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## Book Review of The Model Penal Code and Commentaries

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## BOOK REVIEWS

THE MODEL PENAL CODE AND COMMENTARIES.\* By *The American Law Institute*. Philadelphia: American Law Institute, 1980. Pp. 439. \$105.00.

The Model Penal Code of the American Law Institute is one of the major works in criminal law. It has had a remarkable impact since its completion in 1962. More than half of the states have expressly relied on the Code,<sup>1</sup> numerous other states have been influenced by it in their recent codifications, and innumerable court decisions have discussed the provisions of the Code.<sup>2</sup> One of the difficulties with the Code stemmed from the fact that the original Commentaries to it were completed in 1962.<sup>3</sup> In the two decades since the Code came out there have been tremendous changes in the substantive criminal law which were not reflected in the earlier commentaries to the Code. Many states have substantially limited the application of the felony-murder rule.<sup>4</sup> With respect to the death penalty, the United States Supreme Court has been extremely active, holding that the "sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment,"<sup>5</sup> and further holding that death penalty statutes are only constitutional if they "guide, regularize, and make rationally reviewable the process for imposing a sentence of death."<sup>6</sup> In other areas as well, the changes have been dramatic. Some states have begun to consider the possibility, at least, of convicting a husband for the rape of his wife,<sup>7</sup>

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\* © 1982 by Paul Marcus. The excellent research assistance of Helen Gunn, University of Illinois College of Law, Class of 1983 is gratefully acknowledged.

<sup>1</sup> According to the revised commentaries, 34 "state codifications or revisions have now drawn upon the Model." MODEL PENAL CODE AND COMMENTARIES XI (Official Draft and Revised Comments 1980) [hereinafter cited as COMMENTARIES].

<sup>2</sup> The Code was also quite influential in the drafting of the proposed revised Federal Criminal Code, currently pending in Congress as H.R. 4711 97th Cong., 1st Sess. (1981).

<sup>3</sup> Thirteen tentative drafts with accompanying comments were considered between 1953 and 1962.

<sup>4</sup> See *infra* text accompanying notes 73-97.

<sup>5</sup> Coker v. Georgia, 433 U.S. 584, 592 (1977).

<sup>6</sup> Woodson v. North Carolina, 428 U.S. 280, 303 (1976).

<sup>7</sup> See, e.g., OR. REV. STAT. § 163.375 (1979) which provides: "(1) A person who has sex-

and in most jurisdictions the problem of criminal actions revolving around child custody disputes has intensified.<sup>8</sup>

Professor Peter Low as Reporter and Professor John Jeffries as Associate Reporter, both from the University of Virginia School of Law, have provided a great service by revising and updating these commentaries. Their work began in 1976 and took almost five years; this tremendous effort is reflected in a fine product spanning three volumes.

In this article I will analyze the Code, along with the Commentaries, as found in the first of these volumes, "Offenses Involving Danger to the Person."<sup>9</sup> Four separate topics are dealt with in this volume: Criminal Homicide (Article 210); Assault, Reckless Endangering, Threats (Article 211); Kidnapping and Related Offenses, Coercion (Article 212); and Sexual Offenses (Article 213). I will focus attention on the first of these topics.

This review is restricted to an evaluation of the homicide materials solely because of time and space constraints. Such a restriction is unfortunate, as important issues continue to arise in the other three areas and are well analyzed by the commentators. In the death penalty area much discussion is given to the questions of the role of the jury in imposing the penalty, the type of homicide which should be the subject of the penalty, and the decisions of the United States Supreme Court.<sup>10</sup> The materials dealing with rape focus attention on the proof problems, the question of the desirability of gender neutral language in a rape statute,<sup>11</sup> and grading of statutes which impose certain age limitations for

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ual intercourse with a female commits the crime of rape in the first degree if: (a) The female is subjected to forcible compulsion by the male."

<sup>8</sup> Section 212.4 of the Code provides, in part, that an offense is committed if the defendant "knowingly or recklessly takes or entices any child under the age of 18 from the custody of its parent, guardian or other lawful custodian when he has no privilege to do so." See discussion in COMMENTARIES, *supra* note 1, at 249-52, 257-61.

<sup>9</sup> The other two volumes deal with offenses against property (arson, burglary, robbery, theft, forgery), offenses against the family (bigamy, incest) and offenses against public administration (bribery, perjury, obstructing governmental operations, abuse of office) or against public order and decency (riot, disorderly conduct, obscenity).

<sup>10</sup> See discussion in COMMENTARIES, *supra* note 1, at 110-71.

<sup>11</sup> The commentators discuss this point:

There are a number of features of the Michigan statute that should be noted in contrast to the Model Code. Perhaps the most striking is the avoidance of gender specificity in the Michigan statute and the grading consequences of such an approach. Rape by a female upon a male or another female and rape by a male upon another male are treated in Michigan at the same level of seriousness as rape by a male upon a female. There is symbolic importance in the introduction of such an equivalence into the law. There are also cases where the trauma of rape may be just as great as in the male imposition upon a female to which the most serious form of the offense has been traditionally confined. But the fact remains, as reflected in the Model Penal Code, that rape is perceived as such a serious crime because of the frequency of attacks by males upon females and because of the peculiar harms generally associated with that form of the offense. Undoubtedly the serious sanctions of the Michigan statute are designed with that case in

sexual relations with an underage victim.<sup>12</sup> Finally, in the assault area the Code "undertakes a substantial restructuring of prior law. It eliminates the common law categories and many of the antecedent statutory variations in favor of a single integrated provision."<sup>13</sup>

It is in the homicide area, however, that the Model Penal Code has had perhaps the greatest impact. In bringing uniformity to an inconsistent body of law, in taking positions on controversial substantive areas,<sup>14</sup> and in developing a grading system which brings important policy considerations into the forefront of the punishment decisions, the Code's contribution is significant. It is to this contribution that we now turn.

### CRIMINAL HOMICIDE

The draftsmen of the Code chose to deal with a host of subjects under the rubric of "criminal homicide." Analysis of responsibility for aiding the suicide attempts of another, a view of the capital punishment quandry, and a discussion of negligent homicide are but a few of the areas discussed. In this portion of the article, I will explore in some detail three subjects of particular importance: the definitions of criminal homicide, murder, and manslaughter.

The Model Penal Code, section 210.1, provides that:

"(1) A person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being.

(2) Criminal homicide is murder, manslaughter or negligent homicide."

There are three striking features of the homicide definition.<sup>15</sup> The first is not apparent from a reading of § 210.1, but rather is one emphasized by the commentators. The Code simply requires that the actor cause the death of the victim.<sup>16</sup> It thus "renders unnecessary the ancient requirement that death of another take place within a year and a day of

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mind and will in fact be imposed in such cases in all but a very few instances. Nevertheless, as an abstract proposition, the question of whether a rape statute should be drafted in sex neutral terms seems a close one. . . . [I]t may well be that the Michigan approach is the more desirable.

*Id.* at 294.

<sup>12</sup> The rape materials are discussed *id.* at 274-356.

<sup>13</sup> *Id.* at 183.

<sup>14</sup> Controversial substantive areas of the law which the Model Penal Code has taken a position on are the grading of murder into degrees and the felony murder rule.

<sup>15</sup> As might be expected, however, there are other features that are important as well, such as the limitation of homicide to actions which the defendant causes purposely, knowingly, recklessly, or negligently; and the division of criminal homicide into but three categories of murder, manslaughter, and negligent homicide.

<sup>16</sup> COMMENTARIES, *supra* note 1, at 9.

the actor's conduct,"<sup>17</sup> the so-called year-and-a-day rule.

By the Eighteenth Century, and indeed much earlier, we find a general assumption that a homicide could be prosecuted as such only if the death occurred within a year and a day of the act; this was distinct from any question of the period of limitations for commencing a prosecution. . . . The standard, if perhaps unhistorical, explanation of the rule, often repeated in the books, is that in the condition of medical science until recent times, it would have been hard to establish convincingly a line of causation between an act and a relatively distant death, and it was thus plausible to make the presumption ('conclusive' as well as arbitrary) that a death more than a year removed from the assault or similar antecedent arose from a natural rather than the criminal cause. . . . Occasionally it has been surmised that the rule was linked in some way to the early function of the jury as reporters of the happenings of the vicinage who required no aid from witnesses—but the jury would not have had knowledge sufficient to trace cause to effect over a sizeable interval of time. . . . Again we find a suggestion that the rule was intended simply to soften the old brutal law regarding homicides.<sup>18</sup>

The rule has been subject to considerable criticism and has been rejected by many legislators and courts.<sup>19</sup> As one New Jersey court put it:

The court recognize[s] advances in medical technology to which the law must respond.

The acceptance or rejection of available medical technology and machines which can postpone the actual time of death, due whenever it occurs, as a result of wounds inflicted upon a victim, should not insulate the assailant from trial and punishment for the crime.

The common law "year and a day rule" does not conform to present-day medical realities, principles of equity or public policy. We reject it as an anachronism and declare that it is no longer part of the common law of this State.<sup>20</sup>

The second striking feature of the homicide definition is that the Code does not define the crucial term "death." This omission is, in a sense, justifiable because most states do not define the term in their penal codes and "because this delicate interplay between the criminal law and the advances of medial science is yet too uncertain to reduce to statutory formulation."<sup>21</sup> Such an approach by the draftsmen is too facile. In many states today efforts are being made to codify the definition of the term; in still others, judges have had to wrestle with different and conflicting definitions.

The commentators correctly note that in the vast majority of homi-

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<sup>17</sup> *Id.*

<sup>18</sup> *Commonwealth v. Lewis*, 1980 Mass. Adv. Sh. 1973, 409 N.E.2d 771, 772-73 (1980), *cert. denied*, 450 U.S. 929 (1981).

<sup>19</sup> *But see, e.g.*, IDAHO CODE § 18-4008 (1979); *Commonwealth v. Ladd*, 402 Pa. 164, 178, 166 A.2d 501, 512 (1960) (Musmanno, J., dissenting).

<sup>20</sup> *State v. Young*, 148 N.J. Super. 405, 412-13, 372 A.2d 1117, 1121 (1977).

<sup>21</sup> COMMENTARIES, *supra* note 1, at 11.

cide cases the meaning of death is not at issue.<sup>22</sup> In these cases, no matter what the definition, the victim is clearly dead. In other cases, where the victim's condition is maintained through sophisticated medical technology, the question is a troublesome one.<sup>23</sup> The issue was well stated by an English law professor, Ian Kennedy:

What is this discussion of death all about? Until comparatively recently, there was no argument about when someone was dead. Death was defined as "the absence of vital functions", breathing and heart beat. Then along came machines which could maintain a patient's breathing. Polio victims were among the beneficiaries of this development, since the so-called iron lung could now breathe for them. Then there appeared machines which could take over the functions of the heart and lungs for a while. Open heart surgery, in which the heart may be stopped for a period of time, became possible.

But inevitably a problem arose. If we regard someone as dead when his vital functions are absent, what do we do with someone whose vital functions are maintained by a machine and accompanying technology? The polio victim isn't dead, nor is the patient undergoing heart surgery. But the victim of a car accident whose head has been crushed is breathing by means of a respirator though the respirator may be ventilating a corpse. Clearly the machinery may mimic life when the patient is dead.<sup>24</sup>

In this country the issue has begun to surface with some regularity, as in the case of *State v. Fierro*.<sup>25</sup> The defendant there purposefully shot Victor Corella in the head. Corella was taken to the hospital where emergency surgery was performed. He was maintained on support systems for three days; at that point the systems were terminated and he was pronounced dead. The court conceded that under the common law test (which had been used up to that point in Arizona) he would not have been legally dead, for "the body of the victim was breathing, though not spontaneously, and blood was pulsating through his body before the life support mechanisms were withdrawn."<sup>26</sup> Under the more modern view of death, Corella had died three days before the systems were withdrawn, because at that time his brain was no longer able to function. The Uniform Brain Death Act<sup>27</sup> stated that "for legal and medical purposes an individual who has sustained irreversible cessation

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<sup>22</sup> *Id.* at 10.

<sup>23</sup> The best known case raising the problem was the Karen Quinlan case, *In re Quinlan*, 70 N.J. 10, 57, 355 A.2d 647, 669, *cert. denied*, 429 U.S. 922 (1976), where the court concluded that there was no "reasonable possibility of return to cognitive and sapient life, as distinguished from the forced continuance of that biological vegetative existence to which Karen seems to be doomed."

<sup>24</sup> Kennedy, *Show Biz and the Doctors—Why Panorama Was Wrong*, *The Sunday Times* (London), Nov. 30, 1980, § 1, at 16, col. 3.

<sup>25</sup> 124 Ariz. 182, 603 P.2d 74 (1979).

<sup>26</sup> *Id.* at 185, 603 P.2d at 77.

<sup>27</sup> UNIFORM BRAIN DEATH ACT (1980).

of all functioning of the brain including the brain stem, is dead." The Harvard Medical School test, discussed by the Code commentators,<sup>28</sup> defines "cessation of life" as "brain death" which occurs when there is "(1) unresponsiveness to normally painful stimuli; (2) absence of spontaneous movements or breathing; and (3) absence of reflexes."

The court adopted the modern view and concluded that the victim had suffered brain death before the supports had been withdrawn, hence the defendant could properly be convicted of a homicide offense.<sup>29</sup> No doubt, the victim *was* dead before the support systems were withdrawn, and the defendant was the one who killed him. Without any statutory guidelines as to the definition of death, however, all parties were acting under a severe handicap in predicting the result in the case, surely raising some due process concerns. It is just this sort of case which the Model Penal Code could and should reach. The failure to define the crucial term, "death," is unfortunate, though perhaps not fatal. The President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, established by Congress in 1978, has just recommended that the states endorse the concept that human life ends when the brain stops functioning.<sup>30</sup> The recommendation is receiving a good deal of attention and is likely to have a major impact in the near future on the law in this area. Still, it is both disappointing and surprising that the draftsmen of the Model Penal Code chose not to develop their own definition of this term.<sup>31</sup>

It is, finally, worth noting that under the homicide definition, "human being" is a person "who has been born and is alive." Such a definition maintains the earliest common law view that homicide offenses are only committed when the victim is born alive:

If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe, or if a man beat her, whereby the childe dyeth in her body, and she is delivered of a dead childe, this is a great misprision [i.e., misdemeanor], and no murder; but if the childe be born alive and dyeth of the potion, battery, or other cause, this is murder; for in law it is accounted a reasonable creature, *in rerum natura*, when it is born alive.<sup>32</sup>

One of the obvious reasons for so limiting the definition was to avoid

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<sup>28</sup> COMMENTARIES, *supra* note 1, at 10.

<sup>29</sup> 124 Ariz. at 185, 603 P.2d at 77.

<sup>30</sup> The full statute is as follows:

An individual who has sustained either (1) irreversible cessation of circulatory and respiratory function, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead. A determination of death must be made in accordance with accepted medical standards.

<sup>31</sup> This is particularly surprising in light of the approach taken by the Code in the murder and manslaughter sections. The draftsmen there were meticulous in their phraseology and attempted to specify the elements of the offenses. See *infra* text accompanying notes 45-138.

<sup>32</sup> 3 E. COKE, INSTITUTES 58 (1648).

dealing with the abortion question in the homicide area. "Although there may remain a role for the penal law in the field of abortion, there is at least a continuing necessity to avoid enmeshing this quite distinct problem in the law of homicide."<sup>33</sup> On this point the draftsmen and commentators are certainly correct. The legal issues surrounding abortion are complex and diverse, but they are distinct from those normally involved with the law of criminal homicide. It is preferable to deal with such issues apart from the homicide area.<sup>34</sup>

In one area, though, the limited definition of human being raises some question, as recognized by the commentators. "Whatever one's evaluation of [abortion], it seems useful to distinguish abortion from the intentional killing of a fetus without the mother's consent. As a matter of policy, it may be thought appropriate to punish such conduct as murder."<sup>35</sup>

*Keeler v. Superior Court*<sup>36</sup> demonstrates this point very well. The defendant's former wife became pregnant by another man. One day, on an isolated mountain road the defendant encountered her, saw that she was pregnant and "pushed her against the car, shoved his knee into her abdomen, and struck her in the face with several blows."<sup>37</sup> There was little question that the defendant intended to do severe harm to both the mother and the fetus.<sup>38</sup> The head of the fetus was found to be severely fractured, and it was delivered stillborn. The defendant was convicted under a statute which defined murder as "the unlawful killing of a human being, with malice aforethought."<sup>39</sup> The dissenting justices argued that the conviction was proper, for the question "whether a homicide occurred . . . would be determined by medical testimony regarding the capability of the child to have survived prior to the defendant's act."<sup>40</sup> The majority of the California supreme court disagreed, finding that under the usual murder statute the legislature could not have intended to cover the defendant's actions.<sup>41</sup> If it had so intended, the stat-

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<sup>33</sup> COMMENTARIES, *supra* note 1, at 12.

<sup>34</sup> The abortion issues are dealt with in § 230.3 of the Code.

<sup>35</sup> COMMENTARIES, *supra* note 1, at 12.

<sup>36</sup> 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970).

<sup>37</sup> *Id.* at 623, 470 P.2d at 618, 87 Cal. Rptr. at 482.

<sup>38</sup> After noticing that his former wife was pregnant, the defendant exclaimed, "I'm going to stomp it out of you." *Id.*

<sup>39</sup> CAL. PENAL CODE § 187 (West 1970).

<sup>40</sup> 2 Cal. 3d at 641, 470 P.2d at 632, 87 Cal. Rptr. at 496 (Burke, C.J., dissenting). The medical testimony was clear that the fetus had an excellent chance of survival, but for the defendant's actions. "'Baby Girl' Vogt, . . . had reached the 35th week of development, [and] had a 96 percent chance of survival . . . ." 2 Cal. 3d at 639-40, 470 P.2d at 630, 87 Cal. Rptr. at 494 (Burke, C.J., dissenting).

<sup>41</sup> It is the policy of this state to construe a penal statute as favorably to the defendants as its language and the circumstances of its application may reasonably permit; just as in the case of a question of fact, the defendant is entitled to the benefit of every reasonable



ute "would deny him due process of law."<sup>42</sup>

One could certainly draft a statute which does not deal with the abortion situation, but does make into a homicide offense the beating of a woman which results in the child being delivered stillborn.<sup>43</sup> What is perplexing about the commentators' view of such a statute is that they and the draftsmen have simply chosen not to deal with the sensitive question. Many judges and legislators have grappled with the issue of whether such a killing constitutes a homicide offense;<sup>44</sup> it is regrettable that the Code does not offer guidance in this difficult area.

### MURDER

The Model Penal Code, section 210.2, provides that

(1) Except as provided in Section 210.3(1)(b),<sup>[45]</sup> criminal homicide constitutes murder when:

- (a) it is committed purposely or knowingly; or
- (b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.

It is in the definition of murder that the Model Penal Code has made its greatest contribution. In an area fraught with confusion and contradiction, the draftsmen and commentators have sought to bring clarity and uniformity. On the whole, they have succeeded. At com-

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doubt as to the true interpretation of words or the construction of language used in a statute . . . . We hold that in adopting the definition of murder in Penal Code section 187 the Legislature intended to exclude from its reach the act of killing an unborn fetus . . . .

The first essential of due process is fair warning of the act which is made punishable as a crime. "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law". . . . "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids". . . .

This requirement of fair warning is reflected in the constitutional prohibition against the enactment of ex post facto laws . . . . When a new penal statute is applied retrospectively to make punishable an act which was not criminal at the time it was performed, the defendant has been given no advance notice consistent with due process. And precisely the same effect occurs when such an act is made punishable under a preexisting statute but by means of an unforeseeable *judicial* enlargement thereof.

*Id.* at 631, 633-34, 470 P.2d at 624, 626, 87 Cal. Rptr. at 488, 490.

<sup>42</sup> *Id.* at 639, 470 P.2d at 630, 87 Cal. Rptr. at 494.

<sup>43</sup> Illinois and California have both passed statutes which preclude application of the homicide statute in cases where abortion was legally authorized. *See* CAL. PENAL CODE § 187(b) (West Supp. 1981); ILL. REV. STAT., ch. 38, § 9-1.1 (1981) (specifically referring to the new homicide offense of "feticide").

<sup>44</sup> *See* COMMENTARIES, *supra* note 1, at 11-12.

<sup>45</sup> This is the manslaughter section. *See infra* text accompanying notes 98-138.

mon law, murder was the unlawful killing of another human being with "malice aforethought." The term "malice aforethought," often clipped to malice, has no specific definition suitable for use in the area of homicide.<sup>46</sup> Instead, it is thought that killings in four situations evidence a sufficiently criminal mind as to constitute murder. First, of course, malice includes an intent to kill.<sup>47</sup> Second, malice means an intent to inflict grievous bodily harm. Third, the term includes the state of mind present under the genteel terminology of "depraved heart" or "abandoned and malignant heart." This category covers those cases in which the defendant acted with extreme recklessness. The fourth situation, and the most difficult for this writer,<sup>48</sup> consists of killings committed during the course of certain other crimes, felony murder. This clarity of categorization in the malice aforethought area may be more apparent than real, for states were hardly consistent in the application of the doctrine, while still others sought to embellish the term by statutory definition.<sup>49</sup>

The confusion in this area was further compounded by the adoption of statutes dividing murder into degrees, a position first taken by the state of Pennsylvania in 1794. "The thrust of this reform was to confine the death penalty, which was then mandatory on conviction of any common-law murder, to homicides judged particularly heinous."<sup>50</sup> The murder was deemed sufficiently horrible if the killing had been "perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate or premeditated killing."<sup>51</sup> While one might argue whether or not these standards were appropriate, it at least appeared clear what was meant by the statutory terminology. Unfortunately, the phrase "willful, deliberate or premeditated killing" in practice was not at all clear.

The leading discussion of the definition of the terms under first degree murder statutes is probably Judge Leventhal's opinion in *Austin v. United States*.<sup>52</sup> There the defendant had brutally stabbed the victim to

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<sup>46</sup> Unlike, for instance, the definition of malice in the defamation area which refers to knowledge of the falsity or reckless disregard for the truth. *See New York Times v. Sullivan*, 376 U.S. 254 (1964).

<sup>47</sup> The intent to kill will normally be murder unless committed in the heat of passion under the manslaughter statutes. *See infra* text accompanying notes 103-127.

<sup>48</sup> *See infra* discussion at text accompanying notes 73-97.

<sup>49</sup> The commentators refer to the Georgia code sections, since repealed, which defined the term as "that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof" or implied malice "where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart." COMMENTARIES, *supra* note 1, at 17.

<sup>50</sup> *Id.* at 16.

<sup>51</sup> This reference excludes the felony murder provisions which were present in the statutes which otherwise divided murder into degrees.

<sup>52</sup> 382 F.2d 129 (D.C. Cir. 1967).

death, inflicting dozens of knife wounds all over her body. The defendant was convicted of first degree murder after the trial judge had instructed the jury that the deliberation and premeditation under the first degree murder statute could be "in the nature of hours, minutes, or seconds."<sup>53</sup> Judge Leventhal began by exploring the rationale for the first degree murder statute:

Statutes like ours, which distinguish deliberate and premeditated murder from other murder, reflect a belief that one who meditates an intent to kill and then deliberately executes it is more dangerous, more culpable or less capable of reformation than one who kills on sudden impulse; or that the prospect of the death penalty is more likely to deter men from deliberate than from impulsive murder. The deliberate killer is guilty of first degree murder; the impulsive killer is not.<sup>54</sup>

What the legislature had in mind was "that the determination to kill was reached calmly and in cold blood rather than under impulse or the heat of passion and was reached some appreciable time prior to the homicide."<sup>55</sup> Thus, the trial judge's instruction to the jury was erroneous; by referring to the premeditation element as one which could be committed in a matter of seconds, he had essentially converted virtually *all* murders into first degree murders, an intent the legislature could not have had.<sup>56</sup>

*Austin* illustrates well the problems which the degree statutes created. The Model Penal Code approach rejects the degrees principle and instead provides a clear and healthy balance between the requirements of particular states of mind, and severe punishment for particular types

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<sup>53</sup> The court stated to the jury:

It is your duty to determine from all of the facts and the circumstances which have been presented to you in this case that you may find surrounding the killing on April 24 . . . whether there was any reflection and consideration amounting to deliberation by the defendant . . . Now if there was such deliberation, even though it be of an exceedingly brief duration, that is in itself, so far as the deliberation is concerned, is sufficient. Because it is the fact of deliberation rather than the length of time it required that is important. Although some time, that is there must be some time to deliberate in the mind of the defendant Austin the premeditation and the deliberation. As I have told you before, the time itself may be in the nature of hours, minutes, or seconds. But there must be the deliberation and the premeditation.

*Id.* at 133, n.1.

<sup>54</sup> *Id.* at 134 (*quoting* *Bullock v. United States*, 122 F.2d 213, 214 (D.C. Cir. 1941)).

<sup>55</sup> *Id.* at 134.

<sup>56</sup> The court stated:

In homespun terminology, intentional murder is in the first degree if committed in cold blood, and is murder in the second degree if committed on impulse or in the sudden heat of passion. These are the archtypes, that clarify by contrast. The real facts may be hard to classify and may lie between the poles. A sudden passion, like lust, rage, or jealousy, may spawn an impulsive intent yet persist long enough and in such a way as to permit that intent to become the subject of a further reflection and weighing of consequences and hence to take on the character of a murder executed without compunction and "in cold blood."

of killings.<sup>57</sup> As indicated earlier, under the traditional view of malice, murder was committed by a killing accompanied by an intent to kill, an intent to inflict great bodily harm, or a "depraved heart."<sup>58</sup> In the abstract, the terms—at least the first two—may be straightforward. In practice, however, the terms were difficult to apply in the cases in which the actor probably knew that he would cause death or great bodily harm, but there was some question as to whether that result was his goal or his purpose. For instance, did the husband *intend* to kill his wife when he ordered her into the river and she drowned?<sup>59</sup> Did the "stepmother" *intend* to kill her six year old girl when she "whipped" the child continuously?<sup>60</sup> Similarly, did the defendant *intend* to inflict grave bodily harm on his wife when he struck her and she bumped her head on the car?<sup>61</sup> In these cases the defendants certainly knew of the likely consequences of their acts, but some doubt must be raised as to whether they intended such consequences.

The Model Penal Code avoids this fine distinction between intent and knowledge by allowing for a murder conviction if the killing was done in a purposeful or knowing fashion. The commentators properly remark that for homicide purposes there ought not to be any distinction between an intentional killing and a knowing killing. The Code thus rejects those statutes which so distinguish, either with regard to the definitions of the offenses or the grading of them for purposes of punishment.<sup>62</sup> The commentators also make clear the nature of proof required for intent, purpose or knowledge. That is, under the Code the judge may not instruct the jury to presume that the defendant intended

the natural or probable consequences of his acts. Liability under Section 210.2(1)(a) may not rest merely on a finding that the defendant purposefully or knowingly did something which had death of another as its natural and probable consequence. Rather, the prosecution must establish that the defendant engaged in conduct with the conscious objective of causing death of another or at least with awareness that death of another was practically certain to result from his act.<sup>63</sup>

This conclusion is quite proper; murder is the highest homicide offense precisely because the defendant's culpability is the greatest. A murder

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<sup>57</sup> *Id.* at 137. The punishment provisions of the Code are not treated in this article. A person convicted of murder, however, may be sentenced to death under certain circumstances pursuant to § 210.6.

<sup>58</sup> Or by a killing during the course of the commission of a felony. *See infra* text accompanying notes 73-97.

<sup>59</sup> Yes, he knew she could not swim. *State v. Myers*, 7 N.J. 465, 81 A.2d 710 (1951).

<sup>60</sup> Yes. *State v. Lamborn*, 452 S.W.2d 216 (Mo. 1970).

<sup>61</sup> Yes, he should have immediately taken his wife to the hospital. *People v. Geiger*, 10 Mich. App. 348, 159 N.W.2d 383 (1968).

<sup>62</sup> *E.g.*, WISC. STAT. §§ 940.01-.03 (1979). *See* COMMENTARIES, *supra* note 1, at 20.

<sup>63</sup> *Id.* at 20-21.

charge should not stand upon so tenuous a ground as what somebody else knew, or what a natural consequence should have been. Of course, direct evidence of intent or knowledge is not required, and the jury may be told that it can infer the necessary state of mind from the acts of the defendant. That, however, is quite different—and far more justifiable—than an instruction as to presumptions of natural and probable consequences.

Suppose the defendant does not intend to inflict grievous bodily harm, does not intend to kill, and does not know that the death will occur. Should the defendant be convicted of murder under other circumstances? Even today, few people would contest the murder conviction of the defendant who shoots a gun into a room,<sup>64</sup> shoots it into a moving automobile,<sup>65</sup> or takes a small child and literally throws her into her bedroom.<sup>66</sup> When death occurs the actor is seen as greatly at fault, even though he may not have intended that death would result, or may not have known that the victim would die. He is held for murder because he consciously disregarded a grave risk to a fellow human being. In common law terms, he has evidenced an "abandoned and malignant heart." The Code follows this rationale, but seeks to clarify the meaning of the rule. The defendant can be held for murder when the act is "committed recklessly under circumstances manifesting extreme indifference to the value of human life." Though the language is still a bit hazy, it is a vast improvement over the common law terminology<sup>67</sup> and it achieves its "primary purpose of communicating to jurors in ordinary language the task expected of them."<sup>68</sup>

Two points should be made concerning the extreme indifference formulation. First, it is not indifference to *any* risk which will give rise to a murder charge in this context. It is a risk which demonstrates the defendant's total disregard for human life; it is the shooting of the gun, the brutal treatment of the young child. Any action short of this "extreme indifference" can still be considered as a homicidal act, but only at the level of manslaughter rather than murder.<sup>69</sup> Second, it should be

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<sup>64</sup> *People v. Jernatowski*, 238 N.Y. 188, 144 N.E. 497 (1924).

<sup>65</sup> *Hill v. Commonwealth*, 239 Ky. 646, 40 S.W.2d 261 (1931).

<sup>66</sup> *Seidler v. State*, 64 Wisc. 2d 456, 219 N.W.2d 320 (1974).

<sup>67</sup> The language in the Code is certainly an improvement over other academic efforts in the area. One law professor has defined murder to include unintentional homicide "by an act so extremely dangerous and disregarding of the lives and safety of others as to be wantonly disregarding of such interests according to the standard of the conduct of a reasonable man under the circumstances." Moreland, *A Suggested Homicide Statute for Kentucky*, 41 Ky. L.J. 139, 146 (1953). Another has summarized the common law version of unintentional murder as involving "wanton and willful disregard of an unreasonable human risk." R. PERKINS, *CRIMINAL LAW* 36-37, 46 (2d ed. 1969).

<sup>68</sup> COMMENTARIES, *supra* note 1, at 25.

<sup>69</sup> Section 210.3 defines manslaughter as an act which is "committed recklessly."

stressed that the murder charge can only be sustained on a showing of *conscious* disregard of the risk of harm to others. It is not enough to prove that the defendant should have been aware of the probable consequences, or that other people knew or would have known of the consequences. The murder charge requires a very high degree of culpability: the actual awareness of this very great risk. The famous English case of *Regina v. Ward*,<sup>70</sup> therefore, would not be valid under the Code, as noted by the commentators. The defendant was a man of "sub-normal" intelligence who was charged with the murder of a small child. He testified that he had picked up the crying child and shook her until she had stopped. He had no intention to harm her seriously and apparently did not understand that he was harming her. The thrust of his defense was rejected by the trial judge who instructed the jury that

if, when he did the act which he did do, he must as a reasonable man have contemplated that death or grievous bodily harm was likely to result to the child as a result of what he did, then, members of the jury, if you are satisfied about that, he is guilty of murder.<sup>71</sup>

Under the Code, this instruction is erroneous due to the reference to the reliance on the standard of conduct of a "reasonable man."<sup>72</sup>

The commentators state several times that under the Code a defendant can only be convicted of murder if he or she killed purposely, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life. The felony murder rule as such is not found in the Code. Still, the rule may have been adopted sub silentio by the draftsmen in the form of the following presumption: "Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape, or deviate sexual intercourse . . . arson, burglary, kidnapping or felonious escape." To determine if the rule finds new life in the Code we must first examine the traditional felony murder doctrine.

At common law, all defendants committing a felony were held for murder if the killing occurred during the course of that felony. Problems arose in the application of the rule. There have been cases in

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<sup>70</sup> [1956] 1 Q.B. 351.

<sup>71</sup> *Id.* at 354-55.

<sup>72</sup> As the commentators point out, Parliament overruled *Ward* in the Criminal Justice Act of 1967, ch. 80, § 8:

A court or jury, in determining whether a person has committed an offense,—

- (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but
- (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.

which the issue was whether a "killing" had occurred if the victim of the crime dropped dead from a heart attack.<sup>73</sup> In other cases the defense contended that the felony murder rule did not apply unless the killing was in furtherance of the felony.<sup>74</sup> In numerous cases the defendants asserted that the killing was not during the course of the crime because the death occurred during the escape portion of the criminal endeavor.<sup>75</sup> Still, in virtually every American jurisdiction<sup>76</sup> the rule was a well established alternative to the other forms of malice aforethought for purposes of proving murder.

The purpose of the felony murder rule has never been entirely clear. Chief Justice Traynor stated that it was "to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit."<sup>77</sup> At a time when all felonies were punishable by death "it made little difference whether the actor was convicted of murder or of the underlying felony because the sanction was the same."<sup>78</sup> A broad based felony murder rule is indefensible in the modern world, where all kinds of acts which are not particularly dangerous to life and are not given severe penalties are designated felonies.<sup>79</sup> As the commentators properly remark, under the rule, the "homicide, as

<sup>73</sup> *People v. Stamp*, 2 Cal. App. 3d 203, 82 Cal. Rptr. 598, *cert. denied*, 400 U.S. 819 (1969) ("So long as life is shortened as a result of the felonious act, it does not matter that the victim might have died soon anyway. In this respect, the robber takes his victim as he finds him.").

<sup>74</sup> *See, e.g., Commonwealth v. Waters*, 491 Pa. 85, 92, 418 A.2d 312, 316 (1980) (it was "error for the trial judge to refuse to instruct the jury that the state was required to show the conduct causing the death was done in furtherance of the design to commit the felony.").

<sup>75</sup> *See, e.g., Whitman v. People*, 161 Colo. 110, 420 P.2d 416 (1966) (felony murder rule applied to killings which occurred during the escape from the commission of an offense).

<sup>76</sup> Until the last decade, only Ohio had abandoned the felony murder rule. As pointed out by the commentators, however, vestiges of the rule remain even in Ohio.

A close relative of the felony-murder rule is continued, however, under the label of imputed intent. A person who joins with another in a crime of violence is presumed to have agreed to whatever acts may be necessary to accomplish the criminal objective. Thus, each participant in an armed robbery may be presumed to have had a purpose to kill in connection with an unplanned but foreseeable homicide committed incident to the robbery.

COMMENTARIES, *supra* note 1, at 33 n.80.

<sup>77</sup> *People v. Washington*, 62 Cal.2d 777, 781, 402 P.2d 130, 133, 44 Cal. Rptr. 442, 445 (1965).

<sup>78</sup> COMMENTARIES, *supra* note 1, at 31 n.74, states:

The primary use of the felony murder rule at common law therefore was to deal with a homicide that occurred in furtherance of an attempted felony that failed. Since attempts were punished as misdemeanors, . . . the use of the felony murder rule allowed the courts to punish the actor in the same manner as if his attempt had succeeded. Thus, a conviction for attempted robbery was a misdemeanor, but a homicide committed in the attempt was murder and punishable by death.

<sup>79</sup> In Illinois, for instance, the following offenses are classified as felonies in the criminal code. ILL. REV. STAT. ch. 38, § 28-1.1 (1981) (syndicated gambling); § 29-1, 29-2 (offering or accepting a bribe); § 31-4 (obstructing justice); § 32-3 (subornation of perjury); § 32-8 (tampering with public records); § 21-1 (criminal damage to property); and § 17-3 (forgery).

distinct from the underlying felony, was thus an offense of strict liability."<sup>80</sup> It is difficult, indeed, to justify a murder conviction under such a strict liability rationale. As a practical matter, there has been no evidence to demonstrate that the felony murder rule serves a useful purpose in actually deterring felons from killing negligently or accidentally.<sup>81</sup> More substantively, "it remains indefensible in principle to use the sanctions that the law employs to deal with murder unless there is at least a finding that the actor's conduct manifested an extreme indifference to the value of human life."<sup>82</sup>

State legislators and judges have recognized the validity of the criticism in the Commentaries and have stepped back from the formerly broad view of the felony murder rule. As the commentators discuss, the rule has been limited in a number of significant ways, whether by statute or court decision. In some states only particularly dangerous felonies are covered under the rule.<sup>83</sup> In other states, the felony must be one which is independent of the homicide itself. Hence, assault with a deadly weapon could not be the base felony under the rule because the assault is an offense included in the charge of homicide.<sup>84</sup> In some jurisdictions the punishment has been downgraded.<sup>85</sup> Still other states have flatly rejected the felony murder rule.<sup>86</sup> Foremost of these jurisdictions is the state of Michigan which declared its position in the case of *People v. Aaron*.<sup>87</sup> The state supreme court first looked to "the most basic principle of the criminal law in general . . . criminal liability for causing a

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<sup>80</sup> COMMENTARIES, *supra* note 1, at 31.

<sup>81</sup> Indeed, the evidence is somewhat to the contrary. "There is no basis in experience for thinking that homicides *which the evidence makes accidental* occur with disproportionate frequency in connection with specified felonies." COMMENTARIES, *supra* note 1, at 38 (emphasis in original). The statistical evidence cited by the commentators shows that the number of all homicides which occur during the course of robbery, burglary, and rape is somewhat lower than might otherwise be expected. *Id.* at 38 n.96.

<sup>82</sup> *Id.* at 38-39.

<sup>83</sup> A number of codes specify the felonies which can be the basis for the rule. *See, e.g.*, ILL. REV. STAT. ch. 38, § 9-1 (1979). Some courts have attempted to limit the felony murder rule to the felonies which, in the abstract, are inherently dangerous to human life. For criticism of the rule, see COMMENTARIES, *supra* note 1, at 35.

<sup>84</sup> For a dissenting view, see *State v. Thompson*, 88 Wash. 3d 13, 558 P.2d 202, *appeal dismissed*, 434 U.S. 898 (1977).

<sup>85</sup> Alaska, Louisiana, New York, Pennsylvania, and Utah have reduced the felony murder crime to second degree murder. *See* discussion in *People v. Aaron*, *infra*, 409 Mich. 672, 689, 299 N.W.2d 304, 315 (1980).

<sup>86</sup> Even in those states which have not acted in such drastic fashion, severe restrictions have been imposed with respect to the foreseeability of the offense, especially with regard to killings not directly caused by the defendant or a co-defendant. *See, e.g.*, *State v. Williams*, 254 So. 2d 548 (Fla. Dist. Ct. App. 1971); *Jackson v. State*, 92 N.M. 461, 589 P.2d 1052 (1979). *Contra*, *People v. Hickman*, 59 Ill.2d 89, 319 N.E.2d 511 (1974); *Jackson v. State*, 286 Md. 430, 408 A.2d 711 (1979).

<sup>87</sup> 409 Mich. 672, 299 N.W.2d 304 (1980).



particular result is not justified in the absence of some culpable mental state in respect to that result."<sup>88</sup> The court had little difficulty in concluding that

[t]he most fundamental characteristic of the felony-murder rule violates this basic principle in that it punishes all homicides, committed in the perpetration or attempted perpetration of proscribed felonies whether intentional, unintentional or accidental, without the necessity of proving the relation between the homicide and the perpetrator's state of mind. This is most evident when a killing is done by one of a group of co-felons. The felony-murder rule completely ignores the concept of determination of guilt on the basis of individual misconduct. The felony-murder rule thus "erodes the relation between criminal liability and moral culpability."<sup>89</sup>

The court then speculated that the impact of the abolition of the felony murder rule would be limited:

From a practical standpoint, the abolition of the category of malice arising from the intent to commit the underlying felony should have little effect on the result of the majority of cases. In many cases where felony murder has been applied, the use of the doctrine was unnecessary because the other types of malice could have been inferred from the evidence.

Abrogation of this rule does not make irrelevant the fact that a death occurred in the course of a felony. A jury can properly infer malice from evidence that a defendant intentionally set in motion a force likely to cause death or great bodily harm. . . . Thus, whenever a killing occurs in the perpetration or attempted perpetration of an inherently dangerous felony, . . . in order to establish malice the jury may consider the "nature of the underlying felony and the circumstances surrounding its commission."

If the jury concludes that malice existed, they can find murder. . . .

As previously noted, in many circumstances the commission of a felony, particularly one involving violence or the use of force, will indicate an intention to kill, an intention to cause great bodily harm, or wanton or willful disregard of the likelihood that the natural tendency of defendant's behavior is to cause death or great bodily harm. Thus, the felony-murder rule is not necessary to establish *mens rea* in these cases.<sup>90</sup>

While few courts or legislatures have gone as far as the *Aaron* court,<sup>91</sup> it is beyond dispute that the modern trend is for severe limitation of the traditional felony murder rule. One would, therefore, hope for and expect repudiation of the rule in the Model Penal Code and its Commentaries. The rule is expressly repudicated, but the essence of it seems to survive. The Code "creates a presumption of the required reck-

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<sup>88</sup> *Id.* at 708, 299 N.W.2d at 316.

<sup>89</sup> *Id.*, 299 N.W.2d at 317.

<sup>90</sup> *Id.* at 729-30, 299 N.W.2d at 327. See also COMMENTARIES, *supra* note 1, at 37 ("For the vast majority of cases it is probably true that homicide occurring during the commission or attempted commission of a felony is murder independent of the felony-murder rule.").

<sup>91</sup> In addition to Ohio, the states of Kentucky and Hawaii have specifically abolished the felony murder doctrine. See discussion in *People v. Aaron*, 409 Mich. at 690, 299 N.W.2d at 314.

lessness and extreme indifference, however, if a homicide occurs during the commission or attempted commission of robbery, sexual attack, arson, burglary, kidnapping, or felonious escape.”<sup>92</sup> This presumption also applies to the person who is an accomplice to the commission of one of the specified crimes. The important question is whether this presumption differs in material form from the felony murder.

The Model Penal Code’s approach is different from the traditional rule in that the jurors are said to be free to disregard the “presumption.”<sup>93</sup> Thus, the commentators conclude that the effect of the Code provision “is to abandon felony murder as a separate basis for establishing liability for homicide.”<sup>94</sup> Two responses must be made to this conclusion. First, there is considerable doubt whether the jurors will disregard the presumption, especially in cases in which no *independent* evidence is offered as to the recklessness state of mind. That is, as I read the presumption, the jurors may find (indeed, are encouraged to find) the necessary state of mind with no evidence other than the commission of the named felonies. This looks suspiciously like the felony murder rule. Second, and more fundamentally, what possible basis can exist for the presumption here? The commentators refer to the presumption “as a concession to the facilitation of proof.”<sup>95</sup> If, however, the felony murder rule is wrong because it fails to require “a finding that the actor’s conduct manifested an extreme indifference to the value of human life,”<sup>96</sup> it would seem that the presumption is just as wrong. A finding of extreme indifference is required, but that requirement can be met merely by a showing that the defendant or a co-defendant committed a particular felony. The draftsmen and commentators remark that “[p]rincipled argument in favor of the felony-murder doctrine is hard to find,”<sup>97</sup> yet it is also hard to find a principled argument in favor of the presumption in the Code.

#### MANSLAUGHTER

The Model Penal Code, section 210.3, provides that

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<sup>92</sup> COMMENTARIES, *supra* note 1, at 29.

<sup>93</sup> *Id.* at 30. It is doubtful that the commentators mean to continue using the term “presumption” in this context. It appears more likely that they intend to use the term “inference” which would allow the jury to reject the evidence with no contrary showing. If they truly mean presumption in the sense that the burden of proving this element (recklessness) is on the defendant, serious constitutional questions would have to be raised in light of *Mullaney v. Wilbur*, 421 U.S. 684 (1975) and *Patterson v. New York*, 432 U.S. 197 (1977). See generally Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299 (1977). See also *infra* note 124.

<sup>94</sup> COMMENTARIES, *supra* note 1, at 30.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 39.

<sup>97</sup> *Id.* at 37.

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

At the time the Model Penal Code was drafted the state of the law with respect to the offense of manslaughter was muddled, to say the least. Some states divided the crime into two types, voluntary and involuntary.<sup>98</sup> Other states did not even attempt to define the crime, simply incorporating the common law offense. At common law, manslaughter was a "catch-all" category covering homicides which were not considered murder. This usually involved intentional killings accompanied by adequate provocation and reckless killings that did not rise to the level of "depraved heart" murder.<sup>99</sup> Still other states adopted statutes which divided the crime into degrees.<sup>100</sup> Hence, in a very real sense, the major contribution of the draftsmen here was to bring some uniformity to the crime in those states which have adopted the Code.

The first type of manslaughter recognized by the Code is the reckless killing of another. Carefully distinguishing negligent homicide,<sup>101</sup> the Code mandates a showing that the defendant "consciously disregards a substantial and unjustifiable risk." It is considerably more difficult to prove this reckless conduct than to prove negligent acts; the section requires behavior which is "a gross deviation from the standard of conduct that a law-abiding person would observe," and proof is required of a "conscious disregard of perceived homicidal risk."<sup>102</sup> If the risk creation demonstrates "extreme indifference," the crime is murder rather than manslaughter.

The second type of manslaughter is the killing in the heat of pas-

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<sup>98</sup> The traditional view is that voluntary manslaughter is committed when there is an intent to kill, but no malice aforethought. Involuntary manslaughter is committed without this intent to kill, but upon otherwise culpable behavior. The division, however, was not so explicitly recognized as in many of the statutory provisions. *See* COMMENTARIES, *supra* note 1, at 44-48.

<sup>99</sup> This form of manslaughter thus required more culpability than for ordinary civil negligence, but less than for the "abandoned heart" murder. *Id.* at 44.

<sup>100</sup> Foremost among these statutes was the New York law which allowed for first degree manslaughter when the killing occurred in the heat of passion in a cruel and unusual manner and second degree manslaughter in the heat of passion, but not by means either cruel or unusual. N.Y. PENAL LAW §§ 1050, 1052 (McKinney 1909) (repealed 1965).

<sup>101</sup> Section 210.4 states: "Criminal homicide constitutes negligent homicide when it is committed negligently." The discussion of the commentators in the section is quite helpful, but reference to it in this article is deleted because of space limitations.

<sup>102</sup> COMMENTARIES, *supra* note 1, at 53.

sion as a result of severe provocation. Wharton states the policy for allowing a lesser penalty even though the killing was intentional: "As a concession to human frailty, a killing, which would otherwise constitute murder, is mitigated to voluntary manslaughter."<sup>103</sup> The common law had difficulties defining this aspect of the crime and applying it in a manner consistent with the underlying policy. The greater the heat of passion and the more severe the provocation, the greater chance that the crime would be considered manslaughter rather than murder. The oft-stated theory was that if this was the kind of incident which would cause even a reasonable person to lose self-control the law ought not hold the defendant to the sanction for murder. The problem, though, was that "a reasonable person does not kill even when provoked."<sup>104</sup> As explained by Wechsler and Michael, the policy rationale stated above is nonetheless served by allowing mitigation to the manslaughter charge:

[T]he more strongly [most persons] would be moved to kill by circumstances of the sort which provoked the actor to the homicidal act, and the more difficulty they would experience in resisting the impulse to which he yielded, the less does his succumbing serve to differentiate his character from theirs.<sup>105</sup>

The Model Penal Code has sought to effectively eliminate three major problems involved in applying the provocation rules: first, the requirement that the provocation be sufficient to affect even the reasonable person; second, the view that words alone were insufficient to constitute adequate provocation; and third, the provision that there could be no break in time between the provocation and the defendant's action.

Determining what a reasonable person would or would not do under difficult circumstances has never been an easy task for finders of fact, as seen in the many conflicting negligence cases in tort law.<sup>106</sup> The reasonable person standard does, however, allow for a specific objective standard upon which persons could rely. In the criminal context, however, some question was raised as to whether the reasonable person standard should be used to determine adequate provocation. As noted by the commentators, "[a] taunting attack that would seem trivial to the

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<sup>103</sup> 2 WHARTON'S CRIMINAL LAW § 153 (14th ed. 1978).

<sup>104</sup> COMMENTARIES, *supra* note 1, at 56.

<sup>105</sup> Wechsler & Michael, *A Rationale of the Law of Homicide II*, 37 COLUM. L. REV. 1261, 1281 (1937).

<sup>106</sup> Learned Hand attempted to devise a formulation to assist in the tort negligence decision. He wrote that the negligence determination "is a function of three variables: (1) The probability [of the result]; (2) the gravity of the resulting injury . . . ; (3) the burden of adequate precautions." He went on to explain: "Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B [is less than] PL." *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2nd Cir. 1947).

ordinary citizen may be extremely threatening to the blind man."<sup>107</sup> *Commonwealth v. Stasko*<sup>108</sup> demonstrates well the refusal to consider the individual traits of the defendant which might have led him to be provoked. The defendant attempted at trial to offer medical evidence to show his "tendency to have a short temper and erupt in sudden rages." The trial judge's refusal to allow the evidence into the record was affirmed:

The purpose of the testimony was to show that, in the case of this particular accused, there was sufficient provocation for the attack. This evidence was clearly inadmissible: "Our law is quite explicit that the determination of whether a certain quantum of provocation is sufficient to support the defense of voluntary manslaughter is purely an objective standard. . . ." The test for adequate provocation is "whether a reasonable man, confronted with this series of events, became impassioned to the extent that his mind was incapable of cool reflection."<sup>109</sup>

Indeed, in one case evidence was refused, even though the court conceded that the evidence would have shown the defendant to be "a man with a low intelligence quotient and a history of mental disturbance . . . [as the] objective standard precludes consideration of the innate peculiarities of the individual defendant."<sup>110</sup>

The Code seeks to start anew in this area, for it "sweeps away the rigid rules that limited provision to certain defined circumstances. Instead, it casts the issue in phrases that have no common-law antecedents and hence no accumulated doctrinal content."<sup>111</sup> Manslaughter is shown when the killing is "committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse." While the Code does retain the reasonable person standard, this requirement may be met by looking to "the viewpoint of a person in the actor's situation under the circumstances as he believes them to be." It thus appears that the Code strikes a healthy balance between the opposing positions. Some reasonable person standard must be met, so that the section "preserves the essentially objective character of the inquiry and erects a barrier against debilitating individualization of the legal standard."<sup>112</sup> Still, the reasonableness must be assessed "from the viewpoint of a person in the actor's situation." "[I]t is clear that personal handicaps and some external circumstances must be taken

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<sup>107</sup> COMMENTARIES, *supra* note 1, at 56.

<sup>108</sup> 471 Pa. 373, 370 A.2d 350 (1977).

<sup>109</sup> *Id.* at 384, 370 A.2d at 356 (*quoting* *Commonwealth v. McCusker*, 448 Pa. 382, 389-90, 292 A.2d 286, 289-90 (1972)).

<sup>110</sup> *State v. Jackson*, 226 Kan. 302, 309, 597 P.2d 255, 259 (1979), *cert. denied*, 445 U.S. 952 (1980). *See also* *Bedder v. Director of Public Prosecutions* [1954] 2 All E.R. 801. *But see* *Director of Public Prosecutions v. Camplin* [1978] 2 All E.R. 168.

<sup>111</sup> COMMENTARIES, *supra* note 1, at 61.

<sup>112</sup> *Id.* at 62.

into account. Thus, blindness, shock from traumatic injury, and extreme grief are all easily read into the term 'situation.'"<sup>113</sup>

The common law also had trouble defining the sort of external activity which would give rise to the provocation defense. The rule traditionally was that "words alone, however scurrilous or insulting, will not furnish the adequate provocation required."<sup>114</sup> The major exception to the "mere words" rule, as noted by the commentators, "concerned informational words disclosing a fact that would have been adequate provocation had the actor observed it himself,"<sup>115</sup> such as the case in which the defendant is told, "I just killed your child." Under the code, no explicit rule is promulgated with respect to "mere words." The Code draftsmen recognized that the important question "cannot be resolved successfully by categorization of conduct. It must be confronted directly on the facts of each case."<sup>116</sup> In most cases words alone will not be sufficient provocation. In the highly unusual case, however, mere words might be sufficient to cause even the reasonable person to lose self-control.<sup>117</sup>

At common law a manslaughter claim was not allowed if there was a cooling off period between the provocation and the killing. The final contribution of the Code in this area is the elimination of this "sudden provocation" element. The reason for the strict rule was that "[f]or the reasonable man, at least, passion subsides and reason reasserts its sway as the provoking event grows stale."<sup>118</sup> The most famous case in the area, discussed by the commentators, is *State v. Gounagias*<sup>119</sup> where "the deceased committed sodomy on the unconscious defendant and subsequently spread the news of his accomplishment. Those who learned of the event taunted and ridiculed the defendant until he finally lost control and killed his assailant some two weeks after the sodomy."<sup>120</sup>

This theory of the cumulative effect of reminders of former wrongs, not of new acts of provocation by the deceased, is contrary to the idea of sudden anger as understood in the doctrine of mitigation. In the nature of the thing *sudden* anger cannot be cumulative. A provocation which does not cause instant resentment, but which is only resented after being thought upon and brooded over, is not a provocation sufficient in law to reduce

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<sup>113</sup> *Id.*

<sup>114</sup> *State v. Castro*, 92 N.M. 585, 590, 592 P.2d 185, 187 (1979) (quoting *State v. Nevares*, 36 N.M. 41, 44-45, 7 P.2d 933, 935 (1932)).

<sup>115</sup> COMMENTARIES, *supra* note 1, at 58.

<sup>116</sup> *Id.* at 61.

<sup>117</sup> As in *People v. Borchers*, 50 Cal. 2d 321, 325 P.2d 97 (1958), where the wife told her husband, the defendant, that she had been unfaithful, asked him to kill her and her four-year-old child, and taunted him by calling him a "chicken."

<sup>118</sup> COMMENTARIES, *supra* note 1, at 59.

<sup>119</sup> 88 Wash. 304, 153 P. 9 (1915).

<sup>120</sup> COMMENTARIES, *supra* note 1, at 59.

intentional killing from murder to manslaughter . . . .<sup>121</sup>

The problem with the rule is that the law should not necessarily distinguish between the person who instantly reacts to the provocation and the person who broods for a week or two and then responds. The Code recognizes this, and does not set out a specific rule with respect to the suddenness of the situation. The validity of the Code's position is seen in cases such as *People v. Berry*.<sup>122</sup> The victim in that case, defendant's wife, was a suicidally inclined young woman who pursued her death wish by "sexually arousing him and taunting him into jealous rages in an unconscious desire to provoke him into killing her and thus consummating her desire for suicide."<sup>123</sup> For a two week period she continually harassed defendant with sexual taunts and incitements, and repeated references to her involvement with another man. Finally, the defendant strangled her to death. Under the "sudden passion" rule the defendant would not have been able to prove his defense.<sup>124</sup> The court, however, recognized that the

two-week period of provocatory conduct by his wife . . . could arouse a passion of jealousy, pain and sexual rage in an ordinary man of average disposition such as to cause him to act rashly from this passion. . . .

The Attorney General contends that the killing could not have been done in the heat of passion because there was a cooling period . . . . However, the long course of provocatory conduct, which had resulted in intermittent outbreaks of rage under specific provocation in the past, reached its final culmination . . . .<sup>125</sup>

The Model Penal Code treatment of manslaughter is a "modified

<sup>121</sup> 88 Wash. at 314, 153 P. at 14. See also *People v. Wilson*, 3 Ill. App. 3d 481, 486, 278 N.E.2d 473, 477 (1972) ("To reduce an unlawful killing from murder to voluntary manslaughter, the sudden and intense passion resulting from serious provocation cannot be followed by a period of time sufficient for the passion to cool and the voice of reason to be heard.").

<sup>122</sup> 18 Cal. 2d 504, 556 P.2d 777, 134 Cal. Rptr. 415 (1976).

<sup>123</sup> *Id.* at 514, 556 P.2d at 780, 134 Cal. Rptr. at 418.

<sup>124</sup> The Model Penal Code requires the government to prove the elements of the voluntary manslaughter offense, though some states required the accused to prove the provocation claim by a preponderance of the evidence. As the commentators point out, there has been some question as to the constitutionality of placing this burden on the defendant. In *Mullaney v. Wilbur*, 421 U.S. 684 (1975) the Supreme Court struck down a state statute which required the defendant to prove provocation by preponderance of the evidence. But see *Patterson v. New York*, 432 U.S. 197 (1977) where the Court upheld the constitutionality of requiring the defendant to shoulder the burden under a state statute which referred to emotional disturbance. The Court found that the emotional disturbance element, unlike the provocation aspect in *Mullaney*, raised an affirmative defense. "The Model Code takes . . . the . . . position advanced as a constitutional rule by Mr. Justice Powell's dissent in *Patterson*, that, once the defendant has come forward with some evidence of extreme emotional disturbance, the burden of proving its non-existence should shift to the prosecution." COMMENTARIES, *supra* note 1, at 63-64 n.58. See also *supra* note 93.

<sup>125</sup> 18 Cal. 3d at 515-16, 556 P.2d at 780-81, 134 Cal. Rptr. at 419.

and substantially enlarged version of the rule of provocation."<sup>126</sup> This expansion is thoroughly justified, however, for it realistically allows the important questions regarding mitigation of the crime to be placed before the jury without any strict categories as to time or type of behavior required. It allows the jury to apply a standard which is both subjective and objective. In short, it is a substantial improvement over the uncertainties of the common law.<sup>127</sup>

I turn now to another situation. Suppose the defendant shoots and kills the victim, believing that the victim was about to shoot and kill him. The defendant's belief, though genuinely held, is unreasonable. Had this mistaken belief been reasonable, the defendant would be able to raise a complete, or "perfect," claim of self-defense. Under the traditional provocation rule, the hypothetical defendant would be convicted of murder because he had the intent to kill and could not claim to have been aroused by the "heat of passion." Recognizing this "as an indefensible position"<sup>128</sup> the Code has adopted a version of the "imperfect" right of self-defense. The standard version, as enacted in Illinois, focuses attention on the defendant's sincere, but unreasonable belief: "A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing . . . , but his belief is unreasonable."<sup>129</sup> The Code treatment of the im-

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<sup>126</sup> COMMENTARIES, *supra* note 1, at 60.

<sup>127</sup> The Commentaries also discuss the diminished responsibility concept. The commentators clearly support the notion that "all evidence logically relevant to establishing the actor's state of mind" should be admissible. COMMENTARIES, *supra* note 1, at 66. This, of course, reiterates the point that the individual characteristics of the defendant ought to be considered to some extent in determining provocation and the reaction of the defendant. With respect to the question of allowing diminished responsibility to reduce murder to manslaughter, however, the commentators are far less certain:

Recognizing diminished responsibility as an alternative ground for reducing murder to manslaughter undermines this scheme. Unlike provocation, diminished responsibility is entirely subjective in character. It looks into the actor's mind to see whether he should be judged by a lesser standard than that applicable to ordinary men. It recognizes the defendant's own mental disorder or emotional instability as a basis for partially excusing his conduct. This position undoubtedly achieves a closer relation between criminal liability and moral guilt.

*Id.* at 71. The commentators conclude that the Code does not recognize diminished responsibility as a distinct category of mitigation, but "leaves the issue, together with many others, as part of the generic problem of determining the extent to which the actor's individual characteristics should be taken into account in the formula." *Id.* at 73.

<sup>128</sup> *Id.*

<sup>129</sup> ILL. REV. STAT. ch. 38, § 9-2(b) (1979). See also *People v. Joyner*, 50 Ill. 2d 302, 309, 278 N.E.2d 756, 759 (1972):

Occasionally a defendant who raises a defense of self-defense to a charge of murder is convicted of manslaughter . . . . The difference between a justified killing under self-defense and the one not justified, amounting to voluntary manslaughter, is that in the former instance the belief that the use of force is necessary is reasonable under the circumstances, and in the latter, the belief is unreasonable.



perfect defense is preferable to this version simply because it is more precise. It allows for a manslaughter conviction in the situation discussed above, but specifies that the defendant could be guilty of criminal homicide if his belief was formed recklessly or negligently.<sup>130</sup>

The final area in the law of manslaughter in which the Code has made an important contribution is the misdemeanor-manslaughter rule, an offshoot of the felony murder rule. As with felony murder, the broad scope of the rule provided that it was a homicide offense if the defendant caused a death while committing, or attempting to commit, a crime. Although a number of courts have narrowly construed the rule<sup>131</sup> it is, nevertheless, "objectionable on the same ground as the felony-murder rule. It dispenses with proof of culpability and imposes liability for a serious crime without reference to the actor's state of mind."<sup>132</sup> To be sure, it is even worse than the felony murder rule, for the defendant may be charged with a homicide offense even though he may not have committed any serious offense and might not be chargeable with generally reckless conduct.<sup>133</sup>

*People v. Nelson*<sup>134</sup> is perhaps the most extreme application of the misdemeanor-manslaughter rule. The defendant was an elderly man, formerly a tenant, who eventually became the owner of his building. Two persons were killed in a fire which occurred in the building. The government showed that a violation of the building law, a misdemeanor, caused the deaths. The defendant contended that he did not know of the building law and thus had not acted in a reckless fashion. The trial judge would not let the jury consider the issue of the defendant's knowledge, and the Court of Appeals of New York affirmed.<sup>135</sup> The dissenter disagreed:

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<sup>130</sup> It is difficult to imagine many situations in which the defendant would be able to state a legitimate self-defense argument when he was reckless as to the mistaken belief in the necessity. If recklessness requires a conscious disregard of a substantial risk with respect to the necessity of defense, the prosecution may properly argue that he truly did not believe he was entitled to use force and hence ought to be guilty of murder.

<sup>131</sup> For example, some states apply the rule only to misdemeanors *mala in se* but not to misdemeanors *mala prohibita*. Others refuse to apply the rule where the underlying crime is one of strict liability. *But see infra* text accompanying notes 134-38. The commentators discuss these limitations in some detail. COMMENTARIES, *supra* note 1, at 76-77.

<sup>132</sup> *Id.* at 77.

<sup>133</sup> In a situation involving a serious crime such as rape or armed robbery, it would not be difficult for the finder of fact to conclude that the defendant had consciously disregarded a very serious risk, proven by his involvement in such a violent crime. The death of the victim could more justifiably be considered criminal homicide.

<sup>134</sup> 309 N.Y. 231, 128 N.E.2d 391 (1955).

<sup>135</sup> The court stated:

It is undeniable that a tremendous duty is placed upon the owners and those in charge of property under the applicable section of the Multiple Dwelling Law; however, it is quite apparent that the Legislature intended the burden to be onerous so that owners would be impressed with the consequences flowing from violation of the statute, which viola-

If awareness of the misdemeanor is held to be irrelevant, the basis for guilt of manslaughter is eliminated. . . .

" . . . When there is a general intent to do evil, in other words, of which evil the wrong actually done may be looked upon as a probable incident, then the party having such general intent is to be regarded as having intended the particular wrong."<sup>136</sup>

*Nelson* demonstrates how indefensible the misdemeanor-manslaughter rule is. Even though the defendant may have committed the substantive crime, it is wrong to hold him for a homicide offense without a showing of a culpable state of mind. Unlike the presumption adopted in the felony-murder area,<sup>137</sup> the approach of the Code draftsmen here is straightforward. They expressly abolish the misdemeanor-manslaughter rule. This approach is quite proper. If the defendant acted in an otherwise reckless or negligent fashion, he may be charged with homicide. If he has not acted culpably, even though guilty of a misdemeanor, he should not be brought within the reach of a manslaughter statute.<sup>138</sup>

#### CONCLUSION

The approach of the Model Penal Code in the area of criminal homicide is illustrative of the general approach of the Code. There are several difficult subjects which the draftsmen have chosen to deal with in a direct and clear fashion; others have been avoided or obfuscated. For example, the draftsmen were careful to define with clarity the elements of the crime of manslaughter, avoiding the common law difficulties. They explicitly rejected those murder statutes which had divided the offense into degrees. On the other hand, they have failed to come to terms with important definitions such as "death," they have refused to confront the possibility of a feticide statute, and have only partially responded to the intense criticism of the felony murder.

The great worth of the Code cannot, however, be evaluated by looking to such specifics. The Code has had tremendous influence on the criminal law in this country and has brought considerable clarity

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tions could so readily endanger human life in the congested conditions under which people must live in the City of New York.

*Id.* at 236, 128 N.E.2d at 394.

<sup>136</sup> *Id.* at 239, 128 N.E.2d at 395 (Van Voorhis, J., dissenting) (quoting 1 WHARTON'S CRIMINAL LAW § 157 (12th ed. 1932)).

<sup>137</sup> See *supra* text accompanying notes 73-97.

<sup>138</sup> Related to the misdemeanor manslaughter rule is the so-called intent to injure rule. As stated by the commentators, many jurisdictions have provisions in which "one who caused the death of another by a simple battery was generally guilty of manslaughter or of involuntary manslaughter where that was a separate category, however improbable the fatal result." COMMENTARIES, *supra* note 1, at 78. The imposition of homicide sanctions makes little sense absent some reckless or negligent conduct apart from the battery itself. The Code rejects the intent to injure rule and simply focuses on whether the defendant's action is reckless or negligent in determining which, if any, homicide category should be applied.

and uniformity to an area of the law in which both were notoriously absent. The efforts of Professors Low and Jeffries will serve further to clarify and explain the rationale for the Code, allowing lawyers, judges and legislators to understand the positions taken by the draftsmen and intelligently to decide whether such positions are supportable. The commentators' efforts are both substantial and significant. By updating the explanations for the Code provisions they have provided an invaluable aid to those engaged in the administration of criminal justice.

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PRISONS AND POLITICS. By *Richard A. McGee*. Lexington, Mass.: Lexington Books, 1981. Pp. xiv, 162. \$21.95.

Those in the business of crisis prediction should have little difficulty recognizing one that's as sure a bet as any for the 1980s—the crisis of America's burgeoning prisons. The criminal justice system responded to the crime explosion of the 1960s and '70s, a period in which the homicide rate doubled, with an unprecedented expansion in our prison and jail populations—from 356,000 in 1970 to 530,000 by 1977. With most indicators pointing to a continuation of the upward trend in inmate populations, only the most optimistic and least informed could not be concerned about the potential for upheaval in our nation's prisons by 1990.

Under such circumstances, we would be foolish not to do our best to understand the lessons of previous episodes of turmoil in our prisons, as well as a few episodes of success that have occurred here and there, so as to avoid repeating past errors and make use of what has worked. In sharing his treasure of personal experience as a prison administrator in the states of New York, Washington, and California, Richard McGee, in *Prisons and Politics*, provides the means to enable others to understand such lessons. McGee's account of the problems of prison administration and how he has dealt with them is both thoughtful and thorough. His grasp of the fundamental issues is deep:

Public officials . . . know instinctively that their prisons are unflattering reflections of their cultures. All societies have difficulty reconciling their desire to be humane and compassionate with their exasperation with overt antisocial behavior. To hurt and heal, to banish and forgive, to destroy and rebuild: these difficult and contradictory concepts come face to face in their starkest form in prison. (p. 84.)

McGee's credentials in prison administration are second to none.