

See: Minutes of Subcommittee No. 2
10/22/69, p. 27, Vol. XI, Tapes 84 & 85
11/14/69, p. 1, Vol. XI, Tape 87

CRIMINAL LAW REVISION COMMISSION
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ARTICLE 10. CRIMINAL HOMICIDE

Preliminary Draft No. 1; August 1969

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Subcommittee No. 2

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Section 1. Criminal homicide. (1) A person commits the crime of criminal homicide if he causes the death of another human being intentionally, knowingly, recklessly or with criminal negligence without justification or excuse as provided in Articles 2 to 5 of this Code.

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

(3) "Human being" means a person who has been born and was alive at the time of the criminal act.

COMMENTARY - CRIMINAL HOMICIDE

A. Summary

Subsection (1). The definitions set out trace the limits of the homicide provisions of the code. Subsection (1) provides that criminal homicide consists of intentionally, knowingly and recklessly killing another. This portion reflects traditional concepts. Criminal homicide also can be committed negligently by the terms of this subsection, but the general definition of negligence elsewhere in this code makes it clear that "mere" or "civil" negligence will not constitute criminal homicide. The negligence must be creation of a "substantial and unjustifiable risk" of causing death of which the actor should be aware. And the risk must be "of a nature and degree that the actor's failure to perceive it" involves "substantial culpability." To further distinguish it from tort law negligence, it is referred to as criminal negligence.

Homicides are sometimes committed intentionally or knowingly where no criminal liability attaches (e.g., in a case of self-defense). Subsection (1) recognizes situations of this kind by requiring that to be criminal the homicide must be committed without justification or excuse as provided in other Articles of the code dealing with culpability, complicity, justification and responsibility.

Subsection (2). Criminal homicide is broken into three branches--murder, manslaughter and criminally negligent homicide.

Subsection (3). The definition of "human being" as one who has been born and was alive at the time of the criminal act excludes the crime of abortion from the operation of this Article. Abortion is treated as a less serious offense elsewhere in this code. (See MPC section 230.3 and Commentary, T.D. No. 9, p. 146).

B. Derivation

The definitions are a mixture of the language from the MPC sections 210.0 and 210.1, New York Revised Penal Law section 125.00 and the Michigan Revised Criminal Code section 2001.

The phrase "without justification or excuse as provided in Articles 2 to 5" does not appear in any of the sections above referred to but is clearly within the purview of their meaning. The MPC comment to its definition in section 210.1 indicates that the qualification is intended to be included in the MPC draft. (See Commentary, T.D. No. 9, p. 25).

C. Relationship to Existing Law

No similar provisions appear in ORS but the definitions set out in this section are largely in line with the intent and operation of present provisions in Oregon law.

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 210.0. Definitions.

In Articles 210-213, unless a different meaning plainly is required:

(1) "human being" means a person who has been born and is alive;

(2) "bodily injury" means physical pain, illness or any impairment of physical condition;

(3) "serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ;

(4) "deadly weapon" means any firearm, or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury.

Section 210.1. Criminal Homicide.

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

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

Text of New York Revised Penal Law

§ 125.00 Homicide defined

Homicide means conduct which causes the death of a person or an unborn child with which a female has been pregnant for more than twenty-four weeks under circumstances constituting murder, manslaughter in the first degree, manslaughter in the second degree, criminally negligent homicide, abortion in the first degree or self-abortion in the first degree. L.1965, c. 1030, eff. Sept. 1, 1967.

Text of Michigan Revised Criminal Code

[Definition of Terms]

Sec. 2001. The following definitions are applicable in this chapter unless the context otherwise requires:

(a) "Homicide" means conduct which causes the death of a person under circumstances constituting murder in the first or second degree, manslaughter, or criminally negligent homicide.

(b) "Person", when referring to the victim of a homicide, means a human being who had been born and was alive at the time of the homicidal act.

Section 2. Murder. (1) Except as provided in subsection (2) of section 3 of this Article criminal homicide constitutes murder when:

(a) It is committed intentionally or knowingly; or

(b) It is committed recklessly under circumstances manifesting extreme indifference to the value of human life; or

(c) It is committed by a person, acting either alone or with one or more persons, who commits or attempts to commit arson in the first degree, burglary in the first degree, escape in the first degree, kidnapping in the first degree, rape in the first degree, robbery in any degree or sodomy in the first degree and in the course of an in furtherance of the crime he is committing or attempting to commit, or the immediate flight therefrom, he, or another participant if there be any, causes the death of a person other than one of the participants.

(2) It is an affirmative defense to a charge of violating paragraph (c) of subsection (1) of this section that the defendant:

(a) Was not the only participant in the underlying crime; and

(b) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid in the commission thereof; and

(c) Was not armed with a deadly weapon or any instrument, article or substance readily capable of causing death and of a sort not ordinarily carried in public places by law abiding persons; and

(d) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(e) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death.

(3) It is a defense to a charge of murder that the defendant's conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide. Nothing contained in this subsection (3) shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter or any other crime.

COMMENTARY - MURDER

A. Summary

This section defining murder is novel in at least two ways. First, it abolishes the degree distinction in murder which has traditionally been employed in many states since the early adoption of this device by Pennsylvania upon whose statute most murder degrees came to be based. Second, the murder definition continues to recognize the felony-murder doctrine but makes important changes in it.

Subsection (1). Pursuant to the definition in the section a person commits murder when he intentionally or knowingly kills another; or when he kills recklessly with extreme indifference to human life; or when a person, other than a participant in the crime, is killed in the course of the more violent and potentially dangerous felonies--arson, burglary, rape, robbery, escape, kidnapping and forced sodomy.

The exception appearing in subsection (1) of the draft section refers to the kind of circumstances which will have the effect of reducing the homicide to manslaughter which would otherwise constitute murder. Although the formula in the draft section on manslaughter is considerably different, an exception similar in purpose is firmly established in Oregon law which deals with the concept in traditional terms of killing as the result of a "sudden heat of passion." (ORS 163.040).

Subsection (2). With respect to a murder charge arising out of one of these felonies, subsection (2) of the section establishes a defense if the person asserting it can prove by a preponderance of the evidence that he was not alone in the crime, that he did not commit the act of killing or solicit it, that he was not armed with a deadly weapon and did not have reason to think a co-felon was so armed and that he had no reasonable ground to believe any other participant in the underlying felony was likely to engage in conduct likely to result in death.

Subsection (3). Subsection (3) creates a partial defense involving suicide where the defendant has caused or aided another to commit suicide. If the defendant intentionally causes or aids the crime without duress or deception, he may at most be held for manslaughter (see section 3, infra). Where duress or deception is employed, however, the crime is raised to murder. Under this defense the defendant has the burden of introducing evidence but the proof of intent beyond a reasonable doubt stays with the state.

B. Derivation

Subsection (1) is derived largely from section 210.2 (1) of the MPC. The draft departs from the MPC treatment of felony-murder and causing or aiding suicide in favor of the policy approach and language of New York Revised Penal Law section 125.25 which is also followed closely in the Michigan draft, section 2005 (4).

C. Relationship to Existing Law

Oregon presently provides for first and second degree murder. Murder in the first degree (ORS 163.010) has three branches: any killing done "purposely and of deliberate and premeditated malice" is the first branch; a killing arising in the course of committing rape, arson, robbery or burglary (the felony-murder doctrine) is the second branch of first degree murder; the third branch is a killing of a police officer without justification when the officer is acting in the line of duty.

Oregon second degree murder (ORS 163.020) has four categories: the first category is anyone killing "purposely and maliciously but without deliberation"; the second category is a killing arising out of "any felony other than rape, arson, robbery or burglary; the third branch of second degree murder is killing by an act "imminently dangerous to others, and evincing a depraved mind regardless of human life, although without any design to effect the death of any particular individual"; the fourth category is a killing as the result of a duel.

similar to the purpose and knowledge culpability levels of the MPC) killings and killings arising out of the more dangerous felonies. Second degree murder is defined, first, in the old common law tradition as consisting of causing the death of another arising out of an assault with the intent to cause serious physical injury, and second, the causing death under circumstances manifesting extreme indifference to human life. It is probable that one of the strong motivating factors leading to the two degree treatment has to do with plea bargaining.

The draft section makes no mention of murder defined at the common law as death caused by one intentionally inflicting serious bodily harm on another. It is believed that these kinds of situations are more satisfactorily judged by the standards of recklessness and extreme recklessness as to causing death.

The draft defines murder in terms of intentionally or knowingly causing the death of another. These terms were developed by the MPC (and adopted elsewhere for this code) and are a vast improvement over the cumbersome mens rea descriptions developed for murder under the common law. The draft also describes as murder the killing of another "recklessly under circumstances manifesting extreme indifference to the value of human life." This corresponds fairly closely in policy to the language in ORS 163.020 which defines such killing as second degree murder. The draft section is meant to cover situations such as one shooting into a crowd or an occupied house or automobile. Where a jury is convinced that the reckless act is not one showing extreme indifference to human life, it can find the accused guilty of manslaughter (see section 3, infra).

The draft section follows the modern trend away from the common law felony-murder rule pursuant to which almost any killing occurring during the commission of some other felony renders all participants in the underlying crime guilty also of murder. This has had some highly questionable results in cases where a co-felon had no idea that force would be used or where the death is that of a co-felon slain by police or the victim.

The draft extends a defense to the felony-murder doctrine in what constitutes a novel change. The comment following the New York section, upon which this section is based, reads as follows:

"Finally, the most novel change appears in the exception extending a defendant an opportunity to fight his way out of a felony murder charge by per-

suading a jury, by way of affirmative defense, that he not only had nothing to do with the killing itself but was unarmed and had no idea that any of his confederates was armed or intended to engage in any conduct dangerous to life. This phase of the provision is based upon the theory that the felony murder doctrine, in its rigid automatic envelopment of all participants in the underlying felony, may be unduly harsh in particular instances; and that some cases do arise, rare though they may be, where it would be just and desirable to allow a non-killer defendant of relatively minor culpability a chance of extricating himself from liability for murder, though not, of course, from liability for the underlying felony."

It is not anticipated that this defense will often be successful. Not only must the defendant establish all the elements of the defense, he must also prove them by a preponderance of the evidence, because the defense is termed an affirmative one which under the definition of section 1.12 of the MPC means the defendant not only bears the production burden but also the persuasion burden.

The proposed draft also erases the felony-murder provision found in ORS 163.020 (1) which provides that death resulting from the commission of any felony, other than those described in the first degree murder statute, is second degree murder. Several other states presently have a provision similar to Oregon's, but all recent criminal codes have deleted it.

Only a few cases were found in Oregon arising under the second degree felony-murder doctrine, and these cases all involved what were clearly potentially dangerous felonies. For instance in State v. Morris, 83 Or 429, 163 P 567 (1917), the defendant was committing larceny in a dwelling house when he strangled his victim. In State v. Reyes, 209 Or 595, 303 P2d 519 (1957), the defendant was committing the felony of assaulting an officer with a deadly weapon (he was holding the officer at bay so he could escape) when he shot and killed a third party.

Whether the Oregon court would find a way to limit the second degree felony-murder doctrine should a case involving death arise out of a "non-dangerous" felony remains open to conjecture. The language of the present statute would seem to allow second degree murder convictions without reference to the degree of danger created in the commission of the underlying felony. This seems inadvisable as a policy matter and the opportunity for such a result is forestalled in the draft section.

The draft section makes substantial changes in existing law. Only one degree of murder is recognized. The chief distinction presently between first and second degree murder in Oregon, and elsewhere generally, is the element of premeditation. This is the embodiment of the common law concept of mens rea in a term of art that has come to have little useful meaning in a state which no longer employs capital punishment. The principal reason for degrees of murder historically has been to permit mercy in sentencing to those defendants who have aroused the sympathy of the jury. Thus if the defendant did not premeditate (further explained in ORS 163.120 which describes as evidence of malice and premeditation killing by poison, or lying in wait or some other proof that "the design was formed and nurtured in cold blood") he cannot be held for first degree murder. Where capital punishment exists this means he will not be subject to execution.

The court decisions in Oregon, as well as most other states, have rendered the test based on premeditation virtually useless. The term has come to mean that any prior design to kill, though it be formed only an instant before the act, may be sufficient to constitute premeditation. See State v. Ogilvie, 180 Or 365, 175 P2d 454 (1947); State v. Morey, 25 Or 241, 35 P 655 (1894). As a result it becomes a fairly metaphysical exercise to distinguish between premeditation constituting murder in the first degree in Oregon and reckless killing described as murder in the second degree in ORS 163.020. But a more basic objection to breaking murder into degrees is the belief that no single factor or list of factors can satisfactorily form the basis of sentencing distinctions. A man who lies in wait to kill his wife's lover is probably not as dangerous to society at large as the man who fires a pistol into a crowded room without intending to kill any particular person. Yet the betrayed husband is guilty under present law of first degree murder while the second actor is guilty of second degree murder. Since Oregon has no capital punishment it seems wiser to charge each simply with murder and let the judge treat each man according to his dangerousness through imposition of appropriately different sentences.

The draft section makes no special murder category for the killing of a policeman or killing as a result of a duel. The former is adequately covered under the general language of the section. So is the latter even in the event that this picturesque though thoroughly outmoded method for settling arguments should be employed today.

Although most of the recently drafted criminal codes have abolished degrees of murder, an exception is that of Michigan which retains two degrees. Michigan provides first degree murder to consist of "intentional" (as defined in terms

Subsection (3). Suicide. ORS 163.050 presently defines as manslaughter the deliberate and purposeful procuring by one person of another to commit suicide. This reflects the law as it generally exists in most states and which will be continued in principle in this code (see section 3, infra). The Oregon law is silent on whether it is possible for the crime of murder to exist if the suicide is intentionally caused or aided through duress or deception. The only Oregon case found dealing with the general subject is not useful because the facts indicate in State v. Bouse, 199 Or 676, 264 P2d 800 (1953), that the defendant himself actually killed his wife although he claims she sought his aid and that it was pursuant to a suicide pact. The court said that even if the defendant's story was believed it would not necessarily reduce the crime to manslaughter.

Situations where a person deliberately forces the victim to pull the trigger which results in death of the victim or where the defendant gets the victim to kill himself as a result of a suicide pact deceptively induced by the defendant clearly constitute the crime of murder and are treated as such under this section. Only where there are mitigating factors--the absence of duress or deception--should the defendant be allowed a defense which would have the effect, if successful, of reducing the crime to no more than manslaughter.

The MPC has a provision in section 210.5 (1) which defines as murder the purposeful causing of the death of another by suicide "by force, duress or deception." Though not stated, it is clearly within the concept of this section that the defendant has a defense to murder under the section if he can negate force, duress and deception. What is implied in the MPC is made explicit in subsection (3) of the draft section.

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 210.2. Murder.

(1) Except as provided in Section 210.3(1)(b), criminal homicide constitutes murder when:

(a) it is committed purposely or knowingly; or

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

(2) Murder is a felony of the first degree [but a person convicted of murder may be sentenced to death, as provided in Section 210.6].

Section 210.5. Causing or Aiding Suicide.

(1) Causing Suicide as Criminal Homicide. A person may be convicted of criminal homicide for causing another to commit suicide only if he purposely causes such suicide by force, duress or deception.

(2) Aiding or Soliciting Suicide as an Independent Offense. A person who purposely aids or solicits another to commit suicide is guilty of a felony of the second degree if his conduct causes such suicide or an attempted suicide, and otherwise of a misdemeanor.

Text of California Tentative Draft

Section 1415. Murder.

(1) Except as provided in Section 1420, criminal homicide constitutes murder when:

(a) it is committed intentionally or knowingly; or

(b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference may be inferred from evidence that the defendant was engaged in or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit armed robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary while armed, aggravated kidnapping or felonious escape, in the furtherance of which he committed, or induced or aided another to commit, an inherently dangerous act from which death resulted.

(2) A person convicted of murder will be sentenced to life imprisonment [or death, as provided in Section 1411].

Text of New York Revised Penal Law

§ 125.25 Murder

A person is guilty of murder when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime; or

(b) The defendant's conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the second degree or any other crime; or

2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person; or

3. Acting either alone or with one or more other persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, escape in the first degree, or escape in the second degree, and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

(b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

Murder is a class A felony.

Text of Michigan Revised Criminal Code

[Murder in the First Degree]

Sec. 2005. (1) A person commits the crime of murder in the first degree if:

(a) With 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 in the first degree, burglary in the first or second degree, escape in the first degree, kidnapping in the first degree, rape in the first degree, robbery in any degree, or sodomy in the first degree, and in the course of and in furtherance of the crime that he is committing or attempting to commit, or of immediate flight therefrom, he, or another participant if there be any, causes the death of a person other than one of the participants.

(2) A person does not commit murder in the first degree under subsection (1) (a) or murder in the second degree under section

2006 if he acts under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse. The reasonableness of the 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. The burden of injecting the issue of extreme mental or emotional disturbance is on the defendant, but this does not shift the burden of proof. This subsection does not apply to a prosecution for or preclude a conviction of manslaughter or any other lesser crime.

(3) A person does not commit murder in the first degree under subsection (1) (a) if his conduct consists of causing or aiding, without the use of duress or deception, another person to commit suicide. The burden of injecting the issue is on the defendant, but this does not shift the burden of proof.

(4) It is an affirmative defense to a charge of violating subparagraph 1(b) that the defendant:

(a) Was not the only participant in the underlying crime; and

(b) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and

(c) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(d) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(e) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

(5) Murder in the first degree is punishable by imprisonment not less than ten years to life.

Text of Michigan Revised Criminal Code (Cont'd.)

[Murder in the Second Degree]

Sec. 2006. (1) A person commits the crime of murder in the second degree if:

(a) With intent to cause serious physical injury to a person other than himself, he causes the death of that person or of another person; or

(b) Under circumstances manifesting extreme indifference to the value of human life, he recklessly engages in conduct which creates a grave risk of death to a person other than himself, and thereby causes the death of another person.

(2) Murder in the second degree is a Class A felony.

Section 3. Manslaughter. Criminal homicide constitutes manslaughter when:

- (1) It is committed recklessly; or
- (2) A homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the standpoint of a person in the actor's situation under the circumstances as he believes them to be; or
- (3) A person intentionally causes or aids another person to commit suicide.

COMMENTARY - MANSLAUGHTER

A. Summary

Subsection (1). The crime of manslaughter is defined under subsection (1) of the draft to consist of reckless killing. Recklessness is defined elsewhere in this code (and in the MPC) as consisting of a conscious disregard for a substantial and unjustifiable risk. The risk disregarded must be one that involves a gross deviation from the standard of conduct that a law abiding person would otherwise observe in the actor's situation. If the reckless act on the facts also evidences an extreme indifference for the value of human life, the crime then falls within the definition of murder in section 2 of the draft.

Of this recklessness formula for manslaughter the comment to the MPC says:

"There also is a departure from existing norms in the abandonment of the conception that a homicide is ipso facto manslaughter if it resulted from an otherwise unlawful act, the misdemeanor-manslaughter analogue of the felony-murder rule. There must be a substantial and unjustifiable risk of homicide to establish either recklessness or negligence. See Section 2.02. Given such risk, the character of the

defendant's conduct is relevant, of course, in determining recklessness or negligence and its unlawfulness may warrant the conclusion that the risk created was unjustified; that is a matter to be dealt with by the courts in framing charges with respect to recklessness and negligence."

Subsection (2). A second part of the manslaughter definition contained in subsection (2) encompasses those kinds of cases which would otherwise be murder (intentionally or knowingly killing another). The draft reframes the test for reduction of murder to manslaughter which in present law turns on the "heat of passion" and "adequate provocation" tests. Instead the decisive question asked under the draft is whether the homicide was committed "under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse" and adding that 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."

Subsection (3). Subsection (3) of the section defines as manslaughter the intentional causing or aiding another to commit suicide. All cases of intentionally causing or aiding a suicide are prosecutable as manslaughter under this provision but, as noted in the commentary to section 2; supra, those cases in which "duress or deception" is used by the defendant are also prosecutable as murder.

B. Derivation

The section follows the language of MPC section 201.3 but adds the New York provision on suicide. The proposed Michigan draft includes the concepts in the MPC but adds to the definition of manslaughter criminal abortion resulting in death of the female and the intentional causing or aiding of another person to commit suicide. New York breaks manslaughter into two degrees. Second degree manslaughter includes the reckless killing of another, a criminal abortion resulting in the female's death and the intentional causing or aiding of another to commit suicide (New York Revised Penal Law section 125.15). First degree manslaughter includes the causing of another's death as the result of an assault with intent to cause serious bodily harm. It also includes death resulting from a more aggravated form of abortion and the MPC formula which reduces to manslaughter a killing which would otherwise be murder. It is interesting to note that the intent to do serious physical harm formula, classified in New York as first degree manslaughter, is classified in the Michigan draft as second degree murder. The MPC policy

is to permit a determination of such acts on the basis of recklessness (manslaughter) or recklessness with extreme indifference to the value of human life (murder).

The proposed California draft, like the section proposed here, follows the MPC.

C. Relationship to Existing Law

The section makes major changes in the law of manslaughter in Oregon. First, it changes the basic test in what is now the voluntary manslaughter statute. Voluntary manslaughter is defined in ORS 163.040 (1) as the killing of another intentionally without malice and deliberation "upon a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible." This traditional formula is replaced by the more subjective concept embodied in subsection (2) of the draft section which treats on a parity with provocation cases in the classic sense, situations where the provocative circumstance is something other than an injury inflicted by the deceased on the actor but nonetheless is an event calculated to arouse extreme mental or emotional disturbance. The draft section also introduces a larger element of subjectivity, though it is only the actor's "situation" and "the circumstances as he believes them to be", not the defendant's scheme of moral values, that are thus to be considered. The ultimate test, however, is objective; there must be "reasonable" explanation or excuse for the actor's disturbance. Thus, the draft retains a certain degree of the objective standard but turns away from the present Oregon law which apparently gauges the accused's acts on a purely reasonable man test without reference to the accused's circumstances or relevant personal characteristics.

The comment in the MPC on the new formula reads as follows:

"Though it is difficult to state a middle ground between a standard which ignores all individual peculiarities and one which makes emotional distress decisive regardless of the nature of its cause, we think that such a statement is essential. For surely if the actor had just suffered a traumatic injury, if he were blind or were distraught with grief, if he were experiencing an unanticipated reaction to a therapeutic drug, it would be deemed atrocious to appraise his crime for purposes of sentence without reference to any of these matters. They are material because they bear upon the inference as to the actor's character that it is fair to draw upon the basis of his act. So too in such a situation as Gounagias, supra, where lapse of time increased rather than diminished the extent of the

outrage perpetrated on the actor, as he became aware that his disgrace was known, it was shocking in our view to hold this vital fact to be irrelevant.

"We submit that the formulation in the draft affords sufficient flexibility to differentiate between those special factors in the actor's situation which should be deemed material for purposes of sentence and those which properly should be ignored. We say that there must be a 'reasonable explanation or excuse' for the extreme disturbance of the actor; and that the reasonableness of any 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.' There will be room, of course, for interpretation of the breadth of meaning carried by the word 'situation', precisely the room needed in our view. There will be room for argument as to the reasonableness of the explanations or excuses offered; we think again that argument is needed in these terms. The question in the end will be whether the actor's loss of self-control can be understood in terms that arouse sympathy enough to call for mitigation in the sentence. That seems to us the issue to be faced." (Comment, T.D. No. 9, p. 48).

A second major change the draft effects in the Oregon law is the abolition of the involuntary manslaughter definition in ORS 163.040 (2). This ORS section defines as manslaughter the killing of another "in the commission of an unlawful act" (the misdemeanor-manslaughter doctrine), or the killing of another while performing "a lawful act without due caution or circumspection."

In limiting the crime of manslaughter in terms of recklessness the draft rejects the misdemeanor-manslaughter rules insofar as they base liability on an unlawful act even though it entails no substantial risk of death. Such a rule is inconsistent with the general concepts of culpability which should animate a modern criminal law code imparting with respect to homicide, as distinguished from the underlying misdemeanor, a form of strict liability. It is difficult to tell from the few Oregon decisions on the point whether a strict liability policy obtains under the Oregon statute. All the cases found dealing with the unlawful act doctrine involved misdemeanors which were of the inherently dangerous kind: State v. Trent, 122 Or 444, 252 P 975 (1927), defendant fired gun to frighten off suspected trespassers, killing one of them; State v. Boag, 154 Or 354, 59 P2d 396 (1936), and State v. Miller, 119 Or 409, 243 P 72 (1926), both involved dangerous operation of cars (drunken driving and speeding, respectively) resulting in deaths.

Suppose instead that the accused has a disagreement with the victim and pushes the victim through a screen door. The victim cuts his finger slightly on the screen, contracts tetanus and dies. The act is clearly unlawful but the results can hardly be anticipated--the nature of the act is not very dangerous within the understanding of the reasonable man. A strict application of the Oregon statute would hold the accused guilty of manslaughter asking only if the act was unlawful. The draft section would ask instead, was the act of the accused so reckless as to create a substantial and unjustifiable homicidal risk. Thus under the draft section only if the unlawful act (misdemeanor) is reckless will a conviction for manslaughter be proper. It will be seen in the discussion of the next section that the performance of an unlawful act may result in criminal homicide if deemed criminally negligent. But "mere" negligence or even "gross" negligence of the civil variety will not result in a conviction for manslaughter under the draft section.

The second branch of Oregon's involuntary manslaughter provision also is abolished in the draft section. This branch defines as manslaughter a killing resulting from the performance of a lawful act "without due caution or circumspection." On its face the present statute refuses the strict liability doctrine which apparently attaches to the unlawful act manslaughter doctrine. But the words "due caution or circumspection" can hardly be equated with homicidal risk created due to recklessness or criminal negligence. In fact the Oregon cases apparently equate the phrase with civil negligence. See State v. Clark, 99 Or 629, 196 P 360 (1921), where the defendant mistook his companion for a deer and shot and killed him. The trial court instructed in terms of "gross" negligence, but the Supreme Court seems to say that mere negligence is enough and that the instruction went farther than it need have in protecting the defendant. Accord: State v. Metcalf, 129 Or 577, 278 P 974 (1929).

Under the draft section the question again is whether the lawful act resulting in death was performed in a manner which recklessly created a substantial and unjustifiable homicidal risk (or under the next section whether the performance of the lawful act created a criminally negligent degree of risk which might result in conviction for criminally negligent homicide).

Subsection (3) of the section makes no change in present Oregon law. ORS 163.050 currently reads as follows:

"Any person who purposely and deliberately procures another to commit self-murder or assists another in the commission thereof, is guilty of manslaughter."

The MPC has a provision identical in purpose with this subsection. The MPC provision, section 210.5, differs, however, in that it creates a separate offense for this kind of criminal activity. The sanction in the MPC section is the same, however, as it is for manslaughter. In explanation of its choice the comment to the MPC section reads as follows:

"We think, therefore, the wiser course is to maintain the prohibition [against intentionally causing or aiding suicide of another] and rely on mitigation of sentence when the ground for it appears. To facilitate such mitigation in cases where it is proper, we follow the legislation that treats the crime as a distinct offense, although the sanction we propose is the same as that for manslaughter." (T.D. No. 9, p. 57).

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 210.5. Causing or Aiding Suicide.

(1) Causing Suicide as Criminal Homicide. A person may be convicted of criminal homicide for causing another to commit suicide only if he purposely causes such suicide by force, duress or deception.

(2) Aiding or Soliciting Suicide as an Independent Offense. A person who purposely aids or solicits another to commit suicide is guilty of a felony of the second degree if his conduct causes such suicide or an attempted suicide, and otherwise of a misdemeanor.

Text of California Tentative Draft

Section 1420. Manslaughter.

(1) Criminal homicide constitutes manslaughter when:

(a) it is committed recklessly; or

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

(2) Manslaughter is a felony of the second degree.

Text of New York Revised Penal Law

§ 125.15 Manslaughter in the second degree

A person is guilty of manslaughter in the second degree when:

1. He recklessly causes the death of another person; or
2. He commits upon a female an abortifacient act which causes her death, unless such abortifacient act is justifiable pursuant to subdivision three of section 125.05; or
3. He intentionally causes or aids another person to commit suicide.

Manslaughter in the second degree is a class C felony.

§ 125.20 Manslaughter in the first degree

A person is guilty of manslaughter in the first degree when:

1. With intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or
2. With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in paragraph (a) of subdivision one of section 125.25. The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision; or
3. He commits upon a female pregnant for more than twenty-four weeks an abortifacient act which causes her death, unless such abortifacient act is justifiable pursuant to subdivision three of section 125.05.

Manslaughter in the first degree is a class B felony.

Text of Michigan Revised Criminal Code

[Manslaughter]

Sec. 2010. (1) A person commits the crime of manslaughter if:

- (a) He recklessly causes the death of another person; or
- (b) He commits a criminal abortion, as defined in section 7015, on a female and thereby causes her death; or
- (c) He intentionally causes or aids another person to commit suicide; or
- (d) He causes the death of another person under the influence of extreme mental or emotional disturbance as defined in section 2005(2).

(2) Manslaughter is a Class B felony.

Section 4. Criminally negligent homicide. A person commits the crime of criminally negligent homicide when, with criminal negligence, he causes the death of another person.

COMMENTARY - CRIMINALLY NEGLIGENT HOMICIDE

A. Summary

This section covers deaths caused through criminal negligence which has been defined in the MPC, and followed in preliminary drafts in this code, as follows:

"A person acts with criminal negligence, or is criminally negligent with respect to attendant circumstances or the result of his conduct when he should be aware of a substantial and unjustifiable risk that the circumstances exist or that his conduct will cause the result and his failure to be aware of the risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation." (See Subcommittee No. 1, General Principles of Liability--Culpability, P.D. No. 1, December 1968).

The basic difference between manslaughter and criminally negligent homicide is that in recklessness, constituting manslaughter, a conscious advertence to the risk exists, while in criminally negligent homicide the risk is created inadvertently. The MPC comment says of this:

"The distinction between advertence and inadvertence is, however, of such large importance generally in evaluating both the actor's conduct and his character, that we propose to treat such homicides as of a lower grade than manslaughter. In grading the offense as a third-degree felony, the draft provides a sentence range considerably lower than prevailing law in states where manslaughter is now a single category but somewhat higher than the norm in states in which voluntary and involuntary manslaughter are distinguished for purposes of sentence. Given the ameliorative powers which the Code vests in the Court (e.g., Sections 6.11, 7.01), we do not think the sanction is excessive." (Comment, T.D. No. 9, p. 53).

B. Derivation

The language is drawn from the New York statute, section 125.10, but is identical in policy and scope with MPC section 210.4. The California draft follows the MPC.

C. Relationship to Existing Law

The creation of this offense will be at least partially new to Oregon law which, like most states, has experienced difficulty in articulating the definition of negligence involved in criminal cases. This section will encompass the existing Oregon provision in ORS 163.091 which applies only to death caused through the "gross" negligence in driving a motor vehicle. In addition, as mentioned in the discussion of the manslaughter section, above, some of the cases which might have been disposed of under ORS 163.040 (2) as involuntary manslaughter on the grounds of a lawful act done without due caution or an unlawful act resulting in death, will now find a more proper disposition under this section.

The use of the term "criminal negligence" as defined fully elsewhere in the code should obviate the definitional difficulties and ambiguities heretofore encountered in the Oregon cases. See e.g., State v. Metcalf, 129 Or 564 (1929), in which the court apparently equates "due caution and circumspection" under the lawful act branch of involuntary manslaughter with mere civil negligence. On the other hand see State v. Hodgdon, 244 Or 219, 419 P2d 647 (1966), which equates "gross negligence" under the negligent homicide statute in ORS 163.091 with "recklessness". In the Hodgdon case the result apparently is that the degree of negligence presently required under ORS 163.091 for conviction in an auto death case approximates the meaning of "criminal negligence" as defined in this code and used in the draft section.

In discussing the policy behind the adoption of this section the comment to the MPC says:

"It has been urged with strong conviction that inadvertent negligence is not a sufficient basis for a criminal conviction, both on the utilitarian ground that threatened sanctions cannot influence the inadvertent actor who, by hypothesis, does not perceive their relevancy and on the ground that punishment should be reserved for cases that involve a moral fault which here is absent. But, as we have said in dealing with the problem generally, we are not persuaded that in condemning homicide by negligence the law is impotent to stimulate care that otherwise might not be taken or that an actor's failure to use his faculties may not be deemed a proper ground for condemnation.

"The Code definition of negligence, applied to homicide, requires that the homicidal risk be of such a nature and degree that the actor's failure to perceive

it, considering the nature and purpose of his conduct, the circumstances known to him and the care that would be exercised by a reasonable person in his situation, involves substantial culpability' or, alternatively, 'a substantial deviation from the standard of care that would be exercised by a reasonable man in his situation'. We think that justice is sufficiently safeguarded by insisting on substantial culpability or deviation; that these terms 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 and rightly we believe 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." (T.D. No. 9, pp. 52-53).

The concern of most states with the problem of vehicular homicides was given close attention in the preparation of the MPC section on negligent homicide. The comment to the MPC on this aspect reads as follows:

"In the United States, as well as elsewhere, it has been notoriously difficult to convict the negligent motorist of manslaughter. Facing the fact of jury nullification in such cases, many states have enacted special statutes dealing with vehicular homicide, reducing the grade of the offense and possible sentence on conviction below the levels otherwise obtaining for manslaughter by negligence.

"While we appreciate the practical value of such special provisions for vehicular homicides, we think they are unnecessary as the Code is drawn. The separation from manslaughter is accomplished by treating negligent homicide as a distinct offense of lower grade. If the evidence does not make out a case of negligence, as negligence is defined in Section 2.02, we see no reason for creating liability for homicide, as distinguished from any traffic offense that is involved. If the evidence suffices to establish such a case, the offense is in our view too serious for proper treatment as a misdemeanor. And if conviction of a misdemeanor is all that is believed to be desirable or possible, a prosecution for reckless conduct under Section 201.11 or for a traffic offense should be sufficient. One of the objects of the draft is to avoid proliferation of offenses or distinctions with respect to sentence unsupported by principled rationale." (T.D. No. 9, pp. 53-54, 55).

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 210.4. Negligent Homicide.

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

(2) Negligent homicide is a felony of the third degree.

Text of New York Revised Penal Law

§ 125.10 Criminally negligent homicide

A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person.

Criminally negligent homicide is a class E felony.