Kentucky statutes and the jury likewise acquitted him because of the lack of the requisite mental state, he would not be serving a prison term. The Ohio involuntary manslaughter statute essentially results in strict criminal liability in many traffic related homicides. A conviction depends only on violation of a statute, either a felony or misdemeanor, as the proximate cause of another's death.²¹⁴ By enacting the aggravated vehicular homicide and vehicular homicide statutes the Ohio leg-

207. MODEL PENAL CODE § 210.3 comment 7 (1980).

208. KY. REV. STAT. ANN. § 507.030 (Baldwin 1984).

209. *Id.* § 532.060(1)(b).

210. *Id.* § 507.040.

211. *Id.* § 532.060(1)(c).

212. *Id.* § 507.050.

213. *Id.* § 532.060(1)(d).

214. There are situations where mere violation of a statutory misdemeanor would not result in a conviction of involuntary manslaughter. *See, e.g., State v. Jodrey*, No. 840406 (Ohio Ct. App. Apr. 10, 1985) (LEXIS, Ohio library, App file) (driving under suspension in violation of section 4507.16, a misdemeanor, was not the proximate cause of victim of traffic accident's death). The Ohio Supreme Court has recognized that a statutory violation must be the proximate cause of a fatality to support an involuntary manslaughter conviction. *Jackson v. State*, 101 Ohio St. 152, 127 N.E.2d 870 (1920).

islature intended a conviction to be based on a culpable mental state rather than what, in some cases, has amounted to strict criminal liability.

C. *Restructure the Penalties for Involuntary Manslaughter*

If involuntary manslaughter continues to be used in connection with vehicular related fatalities a separate penalty should be drafted. This penalty should be structured so that it is lesser in severity than the penalty for vehicular homicide.²¹⁵ Therefore, if an individual charged with all three crimes is acquitted of aggravated vehicular and vehicular homicide but convicted of involuntary manslaughter, the sanction will more accurately correspond to the jury's verdict. Furthermore, it would reflect the notion that an individual convicted of involuntary manslaughter which does not require a finding of a specific mental state is not more blameworthy than individuals convicted of reckless or negligent operation of a motor vehicle.

D. *Narrowly Construe Involuntary Manslaughter in the Absence of Amendment*

Involuntary manslaughter should be narrowly construed if applied in connection with deaths resulting from the operation of motor vehicles. This conclusion is supported by two propositions. First, involuntary manslaughter and the vehicular homicide statutes are redundant, yet can result in disparate and inequitable penalties.²¹⁶ Second, according to the rules of statutory construction the specific statute should govern over the general statute.²¹⁷ Therefore, aggravated vehicular homicide and vehicular homicide should govern over involuntary manslaughter.

In criminal cases involving traffic fatalities, judges should not apply involuntary manslaughter. At the very least, if courts do impose sentences under involuntary manslaughter for traffic fatalities, they should narrowly construe the penalty provisions. In *State v. Chippen-*

215. Vehicular homicide is a misdemeanor of the first degree punishable by imprisonment up to six months and a fine which can not exceed \$ 1,000. OHIO REV. CODE ANN. § 2929.21(B)(1), (C)(1) (Baldwin Supp. 1990). For example, Indiana's involuntary manslaughter statute is premised on killing someone as a result of committing a felony or misdemeanor. However, the statute specifies that "if the killing results from the operation of a vehicle, the offense is a Class D felony." IND. CODE ANN. § 35-42-1-4 (West 1986). A Class D felony carries a lesser penalty than a Class C penalty which applies to all other forms of involuntary manslaughter. Compare *id.* § 35-50-2-6 (West Supp. 1990) with *id.* § 35-50-2-7 (West Supp. 1990). Reference to the Indiana statute is provided solely for its consistent penalty provision.

216. See *supra* text accompanying notes 127-137.

217. See *supra* text accompanying notes 100-126.

*dale*²¹⁸ and *State v. Davis*²¹⁹ the courts placed emphasis on what both thought was the language of the proposed manslaughter statute which explicitly excluded traffic fatalities from the involuntary manslaughter offense.²²⁰ Despite the court's incorrect account of the legislative history, the opposite implication, that involuntary manslaughter should be applied to vehicular related deaths, is not supported by the inconsistencies that result or the fact that there is no reason to have the separate vehicular homicide offenses.

V. CONCLUSION

Homicides caused by operation of a motor vehicle should not be prosecuted under the involuntary manslaughter statute. Prosecution under involuntary manslaughter displaces both the aggravated vehicular homicide and vehicular homicide statutes. These statutes were enacted in 1974 and have not been repealed by the Ohio legislature. By applying involuntary manslaughter to the operation of a motor vehicle which resulted in the death of another, the courts are, in effect, nullifying the vehicular related homicide statutes. Furthermore, involuntary manslaughter operates in this context essentially as a strict criminal liability statute, and the Ohio legislature intended that convictions for motor vehicle homicides be based on either reckless or negligent conduct. However, this conclusion finds its greatest support in the overwhelming unfairness which results from the disparate penalties associated with these offenses. The legislature did not intend for someone who was not acting recklessly or negligently to spend ten years in prison because another person was killed in a motor vehicle *accident*. Thus, the other tragedy is the deprivation of liberty for those persons who have been sentenced under the involuntary manslaughter statute.

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218. 52 Ohio St. 3d 118, 56 N.E.2d 1134 (1990).

219. 13 Ohio App. 3d 265, 469 N.E.2d 83 (1983).

220. *Chippendale*, 52 Ohio St. 3d at 122, 556 N.E.2d at 1138; *Davis*, 13 Ohio App. 3d at

269, 469 N.E.2d at 88.

