

2019

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Recommended Citation

37 Miss. C. L. Rev. 107 (2019).

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WHY MISSISSIPPI SHOULD REFORM ITS PENAL CODE

*Judith J. Johnson*¹

I. INTRODUCTION

The Mississippi Penal Code was determined at the turn of this century to be the fifty-second-worst penal code in the United States.² As much as Mississippi is often used to being—and is even proudly defiant for being—ranked low on national scales, this is an issue about which we should be deeply concerned. A well-drafted penal code is crucial because it is at the core of the primary value of justice. While we are experienced with being ranked last in many situations, often unfairly, the criticism of the Mississippi Penal Code is accurate. Although many of the cited defects are ameliorated by court opinions, it is not desirable that the penal law should be so dependent on numerous sources outside the code.³

The legislature established the Mississippi Judicial Advisory Committee in 1993 to improve the administration of justice.⁴ The Advisory Committee established the Criminal Code Consulting Group [hereinafter referred to as the Committee] to suggest revisions to the penal code. The Committee has been meeting since 1996 and is finally reaching the end of its charge and will present its proposals to the legislature in the foreseeable future. The legislature will have to decide whether to take up this important and daunting challenge to rise from the fifty-second ranked penal code to a more respectable position. More important than a mere ranking, the Committee proposals will improve the administration of the criminal justice system.

When the Committee was first appointed by the Judicial Advisory Committee, the main concern expressed regarded sentencing disparity. The Committee was charged with reforming the criminal statutes to remedy this disparity, along with other issues identified by criminal code reform in other

1. Professor of Law, Mississippi College School of Law. I want to thank Michelle Sultan, the current research assistant for the Committee, for her assistance. I also want to thank Michael Primack for additional assistance. In addition, I want to thank all my research assistants and all of the members of the Committee who have provided valuable support over the years.

2. Paul H. Robinson, Michael T. Cahill, and Usman Mohammed, *The Five Worst (and Five Best) American Criminal Codes*, 95 *Northwestern U. L. Rev.* 1, 3 n.3 (2000). Being fifty-second sounds impossible; however, the evaluation by noted criminal law experts added the federal code and the D.C. code to their assessments. *Id.*

3. See *infra* discussion accompanying notes 144–45. Mississippi does not have a penal code, denominated as such, but most of the criminal laws are concentrated in MISS. CODE ANN. Title 97, and the Committee principally dealt with those laws.

4. MISS. CODE ANN. § 9-21-1 (1993 Cumulative Supplement) (current version at MISS CODE ANN. § 9-3-69 (2017)). The Judicial Advisory Study Committee was eliminated in 2018. H.B. 949 (2018). The Criminal Code Consulting Group (which I will refer to hereinafter as the Committee) is now operating under the auspices of the Mississippi Supreme Court.

jurisdictions. With regard to sentencing disparity, many criminal statutes in Mississippi provide a range of decades as a possible sentence, such as one year to thirty years.⁵ This allows one defendant to be sentenced to spend most, if not all, of his life in prison, while another may get only a one-year sentence for the same conduct.⁶ Another obvious problem with Mississippi criminal law is the often-vague definitions of the conduct prohibited.⁷ Because the chief distinction between criminal and civil offenses is a criminal state of mind, it is especially concerning that states of mind are often lacking or confusing in many Mississippi statutes.⁸ Yet another major problem is that Mississippi has a patchwork of often disorganized criminal statutes that do not relate to each other, with no definitions that apply to the overall criminal code.⁹ To avoid exacerbating this problem, the Committee is recommending a comprehensive reform of the principle criminal statutes. The Committee's proposals, if adopted, would make substantial progress in addressing these and other problems with the Mississippi Code, as explained in this article.

This article is the first in a series of articles that will present the case for penal-code reform and explain the Committee's rationales. This series of articles is intended to replace comments, which the Committee did not write, although there are extensive comments to the Model Penal Code, on which these proposals are based.

This first article will introduce and explain the Committee's process. In addition, this article will begin the explanation of the important areas of change, starting with states of mind and homicide. Future articles will explain the other groups of crimes and other issues that the Committee has addressed.

In this article, Section II will explain the methodology of the Committee's work; Section III will explain the Model Penal Code because it was used as the basis for the Committee's proposals; Section IV will discuss the criticism of the current code; Section V will explain how the reform would improve two important areas of the Mississippi Code: state of mind and homicide. Section VI will conclude.

II. COMMITTEE METHODOLOGY

The Committee consists of judges, prosecutors, defense attorneys, legislative drafters, and law professors.¹⁰ The Committee has laboriously moved

5. See *infra* note 60.

6. See *infra* discussion accompanying notes 60–64 and 89–92.

7. See *infra* discussion accompanying notes 67–71.

8. See *infra* discussion accompanying notes 78–85.

9. See *infra* discussion accompanying notes 72–76.

10. Current committee members: Professor Judith J. Johnson, chair; Professor Matthew Steffey, reporter; Judge Donna Barnes; Patrick Beasley; Judge John Emfinger; Greta Harris; Mary Katherine Lindsay; Caryn Quilter; Professor Ronald J. Ryclak; Kathy Sones; Alison Steiner; and Ed Snyder.

Original Committee Members: Professor Judith Johnson, chair; Professor Matthew Steffey, reporter; Judge Fred Banks, co-chair for some period of time; Judge Robert Gibbs, who also co-chaired for some period of time; Judge Robert Bailey; James Craig; Judge Bobby DeLaughter; Rusty Fortenberry; Tom Fortner; Buddy

through the most important parts of Title 97 of Mississippi Code of 1972, which contains the principal criminal statutes, trying to develop a penal code that is both more coherent and comprehensive than current law.¹¹ The Committee has only dealt with the substantive criminal law, leaving for another committee the reform of the corrections system, which is also needed.

I was appointed to chair the Committee in 1995, so the first question is why it has taken so long for the Committee to complete its work. Other states have no doubt spent a good deal of money and have had paid staffs of attorneys and research assistants.¹² Being faced with very limited resources, we have been benefitted by many public-spirited members.¹³ Our Committee is all-volunteer and has worked on one statute at a time at its monthly meetings.

Why did this effort take so long? The Committee is all-volunteer, as noted, working without a staff and with only one student research assistant at a time, paid for by Mississippi College School of Law. As our reporter, Professor Matt Steffey, has often said, “of good, cheap, and fast, we could only have two, good and cheap, not fast.”¹⁴ As noted, other states have been able to accomplish the task more quickly, but not with such economy.¹⁵ More importantly, we could not have paid for the experience and expertise that we have been able to garner for our effort, as illustrated by the members of the Committee, current and former.¹⁶

At each of the monthly meetings, we compare the Mississippi law to the relevant Model Penal Code provision and propose changes in the Mississippi law

McDonald; Rob McDuff; Bilbo Mitchell; Al Moreton; Professor Ronald J. Rychak; Ed Snyder; Kathy Sones; Judge Leslie Southwick; Gwynetta Tatum; Frank Trapp; Senator Bennie Turner; Judge Frank Vollor; Professor Carol West; and Amy Whitten.

Others who have served on the Committee: Dewitt Allred, Judge George Carlson, Judge Virginia Carlton, Judge Kay Cobb, Andre DeGruy, Judge Oliver Diaz, David Dykes, Chris Klotz, Katie Lawrence, Frank McWilliams, Margarette Meeks, Faye Peterson, Clarence J. Richardson, Judge Larry Roberts, Judge Keith Starrett, Robert Taylor, Shondra Taylor-Legget, and Philip Weinberg.

Others who attended to help with specific issues: Drs. Phillip Meredith and Reb McMichael, Professor Cecile Edwards, Judge John Hudson, and Dean Emeritus Jim Rosenblatt. Judge Tom Broome also provided valuable input.

11. The Committee meets in Jackson at the Mississippi College School of Law. The law school has furnished the meeting space and paid the research assistant. In addition, the law school also furnished lunch for the committee for several years under the leadership of Dean Jim Rosenblatt. The Committee is very grateful for the support of the law school during all these years. The Administrative Office of the Courts has also furnished valuable support to the committee by sending out meeting notices and providing lunch for the committee for several years.

12. See, e.g., District of Columbia Government, *FY 2017 Proposed Budget and Financial Plan*, 6 A Fair Shot, June 22, 2016, at C-169 (2017) (with a budget of over \$700,000 per year for the Criminal Code Reform Commission) (approval recorded in *FY 2017 Approved Budget, Changes to Date, and Revised Budget*), both available at <https://cfo.dc.gov/page/annual-operating-budget-and-capital-plan>.

Other states have used state commissions and state resources. Conversation between Caryn Quilter (committee member) and Jessica Sanders (Alabama) on June 5, 2018 and Rob Kepple (Texas) on June 20, 2018.

13. See *supra* note 10.

14. Conversations with Professor Matthew Steffey (on numerous occasions).

15. See District of Columbia Government, *supra* note 12.

16. See *supra* note 1.

to reflect the needs of the state and the need for uniformity. The Committee is currently reviewing all the proposals it has adopted in preparation for compiling the results for presentation to the Mississippi Legislature.

The Committee based the proposed revisions on the Model Penal Code, which virtually all states that have reformed their penal codes have used.¹⁷ Thus it would be helpful to explain the Model Penal Code at this point.

III. THE MODEL PENAL CODE

The Model Penal Code [hereinafter the MPC or the Model Code] was developed by the American Law Institute¹⁸ [hereinafter ALI] and published in 1961 as a model for states to reform their penal codes, which most states have done.¹⁹ The Model Code serves as a measure of uniformity among the several codes. The Model Code has extensive comments that the Committee used in its considerations, as well as the experience of many states that have reformed their penal codes. As opposed to the restatements of the law, which were designed to digest the law and be consulted by judges as a guide to decision-making, the Model Code was designed to be adopted as an actual code by the states, with modifications to suit their particular situations.²⁰ The drafters of the Model Code reviewed centuries of development of the common law and statutory law to formulate rules and general principles and develop a body of work that could be adopted by legislative bodies.²¹

The ALI recognized the need for penal-code reform, as have the states that have reformed their penal codes, because of the confusing and inconsistent random statutes adopted over the past 200 years. Most states retained the common-law crimes recognized in England roughly before the Revolutionary War. Then state statutes were overlaid on the English common law and its confusing interpretations by common-law judges, which were followed by

17. Gerald E. Lynch, *Towards a Model Penal Code, Second (Federal?): The Challenge of the Special Part*, 2 BUFF. CRIM. L. REV. 297 (1998).

The Model Penal Code is among the most successful academic law reform projects ever attempted. In the first two decades after its completion in 1962, more than two-thirds of the states undertook to enact new codifications of their criminal law, and virtually all of those used the Model Penal Code as a starting point. *Id.*

The American Law Institute is in the process of making some changes to the MPC, notably in the area of sex crimes. *See, e.g.*, MODEL PENAL CODE §§ 213.0-213.11 (AM. LAW. INST., Proposed Official Draft 2015). The original draft of sex crimes was considered outdated and unsatisfactory. *See, e.g.*, Gerald E. Lynch, *Revising the Model Penal Code: Keeping It Real*, 1 OHIO ST. J. CRIM. L. 219, 230-31 (2003). The Committee also had to completely redraft the sex crimes sections, but that is a story for another day. The core provisions of the Model Code, however, have stood the test of time and there would be little to gain from changing them. *See* Lynch, *Towards a Model Penal Code*, *supra* note 17, at 297.

18. The American Law Institute was organized in 1923 to improve and clarify the law. The ALI consists of distinguished lawyers, judges, and professors. Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425 (1968).

19. *See* Lynch, *Revising the Model Penal Code*, *supra* note 17, at 297.

20. *Id.* at 220.

21. *Id.*

interpretations of state judges making common law for the state.²²

Two-thirds of the states reformed their penal codes using the Model Code as the basis for their reforms.²³ This effort occurred during the first twenty years after the MPC was published and has peaked thereafter. The states with the worst-ranked penal codes failed to conduct a review using the MPC.²⁴ Thus, although Mississippi comes late into the process, it may draw from the experience of many other states that have reformed their penal codes.²⁵

In addition to establishing some uniformity among criminal codes and crimes, virtually all American law students are introduced to the Model Code and its version of general definitions, as well as many of its crimes and defenses.²⁶ Also, courts and commentators frequently cite the Model Code as persuasive authority.²⁷ The Mississippi Supreme Court has cited the Model Code favorably,²⁸ and the Mississippi Legislature has based some of its codifications on the Model Code.²⁹ Finally, the drafters wrote extensive comments, explaining the provisions of the Model Code in detail. Although the comments will not be part of the legislation, lawyers, judges, and courts often rely on the comments to interpret the Model Code provisions.

The Committee chose not to publish separate comments, other than this series of articles, but to rely instead on the Model Code comments where appropriate. This set of articles will serve to some extent as comments and will be approved by the Committee before publication.

The Model Penal Code is divided into four parts.³⁰ The first covers general principles governing liability.³¹ This is the most important contribution of the MPC, which defines such important issues as criminal intent, inchoate crimes (such as attempt and conspiracy), as well as mens rea defenses (such as justification).³² The second part defines specific offenses,³³ such as criminal homicide³⁴ and theft.³⁵ The third part of the Model Code governs the process of treatment and correction,³⁶ and the fourth part organizes the various groups responsible for corrections.³⁷ Our Committee dealt only with the first two parts, leaving for another committee the work of studying, and possibly reforming, the

22. *Id.* at 225.

23. Lynch, *Towards a Model Penal Code*, *supra* note 17, at 297.

24. *Id.*

25. *Id.* at 297–98.

26. *Id.*

27. *Id.*

28. *See, e.g.*, *Fleming v. State*, 604 So. 2d 280, 292 (Miss. 1992) (approving of Model Code definition of serious bodily injury).

29. *See, e.g.*, MISS. CODE ANN. § 97-3-7 (2017) (simple and aggravated assault).

30. Wechsler, *supra* note 18, at 1428.

31. MODEL PENAL CODE Part I. General Provisions. (AM. LAW INST. 1985).

32. *Id.* Article 3 Principles of Justification.

33. *Id.* Part II. Definition of Specific Crimes

34. *Id.* at Article 210 Criminal Homicide.

35. *Id.* at Article 223, Theft and Related Offenses.

36. *Id.* at Part III. Treatment and Correction.

37. *Id.* at Part IV. Organization of Correction.

corrections process.

Another important contribution of the Model Code is to divide crimes by seriousness and to punish them accordingly. As will be discussed further below, a guiding principal of the Model Code is that no one should be punished severely for a true crime unless he has a requisite mental state.³⁸ A true crime is one involving a degree of moral condemnation and usually contemplates imprisonment.³⁹ For this reason, the punishment for the crime should be commensurate with the defendant's state of mind, as well as the severity of the offense. The Model Code recognizes three degrees of felonies,⁴⁰ which the Committee expanded to four degrees.⁴¹ Thus, murder is a felony in the first degree,⁴² along with aggravated forms of rape,⁴³ robbery⁴⁴ and kidnapping.⁴⁵ Manslaughter is a felony in the second degree,⁴⁶ along with non-aggravated forms of rape,⁴⁷ robbery,⁴⁸ kidnapping,⁴⁹ and others. Negligent homicide is a felony in the third degree,⁵⁰ along with non-aggravated burglary, and so forth.⁵¹

38. See MODEL PENAL CODE § 2.02 cmt. at 235–36 (AM. LAW INST. 1985).

39. See generally WAYNE R. LAFAYE, CRIMINAL LAW § 1.6(b) (5th ed. 1985). By true crime, I mean a crime that is malum in se, inherently evil in itself, as opposed to crimes that are merely malum prohibitum, not inherently wrong, but wrong only because they are prohibited by statute. *Id.*

40. MODEL PENAL CODE § 6.01 (AM. LAW INST. 1985).

41. Minutes of the Consulting Grp. on Miss. Criminal Code Revision, (Sept. 12, 2014) [hereinafter cited as Minutes] (on file with author).

In the footnotes, I cited the statutes the Committee is proposing, leaving in the changes made to the Model Penal Code, indicated by underlining, which are additions, and strikeouts, which are deletions. Statutes cited in the text do not have the changes indicated. Also, I treated homicide and mens rea statutes differently, as noted in those section. See *infra* note 157. The proposed sentencing scheme for felonies is as follows:

§ 6.06. Sentence of Imprisonment for Felony

A person who has been convicted of a felony may be sentenced to imprisonment, as follows:

- (a) in the case of a felony of the first degree, for a term the minimum of which shall be fixed by the Court at not less than twenty one year ~~nor more than ten~~ years, and the maximum of which shall be life imprisonment;
- (b) in the case of a felony of the second degree, for a term the minimum of which shall be fixed by the Court at not less than ten one year ~~nor more than three~~ years, and the maximum of which shall be ~~ten~~ twenty years;
- (c) in the case of a felony of the third degree, for a term the minimum of which shall be fixed by the Court at not less than 1 year, ~~at not less than one year nor more than two years~~, and the maximum of which shall be ~~five~~-ten years;
- (d) in the case of a felony of the fourth degree, for a term the minimum of which shall be fixed by the Court, and the maximum of which shall be five years.

42. MODEL PENAL CODE § 210.2(2) (AM. LAW INST. 1985).

43. *Id.* § 213.1(1).

44. *Id.* § 222.1(2).

45. *Id.* § 212.1.

46. *Id.* § 210.3(2).

47. *Id.* § 213.1(1).

48. *Id.* § 222.1(2).

49. *Id.* § 213.1(1).

50. *Id.* § 210 (2).

51. *Id.* § 221.1(2).

The Committee classified the most serious forms of theft as felonies in the fourth degree,⁵² along with others.⁵³

The Model Code recognizes misdemeanors⁵⁴ and petty misdemeanors.⁵⁵ The Model Code also classifies regulatory offenses as violations,⁵⁶ which are not considered true crimes and thus not criminal.⁵⁷ The Committee adopted the violation category,⁵⁸ but divided misdemeanors into four classes, A-D.⁵⁹

Classifying crimes appropriately will improve the current code, but why go through this lengthy and disruptive process? The following section will explore the criticism of the current code.

IV. CRITICISM OF THE CURRENT MISSISSIPPI CODE

As noted in the introduction, the main problem identified by the Judicial Advisory Committee when we began our work was sentencing disparity. Our Committee was charged with reforming the criminal statutes to remedy that, along with other issues that other states had faced in reforming their criminal statutes. There are statutes in Mississippi that allow for a sentence of from five years to life, for example.⁶⁰ There are many others that have a very wide range in the penalty.⁶¹ Others, such as the manslaughter-penalty statute, punish serious conduct the same as much less serious conduct.⁶² A defendant who would otherwise be guilty of murder could get a two-year sentence because he was

52. Minutes, *supra* note 41 (Sept. 12, 2012).

53. See, e.g., less serious forms of the following: Hindering Prosecution, Child Pornography, Aiding Another in Committing a Crime. See full chart in the appendix assigning penalties to the various crimes the Committee has covered.

54. MODEL PENAL CODE § 1.04(3) (AM. LAW INST. 1985).

55. *Id.* § 1.04(4).

56. *Id.* § 1.04(5).

57. See LAFAVE, CRIMINAL LAW, *supra* note 39.

58. See Minutes, *supra* note 41 (Aug. 8, 2014).

59. See *id.* (March 9, 2012); see also *id.* (September 12, 2014). The sentencing scheme for misdemeanors and violations is as follows:

§ 6.08

(a) Sentences of misdemeanors shall be a definite term of imprisonment in the county jail or to hard labor for the county, within the following limitations:

- (1) For a Class A misdemeanor, not more than one year.
 - (2) For a Class B misdemeanor, not more than six months.
 - (3) For a Class C misdemeanor, not more than three months.
 - (4) For a Class D misdemeanor, not more than one month.
- (b) A violation is punished by a fine of not more than ~~£200~~ §250.

60. See, e.g., MISS. CODE ANN. § 97-3-79 (2017). (Robbery using deadly weapon.)

61. See, e.g., *id.* § 97-3-53. (Kidnapping. The penalty for kidnapping is from one to thirty years for the conduct of confining a person unlawfully.) The Committee proposes to penalize the conduct by a sentence of from one year to life but breaks the crime of unlawful confinement into three crimes with greater punishments for more aggravated conduct. The defendant could get life for confining a victim to use as a hostage or for ransom, but unlawful confinement with no aggravating factors could be punished up to a year in prison. See Minutes, *supra* note 41 (June 8, 2018).

62. MISS. CODE ANN. § 97-3-25 (2017).

acting in the heat of passion, while someone who was guilty of the less-serious form of manslaughter by culpable negligence could get twenty years.⁶³ A broad range in sentencing also allows an unfair disparity among the courts for the same conduct.⁶⁴

Sentencing disparity is not the only problem with the Mississippi criminal law, and several other problems have been identified in addition. The best analysis of the problems with Mississippi law was a national study that resulted in an article classifying the Mississippi Criminal Code as the fifty-second worst code in the United States. The article was written by noted criminal law scholar Paul Robinson, along with others.⁶⁵ The authors used five criteria for ranking the codes.⁶⁶

The first criterion was whether the code comprehensively states the conduct that it is prohibiting, requiring, or permitting.⁶⁷ While Mississippi did not score at the very bottom on this criterion, it was toward the bottom.⁶⁸ The authors considered such things as whether the state still recognizes non-codified, common law crimes, which Mississippi does;⁶⁹ whether terms are adequately defined;⁷⁰ and whether there is sufficient guidance regarding affirmative defenses.⁷¹

The second criterion was “effectiveness in communicating rules of conduct.”⁷² Mississippi ranked last on this criterion in part because of its “confusing, convoluted, or arcane language in setting out offenses,”⁷³ its random organization of crimes,⁷⁴ and its lack of a simple description of defenses.⁷⁵

63. *Id.*; see *infra* Section V.B.2.b.

64. By adopting the proposed scheme of four degrees of felonies and four classes of misdemeanors, there will be less possibility for sentencing disparity. Each degree or class has a limited range of punishment and comports with crimes of similar seriousness. See *supra* discussion accompanying notes 38–59.

65. See Robinson, *supra* note 2, at 1. Paul Robinson is currently the Colin S. Diver Professor of Law at the University of Pennsylvania School of Law.

Paul Robinson is one of the world’s leading criminal law scholars. A prolific writer and lecturer, Robinson has published articles in virtually all of the top law reviews, lectured in more than 100 cities in 33 states and 27 countries, and had his writings appear in 13 languages.

A former federal prosecutor and counsel for the US Senate Subcommittee on Criminal Laws and Procedures, he was the lone dissenter when the US Sentencing Commission promulgated the current federal sentencing guidelines. He is the author or editor of 15 books, including the standard lawyer’s reference on criminal law defenses, three Oxford monographs on criminal law theory, a highly regarded criminal law treatise, and an innovative case studies course book.

www.law.upenn.edu/cf/faculty/phrobins/

Professor Robinson was joined by Michael T. Cahill, who was a federal circuit court law clerk at the time, and by Usman Mohammed, who was a student at the University of Michigan.

66. Robinson, *supra* note 2, at 3.

67. *Id.* at 6.

68. *Id.* at 24–25.

69. See Michael Hoffheimer, *Murder and Manslaughter in Mississippi: Unintentional Killings*, 71 Miss. L.J. 35, 124–26 (2001).

70. Robinson, *supra* note 2, at 25.

71. *Id.*

72. *Id.* at 29.

73. *Id.* at 25.

74. *Id.* at 34–35.

75. *Id.* at 32.

Mississippi was especially cited for its overlapping offenses, with homicide, which will be discussed more fully below, as the example.⁷⁶

The third criterion was the “comprehensiveness and accessibility of the principles of adjudication.”⁷⁷ Mississippi received a zero on this criterion, as did five other states.⁷⁸ The fact that Mississippi does not specify and/or define culpability requirements in many of its crimes is a major failing, which will also be discussed below.⁷⁹ In addition, Mississippi fails to define excuses and non-exculpatory defenses⁸⁰ or general provisions, such as causation.⁸¹

The fourth criterion was “accuracy in imposing liability.”⁸² Mississippi was again cited as an example of a state that criminalizes harmless or trivial conduct.⁸³ Also included as a measure under this criterion is whether there is a default standard for mens rea when not specified in a statute.⁸⁴ There is no general mens rea statute in Mississippi. This will be discussed more fully below.⁸⁵

In addition, the worst codes, including Mississippi, have unconstrained felony murder rules, as discussed more fully *infra*.⁸⁶ In other words, death during any felony could be murder. Also cited was Mississippi’s misdemeanor manslaughter rule, which is also unconstrained and could theoretically be imposed for any misdemeanor, discussed more fully below.⁸⁷ Another factor in which Mississippi was deficient was that there is limited codification of excuse and justification defenses.⁸⁸

The fifth criterion was accuracy in “grading and punishment.”⁸⁹ Mississippi ranked last on this criterion because of inconsistency in grading offenses and failure to recognize or to make appropriate distinctions,⁹⁰ citing as the worst example Mississippi’s theft statutes,⁹¹ which will be discussed in a later article. As noted earlier, sentencing disparity was the main problem identified by the Judicial Advisory Committee.⁹²

Because a complete description of the Committee’s work would be impossible in one article, I will limit my discussion to two important subjects, mens rea and homicide. I will address first the definitions of criminal states of

76. *Id.* at 36. See Section V.B.1.b; V.B.2.b.

77. *Id.* at 38.

78. *Id.*

79. See *infra* Section V.A.

80. Robinson, *supra* note 2, at 40.

81. *Id.* at 41.

82. *Id.* at 44.

83. *Id.* at 44–45.

84. *Id.* at 47–48.

85. See *infra* Section V.A.

86. See *infra* Section V.B.1.ii.

87. See *infra* discussion accompanying notes 257–60.

88. Robinson, *supra* note 2, at 50.

89. *Id.* at 51.

90. *Id.*

91. *Id.* at 59.

92. See *supra* discussion accompanying notes 60–64.

mind, or mens rea, noted above as one of the Mississippi Code's major defects.⁹³

V. PARTICULAR AREAS OF CHANGE

A. Mens Rea

One of the hallmarks of a criminal code is to address the need to punish people who act with evil intent. The Model Code emphasizes that, for serious offenses, the justice system should look at the defendant's actual belief, not just what a reasonable person would have believed.⁹⁴ The Model Code does employ an objective "reasonable person" standard, but only for less serious offenses. More importantly, to be guilty of a true crime,⁹⁵ the defendant must fall substantially below the standard or norm of a reasonable person.⁹⁶

The most important and most difficult issue is defining criminal intent so that it will serve as notice to a potential offender and be helpful in explaining the concept to judges and juries, who must decide whether the offender acted with the requisite criminal intent. The Model Code reduced criminal intent to a few simple concepts that may be generalized to apply to all crimes.⁹⁷ This may be the most important contribution the Model Code has made to criminal justice. As noted earlier, Mississippi has many statutes that have no identifiable criminal intent or that have confusing and contradictory words denoting criminal intent,⁹⁸ some examples of which are discussed below.⁹⁹

Mississippi was not alone in this. Before the Model Code, "[f]or centuries, the approach to mental components of crimes had been a quagmire of legalese—both in Latin and in English—though legislators and judges had vainly attempted to give some coherence to concepts of wrongfulness."¹⁰⁰ The Model Code replaced the archaic verbiage such as "willful, wanton, mind regardless of social duty," with concepts of purpose, knowledge, recklessness, and criminal negligence.¹⁰¹ These words were accompanied by definitions that judges and jurors can understand and apply.¹⁰²

1. The Model Penal Code and The Committee's Proposals

The Committee agreed with the important philosophy of the Model Code that no one should be liable for any true crime unless he acts with one of the states of mind prescribed by the Code.¹⁰³ For this reason, except as otherwise

93. See *supra* discussion accompanying notes 79–85.

94. See MODEL PENAL CODE § 2.02 cmt. at 235–36 (AM. LAW INST. 1985).

95. See Wechsler, *supra* note 18, at 1435–37; see also LAFAVE, CRIMINAL LAW, *supra* note 39.

96. MODEL PENAL CODE § 2.02(2)(d) (AM. LAW INST. 1985).

97. See *id.* § 2.02.

98. See *supra* discussion accompanying notes 78–84.

99. See *infra* Section V.A.2.b.

100. Ronald L. Gainer, *Remarks on the Introduction of Criminal Law Reform Initiatives*, 7 J.L. ECON. & POL'Y 587, 588 (2011).

101. See MODEL PENAL CODE § 2.02(2) cmt. at 242–44 (AM LAW INST. 1985).

102. See *id.* § 2.02(2).

103. See Wechsler, *supra* note 18, at 1435–37. In addition, the conduct must be based on a voluntary act,

which is defined as well. *Id.*

I have handled the proposed statutes differently throughout this article. In some cases, the statute is just too long to include in the text, as in the case with the mens rea statute, so I put it in the footnote and paraphrased it in the explanation. Shorter statutes, like manslaughter and negligent homicide, I put in the text, along with putting the full statute in the footnotes.

This is the entire mens rea statute as proposed by the Committee. The italicized portions indicate changes that the Committee made from the Model Code:

§ 2.02

(1) Minimum Requirements of Culpability. Except as provided in § 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or criminally negligently, as the law may require, with respect to each material element of the offense.

(2) Kinds of Culpability Defined.

(a) Purposely.

A person acts purposely with respect to a material element of an offense when:

- (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
- (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

(b) Knowingly.

A person acts knowingly with respect to a material element of an offense when:

- (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
- (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

(c) Recklessly.

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

(d) Criminally Negligently.

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

(3) Culpability Required Unless Otherwise Provided. When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto, *except when the only culpability prescribed by law defining an offense is criminal negligence, criminal negligence shall suffice to establish all material elements.*

~~(4) Prescribed Culpability Requirement Applies to All Material Elements. When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.~~

~~(5) (4) Substitutes for Criminal Negligence, Recklessness and Knowledge.~~ When the law provides that criminal negligence suffices to establish an element of an offense, such element also is established if a person acts purposely, knowingly or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts purposely.

~~(6) (5) Requirement of Purpose Satisfied if Purpose Is Conditional.~~ When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense.

~~(7) (6) Requirement of Knowledge Satisfied by Knowledge of High Probability.~~ When knowledge of the

noted, the Committee agreed with the Model Code's proposals regarding states of mind.

The most obvious and arguably the most serious state of mind is purpose. So, if the defendant has "the conscious object to engage in the conduct of that nature or to cause such a result," he is acting purposefully.¹⁰⁴ In the case of a defendant who intends to kill, for example, he is acting purposely with regard to the result of death.¹⁰⁵

The next most culpable state of mind is knowledge, which is very close to purpose. Both purpose and knowledge require knowledge of the attendant circumstances; however, knowledge does not require that the result (if an element of the crime) be intended, just that "it is practically certain that his conduct will cause such a result."¹⁰⁶ If the defendant intends to burn a building, knowing that there are people in the building who cannot get out, he may not have the object of killing, but he knows the result is practically certain to occur.¹⁰⁷

The next most culpable state of mind is recklessness. Recklessness is defined as conscious disregard of "a substantial and unjustifiable risk" that the result will occur.¹⁰⁸ If the defendant drives eighty miles per hour through a school zone, he is reckless with regard to killing someone if he is aware that he is driving through the school zone and that there may be children in the vicinity. The risk required is defined as "a gross deviation of conduct that a law-abiding person would observe" in his situation.¹⁰⁹

The amount of risk is arguably the same for the least serious criminal state

existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.

~~(8)~~ (7) Requirement of Willfulness Satisfied by Acting Knowingly. A requirement that an offense be committed willfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears.

~~(9)~~ (8) Culpability as to Illegality of Conduct. Neither knowledge nor recklessness or *criminal* negligence as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of an offense is an element of such offense, unless the definition of the offense or the Code so provides.

~~(40)~~ (9) Culpability as Determinant of Grade of Offense. When the grade or degree of an offense depends on whether the offense is committed purposely, knowingly, recklessly or *criminally* negligently, its grade or degree shall be the lowest for which the determinative kind of culpability is established with respect to any material element of the offense.

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104. MODEL PENAL CODE § 2.02(2)(a) (AM. LAW INST. 1985). *See id.*

105. Unless otherwise noted, the Committee accepted the Model Code provision discussed without significant changes. *See* Wechsler, *supra* note 103.

106. MODEL PENAL CODE § 2.02(2)(b) (AM LAW INST. 1985). *See* Wechsler, *supra* note 103.

107. Knowledge is very close to the state of mind described by the Model Code as "reckless with extreme indifference to the value of human life." *See, e.g.,* Section V.B.1.b.(i). In the example of the defendant burning a building, knowing there are people inside who cannot get out, the defendant would be extremely reckless in burning a building where people are likely to be, even if he does not know they are there and cannot get out. *See* Wechsler, *supra* note 18, at 1435–39 and LAFAYE, CRIMINAL LAW, *supra* note 39, § 5.2 for a discussion of the distinctions among the various states of mind.

108. MODEL PENAL CODE § 2.02(2)(c) (AM LAW INST. 1985). *See* Wechsler, *supra* note 103.

109. MODEL PENAL CODE § 2.02(2)(c) (AM LAW INST. 1985). He may even be reckless with extreme indifference to the value of human life in this situation. *See, e.g., supra* Section V.B.1.b.(i).

of mind, “negligence.” The main difference between recklessness and negligence is that the defendant is aware of the risk for recklessness, and for negligence, he *should* have been aware of the risk, which is a “gross deviation from the standard of care that a reasonable person would observe” in the defendant’s situation.¹¹⁰ If the defendant was driving through a school zone at 80 miles per hour, then he would be criminally negligent even if he was consciously unaware of the risk because a reasonable person would have been aware.

The drafters of the Model Code used the term “negligence,” but then emphasized in the definition and the comments that ordinary negligence should never be sufficient to commit a true crime,¹¹¹ as noted earlier. Ordinary negligence only requires a deviation from the standard of care that a reasonable person would be aware of, not a gross deviation, which is more in keeping with gross negligence or criminal negligence.¹¹² The Committee considered that using the term “negligence” and defining it to mean “criminal negligence” could only lead to confusion, and to a court’s interpretation of the elements of the crime to require only ordinary negligence. Thus, the Committee, along with other jurisdictions, chose to denominate this type of culpability as *criminal negligence*.¹¹³

The Model Code does recognize that there is a place for strict liability, which does not require any mens rea, but grades those offenses as violations, not true crimes.¹¹⁴ These offenses are only punished by fines or other civil penalties and do not give rise to other legal disadvantages attending criminal convictions.¹¹⁵ The Committee agreed with this position.

2. Mississippi

*a. How the Committee Proposals will affect the Mississippi Code’s mens rea requirements.*¹¹⁶

How will all this affect the current Mississippi Code? There are criminal statutes scattered throughout the Mississippi Code. For that reason, the proposed changes contained in proposed Section 2.02 will be made principally with regard to Title 97 of the Mississippi Code, which deals with major crimes.¹¹⁷ Even in that title, there will be statutes that have not been altered by the proposed changes. With regard to those, the mens rea terms proposed by the Committee will not necessarily supplant other terms indicating mens rea. However, section

110. Compare MODEL PENAL CODE § 2.02(2)(c) (AM. LAW INST. 1985) with *id.* § 2.02(2)(d).

111. See *id.* § 2.02(2) cmt. at 241–42.

112. See *id.*

113. Minutes, *supra* note 41 (Dec. 8, 2006).

114. MODEL PENAL CODE § 6.03(4) (AM. LAW INST. 1985). Examples of strict liability crimes would any violation of the traffic laws, not paying a toll on a road, and evasion of taxes. These are regulatory offenses that do not involve true crimes. See LAFAVE, CRIMINAL LAW, *supra* note 39.

115. See Wechsler, *supra* note 18, at 1439.

116. The Committee adopted the Model Code provisions described, unless otherwise indicated.

117. See Minutes, *supra* note 41 (Aug. 8, 2014).

2.02(3) provides that if there is no mens rea requirement expressed in the statute, each element is established “if the person acts purposely, knowingly, or recklessly.”¹¹⁸

For crimes that are in the nature of regulatory offenses, termed “violations” by the Model Code,¹¹⁹ the state of mind provisions would not apply.¹²⁰ In other words, for those Mississippi statutes that do not require an express state of mind, Section 2.02(3) would apply, unless the statute clearly intends that there be no mens rea requirement; in that case, the crime is a strict liability offense.¹²¹

As noted below, willfulness is often the required state of mind.¹²² Although the Model Code does not use the term, the term is used in state criminal codes, including Mississippi’s, with varying definitions.¹²³ Section 2.02(7) provides that if the statute requires willfulness, the requirement is satisfied if the defendant acted knowingly.¹²⁴ Since willfulness is a problematic term that may mean anything from purpose to criminal negligence, this will provide some clarity to the law. Even with other terms not covered, the Committee believes that the standardization of definitions will be helpful in interpreting those terms.

In addition to the definitions, there are other subsections that clarify mens rea requirements. The original version of Section 2.02(4) applies any mens rea term expressed in the statute to all material elements of the crime.¹²⁵ The Committee chose not to adopt this subsection, rather preferring that the state of mind for any elements with no specified state of mind be covered by Section 2.02(3) and that recklessness will suffice for these elements.¹²⁶ However, if the crime requires only criminal negligence, the Committee decided that criminal negligence will be sufficient for any other material elements.¹²⁷ For example, if burglary requires breaking and entering the dwelling of another during the nighttime with the purpose of committing a felony, the elements of breaking, entering, dwelling and during the nighttime would be satisfied if the defendant was reckless with regard to their existence.

118. MODEL PENAL CODE § 2.02(3) (AM LAW INST. 1985). See Wechsler, *supra* note 103.

119. *Id.* § 2.05(1).

120. *Id.* § 2.05; Minutes, *supra* note 41 (Aug. 8, 2014).

121. *Id.* § 2.05 (AM LAW INST. 1985).

122. See, e.g., MISS. CODE ANN. § 97-17-87 (2017).

123. “The adverb ‘willfully’ has such extremes of meaning that it gives no clue to the *mens rea* requirement to which it refers if it is considered alone.” DONALD A. DRIPPS, RONALD N. BOYCE & ROLLIN M. PERKINS, *CRIMINAL LAW AND PROCEDURE* 758 (13th ed. 2018).

124. MODEL PENAL CODE § 2.02(7) (AM LAW INST. 1985). See Wechsler, *supra* note 103.

125. See *id.* § 2.02(4). This is the original version of the § 2.02(4) that the Committee did not adopt:

(4) Prescribed Culpability Requirement Applies to All Material Elements. When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.

See Wechsler, *supra* note 103.

126. See Minutes, *supra* note 41 (Sept. 8, 2006).

127. See Wechsler, *supra* note 103.

Section 2.02(5) clarifies that if the defendant's state of mind is more serious than the crime requires (for example, if he acts recklessly when the crime only requires criminal negligence), he still may be convicted.¹²⁸ Subsection (9) clarifies that ignorance of the law is not a defense.¹²⁹ Finally subsection (10) specifies that when the defendant, for example, has the intent to kill but recklessly believes that he is justified, he will be guilty of the less serious offense that requires recklessness, rather than the more serious crime that requires purpose.¹³⁰

b. Specific examples of mens rea problems with the Mississippi Code

As noted, one of the criticisms of the Mississippi Code was that there were no defined mens rea terms¹³¹ but also that the mens rea terms used are numerous and confusing. For example, in homicide alone, the statutes use several undefined terms. In addition to the more common "willful,"¹³² "culpable negligence,"¹³³ "depraved heart,"¹³⁴ "deliberate design,"¹³⁵ "without malice,"¹³⁶ and "intentional,"¹³⁷ the homicide provisions also use such terms as "accident and misfortune,"¹³⁸ "ordinary caution,"¹³⁹ "unlawful intent,"¹⁴⁰ "not cruel and unusual,"¹⁴¹ "without taking advantage"¹⁴² and "intentional and not accidental."¹⁴³

While the opinions of the Mississippi Supreme Court have filled in the gaps on some of these terms,¹⁴⁴ these opinions are not always clear or consistent.¹⁴⁵

128. MODEL PENAL CODE § 2.02(5) (AM LAW INST. 1985). See Wechsler, *supra* note 103.

129. MODEL PENAL CODE § 2.02(9) (AM. LAW INST. 1985). The Committee did make some changes in the Model Code, mainly with regard to the terminology, adding "criminal" to the term "negligence." In addition, the Committee made more distinctions between when the state of mind would apply to "elements" and "material elements" of the crime. See Minutes, *supra* note 41 (Sept. 6, 2002); see also Wechsler, *supra* note 103.

130. MODEL PENAL CODE § 2.02(10) (AM. LAW INST. 1985).

131. See Robinson, *supra* note 2, at 32.

132. See MISS. CODE ANN. § 97-3-41 (2017).

133. See *id.* § 97-3-47.

134. See *id.* § 97-3-19.

135. See *id.*

136. See *id.* § 97-3-27.

137. See *id.* § 97-3-25.

138. See *id.* § 97-3-17.

139. See *id.*

140. See *id.*

141. See *id.*

142. See *id.*

143. See *id.*

144. See Hoffheimer, *supra* note 69, at 112–114.

145. See *id.*; see, e.g., *Swanagan v. State*, 229 So. 3d 698, 704 (Miss. 2017), (Depraved heart murder is a killing "done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although *without any premeditated design* to effect the death of any particular individual . . ." [citation omitted] Depraved-heart murder encompasses "a reckless and eminently dangerous act directed toward a single individual." [citation omitted]. *A finding of malice is not required for depraved-heart murder.* [citation omitted; emphasis added] Depraved-heart murder encompasses "a reckless and eminently dangerous act directed toward a single individual." [citation omitted] A finding of malice is not required for depraved-heart murder." *Depraved heart murder is the very essence of malice.* [emphasis added]).

Part of the goal of an acceptable Penal Code is to publish as much of the law as possible in the Code to serve as notice to the public of what is prohibited and what is allowed.¹⁴⁶ Leaving the explanation of the law to varying court opinions and the common law creates confusion and unjust results.

The sections that apply to excuse and justification are particularly problematic in that they do not express a sufficiently serious state of mind. While the Model Code requires at least criminal negligence to be guilty of a crime,¹⁴⁷ Section 97-2-17, the main Mississippi statute on excusable homicide, uses the terms “accident or misfortune in doing any lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent.”¹⁴⁸ Thus, presumably one who is merely negligent would not be allowed to claim excuse. Similarly, justification is set out in Section 97-3-15, and there are no words regarding criminal intent. The statute instead discusses homicide “necessarily committed,” which is not unreasonable under the circumstances,¹⁴⁹ further describing justifiable homicide as “reasonable” and “reasonable ground to apprehend a design to commit a felony or do some great personal injury.”¹⁵⁰ In addition, the force used must be “reasonable.” All of these references to “reasonableness” suggest that if the defendant is unreasonable or merely negligent, he will lose the defense of justification.¹⁵¹ The Model Code was designed to avoid such a result.

The Model Code scheme allows the defendant to claim the justification defense when he honestly believes that he had to act.¹⁵² If he is criminally negligent or reckless in his belief that his act was justified or excused, he may be guilty of crimes requiring criminal negligence or recklessness, such as manslaughter¹⁵³ or negligent homicide.¹⁵⁴ The contribution made by the Model Code is best illustrated by comparing Mississippi’s criminal homicide statutes to the much simpler Model Code scheme.

B. Criminal Homicide

The Model Code greatly simplified homicide by defining the mens rea necessary to commit it.¹⁵⁵ Causing the death of another person is criminal homicide if committed purposely, knowingly, recklessly or negligently, and constitutes murder, manslaughter or negligent homicide.¹⁵⁶ The Committee agreed with this statute, except that, again, we clarified that “negligence” is “criminal negligence,” and we also added provisions for capital murder and

146. See Wechsler, *supra* note 18, at 1432.

147. See MODEL PENAL CODE § 2.02(1) (AM. LAW INST. 1985).

148. MISS. CODE ANN. § 97-3-17 (2017).

149. *Id.*

150. *Id.*

151. *Id.*; see *Bell v. State*, 207 So. 2d 518, 529–530 (Miss. 1949).

152. See MODEL PENAL CODE § 3.09(2) (AM. LAW INST. 1985).

153. See *id.* § 210.3.

154. See *id.* § 210.4.

155. See Wechsler, *supra* note 18, at 1445–46.

156. See MODEL PENAL CODE § 210.1 (AM. LAW INST. 1985).

killing of an unborn child, as discussed more fully below.¹⁵⁷

1. Murder

a. Historically

The common-law version of murder classified criminal homicide as either murder or manslaughter. Murder under the common law was “unlawful killing of another human being with ‘malice aforethought.’”¹⁵⁸ Despite a variety of meanings given to the term “malice aforethought,” the term generally encompassed three mental states regarding the death of another person: intent to kill, intent to a cause “grievous bodily harm,”¹⁵⁹ and depraved-heart murder, which was variously described as an unintentional homicide “under circumstances evincing an abandoned and malignant heart.”¹⁶⁰ Depraved-heart murder is often described as exhibiting a “wanton and willful disregard of an unreasonable human risk” or a “wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty;”¹⁶¹ none of which is very helpful. There is a fourth situation recognized as sufficient for murder, a death that occurs while the defendant was in the commission of an inherently dangerous felony.¹⁶²

An early departure from the common law divided murder into two degrees.¹⁶³ First degree murder was deserving of the death penalty, while the highest penalty for second degree was life imprisonment.¹⁶⁴ First-degree murder was murder perpetrated willfully, deliberately and with premeditation.¹⁶⁵ Courts often had problems explaining the differences among the three terms, and they were often abbreviated to cover any intentional murder.¹⁶⁶ Killings in the commission of certain felonies, usually burglary, arson, kidnapping, rape and robbery, were added to the first-degree murder category, as was killing by certain

157. Minutes, *supra* note 41 (Nov. 10, 2017); *id.* (Jan. 13, 2018).

The Committee proposes the following statute for criminal homicide. The differences between the Model Code and the proposals for homicide are in italics, most of which was taken from the current Mississippi statutes:

§ 210.1 Criminal Homicide

(1) A person is guilty of criminal homicide if he causes the death of another human being purposely, knowingly, or *criminally negligently, or under circumstances defined in § 210.2(1)(b) or 210.3(1)(e) or (f).*

(2) *Criminal homicide is capital murder, murder, manslaughter, or criminally negligent homicide.*

(3) *An indictment for murder or capital murder shall serve as notice to the defendant that the indictment may include any and all lesser included offenses thereof, including, but not limited to, manslaughter and criminally negligent homicide.*

158. See MODEL PENAL CODE § 210.2 cmt. at 13–14 (AM. LAW INST. 1985).

159. See *id.* cmt. at 14–15.

160. See *id.*

161. See *id.*

162. See *id.*

163. See *id.* cmt. at 16.

164. See *id.*

165. See Wechsler, *supra* note 18, at 1446.

166. See *id.*

means, such as poison and torture.¹⁶⁷ How was all this translated into the law in Mississippi?

b. Current Mississippi Law

The current Mississippi criminal homicide statutes are particularly worrisome. In 2013, the Mississippi Legislature amended Section 97-3-21, which, among other things, divided murder into first and second degree.¹⁶⁸ Dividing murder into two degrees is consistent with the historical and majority practice.¹⁶⁹ However, the difference between first and second-degree murder is traditionally that first-degree murder is eligible for the death penalty, while the penalty for second-degree murder is life imprisonment.¹⁷⁰ Under Mississippi law, the jury may impose a life sentence for both first and second-degree murder. However, in the case of second-degree murder, if the jury is unable to agree on a life sentence, the judge may impose a sentence of between twenty and forty years. Mississippi has a different scheme for deciding whether the death penalty is appropriate, as noted below. The Committee retained the distinction between first and second-degree murder to the extent that it was possible while remaining consistent with the Model Code.¹⁷¹

Mississippi departs from the traditional view in several other respects. First-degree murder in Mississippi is murder committed by “deliberate design,” which roughly comports with the Model Code’s criminal homicide committed “purposely.”¹⁷² One obvious problem is that the defendant could also commit manslaughter purposely, but in the heat of passion. “Depraved-heart” murder is second-degree murder, again without any exception for manslaughter, which also might be committed with a “depraved heart,” depending on what that means.¹⁷³ Furthermore, capital murder in Mississippi is punished with death, life without parole or life with parole.¹⁷⁴ The current Mississippi statute then lists the occasions for capital murder, which include only some of the homicides traditionally denominated as first degree and eligible for the death penalty.¹⁷⁵ The most obvious departure is that murder that is “willful, deliberate and premeditated” is not listed among the possibilities for capital murder.¹⁷⁶ Thus “Deliberate design” murder is not capital murder, as opposed to most statutory schemes that assign a possibility of the death penalty for “willful, deliberate and

167. *See id.*

168. 2013 Bill Text MS H.B. 365.

169. *See* LAFAVE, CRIMINAL LAW, *supra* note 39, § 14.7.

170. *See* 2 WAYNE LAFAVE, SUBSTANTIVE CRIMINAL LAW § 14.7 (3d ed. 2017).

171. As noted earlier, there are no degrees of individual crimes under the Model Code, instead there are crimes of similar seriousness grouped for purposes of punishment into first, second and third-degree felonies. Also, as noted, the Committee added a group of fourth-degree felonies. *See supra* discussion accompanying notes 59–70.

172. *See* MODEL PENAL CODE § 210.2 cmt. at 20–21 (AM. LAW INST. 1985).

173. *Id.* MISS CODE ANN. § 97-3-19(1)(b) (2017).

174. *Id.* *Id.* at § 97-3-21(3).

175. MISS. CODE ANN. § 97-3-19(2) (2017).

176. *Id.*; *see supra* note 165.

premeditated murder.”¹⁷⁷ Instead, the Mississippi statute uses such categories as murder of certain public officials, multiple murders, certain felony murders, murders by one serving a life sentence, using an explosive device, murder for hire, and murder on educational property.¹⁷⁸ The Mississippi statute retained the idea that killing in the commission of any felony is felony murder, denominating it as murder in the first degree, which again does not determine whether the death penalty will be imposed. However, a killing in the commission of the following felonies is capital murder and eligible for the death penalty: “rape, kidnapping, burglary, arson, robbery, sexual intercourse with any child under twelve (12), or), . . . nonconsensual unnatural intercourse with mankind,”¹⁷⁹ or felonious abuse and/or battery of a child in violation of subsection (2) of Section 97-5-39”¹⁸⁰ or in any attempt to commit such felonies.¹⁸¹ The Committee recommended no change to the current scheme for capital murder, but clarified the statutory scheme for murder otherwise.¹⁸²

177. See *id.* § 97-3-19(1)(d); see also *supra* discussion accompanying notes 163–65.

178. *Id.* § 97-3-19(2)(a).

179. *Id.* at § 97-3-19(2)(e).

180. *Id.* at § 97-3-19(2)(f).

181. *Id.* at § 97-3-19(2)(e) and (f).

182. Minutes, *supra* note 41 (Oct. 3, 1997); *id.* (and Nov. 10, 2017).

*c. Under the Model Penal Code and the Committee's Proposals to Incorporate, Clarify and Improve Current Mississippi Law.*¹⁸³

183. This final version of the statutory scheme for murder adopted by the Committee is a combination of the Model Code and the current Mississippi statutes. The differences from the Model Code are in italics, most of which are derived from the current Mississippi statutes. Major parts of the statute will be discussed more fully below.

§ 210.2 Murder

(1) Criminal homicide constitutes murder, a felony of the first degree, when it is committed:

(a) purposely or knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or

(b) by any person engaged in the commission or attempted commission of any inherently dangerous felony other than those set forth in § 210.3(1)(e) or (f).

(2) Murder, other than capital murder, shall be punished as follows:

(a) *By a life sentence, if committed purposely or knowingly or in the commission of an inherently dangerous felony.*

(b) If committed recklessly under circumstances manifesting extreme indifference to the value of human life, by:

(i) a life sentence, if so fixed by the jury; or

(ii) twenty to forty years, if the jury fails to agree on a life sentence.

(c) As manslaughter, if the defendant proves, by a preponderance of the evidence, that the defendant committed the homicide in the heat of passion for which there is adequate provocation. The adequacy of such provocation shall be determined from the viewpoint of a reasonable person in the defendant's situation.

The differences between the Committee's adoption of § 210.3 and the current Mississippi capital murder statute are underlined and stricken, as follows:

§ 210.3 Capital Murder

(1) Criminal homicide constitutes capital murder in the following cases:

(a) ~~murder which~~that is perpetrated by killing a peace officer or fireman while such officer or fireman is acting in his official capacity or by reason of an act performed in his official capacity, and with knowledge that the victim was a peace officer or fireman. For purposes of this ~~paragraph~~sub§, the term "peace officer" means any state or federal law enforcement officer, including, but not limited to, a federal park ranger, the sheriff of or police officer of a city or town, a conservation officer, a parole officer, a judge, senior status judge, special judge, district attorney, legal assistant to a district attorney, county prosecuting attorney or any other court official, an agent of the Alcoholic Beverage Control Division of the Department of Revenue, an agent of the Bureau of Narcotics, personnel of the Mississippi Highway Patrol, and the employees of the Department of Corrections who are designated as peace officers by the Commissioner of Corrections pursuant to § 47-5-54, and the superintendent and his deputies, guards, officers and other employees of the Mississippi State Penitentiary;

*(b) murder which*that *is perpetrated by a person who is under sentence of life imprisonment;*

*(c) murder which*that *is perpetrated by use or detonation of a bomb or explosive device;*

*(d) murder which*that *is perpetrated by any person who has been offered or has received anything of value for committing the murder, and all parties to such a murder, are guilty as* ~~principals~~accomplices;

(e) when done with or without any design to effect death, by any person engaged in the commission of the crime of rape of a child under § 213.2(1) and (2), burglary under § 221.1(2)(a) and (b), kidnapping under § 212.1, arson under § 220.1(1), robbery under § 222.1, or aggravated sexual battery under § 213.3 or nonconsensual ~~unnatural~~ intercourse with mankind, or in any attempt to commit such felonies;

(f) when done with or without any design to effect death, by any person engaged in the commission of the crime of ~~felonious abuse and/or battery of a child~~ child abuse, in violation of sub§ (2) of § ~~97-5-39~~230.1, or in any attempt to commit such felony;

*(g) murder which*that *is perpetrated on educational property as defined in § 97-37-17;*

*(h) murder which*that *is perpetrated by the killing of any elected official of a county, municipal, state or federal government with knowledge that the victim was such public official;*

(i) murder of three (3) or more persons who are killed incident to one (1) act, scheme, course of conduct or

i). Simple Murder

The Model Code abandoned the first and second-degree distinction in favor of a list of aggravating and mitigating circumstances,¹⁸⁴ some version of which eventually became mandatory for death penalty cases.¹⁸⁵ Criminal homicide is murder under the Model Code if it is committed purposely or knowingly or “recklessly under circumstances manifesting extreme indifference to the value of human life.”¹⁸⁶ This scheme roughly codifies and clarifies the common law, which defined murder as when the defendant was acting with malice, generally defined as intent to kill, intent to inflict serious bodily injury or acting with a depraved heart without justification, excuse, or mitigation.¹⁸⁷

In the Model Code, the state of mind of “purposefulness” takes the place of “intent to kill,” so that murder is defined as criminal homicide¹⁸⁸ committed purposely or knowingly. Knowledge that the result is practically certain is sufficiently akin to purpose to justify being classified with purposeful murder.¹⁸⁹ The Model Code defines the depraved-heart state of mind as extreme recklessness, requiring that the defendant be consciously aware of and disregard the risk of death to such a degree that he is acting with extreme indifference to the value of human life.¹⁹⁰ This is rather easier to understand than the flowery common-law version of depraved-heart murder.¹⁹¹ Intent to inflict grievous bodily injury was recognized by the Model Code as a type of extremely reckless murder, so it was unnecessary to continue it as a separate category.¹⁹² The Committee adopted this part of the Model Code’s definition of murder, as follows:¹⁹³

criminal episode; or

(j) murder of more than three (3) persons within a three-year period.

(2) Every person who shall be convicted of capital murder shall be sentenced to:

(a) death;

(b) imprisonment for life in the State Penitentiary without parole; or

(c) imprisonment for life in the State Penitentiary with eligibility for parole as provided in § 47-7-3(1)(f).

These two statutes will replace § 97-3-19 through § 97-3-23 for the final revision and approval. *See Minutes, supra* note 41 (Jan. 2018).

184. *See* Wechsler, *supra* note 18, at 1446–47.

185. *Id.*

186. MODEL PENAL CODE § 210.2 (AM. LAW INST. 1985).

187. *See* 2 LAFAVE, *supra* note 170, § 14.2.

188. The definition of murder under the Model Code also excludes extreme emotional disturbance manslaughter, the Model Code’s version of voluntary manslaughter. *See* MODEL PENAL CODE § 210.3 cmt. at 46–47 (AM. LAW INST. 1985).

189. MODEL PENAL CODE § 210.2(1)(a) (AM. LAW INST. 1985).

190. *Id.* § 210.3.

191. “[W]anton and willful disregard of an unreasonable human risk” or a “wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty[.]” MODEL PENAL CODE § 210.2 cmt at 13–14 (AM. LAW INST. 1985).

192. *See id.* § 210 cmt. at 28.

193. *See Minutes, supra* note 41 (Nov. 10, 2017).

Section 210.2 Murder

(1) Criminal homicide constitutes murder, a felony of the first degree, when it is committed:

(a) purposely or knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or

In the next form of murder, felony murder, the prosecution does not have to prove that the defendant was acting purposely, knowingly, or with an extreme degree of recklessness.

ii). Felony Murder

The Model Code eliminates the automatic guilt of criminal homicide if the defendant is committing any felony or misdemeanor, which Mississippi retains. The Model Code recognizes that if the defendant is in the commission of certain listed crimes that endanger lives,¹⁹⁴ there is a presumption that he is acting recklessly with extreme indifference to the value of human life.¹⁹⁵ However, this presumption is rebuttable under the Model Code. The rebuttable nature of the presumption was accepted by only a few jurisdictions.¹⁹⁶ The Committee agreed that the presumption should not be rebuttable, which is consistent with current Mississippi law.¹⁹⁷ The Committee also did not limit the felony-murder presumption to certain listed felonies, as did the Model Code, but rather applied the presumption to any inherently dangerous felony, as follows:¹⁹⁸

Section 210.2 Murder

(1) Criminal homicide constitutes murder, a felony of the first degree, when it is committed:

....

(b) by any person engaged in the commission or attempted commission of any inherently dangerous felony other than those set forth in Section 210.3(1)(e) or (f).¹⁹⁹

194. Robbery, sexual attack, arson, burglary, kidnapping or felonious escape. MODEL PENAL CODE § 210.2(1)(b) (AM. LAW INST. 1985).

195. *See id.* § 210 cmt. at 6.

196. *See id.* § 210.1 cmt. at 8.

197. Minutes, *supra* note 41 (Oct. 3, 1997).

198. Minutes, *supra* note 41 (Sept. 5, 1997).

199. MODEL PENAL CODE §§ 210.3(e) and (f) (AM. LAW. INST., Proposed Official Draft 2015) (This section lists particular inherently dangerous felonies for capital murder. *Supra* note 183.)

Even before the Model Code, most jurisdictions limited the felony murder rule in some way to avoid unjust results, such as a killing in the commission of a felony where danger to life was unforeseen. For this reason, the felony murder rule was either limited by most jurisdictions to certain dangerous felonies, felonies committed in a dangerous way, or to inherently dangerous felonies.²⁰⁰ Inherently dangerous felonies usually include burglary, arson, rape, robbery, and kidnapping, but there may be others, such as shooting into an occupied dwelling.²⁰¹

Thus, if the underlying felony is not inherently dangerous, the crime would not be automatically murder under the felony murder rule. For example, if a seller makes a felonious sale of liquor, and the buyer drinks it, passes out and dies of exposure, the crime would not be felony murder. The prosecution would have to prove that the seller was at least extremely reckless that the sale of the alcohol would cause death.²⁰² The Committee decided to reject the current Mississippi language applying the rule to any felony, but to retain the felony murder rule for inherently dangerous felonies, which is likely the most common view.²⁰³ Limiting the rule to inherently dangerous felonies prevents unjust results and is consistent with the view that the defendant's state of mind should be sufficiently serious to merit punishment for a first-degree felony.

The Committee's proposal also rejects the Model Code's view of limiting the rule to certain felonies.²⁰⁴ This view of felony murder also allows for development of the law so that the courts may decide to apply the rule to other felonies determined to be inherently dangerous.²⁰⁵

Turning to distinctions between the kinds of murder that justify the most serious penalty, we will now discuss penalties and capital murder.

iii). Penalties for Murder and Capital Murder

The Model Code does not divide murder into degrees, as do most states,²⁰⁶ including Mississippi, after the 2013 changes.²⁰⁷ The Committee dealt with the formerly first and second-degree division, adopted in 2013 and discussed above,²⁰⁸ as follows:

Section 210.2 Murder

200. See 2 LAFAVE, *supra* note 170, § 14.5(a) & (b).

201. See 2 LAFAVE, *supra* note 170, § 14.5(b).

202. See MODEL PENAL CODE § 210 cmt. at 32 (AM. LAW INST. 1985).

203. See generally LAFAVE, CRIMINAL LAW, *supra* note 39, § 14.5.

204. Minutes, *supra* note 41 (Sept. 5, 1997).

205. For example, the court could decide that selling certain dangerous drugs could be inherently dangerous, in addition to the usual inherently dangerous felonies, burglary, arson, rape, robbery and kidnapping. Other obvious additions could be such statutory felonies as shooting into an occupied dwelling.

206. See MODEL PENAL CODE § 210 cmt. at 70 (AM. LAW INST. 1985).

207. At the time the committee considered criminal homicide, Mississippi did not have degrees of murder, as it has since 2013. See *supra* Section V.B.1.b.

208. See *id.*

....

(2) Murder, other than capital murder, shall be punished as follows:

(a) By a life sentence, if committed purposely or knowingly or in the commission of an inherently dangerous felony.

(b) If committed recklessly under circumstances manifesting extreme indifference to the value of human life, by:

(i) a life sentence, if so fixed by the jury; or

(ii) twenty to forty years, if the jury fails to agree on a life sentence.

Under the Model Code, the death penalty is possible for any kind of murder, including depraved-heart murder referred to above,²⁰⁹ which would not be possible now in Mississippi.²¹⁰ The Model Code substituted a list of aggravating and mitigating circumstances to be considered in determining whether the defendant should get the death penalty.²¹¹ Consideration of such factors is now mandatory in all jurisdictions for imposition of the death penalty.²¹²

The Committee decided to retain the Mississippi Code's current scheme for capital murder, so that to get the death penalty, the murder must still be one of those listed in the capital murder section.²¹³

The next most serious form of criminal homicide is not denominated murder, but it carries the same penalties: the killing of an unborn child, which will be discussed next.

iii) Killing of an Unborn Child

The Committee also adopted a statute protecting the unborn. The statute tracks the current Mississippi law that provides that if the actor is assaulting the mother and the fetus dies or is injured as a result, the death of the unborn child is punished as a separate felony.²¹⁴ The actor is guilty of a first degree felony if he

209. See MODEL PENAL CODE § 210.2 cmt. at 70.

210. MISS CODE ANN. § 97-3-19 (2017).

211. See MODEL PENAL CODE § 210.6 (AM. LAW INST. 1985).

212. See Wechsler, *supra* note 18, at 1446-47. See MISS. CODE ANN. § 97-3-19 (2017) for Mississippi's version of aggravating and mitigating circumstances.

213. The Capital Murder statute is reproduced *supra* note 183, proposed section § 210.3.

214. This is the statute that the Committee is proposing.

§ 210.7 Killing of an Unborn Child; Serious Bodily Injury to an Unborn Child; Bodily Injury to an Unborn Child

(1) A person is guilty of an offense

(a) if he purposely, knowingly, recklessly, or criminally negligently causes the death of an unborn child by committing an assault against the mother.

purposely or knowingly causes the death; a second degree felony if he recklessly causes the death; and a third degree felony if he criminally negligently causes the death. If he commits an aggravated assault against the mother, which results in the death of the unborn child, he is guilty of a third-degree felony whether he is aware of the pregnancy or not. If a perpetrator kills an unborn child purposely, knowingly, recklessly, or criminally negligently, in some manner other than committing an assault against the mother or legal abortion, he is guilty of a third-degree felony.²¹⁵

Murder is the most serious form of criminal homicide, but the law recognized early on that not all forms of criminal homicides should be treated the same as murder. The less serious forms of criminal homicide, manslaughter and negligent homicide, will now be discussed.

2. Manslaughter and Criminally Negligent Homicide

a. Historically and under the Model Penal Code

Under the early English common law, if a defendant could read, he could claim “benefit of clergy,” since at one time only priests could read. The defendant would then be tried in the ecclesiastical courts, which did not impose the death penalty. Even if he could not read, he could memorize the passage from the Bible that served as the literacy test.²¹⁶ Eventually this practice led to the division of criminal homicide into murder, which justified the death penalty, and manslaughter, which did not.²¹⁷ As noted above, murder was committed with malice aforethought, and every other homicide that was not excused or justified was manslaughter.²¹⁸

Manslaughter was eventually divided into two categories: voluntary and

- (b) The offense is:
 - (i) a first degree felony if he purposely or knowingly causes the death;
 - (ii) a second degree felony if he recklessly causes the death;
 - (iii) a third degree felony if he criminally negligently causes the death.
- (2) A person is guilty of a third degree felony if he causes the death of an unborn child by committing an aggravated assault against the mother. Mistake of fact that the woman is not pregnant is no defense under this subsection.
- (3) A person is guilty of a third degree felony if he purposely, knowingly, recklessly, or criminally negligently causes serious bodily injury to the unborn child.
- (4) Nothing in this section shall be construed to permit the prosecution of any person for conduct relating to:
 - (a) any legal medical procedure performed by a licensed physician or other licensed medical professional, including legal abortions, when done at the request of a mother of an unborn child or the mother’s legal guardian; or
 - (b) the lawful dispensing or administration of lawfully prescribed medication.

For the purposes of this section, the term unborn child means a human being at any stage of development from conception until live birth who is carried in the womb.

215. This statute will replace MISS. CODE ANN. § 97-3-37 (2017). The Committee is still working on a statute that would prohibit causing or aiding suicide.

216. See Hoffheimer, *supra* note 69, at 50 n.37.

217. See MODEL PENAL CODE § 210.3 cmt. at 44 (AM. LAW INST. 1985).

218. *Id.*

involuntary. Voluntary manslaughter is homicide that would otherwise be murder except that it was committed in the heat of passion, based on adequate provocation or when the defendant's belief that he had to kill in self-defense was unreasonable.²¹⁹ Involuntary manslaughter was unintentional criminal homicide that was not sufficiently culpable to rise to the level of the depraved heart state of mind necessary for murder or voluntary manslaughter.²²⁰ Also included in involuntary manslaughter was a killing in the commission of a malum in se misdemeanor, or misdemeanor manslaughter.²²¹

The Model Code recognizes all these concepts, except for misdemeanor manslaughter, but in somewhat different order. As noted above, the Model Code classifies murder as a first-degree felony. As for criminal homicide that is not murder, the Model Code classifies such homicide into two categories: manslaughter, which is a second-degree felony,²²² and negligent homicide, which is a third-degree felony.²²³

The misdemeanor-manslaughter rule, recognized in Mississippi, was abandoned altogether by the Model Code, so that a killing in the commission of a misdemeanor is not automatically manslaughter.²²⁴ Proof of a criminally homicidal state of mind is required. As opposed to a killing in the commission of an inherently dangerous felony that contemplates danger to persons, a killing in the commission of a misdemeanor rarely contemplates danger of causing the death of persons, so the misdemeanor-manslaughter rule could lead to unforeseen and unjust results.²²⁵ The Committee agreed with this position and did not include the misdemeanor-manslaughter rule in its proposed revision.²²⁶

There are two types of manslaughter under the Model Code, one of which is a criminal homicide committed recklessly.²²⁷ As opposed to the prior law that lumped criminal homicide, whether committed criminally negligently or recklessly, into the category of involuntary manslaughter, the Model Code recognizes that a person who is conscious of the risk should be punished more severely.²²⁸

As noted earlier, recklessness requires that the defendant be consciously aware of the great risk he was running in engaging in the conduct that caused the death.²²⁹ While mere recklessness is insufficient for depraved heart murder, which requires an extreme indifference to the value of human life,²³⁰

219. See 2 LAFAYE, *supra* note 170, §§15.1, 15.2(b), 15.3(a).

220. *Id.*

221. See MODEL PENAL CODE § 210 cmt. at 75–76 (AM. LAW INST. 1985). Malum in se is the equivalent of the concept of a true crime discussed earlier. See *supra* discussion accompanying notes 38–39.

222. *Id.* § 210.3.

223. *Id.* § 210.4.

224. See *id.* § 210 cmt. at 77.

225. *Id.*

226. Minutes, *supra* note 41 (Nov. 7, 1997).

227. MODEL PENAL CODE § 210.3(1)(a) (AM. LAW INST. 1985).

228. See MODEL PENAL CODE § 210.3 cmt. at 52–53 (AM. LAW INST. 1985).

229. See *supra* discussion accompanying notes 108–09.

230. See *supra* discussion accompanying notes 189–92.

recklessness is sufficiently serious to justify a more severe punishment than a criminal homicide committed when the defendant's actions merely fall substantially below a reasonable-person standard.²³¹

The second type of manslaughter is considered by the Model Code to be of similar seriousness to reckless manslaughter. This type of manslaughter is what the common law termed "voluntary manslaughter based on adequate provocation." Both forms of criminal homicide are classified as manslaughter, a second-degree felony.²³² The Committee adopted the Model Code's version of reckless manslaughter but made changes in the Model Code's version of heat-of-passion manslaughter.²³³

The Model Code's version of heat of passion manslaughter differs from the common law in that the common law utilized an objective standard. The only subjective factor considered was whether the defendant was in fact acting in the heat of passion. The adequacy of the provocation was viewed from the standpoint of a reasonable person, as was whether a reasonable person would have had time to cool.²³⁴ The Model Code drafters believed that some form of conscious awareness is necessary to justify the second-degree penalty, so the Model Code viewed this type of manslaughter more subjectively. The Committee did not fully agree with this position, as noted below.

To avoid the common-law baggage attached to heat-of-passion manslaughter, the Model Code used the term manslaughter "under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse."²³⁵ "Extreme emotional disturbance," however, has the same meaning as "heat of passion" under the common law,²³⁶ both of which encompass any serious disturbance of emotion, usually requiring some form of anger, fear or grief.²³⁷ The Model Code and the common law diverge at this point by virtue of the Model Code's addition of the following language: "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."²³⁸ In other words, the jury must consider the defendant's subjective viewpoint and decide whether the explanation is reasonable from his point of view, as opposed to the common law that did not consider the defendant's subjective situation or belief at all. The Committee did not adopt this part of the Model Code, retaining the reasonable person standard for whether the provocation was reasonable.²³⁹

231. See MODEL PENAL CODE § 210.3 cmt. at 52–53.

232. See *id.* at 43.

233. See Minutes, *supra* note 41 (Oct. 6, 1997).

234. See MODEL PENAL CODE § 210.3 cmt. at 59 (AM. LAW INST. 1985).

235. See *id.* § 210.3 cmt. at 64.

236. See *id.* § 210.3 cmt. at 60.

237. See *id.*

238. See *id.* § 62.

239. Under § 210.2, the Committee added that "It is an affirmative defense to prosecution under this § [the murder statute] that the defendant committed the homicide in the heat of passion for which there is adequate provocation. The adequacy of the provocation shall be determined from the viewpoint of a reasonable person in the defendant's situation. Heat of passion for which there is adequate provocation mitigates murder to manslaughter." *Id.* § 210.2. § 210.3 provides that "criminal homicide constitutes manslaughter, a felony in

The other major provocation under the common law that mitigated murder to manslaughter was unreasonable belief self-defense and other similar situations in which the homicide would have been excused but for the defendant's unreasonable belief that he had to act in self-defense.²⁴⁰ As noted earlier, the drafters of the Model Penal Code were intent upon avoiding assessment of liability when a defendant was merely negligent.²⁴¹ For this reason the Model Code's scheme for dealing with unreasonable belief is somewhat convoluted. The defendant may claim self-defense or justification, if he honestly believes that he is justified in committing the act. If he is criminally negligent or reckless, he may be guilty of a crime requiring those states of mind.²⁴² Thus, for example if he believes that he must kill in self-defense, and his belief is reckless, he may be guilty of reckless manslaughter.²⁴³ This form of manslaughter is a second-degree felony and is as serious as extreme emotional disturbance manslaughter, the analog of voluntary manslaughter by heat of passion under the common law.²⁴⁴ If the defendant was criminally negligent, he may be guilty of negligent homicide, a third-degree felony and the Model Code equivalent of involuntary manslaughter under the common law.²⁴⁵

3. How do the common law and Model Code schemes compare to Mississippi law?

a. Mississippi

Mississippi dropped the common-law voluntary and involuntary manslaughter dichotomy and instead has many statutes describing various kinds of manslaughter. Some of these statutes are unusual, to put it kindly, and others conflict with each other and the murder statutes. For example, under Section 97-3-19, a killing in the commission of any felony is first-degree murder, and certain listed felonies are worthy of the death penalty,²⁴⁶ yet under Section 97-3-27, a killing in the commission of a felony other than the felonies listed in the death-penalty statute is manslaughter.²⁴⁷

Then there are some unusual types of manslaughter, such as manslaughter

the second degree, when: . . . it is committed under the circumstances defined by § 210(1)(a) Heat of passion for which there is adequate provocation mitigates murder to manslaughter and need not be proven in any prosecution under this §." *Id.* § 210.3. Adding "viewpoint of the defendant's situation" allows the courts to consider whether the defendant's blindness and other physical characteristics and other similar characteristics should be considered in the reasonable person test.

240. Other similar situations would be reasonable belief that the victim was a fleeing felon for use of force in law enforcement or unreasonable-belief killing of an enemy in warfare, for example. Situations that would otherwise be justified or excused except for the unreasonable belief. *See* MODEL PENAL CODE § 210.3 cmt. at 73 (AM. LAW INST. 1985).

241. *See id.* § 210.3 cmt. at 53.

242. *See id.*

243. *See id.* § 210.3 cmt. at 50–51.

244. *See id.* § 210.3 cmt. at 44.

245. *See id.* § 210.3 cmt. at 81.

246. MISS. CODE ANN. § 97-3-19 (2017).

247. *Id.* § 97-3-27.

by a drunken doctor,²⁴⁸ by overloading a boat,²⁴⁹ by “ignorant or negligent management of a steamship or railroad,”²⁵⁰ and by “allowing a dangerous animal to be at large.”²⁵¹ Some of these statutes ostensibly only require the defendant to be negligent, which should never be the basis for criminal liability, as discussed above.²⁵² All of these should be forms of manslaughter by criminally negligent homicide, if the killing occurs when the defendant is criminally negligent. This may be covered by one statute adapted from the Model Code.²⁵³

When the defendant is not a drunken doctor or a careless steamboat operator, and so forth, there is a general Mississippi statute that covers manslaughter by “culpable negligence.”²⁵⁴ Caselaw usually defines culpable negligence as something akin to recklessness under the Model Code.²⁵⁵ Thus there is no statute to generally cover situations in which the defendant is criminally negligent. In other words, the defendant kills under circumstances in which he has fallen greatly below the standard of a reasonable person but is not consciously aware that he has done so. As noted above, while the issue is not free from debate, it is usually considered desirable to hold defendants to some normative standard, so they may not claim ignorance of such norms.²⁵⁶ However, it is unjust for a defendant to be guilty of any form of criminal homicide or other true crime when he is merely negligent or when no reasonable person would foresee death as a result of his conduct, which is possible now in Mississippi.

Section 97-3-29 contains the much-criticized misdemeanor manslaughter rule.²⁵⁷ The statute applies to a killing in the commission of any misdemeanor, but at least does limit the misdemeanors to those recognized at common law.²⁵⁸ Theoretically, the misdemeanor then must at least be *malum in se* (a true crime) and not a regulatory offense, as recognized at common law.²⁵⁹ This still leaves the door open to the possibility of some unforeseen death in the commission of a misdemeanor being automatic manslaughter.²⁶⁰

For example, one of the crimes that is arguably subject to the misdemeanor manslaughter rule is trespass. Whether trespass is a true crime could be debated,²⁶¹ but a killing which occurs when the actor is trespassing could be

248. *Id.* § 97-3-39.

249. *Id.* § 97-3-41.

250. *Id.* § 97-3-43.

251. *Id.* § 97-3-45.

252. *See supra* discussion accompanying notes 94–96.

253. *See* MODEL PENAL CODE § 210.4 (AM. LAW INST. 1985).

254. MISS. CODE ANN. § 97-3-47 (2017).

255. *Compare* Hoffheimer, *supra* note 69, at 130–131 with MODEL PENAL CODE § 202(1)(c) (AM. LAW INST. 1985).

256. *See supra* discussion accompanying notes 94–96.

257. MISS. CODE ANN. § 97-3-29 (2017). *See supra* discussion accompanying note 89.

258. *Id.* § 97-3-29.

259. *See* MODEL PENAL CODE § 210.4 (AM. LAW INST. 1985).

260. *See id.* § 210 cmt. at 75–77.

261. The question is whether trespass is *malum in se* or *malum prohibitum*. *See supra* discussion accompanying notes 38–39 & 257–60.

misdeemeanor manslaughter in Mississippi. As an aside, Mississippi has a special manslaughter statute for the “involuntary” killing of a trespasser, if unintentionally and “by the act, procurement or culpable negligence of another.”²⁶²

Generally, involuntary manslaughter is punished less severely than voluntary manslaughter.²⁶³ Involuntary manslaughter under the common law is criminal homicide committed recklessly or criminally negligently, while voluntary manslaughter is committed with the same state of mind as murder, but with some mitigation, usually by the rule of provocation (which includes the heat of passion) or unreasonable belief self-defense.²⁶⁴ As noted, there is no such dichotomy in Mississippi. All manslaughter is punished with a fine of \$500 and from one year in the county jail to two to twenty years in prison.²⁶⁵

The only manslaughter statute that covers what would be called voluntary manslaughter at common law requires that the defendant not be acting with malice (which is required for murder under the common law, but not in Mississippi) and in the heat of passion, “in a cruel and unusual manner,” or “by the use of a dangerous weapon,” “without authority of law, and not in necessary self-defense.”²⁶⁶

Again, Mississippi’s version of common law voluntary manslaughter is punished the same as other forms of manslaughter.²⁶⁷ The only form of manslaughter punished more severely is the killing of a child, for which the perpetrator may be imprisoned for thirty years.²⁶⁸ Obviously, punishing the most serious form of manslaughter the same as the least serious form of manslaughter, which would be criminally negligent homicide under the proposed scheme, could lead to very serious injustice and disproportionate punishment or lack thereof. Punishing the various types of manslaughter more fairly is only one of the improvements the Committee’s proposed changes would make.

c. The Committee’s Proposals

The Committee adopted the Model Code’s version of reckless manslaughter, but as noted earlier, changed manslaughter based on heat of passion. The Committee retained the reasonable person standard for determining the adequacy of the provocation but did temper it with language that considers the “viewpoint of a person in the defendant’s situation.” The Committee intended for the law to be allowed to develop regarding what issues will be considered for the defendant’s situation. The proposed manslaughter statute is as follows:

262. MISS. CODE ANN. § 97-3-33 (2017).

263. See MODEL PENAL CODE § 210.3 cmt. at 46 (AM. LAW INST. 1985).

264. See 2 LAFAVE, *supra* note 170, §§ 15.2, 15.4.

265. MISS. CODE ANN. 97-3-25 (2017).

266. *Id.* § 97-3-35.

267. Compare *id.* with *id.* § 97-3-25.

268. *Id.* § 97-3-25.

Section 210.4 Manslaughter

Criminal homicide constitutes manslaughter, a felony of the second degree, when it is committed:

(a) recklessly; or

(b) under the circumstances defined by Section 210.2 (1)(a), by a defendant acting in the heat of passion for which there is adequate provocation. The adequacy of the provocation shall be determined from the viewpoint of a reasonable person in the defendant's situation.

With regard to Negligent Homicide, the Committee adopted the Model Code's provision, changing the terminology to "Criminally Negligent Homicide."²⁶⁹ There are several Mississippi cases that indicate that the "culpable negligence" required for many forms of criminal homicide is the equivalent of recklessness under the Model Code.²⁷⁰ With Criminally Negligent Homicide, the Committee would be adding an objective standard for this least serious form of homicide to Mississippi law. The Model Code, along with many jurisdictions, justifies an objective standard for negligent homicide, the least serious form of criminal homicide, because there should be a normative function of the criminal code. In other words, again, there should be a standard of conduct required that no one should be allowed to fall below, even if he is consciously ignorant of the consequences of his conduct.²⁷¹ The statute is as follows:

Section 210.5 Criminally Negligent Homicide

(1) Criminal homicide constitutes criminally negligent homicide when it is committed criminally negligently.

(2) Criminally negligent homicide is a felony in the third degree.

These two statutes would replace the numerous Mississippi statutes on manslaughter.²⁷² The proposed manslaughter and criminally negligent homicide proposals would simplify, clarify and explain these crimes. There is almost no place where this change is more needed than, as seen above, in Mississippi's current manslaughter statutes. Again, under current Mississippi law, voluntary manslaughter is punished the same as other forms of manslaughter.²⁷³ The only form of manslaughter punished more severely is the killing of a child, for which

269. See Minutes, *supra* note 41 (Mar. 9, 2018).

270. See Hoffheimer, *supra* note 69, at 130–131.

271. See MODEL PENAL CODE § 210.3 cmt. at 59 (AM. LAW INST. 1985).

272. These two statutes would replace §§ 97-3-25 through 97-3-47.

273. MISS. CODE ANN. § 97-3-25 (2017).

the perpetrator may be imprisoned for thirty years.²⁷⁴ Obviously punishing the most serious form of manslaughter the same as the least serious form of manslaughter, which would be criminally negligent homicide under the proposed scheme, could lead to very serious injustice and disproportionate punishment or lack thereof.

VI. CONCLUSION

The Committee has been working for more than twenty years to develop a criminal code that is just, modern, consistent, and fits the needs of Mississippi. Instituting the changes proposed by the Committee will improve the ranking among penal codes, but more importantly, these changes will enhance the administration of justice.

We can all agree that the punishment should fit the crime. If the proposed changes are adopted, the Mississippi Code will provide that in larger measure. Citizens will know what conduct is criminally proscribed. Judges will be able to explain the law to juries more clearly. Juries will be able to understand more easily the conduct they should determine is proscribed. In short, the administration of justice will be improved.

In this article, I have used two areas to exemplify the improvements that could be made. First, defining the states of mind necessary to commit a crime will greatly improve the fairness of our criminal laws, which should be dependent on the defendant's state of mind being sufficiently culpable to justify the punishment he receives. In addition, simplifying and clarifying the homicide statutes and assigning penalties commensurate with the severity of the offense will also improve the administration of justice in this most important area of law.

In future articles, I will explain the Committee's proposals for changes to other crimes against the person, such as assault and battery, kidnapping, and sex crimes. Then I will discuss arson, burglary, forgery, and theft crimes. Subsequent articles will explore offenses against the family, such as bigamy and incest, as well as, bribery, perjury, obstruction of government operations, abuse of office, disorderly conduct, and crimes against public decency, such as prostitution.

Mississippi is coming late to the process of reforming the criminal code. However, many jurisdictions are currently re-considering criminal-justice reform. This is a good time for instituting changes that would make our criminal code more consistent and establish penalties that are commensurate with the severity of the offense, without assigning reflexively long sentences. Mississippi should reform its penal code now.

274. *Id.*

APPENDIX
TABLE OF CRIMES AND PUNISHMENT PROPOSED

Crime	Punishment
Attempt	Same as target crime, unless target crime is a First degree felony if the target crime is a First degree felony, Second degree felony
Conspiracy	Same as target crime, unless target crime is a First degree felony if the target crime is a First degree felony, Second degree felony
Solicitation	Same as target crime, unless target crime is a First degree felony if the target crime is a First degree felony, Second degree felony
Homicide:	
Criminal Homicide (Murder, Manslaughter, Feticide, DUI Homicide (negligent homicide covers),	Murder: First degree felony Manslaughter – Second degree felony Criminally negligent homicide – Third degree felony Killing of unborn child purposely or knowingly causing the death of a unborn child by committing an assault against the mother.– First degree felony recklessly causing the death of a unborn child by committing an assault against the mother.- Second degree felony criminally negligently causing the death of a unborn child by committing an assault against the mother.- Third degree felony causing the death of a unborn child committing an aggravated assault against the mother -Third degree felony knowingly, recklessly, or criminally negligent causes the SBI to unborn child- Third degree felony
Assault	<u>Simple Assault:</u> Class A misdemeanor Fourth degree felony: if (a) When acting within the scope of his duty, office or

	<p>employment at the time of the assault: a statewide elected official; law enforcement officer; fireman; emergency medical personnel; public health personnel; social worker, family protection specialist or family protection worker employed by the Department of Human Services or another agency; Division of Youth Services personnel; any county or municipal jail officer; superintendent, principal, teacher or other instructional personnel, school attendance officer or school bus driver; any member of the Mississippi National Guard or United States Armed Forces; a judge of a circuit, chancery, county, justice, municipal or youth court or a judge of the Court of Appeals or a justice of the Supreme Court; district attorney or legal assistant to a district attorney; county prosecutor or municipal prosecutor; court reporter employed by a court, court administrator, clerk or deputy clerk of the court; public defender; or utility worker;</p> <p>(b) A legislator while the Legislature is in regular or extraordinary session or while otherwise acting within the scope of his duty, office or employment; or</p> <p>(c) A person who is sixty-five (65) years of age or older or a person who is a vulnerable person, as defined in Section 43-47-5;</p> <p>(d) A child who is in the process of boarding or exiting a school bus and the actor is in the course of a violation of Section 63-3-615.]</p> <p><u>Aggravated Assault:</u></p>
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	<p>Second Degree- SBI/ causes such injury purposely, knowingly, or recklessly manifesting extreme indifference to the value of human life</p> <p>Third Degree- attempts to cause or purposely/knowingly causes bodily injury to another with a deadly weapon.</p> <p>Assault on police officer a felony, 2a – Second degree felony 2b is Third degree felony.</p>
<p>Domestic Violence</p>	<p><u>Simple Domestic Violence:</u> Class A misdemeanor Fourth degree felony- if at the time of the commission of the offense in question, he has two prior convictions, within 7 years, for any combination of simple domestic violence under this subsection or aggravated domestic violence as defined in subsection (3) of this section or substantially similar offense.</p> <p><u>Aggravated Domestic Violence:</u> Fourth degree felony</p> <p>Third degree felony if two he has two (2) prior convictions within the past seven (7) years, whether against the same or another victim, for any combination of aggravated domestic violence under this subsection or simple domestic violence, which is defined as a felony in the fourth degree, as set forth in Subsection (2) or substantially similar offenses under the laws of another state, of the United States, or of a federally recognized Native American tribe.</p> <p>Felony in the second degree if has at least three (3) previous convictions, whether against the same or different victims, for any combination of offenses defined in subsection (3) of this section or substantially similar offenses under the</p>

	law of another state, of the United States, or of a federally recognized Native American tribe.
Recklessly Endangering Another person	Class A misdemeanor
Terroristic Threats	Third degree felony
Causing and Aiding or soliciting Suicide	Third degree felony
Kidnapping	Third degree felony
Aggravated Kidnapping	First degree felony “unless the defendant establishes, as an affirmative defense, that the defendant voluntarily released the victim without serious bodily injury in a safe place prior to trial in which case it is a felony of the second degree.”
False Imprisonment	Class A misdemeanor
Interference with Custody	Children: Class A misdemeanor “if he 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.” Fourth degree felony “unless the actor, not being a parent or person in equivalent relation to the child, acted with knowledge that his conduct would cause serious alarm for the child’s safety, or in reckless disregard of a likelihood of causing such alarm” Committed persons: Class A misdemeanor
Criminal Coercion	Third degree felony if the actor’s purpose is to commit a felony in the first or second degree or the actor’s purpose is felonious in the first or second degree Fourth degree felony if the actor’s purpose is to commit a felony in the third degree Otherwise Criminal Coercion is a Class A Misdemeanor.

Burglary	Second degree in dwelling or (PKorR) bodily injury or armed If not third degree Multiple convictions: first or second
Indecent Exposure	Class A misdemeanor
Rape of Child	Under 11, and actor 16 or older first degree felony Under 11 and actor under 16 second degree felony 11-16 and actor 4 years older than victim and 21 under third/second degree felony (not sure here says both in different places July 9, 1999 - second, Sept 10, 1999- third) victim 11-16 actor 21 up second degree
Sexual battery	Fourth degree felony
Aggravated sexual battery	Second degree felony
Rape	Second degree felony
Aggravated rape	First degree felony
Limited Spousal Exclusion; Spousal Rape	Second degree felony
Theft	Fourth degree felony if exceeds \$1000 or stolen fire arm or vehicle Class A misdemeanor: any other theft no within above definition Class D misdemeanor: same as above except was not taken by threat or breach of fiduciary obligation amount involved was less than \$100
Robbery	First degree felony – attempts to kill or purposely inflicts or attempts to inflict sbi Second degree felony– recklessly inflicts sbi, threatens with fear of immediate sbi, commits or threatens immediately to commit felony of the first or second Third degree felony – recklessly inflicts bodily injury, threatens another with or purposely puts him in fear of immediate bodily injury, or takes property from person by force

	Fourth degree felony – purposely obtains property of another by threatening to: inflict sbi or inflict bodily injury, accuse anyone of a criminal offense, expose any secret tending to subject any person to hatred contempt or ridicule or to impair his credit or business repute or take or withhold action as an official or cause an official to take or withhold action or bring about or continue a strike boycott or other collective unofficial action, if the property is not demanded or received for the benefit of the group in whose interest the actor purports act or testify or provide information or withhold testimony or information with respect to another’s legal claim or defense, inflict any other harm which would not benefit the actor.
Trespass on nuclear facilities	Fourth degree Felony
Criminal Trespass	Class D misdemeanor Class A misdemeanor: if committed in a dwelling at night Class D misdemeanor: defiant trespasser if defied an order to leave personally communicated to him by the owner of the premises or other authorized persons.”
Arson	Second degree felony
Reckless burning or exploding	Third degree felony
Criminal mischief	Third degree felony – loss excess of \$5000 or “a substantial interruption or impairment of public communication, transportation, supply of water, gas or power, or other public service.” Class A misdemeanor- loss of excess of \$100 if “purposefully or recklessly causes pecuniary loss” Class D misdemeanor-otherwise
Causing Catastrophe	Second degree felony if committed purposely or knowingly

	Third degree felony if committed recklessly
Child Abuse Neglect and delinquency	Second degree felony if purposely, knowingly or recklessly burns, tortures, mutilates, starves, whips, strikes or otherwise abuses any child under 13 in such a manner as to cause bodily injury. Fourth degree felony if purposely or knowingly abandons a child under 13 in such a manner as to cause a substantial risk of serious bodily injury Fourth degree felony if failure to report.
Child Pornography	<p><u>Under both parental and other person knowingly, employs, uses, persuades, induces, entices or coerces</u></p> <p>First degree felony– child less than 11 and actor is at least 16</p> <p>Second degree felony–the actor is at least 16</p> <p>Third degree felony-if the actor is under 16</p> <p><u>Knowingly Permits child to engage in sexually explicit conduct for purpose of visual depiction::</u></p> <p>Third degree felony-child at least 11 but less than 16 and actor is at least four years older than victim</p> <p><u>Having custody/ control of child knowingly permits child to engage in sexually explicit conduct for purpose of visual depiction:</u></p> <p>Third degree felony</p> <p><u>Having custody/ control Sells or otherwise transfers:</u></p> <p>Second degree felony</p> <p><u>Knowingly makes, prints, or publishes or causes to be made etc.:</u></p> <p>Third degree felony</p> <p><u>Knowingly receives, transports, sells, possesses, reproduces for distribution or distributes any visual depiction:</u></p>

	Fourth degree felony
Publicly Displaying Sexually Oriented Materials	Class A misdemeanor
Publicly Displaying Sexually Oriented Materials to Children	Class A misdemeanor- child is less than 11 yrs old and actor is at least 16 Class B misdemeanor- child is less than 11 yrs and actor is under 16 Class B misdemeanor- child is at least 11 but less than 16 and the actor is at least 21
Disseminating Sexually Explicit Material to Children	<u>Knowingly sells written/visual depiction of sexually explicit conduct:</u> Class A misdemeanor-child is less than 11 Class A misdemeanor- if actor is at least 16 Class B misdemeanor- if the actor is under 16 Class B- child is at least 11 and actor is less than 16 and at least four years older than the victim For purpose of the sexual stimulation or gratification of any person, knowingly dissemination sexually explicit conduct: Class B misdemeanor-child is at least 11 but less than 16 and actor is at least four years older than victim
Bigamy	Class A misdemeanor
Hindering Apprehension or Prosecution	Third degree felony if the conduct which the actor knows has been charged or is liable to be charged against the person aided would constitute a felony of the first degree. The offense is a felony in the fourth degree if the conduct which the actor knows has been charged or is liable to be charged against the person aided would constitute a felony of the second or third degree. Otherwise Class A misdemeanor, unless the offense is a misdemeanor, in which case it is a Class D misdemeanor

Aiding Another in Profiting or Benefiting from a Crime	Third degree felony if principal offense was a felony of the first degree. The offense is a felony in the fourth degree if the principal offense was a felony in the second or third degree; otherwise it is a class A misdemeanor
Escape	Third degree felony: under arrest or detained for felony, or following conviction of a felony, force threat deadly weapon or dangerous instrument used, public servant, otherwise Class A misdemeanor.
Implements for Escape	Class A misdemeanor: if unlawfully introduces within detention facility/ unlawfully provides inmate w/weapon/tool etc. which he knows may be useful for escape. Class A misdemeanor: if inmate procures/makes weapon/ tool for escape. Fourth degree felony- if the weapon tool other thing is a firearm destructive device or dangerous weapon
Bail Jumping	Fourth degree felony – if failed to appear at the specified time and place where the appearance was required to answer a charge of felony Class A Misdemeanor-otherwise
Perjury	Third degree felony
Intimidation or Bribery of a Witnesses	Third degree felony
Bribe Receiving by Witness	Third degree felony
Tampering with or Fabricating Physical Evidence	Fourth degree felony
Tampering with Public Records or Information	Class A misdemeanor Fourth degree felony– if the purpose is to defraud defined in section 223.6
Tampering with Witnesses	Class A misdemeanor
False Alarms to Agencies of Public Safety	Class A misdemeanor Fourth degree felony- Second or subsequent

Impersonating a Public Servant	Class A misdemeanor-if falsely pretends to hold position in the public service Fourth degree felony- if falsely pretends to be a law enforcement officer w/intent to induce another
Stimulating Objects of Antiquity, Rarity etc.	Class A misdemeanor
Bad Checks	Class A misdemeanor
Deceptive Business Practices	Class A misdemeanor
Forgery	Third degree felony – money, securities, stamps, government Fourth degree felony– will deed, contract, check, draft, note, etc. otherwise Class A misdemeanor
Commercial Bribery	Class A misdemeanor
Defrauding Secured Creditors	Class A misdemeanor
Fraud in Insolvency	Class A misdemeanor
Defrauding Judgment Creditors	Class B misdemeanor
Receiving Deposits in a Failing Financial Institution	Fourth degree felony – if the value of the property or services secured or sought to be secured exceeds \$500; otherwise Class A misdemeanor
Falsely communicating a Terrorist Threat	Fourth degree felony
Criminal possession or manufacture of forgery device	Third degree felony
Fraudulent Destruction, Removal or Concealment of Recordable Instruments	Third degree felony
Fraudulent use of credit cards and debit cards	Third degree felony– if exceeds \$500 otherwise misdemeanor
Rigging Publicly Exhibited Contest	Fourth degree felony – professional or amateur sport etc. game otherwise Class A misdemeanor
Bribery in Official and Political Matter	Third degree felony

Threats and other Improper Influence in Official and Political Matters	Third degree felony– threatened to commit a crime or made a threat otherwise misdemeanor
Retaliation for Past Official Action	Fourth degree felony– threatened to commit a felony otherwise misdemeanor
Retaliation Against Witness	Fourth degree felony – threatened felony otherwise misdemeanor
Compensation for Past Official Action	Class A misdemeanor
Trading in public Office	Class A misdemeanor
Misuse of Official Information	Class A misdemeanor
False Swearing	Class A misdemeanor- if occurs in official proceeding/ as defined in §241.1(2) Class D misdemeanor- if one is required by law to be sworn/affirmed before notary or other authorized persons.
Unsworn Falsification	Class A misdemeanor- if w/purpose to mislead public servant Class C misdemeanor- if makes a <u>material</u> written false statement which he does not believe to be true on/pursuant to form bearing notice Class D misdemeanor- if he makes written false statement which he does not believe to be true on/pursuant to form bearing notice
False Reports to Law Enforcement Authorities	Class A misdemeanor-falsely incriminating another Class A misdemeanor-False information Class D misdemeanor-Fictitious Reports
Riot; Failure to Disperse	Fourth degree felony –w/ five or more others: “substantial risk of causing, damage to property or physical injury to person” Class A Misdemeanor- w/five or more others “purposely or recklessly causes or creates a substantial risk or public terror or harm.” Otherwise Class A misdemeanor
Failure of Disorderly	Class A misdemeanor

persons to disperse	
Unlawful Assembly	Class A misdemeanor
Harassment	Fourth degree felony– third or more within 5 years
Stalking	Fourth degree felony– violate restraining order etc.
Aggravated stalking	Fourth degree felony– violate restraining order etc. Third degree felony– previous sex conviction
	Fourth degree felony, unless prior conviction or victim under 16 then third degree
Aggravated Abuse of Corpse	Fourth degree felony
Desecration of Venerated Objects	Class D misdemeanor
Aggravated Cruelty to Companion animals	Fourth degree felony
Cruelly injuring livestock	Fourth degree felony
Poisoning animals	Fourth degree felony
Dog fights	Fourth degree felony
Killing or injuring public service animal; penalty	Fourth degree felony– “purposely kills or seriously injures”
False Public Alarms	Fourth degree felony– second or more
False Alarms to Agencies of Public Safety	Fourth degree felony– second or more
Indecent exposure	Fourth degree felony– second or more – child under 16
Procuring prostitutes	Third degree felony– child age 11-18 Second degree felony– child under 11
Promoting Prostitution	Fourth degree felony– second conviction or more Third degree – child 11-18 Second degree – child under 11 Fourth degree felony– allows use of place vehicle or extorts etc. Third degree felon– second conviction or more
Human trafficking	Fourth degree felony

	Third degree felony– child 11-18 Second degree felony– child under 11
Disseminating Obscenity to a Minor	Fourth degree felony– second conviction or more
Computer Luring of a Minor	Fourth degree felony
Criminal Facilitation	Fourth degree felony– if offense was first or second degree
Unauthorized use of Motor Vehicles	Class A misdemeanor
Resisting arrest or other law enforcement	Class A misdemeanor
Obstructing Administration of Law or other Government Function	Class A misdemeanor
Compounding	Class A misdemeanor
Misapplication of Entrusted Property and Property of Government or Financial Institution	Class A misdemeanor
Securing Execution of Writings by Deception	Class A misdemeanor
Gifts to Public Servants by Persons Subject to Their Jurisdiction	Class A misdemeanor
Prohibited Offensive Weapons; Carrying While Concealed; Use or Attempt to Use	Class B misdemeanor- for the first conviction Class A misdemeanor- for any violation after the first conviction Fourth degree felony- any violation after the second or subsequent conviction under this section Third degree felony- for any person convicted of a felony who is subsequently convicted under this section.
Possessing Instruments of Crime	Class A misdemeanor