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## HOMICIDES UNDER THE COLORADO CRIMINAL CODE

BY JOSEPH R. QUINN\*

### INTRODUCTION

ON July 1, 1972, the Colorado Criminal Code became effective. Many significant and long-needed reforms have been accomplished by this legislation. To cite a few examples, deferred prosecutions are now available as a dispositional tool in all cases,<sup>1</sup> an accused generally must be tried within 6 months from the entry of a not guilty plea,<sup>2</sup> the complex problems of multiple prosecutions and double jeopardy have been codified by statute,<sup>3</sup> and a bifurcated trial for class 1 felonies has been established.<sup>4</sup>

However, a broad-scale statutory revision which abandons many long-accepted concepts of the criminal law is bound to create problems of interpretation, at least until such time as judicial construction resolves the competing alternatives. Nevertheless, the inevitability of conflicts in interpretation only increases the need for statutory coherency in definition. Since the Criminal Code expressly recognizes as two of its basic purposes the adequate definition of the act and mental state constituting each offense, and the concomitant warning to all persons of the nature of the prohibited conduct and its penalties,<sup>5</sup> it is proper to question whether the Code has achieved these purposes in its treatment of criminal homicides.

Much has been written over the years with respect to the mental element in crime and the problem of defining criminal culpability in a manner reflective of the real differ-

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<sup>1</sup> Ch. 44, § 1, [1972] Colo. Sess. Laws (to be codified as COLO. REV. STAT. ANN. § 39-7-401 (1973)).

<sup>2</sup> COLO. REV. STAT. ANN. § 40-1-505 (Supp. 1971).

<sup>3</sup> *Id.* §§ 40-1-402 to -404.

<sup>4</sup> Ch. 44, § 1, [1972] Colo. Sess. Laws (to be codified as COLO. REV. STAT. ANN. § 39-11-103 (1973)).

<sup>5</sup> COLO. REV. STAT. ANN. § 40-1-102(1) (Supp. 1971).

ences in moral turpitude for criminal acts.<sup>6</sup> The purpose of this article is not to add to the academic discussion of these issues. Rather, the purpose is to analyze, within the definitional confines established by the Criminal Code, the essential elements of culpability for the various types of criminal homicides and to delineate the salient problems and changes created by this statute.

### I. FIRST DEGREE MURDER

At common law, murder was defined as the unlawful killing of a human being with malice prepense or aforethought.<sup>7</sup> There were no degrees of murder at common law, and the factor of malice was the essential ingredient distinguishing murder from other types of criminal homicide.<sup>8</sup> Malice included something more than an intent to kill or endanger a human life; it was a condition of mind manifesting wickedness, depravity and malignancy.<sup>9</sup> The concept of "aforethought" signified the formation in and by the mind of the intent to do the evil act in advance of the act itself, and connoted the notions of thought, reflection, design, and purpose.<sup>10</sup> Thus, "malice aforethought" included implicitly the concepts of premeditation and deliberation.<sup>11</sup>

In 1861, the Colorado legislature enacted into statute the crime of murder, classified murder into two degrees, and adopted much of the then existing common law pertaining to it.<sup>12</sup> Under Colorado law, murder in the first degree was the unlawful killing of a human being with *express* malice aforethought.<sup>13</sup> Express malice was defined as the "deliberate in-

<sup>6</sup> *E.g.*, G. WILLIAMS, *THE MENTAL ELEMENT IN CRIME* (1965); Perkins, *A Rationale of Mens Rea*, 52 HARV. L. REV. 905 (1939); Perkins, *A Re-Examination of Malice Aforethought*, 43 YALE L.J. 537 (1934); Prevezer, *The English Homicide Act: A New Attempt to Revise the Law of Murder*, 57 COLUM. L. REV. 624 (1957); Wechsler & Michael, *A Rationale of the Law of Homicide: I & II*, 37 COLUM. L. REV. 701, 1261 (1937).

<sup>7</sup> F. WHARTON, *THE LAW OF HOMICIDE* § 2 (3d ed. 1907).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* § 81.

<sup>10</sup> *Id.* § 82.

<sup>11</sup> *Id.*; *see, e.g.*, Hill v. People, 1 Colo. 436 (1872). At common law, premeditation meant to plan, contrive, or scheme beforehand. F. WHARTON, *supra* note 7, § 114. Deliberation meant that the manner of the homicide was determined after examination and reflection, that is, that the consequences, chances, and means were weighed, carefully considered, and estimated. *Id.*, § 112.

<sup>12</sup> Section 18, [1861] Colo. Sess. Laws 292. The murder statute was expanded in 1883 to encompass specific acts of homicide which were deemed murder in the first degree. Section 20, [1883] Colo. Sess. Laws 150.

<sup>13</sup> Section 18, [1883] Colo. Sess. Laws 149 (now COLO. REV. STAT. ANN. § 40-2-1 (1963)); Ingles v. People, 92 Colo. 518, 525, 22 P.2d 1109 (1933).

tention unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof."<sup>14</sup> By statute, murder in the first degree encompassed those homicides "perpetrated by a deliberate and premeditated killing;" those homicides perpetrated by an "act greatly dangerous to the lives of others and indicating a depraved mind, regardless of human life," and those killings perpetrated from a "deliberate and premeditated design, unlawfully and maliciously, to effect the death of a person other than the one who is killed."<sup>15</sup> In the case of certain acts, such as a homicide perpetrated by means of poison, lying in wait, torture, or in the perpetration or attempt to perpetrate certain felonies, proof of express malice aforethought was not necessary. Stated in another fashion, the nature of the acts themselves constituted conclusive proof of express malice aforethought.<sup>16</sup>

Under section 40-3-102(1) of the Criminal Code, first degree murder is a class 1 felony and a person is guilty thereof if he acts in any of the four following ways:

- (a) With premeditated intent to cause the death of a person other than himself, he causes the death of that person or of another person; or
- (b) Acting either alone or with one or more persons, he commits or attempts to commit arson, robbery, burglary, kidnapping, rape, or any sexual offense prohibited by sections 40-3-402, 40-3-403, or 40-3-404, and in the course of or in furtherance of that crime that he is committing or attempting to commit, or of immediate flight therefrom, the death of a person, other than one of the participants, is caused; or
- (c) By perjury or subornation of perjury he procures the conviction and execution of any innocent person; or
- (d) Under circumstances manifesting extreme indifference to the value of human life, he intentionally engages in conduct which creates a grave risk of death to a person other than himself, and thereby causes the death of another.<sup>17</sup>

<sup>14</sup> Section 19, [1861] Colo. Sess. Laws 292 (now COLO. REV. STAT. ANN. § 40-2-2 (1963)).

<sup>15</sup> Ch. 64, § 2, [1901] Colo. Sess. Laws 153 (now COLO. REV. STAT. ANN. § 40-2-3(1) (1963)).

<sup>16</sup> *E.g.*, *Early v. People*, 142 Colo. 463, 352 P.2d 112 (1960); *Dickens v. People*, 67 Colo. 409, 186 P. 277 (1919); *Ehrhardt v. People*, 51 Colo. 205, 117 P. 164 (1911); *Andrews v. People*, 33 Colo. 193, 79 P. 1031 (1905).

<sup>17</sup> COLO. REV. STAT. ANN. § 40-3-102(1) (Supp. 1971). As capital punishment has been held to be unconstitutional, there will be no more executions. *Furman v. Georgia*, 40 U.S.L.W. 4923 (U.S. June 27, 1972). Consequently, crimes under part (c) of this statute are now an impossibility. In subsections (a) and (d) the statute expressly recognizes the principle of transferred intent. Under this principle, the offender is guilty of first degree murder even if the person killed is not the person the offender intended to kill, so long as the offender otherwise had the mental state which characterizes murder under the statute. See *Henwood v. People*, 54 Colo. 188, 129 P. 1010 (1913); *Ryan v. People*, 50 Colo. 99, 114 P. 306 (1911); 1 R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 193 (1957).

In the case of class 1 felonies, provision is made for a separate trial on the issue of penalty before the same jury after a guilty verdict is returned.<sup>18</sup> At the penalty trial, the jury is authorized to return a verdict of death or life imprisonment, or a verdict recommending leniency, in which case the court may impose a sentence of 15 years to life. Recently, in *Furman v. Georgia*,<sup>19</sup> the United States Supreme Court declared capital punishment unconstitutional. The practical and immediate effect of this decision is to render nugatory that portion of the Criminal Code making death an alternative penalty for first degree murder. Consequently, the penalties for first degree murder are now either life imprisonment, or, in the case where leniency is indicated, imprisonment for a period of 15 years to life.

The bifurcated trial section of the Criminal Code was enacted primarily to alleviate the dilemma inherent in capital cases where the jury passes on the issue of culpability and punishment in the same proceeding. It has long been recognized that so long as capital punishment can be imposed, the accused should have the opportunity of testifying about facts in mitigation in an effort to save his life without running the risk of simultaneously incriminating himself on the issue of guilt. With the judicial abolition of capital punishment, however, the primary reason for the bifurcated trial ceases to exist, and the issue of penalty (*i.e.*, life imprisonment or leniency justifying a 15 year to life sentence) can just as effectively be resolved in a unitary proceeding. However, the only provision in the Criminal Code which provides for a leniency verdict in the case of first degree murder is the bifurcated trial provision. The general penalty section of the Criminal Code provides alternative penalties of death or life imprisonment for class 1 felonies. Therefore, until such time as the Criminal Code is amended, the bifurcated trial on penalty should probably be utilized in the case of a conviction for first degree murder so as not to deprive the accused of his right to have the jury determine the propriety of a leniency verdict. If the legislature desires to amend the statute and do away with the bifurcated trial entirely because of the abolition of capital punishment, it can do so by providing for a unitary proceeding on guilt and penalty, the alternatives of penalty being life imprisonment or leniency.

<sup>18</sup> Ch. 44, § 1, [1972] Colo. Sess. Laws (to be codified as COLO. REV. STAT. ANN. § 39-11-103 (1973)).

<sup>19</sup> 40 U.S.L.W. 4923 (U.S. June 27, 1972).

### A. *Premeditated Intent to Cause Death*

Since the concept of express malice encompasses such overlapping ingredients as premeditation, deliberation, depravity of mind, and intent to kill, the Criminal Code follows the example of the American Law Institute's Model Penal Code and eliminates malice from the definition of murder.<sup>20</sup> However, the Criminal Code, contrary to the Model Penal Code, retains the concepts of premeditation and intent, and makes premeditation unique to the crime of first degree murder.<sup>21</sup> The Colorado Criminal Code defines premeditation as "a design formed to do something at any time before it is done."<sup>22</sup> Additionally, under the Criminal Code, "[a] person acts intentionally with respect to a result or to conduct described by a statute . . . when his conscious object is to cause that result, or engage in that conduct, or when his actions are such as to give rise to a substantial certainty that such results will be produced."<sup>23</sup> Thus, murder in the first degree under section 40-3-102(1) (a) requires two distinct elements of mental culpability: (a) there must be a premeditation to perform the act causing death; (b) there must be an intent to cause the death of a person killed or another person.

The legislature obviously intended the concept of premeditation to be a crucial element in distinguishing that form of first degree murder requiring "premeditated intent to cause death" from second degree murder. This difference is made clear because one form of second degree murder is defined as causing the death of a person intentionally, but without premeditation.<sup>24</sup> With such a legislative distinction, it cannot reasonably be argued that the use of the word "premeditated" in the definition of first degree murder was merely superfluous and unnecessary to its definition.

The major source of difficulty in the Criminal Code's

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<sup>20</sup> MODEL PENAL CODE § 201.2 (Tent. Draft No. 9, 1959) provides as follows:

[C]riminal homicide constitutes murder when:

(a) It is committed purposely or knowingly; or

(b) It is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing robbery, rape by force or intimidation, arson, burglary, kidnapping or felonious escape.

<sup>21</sup> COLO. REV. STAT. ANN. § 40-3-102 (a) (Supp. 1971).

<sup>22</sup> *Id.* § 40-3-101(1) (c).

<sup>23</sup> *Id.* § 40-1-601(6).

<sup>24</sup> *Id.* § 40-3-103(1) (a).

treatment of first degree murder is the retention of the concepts of both premeditation and intent. The Model Penal Code several years ago recognized the unwieldy nature of such concepts and attempted to dispel their obscurity by rationalizing the culpability requirements in criminal law under the concepts of knowledge and purpose.<sup>25</sup> The Colorado Criminal Code, however, retains premeditation and intent, and then defines intent by employing part of the Model Penal Code's definition of knowledge and part of its definition of purpose.<sup>26</sup> As a result, the Criminal Code fails to classify degrees of mental culpability on the basis of clearly distinguishable psychological states.

Justice Cardozo in 1928 recognized the false psychology upon which the legal distinction between premeditation and intent is predicated:

I think the distinction is much too vague to be continued in our law. There can be no intent unless there is a choice, yet by the hypothesis, the choice without more is enough to justify the inference that the intent was . . . premeditated. The presence of a sudden impulse is said to mark the dividing line, but how can an impulse be anything but sudden when the time for its for-

<sup>25</sup> MODEL PENAL CODE § 2.02(2) (Tent. Draft No. 4, 1955) provides as follows:

(2) Kinds of culpability defined.

(a) Purposely.

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

(1) 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

(2) if the element involves the attendant circumstances, he knows of the existence of such circumstances.

(b) Knowingly.

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

(1) if the element involves the nature of his conduct or the attendant circumstances, he knows that his conduct is of that nature or he knows of the existence of such circumstances; and

(2) if the element involves a result of his conduct, he knows that his conduct will necessarily cause such a result.

<sup>26</sup> COLO. REV. STAT. ANN. § 40-1-601(6) (Supp. 1971), extracts the "conscious object" language from the Model Penal Code's definition of purposely, and the "knowledge of results" language, with some variation, from the Model Penal Code's definition of knowingly. See note 25 *supra*. After having transposed much of the Model Penal Code's meaning of knowledge and purpose to the Criminal Code's concept of intent, the Criminal Code then employs the concept of knowledge under separate definition. Thus, COLO. REV. STAT. ANN. § 40-1-601(7) (Supp. 1971) provides:

A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware, or reasonably should be aware, that his conduct is of that nature or that the circumstance exists.

This definition is almost identical to the Model Penal Code's definition of knowledge in § 2.02(2) (b). See note 25 *supra*.

mation is measured by the lapse of seconds? Yet the decisions are to the effect that seconds may be enough. What is meant, as I understand it, is that the impulse must be the product of an emotion or passion so swift and overmastering as to sweep the mind from its moorings. A metaphor, however, is, to say the least, a shifting test whereby to measure degrees of guilt that mean the difference between life and death. I think the students of the mind should make it clear to the lawmakers that the statute is framed along the lines of a defective and unreal psychology.<sup>27</sup>

Because these definitions do not reflect actual differing states of mind, it becomes impossible to apply the statutes with any degree of precision. A close analysis of the language makes this clear. Under the Criminal Code's general definition of intention, intention in the case of murder would be the conscious object to cause death or the conscious object to engage in an act of killing, or acting with substantial certainty that death will be produced.<sup>28</sup> The very minimum requirement of culpability for an intentional act is "the performance of conduct involving a voluntary act."<sup>29</sup> A voluntary act, by statutory definition, is "an act performed *consciously* as a result of effort or determination."<sup>30</sup> It is well established in psychology that consciousness implies a state of awareness.<sup>31</sup> Under the Criminal Code, second degree murder is an intentional killing, thereby requiring that the actor be aware of his object or purpose in acting.<sup>32</sup> In differentiating between second and first degree murder, it is necessary to distinguish between taking a life while aware that one is so doing (second degree murder) and taking a life as a result of "a design formed to do something at any time before it is done"<sup>33</sup> (first degree murder).

Apparently, if there is a difference between first and second degree murder, it is a result of added time and planning in the case of first degree murder. However, prior Colorado case law specifically rejects such a distinction. In the much cited case of *Van Houton v. People*, the court stated:

Time, however, is not essential if there was a design and determination to kill formed in the mind of the defendant previous to or at the time the mortal wound was given. It matters

<sup>27</sup> B. CARDOZO, LAW AND LITERATURE 97-99 (1931).

<sup>28</sup> COLO. REV. STAT. ANN. § 40-1-601(6) (Supp. 1971).

<sup>29</sup> *Id.* § 40-1-602.

<sup>30</sup> *Id.* § 40-1-601(2) (emphasis added).

<sup>31</sup> E.g., H. ENGLISH & A. ENGLISH, A COMPREHENSIVE DICTIONARY OF PSYCHOLOGICAL AND PSYCHOANALYTICAL TERMS 58 (1958); 1 R. GOLDENSON, THE ENCYCLOPEDIA OF HUMAN BEHAVIOR: PSYCHOLOGY, PSYCHIATRY AND MENTAL HEALTH 250-53 (1970); cf. *Fain v. Commonwealth*, 78 Ky. 183 (1879).

<sup>32</sup> See p. 154 *infra*.

<sup>33</sup> COLO. REV. STAT. ANN. § 40-3-101(1) (c) (Supp. 1971).



not how short the interval, if it was sufficient for one thought to follow another, and the defendant actually deliberated and premeditated upon such design before firing the fatal shot, this was sufficient to raise the crime to the highest grade known to law.<sup>34</sup>

Clearly, if one has time to be aware of the consequences of an action there has been time for "one thought to follow another." Thus, if one has the requisite mental culpability for second degree murder, one also has the requisite mental culpability for first degree murder.

Viewing the problem in the terms of the statute itself, it is possible to argue that acting with a *conscious object* to cause a result (the definition of intention) involves an awareness which at least implicitly includes a *prior design* to act (the definition of premeditation). And so, in the case of first degree murder, it can be argued that voluntarily acting with a conscious object or purpose to cause death involves, by psychological necessity, a prior design to act in a manner calculated to cause death, to the very extent that one is conscious or aware of his object or purpose. Thus, under such an argument, any difference between a killing accompanied by a prior design to cause death (premeditation), and a killing accompanied by a conscious object to cause death (intention), would be so vague and obscure that a person of ordinary intelligence could not know with fair assurance the nature of the distinction.

The legislative choice of such an unwieldy concept as "premeditated intent" and the legislative selection of premeditation as the crucial element in distinguishing one form of first degree murder from second degree murder raises some serious questions of construction. It has been held that a statute which forbids "the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."<sup>35</sup> For such a statute virtually "licenses the jury to create its own standard in each case," and no more proof is required for a conviction under one statute than under the other.<sup>36</sup> Additionally, equal protection of law requires that a statutory classification be based on differences which are real

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<sup>34</sup> Van Houton v. People, 22 Colo. 53, 66, 43 P. 137 (1895).

<sup>35</sup> See, e.g., Lanzetta v. New Jersey, 306 U.S. 451 (1939); Connally v. General Construction Co., 269 U.S. 385, 391 (1926); People v. Vinnolla, 494 P.2d 826 (Colo. 1972); Cokley v. People, 168 Colo. 280, 450 P.2d 1013 (1969); Fehringer v. People, 59 Colo. 3, 147 P. 361 (1915).

<sup>36</sup> See cases cited note 35 *supra*. See also Herndon v. Lowry, 301 U.S. 242, 263 (1937); Comment, *Prosecutorial Discretion in the Duplicative Statutes Setting*, 42 COLO. L. REV. 455 (1971).

in fact and reasonably related to the legitimate statutory purpose.<sup>37</sup> Thus, where two separate statutes with unequal penalties proscribe what ostensibly might be different acts, but the statutes offer no intelligent standards for distinguishing the acts proscribed, then equal protection is violated.<sup>38</sup> The problems of statutory construction inherent in such concepts as "premeditated intent" and "intent without premeditation" could have been avoided by a more carefully selected basis for distinguishing between different degrees of criminal culpability.<sup>39</sup>

### B. *Felony-Murder*

At common law, an accidental or unintentional homicide committed in the perpetration or attempt to perpetrate a felony was murder.<sup>40</sup> The rule was rationalized on the basis of a fiction: the malice necessary to make the killing murder could

<sup>37</sup> *E.g.*, *Dunbar v. Hoffman*, 171 Colo. 481, 468 P.2d 742 (1970). *See also* *Spillers v. State*, 84 Nev. 23, 436 P.2d 18 (1968); *State v. Chavez*, 77 N.M. 79, 419 P.2d 456 (1966); *State v. Pirkey*, 203 Ore. 697, 281 P.2d 698 (1955).

<sup>38</sup> *See* cases cited note 37 *supra*. Even where certain conduct fits within two different statutory proscriptions, which carry different penalties but set forth distinct legal elements for the statutory offenses, one body of law would require that the accused be prosecuted under the less severe statute. *State v. Shondel*, 22 Utah 2d 343, 453 P.2d 146 (1969); *State v. Collins*, 55 Wash. 2d 469, 348 P.2d 214 (1960); Comment, *Prosecutorial Discretion in the Duplicative Statutes Setting*, 42 *COLO. L. REV.* 455 (1971). However, the Colorado Supreme Court recently indicated in dicta that the prosecutor has discretion in such a situation to proceed under either statute. *People v. James*, 497 P.2d 1256 (Colo. 1972). In the *James* case, however, the Court found that the statutes in question (forgery and unlawful use of credit device) related to two different kinds of criminal conduct, and the classifications were not unintelligible.

<sup>39</sup> Perhaps some degree of definitional consistency and coherency can be salvaged from the Criminal Code by construing "premeditation" in a manner calculated to accomplish what the legislature intended but did not quite achieve — to establish legally qualitative distinctions between first and second degree murder reflective of the real differences in moral turpitude for homicidal acts. The Criminal Code not only states that it shall be construed in such manner as to define adequately the act and mental state which constitutes each offense, but also expressly sanctions the use of case law as an interpretive aid in the construction of its provisions. *COLO. REV. STAT. ANN.* § 40-1-104(3) (Supp. 1971). It is a fact that in some cases judicial construction of the traditional concepts of homicide (such as premeditation, deliberation, wilfulness, malice) has resulted in practically interpreting them out of existence. Prior case law, while not furnishing an ideal solution by any means, affords a less shaky basis for delineating the mental culpability requirements of first degree murder than does the literal application of the Criminal Code. In the case of premeditated intent, construction might be sought in the former culpability requirement of first degree murder, express malice aforethought. Thus, "premeditated intent" might be construed to mean a design to engage in the act of killing, calmly or sedately formed prior to the act itself, accompanied by a consciously evil desire or object to bring about death. *See F. WHARTON, supra* note 7, §§ 81, 82. While this construction of premeditation virtually reinstates much of the admittedly elusive language of the common law, it is at least somewhat more intelligible than the literal definition of premeditated intent in the Criminal Code. Certainly, murder should be defined by something other than the statutory tautologies presently inherent in the Criminal Code.

<sup>40</sup> *F. WHARTON, supra* note 7, § 92.

be constructively imputed from the malice incident to the perpetration of the initial felony.<sup>41</sup> One possible explanation of this doctrine is that at early common law, practically all felonies were punishable by death, so it made little difference whether the accused was hanged for the initial felony or for the death accidentally resulting from the felony.<sup>42</sup>

Prior to the adoption of the Criminal Code, Colorado's felony-murder statute proscribed as first degree murder all killing "committed in the perpetration or attempt to perpetrate any arson, rape, robbery, mayhem or burglary."<sup>43</sup> Although the majority of states have similar statutes, courts in several jurisdictions have imposed various qualifications on the felony-murder rule in an effort to limit its application.<sup>44</sup>

There are two basic conditions precedent to the application of the felony-murder rule under the Criminal Code. Initially, there must be an actual commission or attempt to commit one of the designated felonies — arson, robbery, burglary, kidnapping, rape, gross sexual imposition, deviate sexual intercourse by force or its equivalent, or deviate sexual intercourse by imposition. Secondly, the statute requires that, after the attempt or commission of the designated felony has commenced, the death of another be caused in the course of or in furtherance of the designated felony.

Under the plain meaning of the statute, an accidental homicide committed in the course of conduct which is clearly preparatory in nature would not be within the ambit of the

<sup>41</sup> *Id.* See also *Frady v. People*, 96 Colo. 43, 40 P.2d 606 (1934); *Andrews v. People*, 33 Colo. 193, 69 P. 1031 (1905).

<sup>42</sup> *Commonwealth v. Redline*, 391 Pa. 486, 137 A.2d 472, 476, (1958).

<sup>43</sup> Ch. 64, § 2, [1901] Colo. Sess. Laws 153 (now COLO. REV. STAT. ANN. § 40-2-2 (1963)).

<sup>44</sup> Some of the judicially created limitations are as follows: (1) The felonious act must be dangerous to life. *People v. Pavlic*, 227 Mich. 562, 199 N.W. 373 (1924); *State v. Diebold*, 152 Wash. 68, 277 P. 394 (1929). (2) The homicide must be the natural and probable consequence of the felonious act. *Powers v. Commonwealth*, 110 Ky. 386, 61 S.W. 735 (1901). (3) Death must be proximately caused. *Burton v. State*, 122 Tex. Crim. 363, 55 S.W.2d 813 (1933). (4) The felony must be *malum in se*. *People v. Pavlic*, 227 Mich. 562, 199 N.W. 373 (1924). (5) The act must be a common law felony. *State v. Burrell*, 120 N.J.L. 277, 199 A. 18 (1938); *Commonwealth v. Exler*, 243 Pa. 155, 89 A. 968 (1914). (6) The period during which the felony is in the process of commission must be narrowly construed. *State v. Taylor*, 173 La. 1010, 139 So. 463 (1932); *Huggins v. State*, 149 Miss. 280, 115 So. 213 (1928); *People v. Smith*, 232 N.Y. 239, 133 N.E. 574 (1921); *State v. Marwig*, 227 N.Y. 382, 125 N.E. 535 (1919); *State v. Diebold*, 152 Wash. 68, 277 P. 394 (1929). (7) The underlying felony must be independent of the homicide. *State v. Severns*, 158 Kan. 453, 148 P.2d 488 (1944); *State v. Fisher*, 120 Kan. 226, 243 P. 291 (1926); *State v. Shock*, 68 Mo. 552 (1878); *People v. Moran*, 246 N.Y. 100, 158 N.E. 35 (1927); *People v. Huther*, 184 N.Y. 237, 77 N.E. 6 (1906).

felony-murder rule. Although such conduct might arguably be construed to be in furtherance of the criminal episode itself, conduct in the form of preparation has traditionally been considered as falling short of the criminal attempt.<sup>45</sup> However, the Criminal Code's definition of attempt is sufficiently broad to encompass conduct which formerly fell within the area of non-criminal preparation. The definition of attempt, which is similar to the Model Penal Code's definition of attempt, is intentional conduct "constituting a substantial step towards the commission of an offense."<sup>46</sup> A substantial step is further defined by the Colorado Criminal Code as "conduct, whether act, omission, or possession, which is strongly corroborative of the firmness of the actor's intent to complete the commission of the offense."<sup>47</sup> While the Criminal Code fails to specifically characterize the type of conduct which does or does not constitute a substantial step, the Model Penal Code furnishes some illustrative definitions which might arguably be within the Criminal Code's general definition of attempt. The Model Penal Code provides that the following conduct, if strongly corroborative of the actor's criminal purpose, shall not, as a matter of law, be held insufficient to constitute a substantial step:

- (a) lying in wait, searching for or following the contemplated victim of the crime;
- (b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;
- (c) reconnoitering the place contemplated for the commission of the crime;
- (d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;
- (e) possession of materials to be employed in the commission of the crime, which are specifically designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances;
- (f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;
- (g) soliciting an innocent agent to engage in conduct constituting an element of the crime.<sup>48</sup>

Thus, a person who is armed with a deadly weapon and

<sup>45</sup> *E.g.*, *Lewis v. People*, 124 Colo. 62, 235 P.2d 348 (1951); *People v. Murray*, 14 Cal. 159 (1859); *Commonwealth v. Kelly*, 162 Pa. Super. 526, 58 A. 375 (1948); *Regina v. Cheeseman*, 9 Cox Crim. Cas. 100 (Crim. App. 1862).

<sup>46</sup> COLO. REV. STAT. ANN. § 40-2-101 (Supp. 1971). See also MODEL PENAL CODE § 5.01 (Tent. Draft No. 10, 1960).

<sup>47</sup> COLO. REV. STAT. ANN. § 40-2-101 (Supp. 1971).

<sup>48</sup> MODEL PENAL CODE § 5.01 (Tent. Draft No. 10, 1960).

is driving to the scene of a robbery and kills another in a motor vehicle accident en route, arguably falls within the definition of attempted robbery. Since an attempt under the Colorado Criminal Code includes possessory conduct,<sup>49</sup> and the possession of a deadly weapon is corroborative of the actor's intent to complete the offense,<sup>50</sup> a court could hold that such conduct under the circumstances is sufficient to constitute attempted robbery and thereby render the actor liable for first degree murder under the felony-murder rule.

The Colorado Criminal Code expressly broadens the scope of the felony-murder rule to include *immediate* flight from the scene of the crime.<sup>51</sup> In this respect, the statute follows the holding of *Whitman v. People*,<sup>52</sup> which upheld the defendant's conviction for first degree murder under the former felony-murder statute for the death of an occupant of a motor vehicle with which the defendant collided while fleeing from the scene of a robbery. However, the precise scope of the phrase "immediate flight" will undoubtedly require judicial construction.

The death of one of the participants in the underlying felony is expressly taken out of the felony-murder rule under the Criminal Code.<sup>53</sup> In this respect, the Criminal Code nullifies the case of *Robbins v. People*,<sup>54</sup> which upheld Robbins' felony-murder conviction for his accidental killing of a co-felon during the course of a robbery. Under the Criminal Code, whether the participant be killed by the victim of the robbery, the police, or some third party, the co-participants are not criminally responsible for his death. The rationale for this limitation lies in the fact that the killing of the participant was justifiable under the circumstances. It would be irrational to impute a legally justifiable homicide to a participating felon and, by reason of such imputation, change the character of the act from one of justifiable homicide to one of criminal culpability.<sup>55</sup> However, if the participant himself intentionally, recklessly, or negligently causes the death of a co-participant during the felony or immediate flight therefrom, then ostensibly he could

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<sup>49</sup> COLO. REV. STAT. ANN. § 40-2-101(1) (Supp. 1971).

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

<sup>51</sup> *Id.* § 40-3-102(1)(b).

<sup>52</sup> 161 Colo. 110, 420 P.2d 416 (1966).

<sup>53</sup> COLO. REV. STAT. ANN. § 40-3-102(1)(b) (Supp. 1971).

<sup>54</sup> 142 Colo. 254, 350 P.2d 818 (1960).

<sup>55</sup> See Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50 (1956).

be held to the appropriate degree of criminal liability independent of the felony-murder statute.<sup>56</sup>

One of the most perplexing problems in the felony-murder area is not expressly resolved by the Criminal Code. The problem is whether or not a participant in a crime can be held criminally responsible under the felony-murder doctrine for the death of a third party effected by a nonparticipant. Certainly in the case where the participant uses the body of an innocent person as a shield in order to escape from the scene of the crime, and the innocent person is killed by police bullets, the participant, even independent of the felony-murder rule, would be liable for first degree murder by virtue of the criminal culpability demonstrated in the use of the body of the innocent person.<sup>57</sup> But in the case where the participants of a robbery are fleeing from the scene of the crime and a policeman or the victim of the robbery shoots at their fleeing automobile and accidentally kills an innocent bystander, the question of whether the participants are criminally liable for first degree murder under the felony-murder doctrine is not so easily answered. The Criminal Code merely states that a person commits the crime of first degree murder if, "in the course of or in furtherance of the crime . . . or of immediate flight therefrom, the death of a person, other than one of the participants, is caused."<sup>58</sup> But the Criminal Code contains no definition of causation. The causality relationship between conduct and result in criminal law has been analyzed from many perspectives — proximate cause, direct cause, substantial cause, efficient cause, and so forth.<sup>59</sup> The Model Penal Code undertakes a fresh approach to the issue of causation by establishing a "but-for" test, with the qualification that in offenses requiring

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<sup>56</sup> Thus, the participant could possibly be prosecuted for any of the following: first degree murder, COLO. REV. STAT. ANN. § 40-3-102 (Supp. 1971), on the ground that he had the "premeditated intent to cause death" or he intentionally engaged in an act which created a grave risk of death under circumstances manifesting extreme indifference to the value of human life; second degree murder, *id.* § 40-3-103, on the ground that he caused the death intentionally or with intent to cause serious bodily injury; manslaughter, *id.* § 40-3-104, on the ground that he caused the death recklessly, or perhaps in the exceptional situation, he caused the death intentionally upon heat of passion; criminally negligent homicide, *id.* § 40-3-105, on the ground that he caused the death by criminal negligence; and finally for vehicular homicide, *id.* § 40-3-106, if he proximately caused the death while driving under the influence or in a reckless manner.

<sup>57</sup> See, e.g., *Wilson v. State*, 188 Ark. 846, 68 S.W.2d 100 (1934); *Taylor v. State*, 40 Tex. Crim. 564, 55 S.W. 961 (1900).

<sup>58</sup> COLO. REV. STAT. ANN. § 40-3-102(1)(b) (Supp. 1971) (emphasis added).

<sup>59</sup> See R. ANDERSON, *supra* note 17, § 195; F. WHARTON, *supra* note 7, §§ 27-39; Annot., 32 A.L.R.3d 589 (1970).

purpose or knowledge with respect to a particular result, criminal culpability is generally established only when the actual result was within the purpose or contemplation of the actor.<sup>60</sup>

Since the Colorado Criminal Code expressly sanctions the use of case law as an interpretive aid in the construction of its provisions,<sup>61</sup> an answer to the problem of a participant's responsibility for the death of a third party effected by a nonparticipant might be found at common law. At common law the felony-murder rule was used to establish the mens rea of murder. The rule imputed to all the perpetrators of the felony the malice required for murder, once it was established that a death was criminally caused by one of the perpetrators in furtherance of the felony.<sup>62</sup> But the felony-murder rule was not a rule of imputed causation. At common law the felony-murder rule required a direct causal connection between the perpetration of the felony and the ensuing homicide.<sup>63</sup> Mere temporal coincidence of the felony and the death of another was insufficient to establish felony-murder liability.<sup>64</sup> The rationale of the common law was elucidated in the early case of *Commonwealth v. Campbell*:

No person can be held guilty of homicide unless the act is either actually or constructively his, and it cannot be his act in either sense unless committed by his own hand or by someone acting in concert with him or in furtherance of a common object or purpose. Certainly that cannot be said to be an act of a party in any just sense, or on any sound legal principle, which is not only not done by him, or anyone with whom he is associated or connected in a common enterprise, or in attempting to accomplish the same end, but is committed by a person who is his direct and immediate adversary, and who is, at the moment when the alleged criminal act is done, actually engaged in opposing and resisting him and his confederates and abettors in the accomplishment of the unlawful object for which they are united.<sup>65</sup>

Several jurisdictions passing on the issue have followed the common law rule that the act of killing must be by the felon or his confederate.<sup>66</sup> As one court recently stated, "[A]

<sup>60</sup> MODEL PENAL CODE § 2.03 (Tent. Draft No. 4, 1955).

<sup>61</sup> COLO. REV. STAT. ANN. § 40-1-104(3) (Supp. 1971).

<sup>62</sup> MORRIS, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50, 59 (1956).

<sup>63</sup> PERKINS, *The Law of Homicide*, 36 J. CRIM. L.C. & P.S. 391, 404 (1946); *Commonwealth v. Campbell*, 89 Mass. (7 Allen) 541 (1863); *Rex v. Plummer*, 84 Eng. Rep. 1103 (K.B. 1700). See also the discussion in *Commonwealth v. Redline*, 391 Pa. 486, 137 A.2d 372 (1958).

<sup>64</sup> PERKINS, *supra* note 63.

<sup>65</sup> 89 Mass. (7 Allen) 541 (1863).

<sup>66</sup> *Commonwealth v. Moore*, 121 Ky. 97, 88 S.W. 1085 (1905); *State v. Garner*, 238 La. 563, 115 So. 2d 855 (1959); *Commonwealth v. Balliro*, 349 Mass. 505, 209 N.E.2d 308 (1965); *Podolski v. People*, 332 Mich. 508, 52

distinction based on the person killed . . . would make the defendant's criminal liability turn upon the marksmanship of victims and policemen," and a "rule of law cannot reasonably be based on such a fortuitous circumstance."<sup>67</sup> Since the Colorado legislature saw fit to retain the felony-murder rule, it should have delineated the scope of the rule by either defining the concept of causation or articulating within the felony-murder statute the bounds of its applicability.

One final change effected by the Criminal Code is the establishment of an affirmative defense to the charge of felony-murder. The Criminal Code provides that if the defendant presents some credible evidence on his affirmative defense, "then the guilt of the defendant must be established beyond a reasonable doubt as to the issues underlying the affirmative defense as well as all other elements of the offense."<sup>68</sup> The six factors on which the defendant must present some credible evidence to raise the affirmative defense are as follows: (1) that he "was not the only participant in the underlying crime;" and (2) that he "did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof;" and (3) that he "was not armed with a deadly weapon;" and (4) that he "had no reasonable ground to believe that any other participant was armed with such a weapon or instrument;" and (5) that he "did not engage in or intend to engage in and had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious bodily injury;" and (6) that he "endeavored to disengage himself from the commission of the underlying crime or flight therefrom immediately upon having reasonable grounds to believe that another participant [was] armed with a deadly weapon, instrument, article, or substance or intended to engage in conduct likely to result in death or serious bodily injury."<sup>69</sup> The affirmative defense section seems to be predicated on the assumption that the death of the victim was caused by one of the participants in the felony itself. One might reasonably argue from the thrust of this section that the legislature intended to restrict the application of the felony-murder rule to deaths directly caused by one of the

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N.W.2d 201 (1952); *People v. Wood*, 9 App. Div. 443, 195 N.Y.S.2d 133 (1955).

<sup>67</sup> *People v. Washington*, 62 Cal. 2d 777, 780, 402 P.2d 130, 132, 614 Cal. Rptr. 442, 444 (1965).

<sup>68</sup> COLO. REV. STAT. ANN. § 40-1-507 (Supp. 1971).

<sup>69</sup> *Id.* § 40-3-102(2).



participants in the felony itself, as opposed to a nonparticipant. Judicial construction will undoubtedly be required to resolve the scope of the felony-murder rule under the statute.

### C. *Murder by Extreme Indifference to Human Life*

At common law, the requisite of malice for murder included not only an intent to kill or endanger a particular person, but also "every case where there is a wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty, although no particular person may be intended to be injured."<sup>70</sup> The former Colorado murder statute recognized this principle by proscribing as first degree murder death resulting from an act "greatly dangerous to the lives of others and indicating a depraved mind, regardless of human life."<sup>71</sup> Colorado case law restricted the application of this section to those acts evincing "universal malice," as opposed to acts directed at the person actually killed:

Every act that results in the death of a person is greatly dangerous to the life of such person, but the statute intended that there should be an act which shows the accused to have had a depraved mind, regardless of human life, and is intended to include those cases where a person has no deliberate intention to kill any particular individual. In other words, when a person kills another by an act which is greatly dangerous to the lives of others, and which shows a depraved mind regardless of human life, he is guilty of murder in the first degree, not because he has atrociously murdered a particular individual, but because his act has evinced universal malice, a malice against mankind in general.

....

We think the Legislature, in this clause, intended to raise to the high grade of murder in the first degree those homicides which are the result of what is called "universal malice." By universal malice, we do not mean a malicious purpose to take the life of all persons. It is that depravity of the human heart, which determines to take life upon slight or insufficient provocation, without knowing or caring who may be the victim.<sup>72</sup>

The Criminal Code attempts to codify this concept of universal malice by providing in section 40-3-102(1)(d) that "a person commits the crime of murder in the first degree if [u]nder circumstances manifesting extreme indifference to the value of human life, he intentionally engages in conduct which creates a grave risk of death to a person other than himself, and thereby causes the death of another."<sup>73</sup>

<sup>70</sup> F. WHARTON, *supra* note 7, § 90.

<sup>71</sup> Ch. 64, § 2, [1901] Colo. Sess. Laws 153 (now COLO. REV. STAT. ANN. § 40-2-3(1) (1963)).

<sup>72</sup> *Longinotti v. People*, 46 Colo. 173, 176, 180, 102 P. 165, 166, 168 (1909).

<sup>73</sup> COLO. REV. STAT. ANN. § 40-3-102(1)(d) (Supp. 1971).

There are two essential elements of culpability under this section: (1) the actor must intentionally perform an act creating a substantial homicidal risk; and (2) the act itself must be performed under circumstances manifesting extreme indifference to human life. The intent requisite for culpability under this section does not require a conscious object to cause death, or a premeditated intent to cause death. That type of mental culpability is an ingredient of murder under section 41-3-102(1)(a). Considering the Criminal Code's general definition of intent,<sup>74</sup> the intent contemplated in subsection (1)(d) is either of the following: (1) the actor's conscious object is to engage in that particular conduct; or (2) his actions are such as to give rise to a substantial certainty that death will result from them. The latter definition of intentional conduct constitutes a virtual imputation of intent to the actor regardless of whether or not the fatal results of his conduct are within his conscious object or purpose, and regardless of whether or not he actually intends to engage in death-causing conduct. This imputation of intent requires that the actions create such a risk-endangering situation that the results are almost certain to follow from the act, regardless of the purpose or specific intent of the actor himself. In other words, the act speaks for itself. In this respect, intent becomes a form of aggravated recklessness. Under the Criminal Code one acts recklessly when he is aware or reasonably should be aware of a substantial and unjustifiable risk and consciously disregards the risk in a manner amounting to willful and wanton conduct.<sup>75</sup>

But murder in the first degree under this subsection requires, in addition to intentionally engaging in conduct which creates a grave risk of death, that the act itself must be performed "under circumstances manifesting *extreme* indifference to the value of human life." It has been argued that the adjective "extreme" is misplaced because there are no degrees of indifference to a particular result. In other words, "to speak of extreme indifference is pointless, because indifference itself is the ultimate extremity."<sup>76</sup> Also, it might be argued that when one intentionally engages in conduct which creates a great risk of death to another, he thereby acts under circumstances manifesting extreme indifference to the value of human life. Under such an argument, the "extreme indifference" require-

<sup>74</sup> *Id.* § 40-1-601(6).

<sup>75</sup> *Id.* § 40-1-601(8).

<sup>76</sup> G. WILLIAMS, *supra* note 6.

ment would add nothing to the culpability requirement of first degree murder. However, the legislature obviously did not intend to proscribe as first degree murder any and all acts creating substantial homicidal risks to others where the actor's conscious object is to engage in the act but he is indifferent to the result, or where the actor's conduct gives rise to a high probability of death but death is not intended. If such were the legislative intent, then this particular form of first degree murder would be almost impossible to distinguish from manslaughter, which is defined as recklessly causing the death of another person.<sup>77</sup>

The further requirement that the conduct itself be performed "under circumstances manifesting extreme indifference to the value of human life" seems to reflect the legislative judgment that certain types of criminal conduct resulting in death are qualitatively distinct from a consciously performed act resulting in an unintended death and an act performed in conscious disregard of a substantial and an unjustifiable risk of death. Although the basis for this distinction is extremely difficult to verbalize, it would seem that the additional requirement of *extreme* indifference to life assimilates that type of conscious indifference to consequences which approaches, but does not quite meet, purposeful and knowing conduct.<sup>78</sup> Examples of the proscribed conduct would include shooting into a crowd or an occupied house or an occupied automobile, in disregard of any and all consequences.<sup>79</sup> Section 40-3-102(d) thus reflects, and somewhat broadens, the common law principle of universal malice and the former statutory proscription cast in terms of "a depraved heart regardless of human life."<sup>80</sup>

## II. SECOND DEGREE MURDER

Under prior Colorado law, second degree murder was the unlawful killing of a human being without premeditation or deliberation but with implied malice.<sup>81</sup> Malice was implied when there was no considerable provocation for the killing, or where the circumstances of the killing showed an aban-

<sup>77</sup> COLO. REV. STAT. ANN. § 40-3-104(1)(a) (Supp. 1971).

<sup>78</sup> See MODEL PENAL CODE § 201.2 and Comment (Tent. Draft No. 9, 1959).

<sup>79</sup> Wechsler & Michael, *supra* note 6, at 709-13, 720-22, 742-51.

<sup>80</sup> *Id.*; Ch. 64, § 2, [1901] Colo. Sess. Laws 153 (now COLO. REV. STAT. ANN. § 40-2-3(1) (1963)).

<sup>81</sup> Ch. 64, § 2, [1901] Colo. Sess. Laws 153 (now COLO. REV. STAT. ANN. § 40-2-3(1) (1963)). See, e.g., *Hervey v. People*, 495 P.2d 204 (Colo. 1972); *Watkins v. People*, 158 Colo. 485, 408 P.2d 425 (1965); *Becksted v. People*, 133 Colo. 72, 292 P.2d 189 (1956); *Kent v. People*, 8 Colo. 563, 9 P. 853 (1885).

doned and malignant heart on the part of the slayer.<sup>82</sup> In the context of second degree murder, "abandoned" meant throwing off all self-restraint and pursuing a lawless and evil course with utter disregard to the consequences;<sup>83</sup> "malignant" was defined as governed by malice, not necessarily towards a particular individual, but under circumstances showing an utter disregard for human life proceeding from a heart devoid of social duty and fatally bent on mischief.<sup>84</sup> The distinguishing elements between first and second degree murder were found in the concepts of premeditation and deliberation, or specific intent to kill.<sup>85</sup> Murder in the second degree was not a specific intent crime and accordingly did not require a specific intent to kill.<sup>86</sup> For example, the unjustified shooting at another with a gun would not, standing alone, constitute murder in the first degree, although the act would be sufficient to imply malice for second degree murder.<sup>87</sup> In crimes of general intent, a person was presumed to intend the natural and probable consequences of his acts.<sup>88</sup> Thus, a person of sound mind who did not intend to kill would be responsible, nevertheless, for second degree murder so long as he intended to perform the physical act resulting in death and the act itself was not otherwise legally justified.

The Criminal Code substantially changes the previously existing definition of second degree murder by providing as follows in section 40-3-103:

(1) A person commits the crime of murder in the second degree if: (a) He causes the death of a person intentionally, but without premeditation; or (b) With intent to cause serious bodily injury to a person other than himself, he causes the death of that person or of another person.<sup>89</sup>

<sup>82</sup> Ch. 64, § 2, [1901] Colo. Sess. Laws 153 (now COLO. REV. STAT. ANN. § 40-2-3(1) (1963)).

<sup>83</sup> *McAndrews v. People*, 71 Colo. 542, 553, 208 P. 486, 490 (1922).

<sup>84</sup> *Id.*

<sup>85</sup> Ch. 64, § 2, [1901] Colo. Sess. Laws 153 (now COLO. REV. STAT. ANN. § 40-2-3(1) (1963)). See, e.g., *Hervey v. People*, 495 P.2d 204 (Colo. 1972); *Watkins v. People*, 158 Colo. 485, 408 P.2d 425 (1965); *Becksted v. People*, 133 Colo. 72, 292 P.2d 189 (1956); *Kent v. People*, 8 Colo. 563, 9 P. 853 (1885).

<sup>86</sup> Ch. 64, § 2, [1901] Colo. Sess. Laws 153 (now COLO. REV. STAT. ANN. § 40-2-3(1) (1963)).

<sup>87</sup> *Id.*

<sup>88</sup> E.g., *Keller v. People*, 153 Colo. 590, 387 P.2d 421 (1963); R. ANDERSON, *supra* note 17, §§ 60-61.

<sup>89</sup> COLO. REV. STAT. ANN. § 40-3-103 (Supp. 1971). Second degree murder, a class 2 felony, carrying a sentence of not less than 10 nor more than 50 years, is a lesser included offense of those types of first degree murder requiring "premeditated intent to cause death" and intentional conduct "under circumstances manifesting extreme indifference to the value of human life." *Id.* § 40-1-508(5) (c) provides:

The dilemma created by the Criminal Code's underlying assumption that one can act intentionally but without a prior design to act (premeditation) has been discussed within the context of first degree murder. But even assuming *arguendo* that one can act intentionally but without premeditation, the Criminal Code creates a significant definitional change in second degree murder by requiring as an essential element of culpability the specific intent to cause death or to cause serious bodily injury. Thus, within the context of the Criminal Code's definition of intent,<sup>90</sup> second degree murder requires one of the following mental states: (1) a conscious object to cause death or serious bodily injury; (2) a conscious object to engage in death-causing conduct or seriously-injuring conduct; (3) substantial certainty that death or serious bodily injury will result from one's conduct. While it might be suggested that the legislature did not really intend second degree murder to be a crime of specific intent, the controlling fact is that the plain meaning of the words "intentionally" and "with intent" refute such suggestion.<sup>91</sup>

A literal reading of subsection (1) (a) of the second degree murder statute<sup>92</sup> indicates that, contrary to prior Colorado law, the principle of transferred intent is not recognized in the case of second degree murder.<sup>93</sup> In both the case of first degree murder<sup>94</sup> and second degree murder under subsection (1) (b),<sup>95</sup> the actor who possesses the culpable mental state and causes death by his conduct is criminally responsible even when the person killed is someone other than the intended

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A defendant may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when:

(c) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpability suffices to establish its commission.

<sup>90</sup> *Id.* § 40-1-601(6).

<sup>91</sup> Specific intent is present when from the circumstances the offender must have subjectively desired the prohibited result. Where, however, a specific intent is not made an ingredient of a statutory offense, it is not necessary to prove such specific intent in order to justify a conviction. In such case (general intent), the commission of the act willfully and knowingly is sufficient. (emphasis added) 22 C.J.S. *Criminal Law* § 32 (1961), cited in *Armijo v. People*, 157 Colo. 217, 219, 402 P.2d 79, 80 (1965). As the specific mens rea of second degree murder has been made a statutory element of the offense, it is clearly a crime of specific intent. In contrast, the Colorado rape statute, COLO. REV. STAT. ANN. § 40-3-401 (Supp. 1971), which has no mens rea specified, is a crime of general intent.

<sup>92</sup> COLO. REV. STAT. ANN. § 40-3-103 (Supp. 1971).

<sup>93</sup> See discussion, note 17 *supra*.

<sup>94</sup> COLO. REV. STAT. ANN. § 40-3-102(1) (a) (d) (Supp. 1971).

<sup>95</sup> *Id.* § 40-3-103(1) (b).

victim. But for second degree murder, under subsection (1) (a),<sup>96</sup> the person killed ostensibly must be the person whom the actor intended to kill. It would appear that this statutory shortcoming is an oversight in drafting and might conceivably be corrected by the construction of this subsection in *pari materia* with subsection (1) (b) of the second degree murder statute,<sup>97</sup> and section 40-3-102 (1), which defines first degree murder.<sup>98</sup>

The most perplexing problem under the Criminal Code in the case of second degree murder concerns the concept of diminished responsibility. In the case of second degree murder, section 40-3-102 (2) provides that "diminished responsibility due to lack of mental capacity is not a defense to murder in the second degree."<sup>99</sup> Under the principle of diminished responsibility, evidence of an impaired mental condition, short of legal insanity, traditionally has been admissible in order to negate the specific intent requirements for a particular crime.<sup>100</sup> Since under prior Colorado law second degree murder was not a crime of specific intent, the principle was not applicable.<sup>101</sup> The dilemma created by the subsection on diminished responsibility is that it negates the very definition of second degree murder.<sup>102</sup>

Second degree murder by statutory definition requires a specific intent to either cause death or to cause serious bodily injury. If the provision on diminished responsibility is construed as descriptive of the offense of second degree murder, then second degree murder requires no intent at all, and the statutory definition of the crime itself is illusory. Such a construction produces the absurd and invalid result of second degree murder requiring only the causation of another's death without intention or any mens rea at all.

The Supreme Court of the United States has refused to give effect to the "inexplicably contradictory commands in

<sup>96</sup> *Id.* § 40-3-103 (1) (a).

<sup>97</sup> *Id.* § 40-3-103 (1) (b).

<sup>98</sup> *Id.* § 40-3-102 (1).

<sup>99</sup> *Id.* § 40-3-103 (2).

<sup>100</sup> COLO. REV. STAT. ANN. § 39-8-1 (Supp. 1967), amending COLO. REV. STAT. ANN. § 39-8-1 (1963); COLO. R. CRIM. P. 11 (f); *Watkins v. People*, 158 Colo. 485, 408 P.2d 425 (1965); *McPhee v. People*, 105 Colo. 539, 100 P.2d 148 (1940); *Brennan v. People*, 37 Colo. 256, 87 P. 79 (1906).

<sup>101</sup> *E.g.*, *Watkins v. People*, 158 Colo. 485, 408 P.2d 425 (1965).

<sup>102</sup> The Criminal Code, however, in the general section on responsibility, sanctions the admissibility of evidence of an impaired mental condition, or intoxication, as bearing on the capacity of the accused to form the requisite specific intent required for a particular offense. COLO. REV. STAT. ANN. § 40-1-903 (Supp. 1971). By negating the culpability requirements of second degree murder, § 40-3-103 (1) (b) runs afoul of the

statutes ordaining criminal penalties."<sup>103</sup> As Justice Douglas stated in *United States v. Cardiff*: "Words which are vague and fluid . . . may be as much of a trap for the innocent as the ancient law of Caligula."<sup>104</sup> When the statutory definition of murder in the second degree is juxtaposed with the provision relating to diminished responsibility, the definition of second degree murder fails to make sense. For the statute in one breath requires that death or serious bodily injury be caused *intentionally*, and in the next breath, it mandates that the inability to form the requisite specific intent is not a defense. If the statutory definition of second degree murder is to be salvaged, then it would seem that the subsection relating to diminished responsibility must be nullified.

### III. MANSLAUGHTER

Prior to the enactment of the Criminal Code, manslaughter was divided by statute into voluntary and involuntary manslaughter.<sup>105</sup> The Criminal Code abolishes this distinction and broadens the statutory definition of manslaughter and includes both what was formerly known as voluntary manslaughter and other homicides not previously defined by Colorado statute. Section 40-3-104(1) of the Criminal Code provides as follows:

- (1) A person commits the crime of manslaughter if:
  - (a) He recklessly causes the death of another person; or
  - (b) He intentionally causes or aids another person to commit suicide; or
  - (c) With intent to cause the death of a person other than himself, he causes the death of that person, or of another person, under circumstances where the act causing the death was performed, without premeditation, upon a sudden heat of passion caused by a serious and highly provoking act, affecting the person killing sufficiently to excite an irresistible passion in a reasonable person; but if between the provocation and the killing there is an interval sufficient for the voice of reason and humanity to be heard, the killing is murder.<sup>106</sup>

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basic constitutional requirement that the prosecution must prove "every material element of every charge (100 percent of the total crime) by evidence sufficient to remove all reasonable doubt." *People v. District Ct.*, 165 Colo. 253, 265, 439 P.2d 741, 747 (1965). As the Colorado Supreme Court emphasized in *People v. District Ct.*, "mental capacity to commit a crime is a material part of total guilt for there can be no crime without the means *rea*." *Id.*

<sup>103</sup> *Raley v. Ohio*, 360 U.S. 423 (1959).

<sup>104</sup> 344 U.S. 174 (1952).

<sup>105</sup> Ch. 25, §§ 710-11, [1883] Colo. Sess. Laws 150 (now COLO. REV. STAT. ANN. § 40-2-4 (1963)).

<sup>106</sup> COLO. REV. STAT. ANN. § 40-3-104 (Supp. 1971).

Manslaughter is a class 4 felony carrying a penalty of 1 to 10 years.<sup>107</sup>

#### A. *Recklessly Causing Death*

Under the Criminal Code, the gist of reckless conduct consists of a state of awareness and conscious disregard of a high risk situation amounting to a willful and wanton deviation from reasonable care.<sup>108</sup> "Willful and wanton [conduct] . . . means conduct purposefully committed which the person knew or reasonably should have known was dangerous to another's person or property, and which he performed without regard to consequences . . ." <sup>109</sup> Thus, recklessness "resembles acting knowingly in that a state of awareness is involved but the awareness is of risk, that is of probability rather than certainty; the matter is contingent from the actor's point of view."<sup>110</sup>

The recklessness required for manslaughter was formerly encompassed within the concept of criminal negligence, which was an essential culpability requirement for the misdemeanor of involuntary manslaughter under prior Colorado law.<sup>111</sup> As the Colorado Supreme Court recognized in *Trujillo v. People*,<sup>112</sup> the degree of negligence necessary to sustain a charge of involuntary manslaughter was identical to the degree of negligence necessary to support a claim under the guest statute. The meaning of willful and wanton under the guest cases is virtually identical to the definition of recklessness under the Criminal Code.<sup>113</sup> The net effect, therefore, of subsection (1) (a) of the manslaughter statute is to encompass within its felony provisions the same conduct that was formerly proscribed as involuntary manslaughter, a misdemeanor.

#### B. *Causing or Aiding Suicide*

At common law suicide was a felony, and a person who was present at the suicide and assisted in its commission was

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<sup>107</sup> *Id.* § 40-3-104(2).

<sup>108</sup> *Id.* § 40-1-601(8).

<sup>109</sup> *Id.*

<sup>110</sup> MODEL PENAL CODE § 2.02, Comment (Tent. Draft No. 4, 1955). Since recklessness involves a lesser degree of culpability than an intentional killing, manslaughter under § 1(a) of 40-2-104 qualifies as a lesser included offense of murder under the Criminal Code. See COLO. REV. STAT. ANN. § 40-1-508(5) (c) (Supp. 1971).

<sup>111</sup> *Trujillo v. People*, 133 Colo. 186, 292 P.2d 980 (1956).

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

<sup>113</sup> *E.g.*, *Pettingell v. Moede*, 129 Colo. 484, 271 P.2d 1038 (1954). See generally Comment, *Recent Construction of the Colorado Guest Statute*, 33 U. COLO. L. REV. 374 (1961). See COLO. REV. STAT. ANN. § 40-3-104(1) (a) (Supp. 1971).



guilty of murder.<sup>114</sup> However, one who instigated the suicide and was absent at the time of the suicide was an accessory before the act and escaped punishment under the artificial rule of common law that an accessory could not be tried until the principal was convicted.<sup>115</sup> Although some states proscribe suicide as a crime, a strong opinion exists that "this is not an area in which the penal law can be effective and that its intrusion on such tragedies is an abuse."<sup>116</sup> The Colorado Criminal Code does not make suicide itself a crime.

The *causing* or *aiding* of suicide was not previously proscribed in Colorado by statute. However, such conduct involves behavior which the criminal law can reasonably be expected to proscribe. Although at least one state has held that aiding suicide is not a crime upon the ground that suicide itself is noncriminal,<sup>117</sup> most states treat the conduct as manslaughter or a separate crime of comparable severity.<sup>118</sup> Subsection (1) (b) of the manslaughter statute treats with equal gravity "the intentional causing" and "the intentional aiding" of another to commit suicide. It would seem that if a person by force, duress, or fraud causes the suicide, it might reasonably be punished as murder. The Model Penal Code takes this approach, reasoning that "flagrant murders may be perpetrated by deliberately forcing or coercing self-destruction."<sup>119</sup>

### C. *Killing in Heat of Passion*

Subsection (1) (c) of the manslaughter statute essentially reenacts in less awkward language the former statutory definition of voluntary manslaughter. Under prior Colorado law, voluntary manslaughter was the intentional killing of another in heat of passion caused by a serious and highly provoking injury inflicted upon the slayer sufficient to excite an irresistible passion in a reasonable person.<sup>120</sup> By case law it was not essential that the injury inflicted on the slayer be a physical

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<sup>114</sup> See Annot., 13 A.L.R. 1259 (1921); Annot., 92 A.L.R. 1180 (1934).

<sup>115</sup> *Id.*

<sup>116</sup> MODEL PENAL CODE § 201.5, Comment (Tent. Draft No. 9, 1959).

<sup>117</sup> *Aven v. State*, 102 Tex. Crim. 478, 277 S.W. 1080 (1925); *Sanders v. State*, 54 Tex. Crim. 101, 112 S.W. 68 (1908); *Grace v. State*, 44 Tex. Crim. 193, 69 S.W. 529 (1902).

<sup>118</sup> *Burnett v. People*, 204 Ill. 208, 68 N.E. 505 (1903); *Commonwealth v. Hicks*, 118 Ky. 637, 82 S.W. 265 (1904); *People v. Roberts*, 211 Mich. 187, 178 N.W. 690 (1920); *Blackburn v. State*, 23 Ohio St. 146 (1872).

<sup>119</sup> MODEL PENAL CODE § 201.5, Comment (Tent. Draft No. 9, 1959).

<sup>120</sup> Ch. 25, § 711, [1883] Colo. Sess. Laws 150 (now COLO. REV. STAT. ANN. §§ 40-2-5, 6 (1963)).

injury;<sup>121</sup> nor was it necessary that the provocation immediately precede the act of killing.<sup>122</sup> Although the issue of "cooling time" was technically one of law,<sup>123</sup> the issue was traditionally resolved in favor of the defendant by submitting voluntary manslaughter to the jury upon any evidence, however unreasonable or slight, which tended to reduce the homicide to manslaughter.<sup>124</sup>

The Criminal Code has expressly retained the concept of the hypothetical reasonable person in determining the sufficiency of the provocation. It has been critically argued that "to require . . . that the provocation be enough to make a reasonable man do as the defendant did is patently absurd; the reasonable man quite plainly does not kill."<sup>125</sup> A more flexible standard, in terms of allowing the jury to differentiate between the special factors in the actor's situation which relate to his mental state, would have been to adopt the Model Penal Code's approach of determining the reasonableness of his actions "from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be."<sup>126</sup> Prior Colorado case law, however, particularly within the context of self-defense, furnishes support for the proposition that the actor has the right to act upon appearances, even if they are false;<sup>127</sup> and his culpability in highly provoking circumstances is not determined strictly on the basis of the hypothetical reasonable person.<sup>128</sup> In other words, the actor can be mistaken in his belief and even arguably inappropriate in his actions, so long as his belief and actions are reasonable under the facts as they appeared to him at the time.

The Criminal Code's retention of the concept of "irresistible passion" is also unfortunate. If a passion is in fact irresistible, even to a reasonable person, then how can the act itself meet the minimum requirement of criminal culpability — voluntari-

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<sup>121</sup> See *Ferrin v. People* 164 Colo. 130, 433 P.2d 108 (1967); *Baker v. People*, 114 Colo. 50, 160 P.2d 983 (1945).

<sup>122</sup> *Ferrin v. People*, 164 Colo. 130, 433 P.2d 108 (1967).

<sup>123</sup> *Wickham v. People*, 41 Colo. 345, 93 P. 478 (1907).

<sup>124</sup> E.g., *Ferrin v. People*, 164 Colo. 130, 433 P.2d 108 (1967); *Read v. People*, 119 Colo. 506, 205 P.2d 233 (1949).

<sup>125</sup> MODEL PENAL CODE § 201.3, Comment (Tent. Draft No. 9, 1959). See also *Williams, Provocation and the Reasonable Man*, 1954 CRIM. L. REV. 740, 742.

<sup>126</sup> MODEL PENAL CODE § 201.3 (Tent. Draft No. 9, 1959).

<sup>127</sup> E.g., *LaVoie v. People*, 155 Colo. 551, 395 P.2d 1001 (1964); *Young v. People*, 47 Colo. 352, 107 P. 274 (1910).

<sup>128</sup> *Vigil v. People*, 143 Colo. 328, 353 P.2d 82 (1960).

ness?<sup>129</sup> Additionally, it can be argued that if in fact the passion is irresistible to a reasonable person, and was caused by a threat or use of physical force by the victim, then no criminal liability for manslaughter attaches to the killing. For under the Criminal Code's definition of duress in section 40-1-808, it is expressly provided:

A person may not be convicted of an offense, other than a class 1 felony, based upon conduct in which he engaged because of the use or threatened use of unlawful force upon him or upon another person, which force or threatened use thereof a reasonable person in his situation would have been unable to resist.<sup>130</sup>

The alternatives of outcome in such a case appear to be first degree murder or acquittal. Employing the rule of strict construction of criminal statutes to the benefit of the accused,<sup>131</sup> it would seem that where the killing was the result of a threat or use of force by the victim upon the slayer, sufficient to render the provocation reasonably irresistible, then the killing is noncriminal. This patent inconsistency between the culpability requirements of manslaughter on the one hand and the concepts of voluntariness and duress on the other should be resolved by legislative amendment.

#### IV. CRIMINALLY NEGLIGENT HOMICIDE

Section 40-3-105 of the Criminal Code provides that a person can commit the misdemeanor of criminally negligent homicide in either of two ways: (a) causing death by conduct amounting to criminal negligence; (b) intentionally causing death "in the good faith but unreasonable belief that one or more grounds for justification exist."<sup>132</sup>

##### A. *Death by Criminal Negligence*

Under prior Colorado law, criminal negligence consisted of that wilful and wanton conduct presently encompassed within the concept of recklessness under the Criminal Code;<sup>133</sup> conduct which fell short of wilful and wanton was not criminal negligence. Thus, the former misdemeanor of involuntary manslaughter required criminal negligence consisting of wilful and wanton conduct,<sup>134</sup> and that form of conduct is now punishable

<sup>129</sup> COLO. REV. STAT. ANN. § 40-1-602 (Supp. 1971).

<sup>130</sup> *Id.* § 40-1-808.

<sup>131</sup> *E.g.*, *O'Brien v. People*, 118 Colo. 58, 192 P.2d 428 (1948); *People v. Mooney*, 87 Colo. 567, 290 P. 271 (1930); *Sheely v. People*, 54 Colo. 136, 129 P. 201 (1912); *Robinson v. People*, 23 Colo. 123, 46 P. 676 (1896).

<sup>132</sup> COLO. REV. STAT. ANN. § 40-3-105 (Supp. 1971).

<sup>133</sup> See text accompanying notes 108-113 *supra*.

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

as manslaughter under the Criminal Code.<sup>135</sup> For purposes of a prosecution for criminally negligent homicide under subsection 40-3-105(1)(a), criminal negligence consists in the failure to perceive a substantial and unjustifiable risk.<sup>136</sup>

The essential difference between recklessness and criminal negligence is that "the reckless actor 'consciously disregards' a substantial and unjustifiable risk created by his conduct while the negligent actor merely 'should be aware' of the danger he creates."<sup>137</sup> The effect, therefore, of the statutory definition in subsection (1)(a) of criminally negligent homicide is to proscribe conduct amounting to inadvertence, when that inadvertence causes death. The definition of criminal negligence also requires that the risk "be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the reasonable standard of care . . ."<sup>138</sup> The rationale of this requirement has been explained as follows:

[J]ustice is sufficiently safeguarded by insisting on substantial culpability or deviation; that these items preclude the proper condemnation of inadvertent risk creation unless "the significance of the circumstances of fact would be apparent to one who shares the community's general sense of right and wrong. . . ." They also serve . . . to convict conduct which is inadvertent as to risk only because the actor is insensitive to the interests and claims of other persons in society.<sup>139</sup>

It can be anticipated that prosecutions for criminally negligent homicide will frequently be utilized in traffic deaths where the negligent driving of the defendant falls short of either recklessness or vehicular homicide.

The Criminal Code expressly sanctions the consideration of state statutes and municipal ordinances regulating the defendant's conduct on the issue of criminal negligence.<sup>140</sup> However, a violation of a statute or ordinance would not necessarily constitute prima facie evidence of criminal negligence. For example, a technical or minor violation of a traffic ordinance which results in death would probably not in itself amount to the gross deviation from reasonable care necessary for criminal negligence.

Since the Criminal Code fails to define causation,<sup>141</sup> it is

<sup>135</sup> COLO. REV. STAT. ANN. § 40-3-104(1)(a) (Supp. 1971).

<sup>136</sup> *Id.* § 40-3-105(1)(a).

<sup>137</sup> MODEL PENAL CODE § 201.4, Comment (Tent. Draft No. 9, 1959).

<sup>138</sup> COLO. REV. STAT. ANN. § 40-1-601(9) (Supp. 1971) (emphasis added).

<sup>139</sup> MODEL PENAL CODE § 201.4, Comment (Tent. Draft No. 9, 1959).

<sup>140</sup> COLO. REV. STAT. ANN. § 40-1-601(9) (Supp. 1971).

<sup>141</sup> See text accompanying notes 58-60 *supra*.

arguable that for criminal liability the negligent conduct must be the sole proximate cause of the death.<sup>142</sup> At any rate, the causal requirement should at least be the proximate cause requirement of civil liability.<sup>143</sup>

### B. *Death by Unreasonable Belief in Justification*

The second type of criminally negligent homicide under the Criminal Code consists of intentionally causing "the death of a person in the good faith but unreasonable belief that one or more grounds for justification exist."<sup>144</sup> The statutory law of justification under the Criminal Code generally attempts to formulate justifications for the use of physical force that might otherwise be unlawful. In the case of certain custodial relationships (such as parent, guardian, or warden),<sup>145</sup> and in the case of a peace officer effecting an arrest or preventing an escape,<sup>146</sup> the extent of physical force which lawfully can be employed is now expressly delineated by statute.

Colorado did not previously distinguish between the use of force in defense of person on the one hand and property on the other. Nor was any situational distinction made between deadly physical force and nondeadly physical force. The issue of self-defense was resolved within the standards of "the reasonableness of the fear" and "the necessity of the force."<sup>147</sup> Under the Criminal Code, "[d]eadly physical force may be used only if a person reasonably believes a lesser degree of force is inadequate," and he reasonably believes that he or another person is in imminent danger of being killed or receiving great bodily harm.<sup>148</sup> Certain criminal acts — such as the threatened or actual use of force by a burglar against an occupant, kidnapping, robbery, rape, deviate sexual intercourse, and certain assaults — justify the use of deadly physical force if a lesser degree of force reasonably appears to be inadequate.<sup>149</sup> Reasonable non-

<sup>142</sup> See *Goodell v. People*, 137 Colo. 507, 227 P.2d 279 (1958).

<sup>143</sup> In a civil case where there are concurrent causes, and the defendant's conduct was a proximate cause but not the most immediate cause, the defendant is liable so long as his conduct concurred with other causes. See *Moore v. Standard Paint & Glass Co.*, 145 Colo. 151, 358 P.2d 33 (1960); *Barlow v. North Sterling Irrig. Dist.*, 85 Colo. 488, 277 P. 469 (1929); *Ryan Gulch Res. Co. v. Swartz*, 82 Colo. 225, 263 P. 728 (1928); *Colorado Mort. & Inv. Co. v. Giacomini*, 55 Colo. 540, 136 P. 1039 (1913).

<sup>144</sup> COLO. REV. STAT. ANN. § 40-3-105(1)(b) (Supp. 1971).

<sup>145</sup> *Id.* § 40-1-803(1)(2).

<sup>146</sup> *Id.* § 40-1-807.

<sup>147</sup> Sections 28-30, [1861] Colo. Sess. Laws 294 (now COLO. REV. STAT. ANN. § 40-2-13 to -15 (1963)).

<sup>148</sup> Ch. 46, § 1, [1972] Colo. Sess. Laws, amending COLO. REV. STAT. ANN. § 40-1-804 (Supp. 1971).

<sup>149</sup> *Id.* § 40-1-804(2)(c).

deadly physical force may be employed in defense of premises or property.<sup>150</sup>

The effect of subsection (1)(b) of the criminally negligent homicide section is to render the actor criminally liable for causing death intentionally if the actor subjectively acts in good faith but by objective standards is unreasonable in his belief concerning justification. Since the statute does not require the actor to be *criminally* negligent in his belief (*i.e.*, a gross deviation from reasonable care), it appears that ordinary negligence in belief will result in criminal liability. Of course, the actor still has the right to act upon appearances, even if the appearances are false;<sup>151</sup> so long as his belief in justification is reasonable under the facts as they appeared, he can be mistaken without being criminally culpable. In the case where the actor *reasonably* and correctly believes that property or premises only are being threatened, with no danger to human life, and nevertheless proceeds to use deadly physical force against the perpetrator, his culpability under the Criminal Code could be greater than that of criminally negligent homicide. The deliberate use of deadly force in such a case is hardly the "good faith" contemplated by the definition of criminally negligent homicide, and the act could be prosecuted as murder.

#### V. VEHICULAR HOMICIDE

Prior to the enactment of the Criminal Code, causing death by the operation of a motor vehicle was expressly proscribed in two separate sections of Colorado statutory law. The prior law provided that any person who proximately caused the death of another by operating a motor vehicle in a reckless manner was guilty of a felony punishable by 1 to 14 years.<sup>152</sup> Reckless conduct meant either wilful or wanton conduct.<sup>153</sup> Additionally, any person who, while under the influence of intoxicating liquor or exhilarating or stupifying drugs, caused the death of another by operating a motor vehicle in a reckless, negligent, or careless manner or with a wilful or reckless disregard of human life, was guilty of a felony.<sup>154</sup>

<sup>150</sup> *Id.* §§ 40-1-805, 806.

<sup>151</sup> See note 127 *supra*.

<sup>152</sup> COLO. REV. STAT. ANN. § 13-5-155 (Supp. 1965).

<sup>153</sup> COLO. REV. STAT. ANN. § 13-5-31 (1963); *Martin v. People*, 495 P.2d 537 (Colo. 1972).

<sup>154</sup> Ch. 95, § 1, [1923] Colo. Sess. Laws 256 (now COLO. REV. STAT. ANN. § 40-2-10 (1963)). Section 40-3-106 of the Criminal Code repeals COLO. REV. STAT. ANN. § 40-2-10 (1963) but does not affect COLO. REV. STAT. ANN. § 13-5-155 (Supp. 1965). Under the Criminal Code vehicular homicide is a class 4 felony punishable by 1 to 10 years. COLO. REV. STAT. ANN. §§ 40-3-106, 40-1-105 (Supp. 1971).

Prosecutions under the prior vehicular homicide statute frequently involved issues relating to the technical sufficiency of the charge. Thus, in *Espinoza v. People*,<sup>155</sup> an information phrased in the disjunctive—that the defendant while under the influence caused death by operating a motor vehicle in a reckless, careless, and negligent manner or with reckless and wanton disregard of human life—was held defective. And in *Goodell v. People*,<sup>156</sup> in which the information alleged that the defendant caused death while under the influence and by operating a motor vehicle in a reckless, negligent, and careless manner and with a reckless and wanton disregard of human life, the supreme court held that the conjunctive charge required proof of the higher form of negligence—recklessness. In *Goodell*,<sup>157</sup> the court recognized that a valid prosecution could be predicated upon simple negligence plus intoxication if it were so pleaded.

Section 40-3-106 of the Criminal Code should remove much of the confusion surrounding the technical nature of the pleading. It provides that vehicular homicide can be committed in either of two ways: (1) if a person operates a motor vehicle in a reckless manner and such conduct is the proximate cause of the death of another; (2) if a person operates a motor vehicle while under the influence of any drug or intoxicant and such conduct is the proximate cause of death.<sup>158</sup> The Criminal Code's definition of recklessness is applicable to prosecutions for vehicular homicide.<sup>159</sup> As both sections are cast in terms of "proximate cause," Colorado case law holding that the defendant's conduct must be the sole proximate cause of the accident would appear to be applicable to the new statute.<sup>160</sup> By case law a person is under the influence when his capacity to operate a motor vehicle is impaired even in the slightest.<sup>161</sup> The new statute does not define a motor vehicle, but this can be cured by either judicial construction or a legislative addition adopting the present definition stated elsewhere in the statutes.<sup>162</sup>

<sup>155</sup> 142 Colo. 96, 349 P.2d 689 (1960).

<sup>156</sup> 137 Colo. 507, 327 P.2d 279 (1958).

<sup>157</sup> *Id.*

<sup>158</sup> COLO. REV. STAT. ANN. § 40-3-106 (Supp. 1971).

<sup>159</sup> *Id.* § 40-1-601(8).

<sup>160</sup> *Goodell v. People*, 137 Colo. 507, 327 P.2d 279 (1958).

<sup>161</sup> *Rinehart v. People*, 105 Colo. 123, 95 P.2d 10 (1939).

<sup>162</sup> COLO. REV. STAT. ANN. § 13-1-1 (Supp. 1969), formerly Ch. 122, § 1, [1931] Colo. Sess. Laws 485, provides:

(1) "Vehicle," any device which is capable of moving

### CONCLUSION

The psychological element in homicide is complex. A person may intend to kill another and proceed to kill for a myriad of reasons: self-preservation, revenge engendered by great provocation, or selfish financial gain. In each case, the intent is the same, but the act in its totality is radically different. Because of the complexity and finality of the act, and the severity of penalties attaching to unjustified killings, the need for coherency of definition is compelling. Coherency of definition for criminal acts provides the public with intelligible proscriptions and a forewarning of penalty; and equally important, it enhances the evenhanded application of the law.

Unfortunately, the Criminal Code's treatment of homicides, in several instances, lacks coherency of definition. The overlapping and, at times, the inconsistency with respect to basic concepts of criminal culpability can only foster an unhealthy ambivalence in all stages of the criminal process. The Criminal Code will undoubtedly burden an already overburdened appellate court with issues of definition and scope which could have been resolved at the legislative stages.

itself, or of being moved, from place to place upon wheels or endless tracks; but such term shall not mean or include any farm tractor or any implement of husbandry designed primarily or exclusively for use and used in agriculture operations, or any device moved by muscular power, or moved exclusively over stationary rails or tracks or designed to move primarily through the air.

(2) "Motor vehicle," any self-propelled vehicle which is designed primarily for travel on the public highways and which is generally and commonly used to transport persons and property over the public highways.



