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REFORMING THE MISSISSIPPI CRIMINAL CODE PART IV: OFFENSES AGAINST PROPERTY; THEFT AND RELATED CRIMES

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* Professor of Law, Mississippi College School of Law. I want to thank all my research assistants who have provided valuable support over the years, especially my current research assistant, Calvin Combs, as well as my sister, Elizabeth Jones, for editorial assistance. I especially want to recognize and thank the current members of the Committee for all their hard work: Professor Matthew Steffey, reporter, Judge Donna Barnes, Patrick Beasley, Erin Briggs, Judge John Emfinger, Greta Harris, Caryn Quilter, Professor Ronald J. Rychlak, Kathy Sones, Alison Steiner, Ed Snyder, and Mary Katherine Lindsey. See Judith J. Johnson, Why Mississippi Should Reform Its Penal Code, 37 MISS. C. L. REV. 107 n.10 (2019) for prior members.

I. INTRODUCTION

Clear and fair criminal laws are foundational to criminal justice, and any meaningful reform effort should begin with the criminal laws. The Mississippi Code has been justifiably criticized as often being neither clear nor fair. This article about reforming the theft crimes is the fourth in a series of articles advocating for change to the Mississippi criminal laws. The first article explained why change is needed.[1] Briefly, Mississippi criminal laws have been justifiably criticized[2] because of gross sentencing disparities,[3] vague definitions of the conduct prohibited,[4] as well as confusing or absent definitions of states of mind required to commit the crime.[5] The criminal statutes are also often disorganized and do not relate to each other.[6]

I have been chairing a committee [hereinafter "the Committee"] to reform the Mississippi Criminal Code for more than twenty years.[7] The Committee was originally appointed by the Mississippi Judicial Advisory Study Committee, which was established by the legislature in 1993 to improve the administration of justice.[8] The Committee has completed work on the project and is currently reviewing what we have done, which accounts for the more recent dates I refer to in the minutes of the Committee [hereinafter "Minutes."] The Committee hopes to present its proposals to the legislature in the foreseeable future to alleviate

1. Judith J. Johnson, *Why Mississippi Should Reform Its Penal Code*, 37 MISS. C. L. REV. 107, 113-16 (2019).

2. Paul H. Robinson, Michael T. Cahill, and Usman Mohammed, *The Five Worst (and Five Best) American Criminal Codes,* 95 NW U. L. REV. 1, 3 n.3 (2000) ranked the Mississippi Criminal Code as being the fifty-second worst criminal code in the U.S. The study included the federal code and the D.C. code in the assessments. *Id.*

3. *See* Johnson, *supra* note 1, at discussion accompanying notes 89-92.

4. *See id.* at discussion accompanying notes 67-72.

5. *See id.* at discussion accompanying notes 77-79.

6. See *id.* at discussion accompanying notes 72-76 for a more complete discussion of the Committee and its processes.

7. *See id.* at 109.

8. MISS. CODE ANN. § 9-21-1 (1993 Cumulative Supplement). The Judicial Advisory Study Committee was eliminated in 2018. H.B. 949 (2018). The current committee is now operating under the auspices of the Mississippi Supreme Court. The committee was officially entitled the Criminal Code Consulting Group [hereinafter "the Committee"] and was charged with suggesting revisions to the penal code. The Committee has been meeting since 1996 and is finally reaching the end of its charge.

some of the problems with the current code, described above and more comprehensively in the first article.[9] The Committee proposals are an important part of criminal justice reform, and the purpose of these articles is to explain the Committee's reasoning, as well as to present the proposed changes to the law.

These articles are intended to replace comments, which the Committee chose not to write, although there are extensive comments to the Model Penal Code [hereinafter "Model Code"] on which these proposals are based.[10] References in this article to "comments" mean the comments to the Model Code. Unless otherwise indicated, the Committee relied on and approved of the comments. References to "the Code," in the proposed statutes means the Mississippi Code.

In addition to explaining why change is needed, the first article explained states of mind and homicide.[11] Recently, the Committee made a significant change to the proposed felony murder statute, which is in an addendum to this article.[12]

The second article addressed the most serious non-homicide crimes against the person—assault and battery and related crimes, kidnapping and related crimes, and sex crimes.[13] The third article dealt with crimes against habitation and property that involve danger to persons—arson, burglary, and robbery.[14] The Committee recently addressed some additional Mississippi statutes that should be repealed by the statutes proposed in that article, which are listed in an addendum to this article.[15]

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9. Johnson, *supra* note 1.

10. The first article introduced and explained the Committee's process. As described more fully in that article, the Committee has been meeting since 1996 and consists of judges, prosecutors, defense attorneys, legislative drafters, and law professors. The Committee meets monthly and uses the Mississippi Code, the Model Penal Code [hereinafter the "Model Code"], and the laws of other states to propose changes to the Mississippi law to reflect the needs of the state and to correct some of the deficiencies in the current code. The Committee principally based the proposed revisions on the Model Code, which is discussed more fully in the first article. Johnson, *supra* note 1, at 109-10. The Committee's formal adoptions are recorded in the Minutes of the Committee. Minutes of the Consulting Grp. on Miss. Criminal Code Revision, (Sept. 12, 2014) [hereinafter cited as Minutes] (on file with author). See *id.* for more explanation of the Committee's process.

The Model Code divides crimes by seriousness and punishes them accordingly, delineating three degrees of felonies, which the Committee expanded to four degrees. The Model Code recognizes misdemeanors but does not divide them according to seriousness. MODEL PENAL CODE § 1.04 (AM. L. INST. 1985). The Committee disagreed with this and divided misdemeanors into four classes, A-D. MODEL PENAL CODE § 1.04 as adopted by the Committee. Minutes, *supra* (Sept. 14, 2014). Finally, the Model Code classifies regulatory offenses as violations, which are not considered true crimes and thus not criminal. The Committee adopted the violation category. *See* Johnson, *supra* note 1, at 112-13. See *infra* notes 429 and 445 for the complete version of these statutes.

11. Johnson, *supra* note 1, at V; *see infra* note 223.

12. *See* addendum A.

13. Judith J. Johnson, *Reforming the Mississippi Criminal Code Part II: Non-Homicide Crimes Against the Person*, 38 MISS. C. L. REV. 201, 201 (2021).

14. Judith J. Johnson, *Reforming the Mississippi Criminal Code Part III: Person-Endangering Crimes Against Habitation and Property: Arson, Burglary, Robbery and Related Crimes*, 39 MISS. C. L. REV. 237, 237 (2021).

15. *See* addendum B.

This article addresses theft crimes. The Model Code consolidated the theft crimes into fewer statutes.[16] The Committee went further and consolidated theft into one statute,[17] with one related offense added in a separate section.[18] Section II.A. of this article describes the history of theft crimes. Section II.B. discusses the consolidation of theft crimes. The remainder of section II is devoted to the specific theft crimes and general provisions: theft by unlawful taking (section II.C.); theft of lost, mislaid, or misdelivered property (section II.D.); theft of services (section II.E.); theft by deception (section II.F.); and receiving stolen property (section II.G.). The Committee did not adopt one theft crime proposed by the Model Code, theft of funds received, so that offense is only briefly discussed (section II.H.). Section II.I. discusses general provisions that have not been discussed in earlier sections, grading, spousal immunity, and claim of right and other defenses. Section III explains the related offense of unauthorized use of vehicles, and Section IV concludes. The addendum, referred to above, is included at the end of this article, along with an appendix containing statutes that should be repealed.

II. THEFT

The most important goal for the Model Code drafters [hereinafter "the drafters"] in formulating modern crimes against theft was to simplify and consolidate the theft crimes as much as possible.[19] The drafters expressed a goal of creating a single, consolidated theft crime.[20] In fact, the Model Code divided theft into seven separate crimes.[21] The Model Code consolidated theft by expounding the general principles that apply to all theft crimes in section 223.1, and then defined seven theft crimes and one related offense in sections 223.2-9.[22] These crimes include theft by unlawful taking in section 223.2,[23] theft by deception in section 223.3,[24] theft by extortion in section 223.4,[25] theft of property lost, mislaid or delivered by mistake in section 223.5,[26] receiving stolen property in section 223.6,[27] theft of services in section 223.7,[28] theft of funds received in section 223.8,[29] and unauthorized use of vehicles in section 223.9.[30]

16. MODEL PENAL CODE art. 223 (AM. L. INST. 1980).

17. MODEL PENAL CODE § 223.1 as adopted by the Committee. Minutes, *supra* note 10 (Jan.14, 2019; Feb. 8, 2019; Mar. 8, 2019).

18. MODEL PENAL CODE § 223.2 as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019).

19. MODEL PENAL CODE art. 223 cmt. at 127 (AM. L. INST. 1980).

20. *Id.*

21. MODEL PENAL CODE art. 223 (AM. L. INST. 1980).

22. *Id.*

23. MODEL PENAL CODE § 223.2 (AM. L. INST. 1985).

24. *Id.* at § 223.3.

25. *Id.* at § 223.4.

26. *Id.* at § 223.5.

27. *Id.* at § 223.6.

28. *Id.* at § 223.7.

29. *Id.* at § 223.8.

30. *Id.* at § 223.9.

The Committee agreed with all of the designations in principle,[31] but decided to condense these into one consolidated theft section with some exceptions,[32] along with one related offense.[33] The Committee decided that theft by extortion was more appropriately punished as part of robbery.[34] In addition, the Committee decided not to adopt section 223.8, "theft of funds received."[35] Otherwise, the Committee consolidated the theft crimes into one section, 223.1[36] and adopted the related crime of unauthorized use of motor vehicles in a separate section, 223.2.[37]

I will discuss the history of theft crimes, the Model Code's scheme generally, and then indicate where and why the Committee deviated from this scheme in the particular areas of theft and related law. To understand the consolidation rationale and need for reform, it is important to begin with a history of theft crimes. Explaining the history of theft crimes also illustrates that, no matter how complicated this one proposed statutory provision seems to be, the present law is much more complicated and dispersed among the English common law, the common law of the state, as well as numerous statutes.

A. The History of Theft Crimes

The theft crimes were developed in England over hundreds of years, mostly by the common law courts, beginning with the theft crime that involved use of force, which became robbery.[38] The common law then criminalized taking property without consent, which became larceny.[39] The English Parliament passed statutes much later to deal with other situations in which the actor obtained property that he was not entitled to. The later crimes were not considered as morally reprehensible as robbery or larceny and often were not considered reprehensible at all.[40]

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31. MODEL PENAL CODE § 223.1-2 as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019; Feb. 8, 2019; Mar. 8, 2019).

32. *Id.* at § 223.1 as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019; Feb. 8, 2019; Mar. 8, 2019).

33. *Id.* at § 223.2 as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019).

34. *Id.* at § 223.1 as adopted by the Committee. Minutes, *supra* note 10 (Mar. 8, 2019). *Compare* MODEL PENAL CODE § 222.1(4) (as adopted by the Committee). Minutes, *supra* note 10 (July 10, 2020; Aug. 14, 2020), w*ith* MODEL PENAL CODE § 223.4 (AM. L. INST. 1985). See Johnson, *supra* note 14, at 258-75 for a discussion of this change.

35. *See infra* II.H.

36. *Compare* MODEL PENAL CODE §§ 223.1-8 (AM. L. INST. 1985), *with* MODEL PENAL CODE § 223.1 as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019; Feb. 8, 2019; Mar. 8, 2019).

37. Section 223.2 Unauthorized Use of Motor Vehicles

A person commits a Class A misdemeanor if he knowingly operates another's automobile, airplane, motorcycle, motorboat, or other motor vehicle without consent of the owner. It is an affirmative defense to prosecution under this Section that the actor reasonably believed that the owner would have consented to the operation had he known of it. MODEL PENAL CODE § 223.1 as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019).

38. *See* MODEL PENAL CODE art. 223 cmt. at 128 (AM. L. INST. 1980).

39. *See id.*

40. *See id.* at 128-29.

> In those days a man who deprived another of his property by force or stealth was regarded by all as a very evil person, but he who got the better of another in a bargain by means of a falsehood was more likely to be regarded by his neighbors as clever than as criminal; and if one appropriated to his own use some money or chattel that had been intrusted to him, this was felt to be merely the result of owner's folly, unless the appropriation was by his servant.[41]

It was only later that converting property of another with an unlawful purpose that involved a breach of trust became embezzlement.[42] Because *caveat emptor* was such a dominant force in the law, false pretenses was the last of the theft crimes to be recognized and that was by statute.[43] The differences among these crimes was complicated, as discussed below, but how the property was taken was the main distinguishing feature. Title had to pass for false pretenses. For larceny, possession had to pass, and the actor had to have the intent to steal. The embezzler had to take possession lawfully and then form the unlawful intent.[44] The possibility of charging the wrong crime was ever present.[45] In order to emphasize the necessity for change, I will give an abbreviated description of the three main theft crimes—larceny, embezzlement, and false pretenses.

1. Larceny

Other than robbery, larceny was the first theft crime to be recognized.[46] Larceny was generally defined as "trespassory taking and carrying away of the personal property of another with the intent to steal the same."[47] Robbery was larceny from the person by force or intimidation.[48] Interestingly, the one who committed larceny without force was socially less desirable than the robber, who operated in the open, while there could be an aura of secrecy about larceny.[49] Preventing violence was part of the reason for condemning larceny because even a taking by stealth could prompt a breach of the peace.[50]

Larceny was a common law felony and punishable by death.[51] The common law judges, loath to put so many people to death, contrived various

41. ROLLIN M. PERKINS, PERKINS ON CRIMINAL LAW 231 (2d ed. 1969).
42. *See* MODEL PENAL CODE art. 223 cmt. at 129 (AM. L. INST. 1980).
43. *See id.* at 129-30.
44. *See* PERKINS, *supra* note 41, at 286-88
45. *See id* at 233.
46. *See id.* at 232.
47. *See id.* at 233-34.
48. *See id.* at 279.
49. *See id.* at 280.
50. *See* WAYNE R. LAFAVE, CRIMINAL LAW 968 (5th ed. 1986).
51. *See* PERKINS, *supra* note 41, at 232. Petit larceny was not punishable by death. *Id.*

devices to avoid imposing the death penalty.[52] In the case of larceny, how the property had to have been appropriated was often convoluted, which complicated the issue, in addition to other requirements that were strictly applied.[53]

Larceny required "taking and carrying away of the personal property of another."[54] Larceny applied only to personal property, not to real estate, which could not disappear as readily as personal property. This led to the question of whether the property had been severed from the real estate before it was taken, like an apple from a tree. If it was on the ground when taken, that could be larceny. If it was still attached to the tree, it could not be larceny because it was still part of the real estate.[55] There were also things that were not considered personal property, so they could not be stolen, such as dogs and other animals that were not considered livestock,[56] documents that represented other property,[57] and certain intangibles.[58] Similarly, services also could not be the subject of larceny.[59]

Larceny required taking possession, not title, so if title was wrongfully transferred, the offense was not larceny. The offense, however, could be false pretenses, if all the requirements for that crime were met.[60] Even the owner could be guilty of larceny of his own property, if he was not entitled to possession of it because of failure to pay a lien on it.[61]

The common law required actual physical taking of possession, as distinguished from other types of control.[62] If the actor had "custody," which was something less than full possession, he was not guilty of larceny. This was particularly useful when dealing with servants who may have taken custody of property innocently, and only when they developed the intent to steal did they acquire full possession.[63] At that point, they would be guilty of larceny.[64] The reason for this is that the taking of possession had to be by trespass, meaning in this case without consent.[65]

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52. *See* MODEL PENAL CODE art. 223 cmt. at 128 (AM. L. INST. 1980).

53. *See* PERKINS, *supra* note 41, at 233. I used to teach the common law theft crimes in my criminal law class. It took me three weeks to teach these crimes because of all the distinctions the common law judges created. Because Mississippi retains the common law theft crimes, these distinctions are still possible. I want to acknowledge Professor Rollin M. Perkins, who died in 1993 at the age of 103. I have used his textbook for over 35 years. He taught me all I know about theft crimes, so I am using his hornbook as the source of much of this discussion.

54. *See* PERKINS, *supra* note 41, at 234.

55. *See id.* at 235-36.

56. *See id.* at 236.

57. *See id.* at 237.

58. *See id.*

59. *See* MODEL PENAL CODE art. 223 cmt. at 163-66 (AM. L. INST. 1980).

60. *See infra* II.A.3.

61. *See* PERKINS, *supra* note 41, at 239.

62. *See id.* at 244.

63. *See id.*

64. *See id.* at 240-44.

65. *See id.* at 245-46.

Complicating this element was whether the actor intended to steal when he took the chattel and lied about his intent to simply borrow it,[66] which would be larceny. However, if he did not intend to steal it but merely to borrow the chattel and later decided to keep it, the crime might be embezzlement.[67] The crime would not be larceny because the original taking of possession was lawful.[68] In other words, if the actor developed the wrongful intent at some later point after he acquired possession, he could be guilty of embezzlement, but not larceny.[69] Often, the crime was not embezzlement either, which has very specific requirements, described below.[70]

There are too many variations to exhaust them here. Suffice it to say that there are many other issues that could arise with regard to possession, as well as the other elements of this offense.[71] To give a few examples, lost property could not be the subject of larceny at early common law, but the law developed so that the owner of the lost property retained "constructive possession" until another took possession. If there was a clue to ownership, the taking of possession with the intent to keep it could be larceny.[72] Several issues arose with this type of larceny, including whether there was a clue to ownership, whether the property was lost or mislaid, whether the actor took possession or merely had custody, and what the actor's intent was when he took possession.[73] The crime might not be larceny, depending on the resolution of these issues, and it could not be embezzlement, which required that the property be entrusted to the actor.[74] The Model Code dealt with theft of lost and mislaid property, as well as the related issue of property delivered by mistake—which also may or may not have been larceny—under a separate section, discussed below.[75]

Other issues bedeviled this complicated common law crime, such as misappropriation by a bailee, who had lawful possession, but who could nevertheless be guilty of larceny if he "broke bulk."[76] Thus, the bailee who opened the package with which he was entrusted and took some portion of it could be guilty of larceny.[77] Similarly, the doctrine of "continuing trespass" was concocted as a legal fiction so that one who took property by mistake and later decided to keep it would be guilty of larceny when his possession became trespassory.[78]

All of the foregoing relates to the first two elements of larceny, "trespassory taking" and "of the property of another." After these elements have been met, the

66. *See id.* at 245-46.
67. *See* discussion accompanying note 94.
68. *See* PERKINS, *supra* note 41, at 247.
69. *See infra* II.A.2.
70. *See infra* II.A.2.
71. *S*ee PERKINS, *supra* note 41, at 240-44.
72. *See id.* at 248-49.
73. *See id.* at 248-51.
74. *See id.* at 251.
75. MODEL PENAL CODE § 223.5 (AM. L. INST. 1985).
76. *See* PERKINS, *supra* note 41, at 260-61.
77. *See id.* at 260-61.
78. *See id.* at 262-63.

third element is that the actor must "carry away" the property.[79] The movement could be slight, but it still had to be proven.[80]

The final element was "with the intent to steal."[81] Regardless of how wrongful the original trespassory taking was, the actor had to intend to deprive the victim of the property permanently.[82] This element could be satisfied if the intent was to create a substantial risk of permanent loss.[83]

Because of the limitation on the types of property that could be the subject of larceny, states like Mississippi adopted many statutes adding different types of property to larceny. Statutes in Mississippi prohibit stealing milk from a cow,[84] sheering wool from a dead sheep,[85] stealing a dog,[86] stealing timber,[87] and severing crops,[88] among others.[89] Mississippi has more than twenty-five larceny and related statutes that would be repealed by one consolidated statute, proposed section 223.1.[90] Although I have used the past tense in discussing these complicated issues that attend common law larceny, many of these issues could arise in states like Mississippi that have not eliminated common law crimes.[91]

Other than theft of services and theft of property lost, mislaid, or delivered by mistake, these elements have mainly been simplified into a single offense of unlawful taking or disposition,[92] discussed below.[93] This offense could also cover embezzlement, so I will briefly discuss that crime.

2. Embezzlement

Embezzlement was not a common law crime in England. It was purely statutory.[94] "The common law is all the statutory and case law background of England and the American colonies before the American Revolution."[95] Each state adopted this body of law in some form as the basis for its criminal law.[96] Since the first comprehensive embezzlement statute was not passed in England until 1799, after the American Revolution, it was too late for embezzlement to be

79. *See id.* at 263.
80. *See id.* at 264-65.
81. *See id.* at 265.
82. *See id.* at 265-66.
83. *See id.* at 268.
84. MISS. CODE ANN. § 97-17-55 (1942).
85. *Id.* at § 97-17-49 (1942).
86. *Id.* at § 97-17-51 (1962).
87. *Id.* at § 97-17-59 (2004).
88. *Id.* at § 97-17-47 (2014).
89. *See* Appendix MISS. CODE ANN. § 97-17-55 through MISS. CODE ANN. § 97-17-64.
90. *See* Appendix.
91. *See generally* PERKINS, *supra* note 41, at 26.
92. MODEL PENAL CODE § 223.2 (AM. L. INST. 1985).
93. *See infra* II.C.
94. *See* PERKINS, *supra* note 41, at 286. The first statute mentioning the word "imbezzle" was passed in England in 1529. *Id.*
95. *Id.* at 25 n.3.
96. *Id.* at 25.

adopted into the common law in America.[97] Thus, embezzlement is largely a matter of statutory law. Various statutes were passed in England—and the United States followed this lead—to cover misappropriation of property that was not covered by larceny.[98] Because larceny required a taking without consent, any person in a position of trust who took the property with consent and without the intent to steal it could not be guilty of larceny if he later developed the intent to retain it for himself.[99] Embezzlement was developed to fill in this gap.[100]

Embezzlement was defined generally as "the fraudulent conversion of personal property by a person to whom it was entrusted either by or for the owner."[101] The embezzlement statutes were passed to punish misappropriation by certain categories of trusted persons, beginning with servants and other employees and later adding brokers, attorneys and other agents, trustees and bailees, among others.[102] Mississippi has eleven embezzlement statutes that would be repealed by one consolidated theft statute.[103]

Because statutes prohibiting embezzlement were passed to fill in a gap left by the strict requirements of larceny, an indictment for one crime would not cover the other.[104] Since the actor's intent might not be determined until the jury resolved the issue, if the crime was embezzlement, but the actor had been tried for larceny, any such conviction would have to be overturned.[105] A consolidated theft crime avoids such a waste of judicial resources.

3. False Pretenses

Although false pretenses was not a common law crime in England, the first false pretenses statute was passed in England in 1757, which was before the American Revolution.[106] Therefore, false pretenses is part of American common law.[107] Because the area is covered by statutes in all states, whether false pretenses is a common law crime is academic.[108]

In the beginning, false pretenses was a misdemeanor because it was not considered a serious moral failing by the actor but imputed to the ignorance or inattention of the victim.[109] The main distinction between false pretenses and larceny was that larceny required the taking of possession, while false pretenses required the passage of title.[110] False pretenses is most commonly defined as:

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97. *See id.* at 286-87.
98. *See id.*
99. *See id.* at 288.
100. *See id.*
101. *Id.*
102. *See id.* at 287.
103. *See* Appendix (MISS. CODE ANN. §§ 97-19-19 through 97-25-9).
104. *See* PERKINS, *supra* note 41, at 290.
105. *See id.*
106. *See id.* at 297.
107. *See id.*
108. *See id.; But see* LAFAVE, *supra* note 50, at 1006 (opining that false pretenses is purely statutory).
109. *See supra* II.A.
110. *See* PERKINS, *supra* note 41, at 296.

> (1) false representation of a material past or present fact (2) that causes the victim (3) to pass title to (4) his property to the wrongdoer, (5) who (a) knows his representation to be false and (b) intends thereby to defraud his victim.[111]

Because false pretenses filled in a gap left by larceny, false pretenses applied to personal property, but not to real property.[112] Title to real property could not be the subject of false pretenses unless added by statute.

False pretenses required the knowing[113] misrepresentation of a material past or present fact that caused the owner to pass title to the actor.[114] "Puffing," predictions, opinions, and promises were insufficient to qualify as a misrepresentation of fact.[115]

The passage of title was required for false pretenses, so if only possession was passed, the crime was possibly larceny, but not false pretenses.[116] Further, the owner had to be misled into passing title of his property to the actor.[117] Moreover, the actor had to know he was misrepresenting a fact,[118] and he also must have intended to defraud the owner.[119] If he simply withheld information, this was not false pretenses. Also, misrepresenting a fact to induce the owner to do something he was otherwise legally obligated to do, such as pay a debt, was not false pretenses because there was no intent to defraud.[120]

Mississippi has a code section entitled False Pretenses and Cheats, but no offense actually designated as "false pretenses."[121] There are more than thirty-five offenses under this section, many of which would be replaced by this one consolidated theft statute.[122]

The Model Code's revision of theft offenses has mostly relegated all of these earlier distinctions and complications to interesting history. I will now explain how the Model Code accomplished this, beginning with the Model Code's consolidation of theft offenses generally.

B. Model Code Consolidation of Theft Offenses and Changes by the Committee

The Model Code identified that the unifying concept of the theft offenses addressed in article 223 was the involuntary transfer of property without consent

111. *See* LAFAVE, *supra* note 50, at 1007.
112. *See* PERKINS, *supra* note 41, at 297.
113. *See id.* at 309-310.
114. *See* PERKINS, *supra* note 41, at 299-300.
115. *See id.* at 301.
116. *See id.* at 306-08.
117. *See id.* at 308-09.
118. *See id.*
119. *See id.*
120. *See id.* at 310-11.
121. *See* Appendix.
122. *Id.*

or by fraud or coercion.[123] There are other instances of involuntary transfers of property not covered in article 223, which are punished as robbery under article 222,[124] as well as forgery and fraudulent practices under article 224.[125]

Article 223 consolidates the theft offenses that were recognized in England before the American Revolution—or shortly thereafter in the case of embezzlement[126]—and incorporated at one time into the statutory or common law of all American jurisdictions[127]—larceny, embezzlement, false pretenses, receiving stolen property, extortion, as well as offenses that were not previously covered by this incorporation, such as theft of services.[128]

Because of the ubiquity of the death penalty for most crimes, the common law judges developed arcane and complicated distinctions among the various theft crimes to avoid imposing the death penalty.[129] We have discussed only a few of these distinctions.[130] While the Model Code eliminated most of these distinctions to consolidate theft into one concept, the drafters did preserve some of the substantive distinctions among the theft crimes.[131]

The Model Code recognized that society no longer made moral distinctions among the various methods of acquiring property wrongfully, but, nevertheless, thought that some distinctions that corresponded with the original theft crimes had to be retained.[132] Therefore, the drafters' purpose of consolidation was not to combine these crimes into one offense, but rather to relieve procedural difficulties.[133] The Model Code's important contribution is its recognition of the need to distinguish among the various kinds of property deprivations, but to limit the extent of these distinctions.[134] Thus, the actor who claims to be guilty of another type of theft rather than the one charged will still be guilty of theft under the consolidated theft provision. For example, the actor who contends that he did not acquire title by false representations because the title was reserved by the vender, could still have acquired possession by fraud and be guilty of theft by taking unlawful possession.[135]

Section 223.1(1) provides as follows:

> Conduct denominated theft in this Section constitutes a single offense. An accusation of theft may be supported by evidence that it was committed in a manner that would be theft under this

123. MODEL PENAL CODE art. 223 cmt. at 128 (AM. L. INST. 1980).
124. MODEL PENAL CODE art. 222 (AM. L. INST. 1980).
125. *Id.* at art. 224.
126. *See supra* discussion accompanying note 94.
127. *See* PERKINS, *supra* note 41, at 25 and *supra* discussion accompanying notes 96-97.
128. *See* MODEL PENAL CODE art. 223 cmt. at 127-29 (AM. L. INST. 1980).
129. *Id.* at 129.
130. *See supra* discussion section II.A.
131. *See* MODEL PENAL CODE art. 223 cmt. at 132 (AM. L. INST. 1980).
132. *See id.*
133. *See id.* at 133.
134. *See id.*
135. *See id.* at 134.

> section, notwithstanding the specification of a different manner in the indictment or information, subject only to the power of the court to insure a fair trial by granting a continuance or other appropriate relief where the conduct of the defense would be prejudiced by the lack of fair notice or by surprise.[136]

The Committee adopted these concepts and adopted section 223.1(1) without any changes.[137] Section 223.1(1) allows any accusation of theft, as

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136. MODEL PENAL CODE § 223.1(1) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

137. *Compare* MODEL PENAL CODE § 223.1(1) (AM. L. INST. 1985), *with* MODEL PENAL CODE § 223.1(1) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019). Because we made significant changes in the theft sections, I have tried to indicate changes in language by underlining additions to the original version of the Model Code, along with strike-outs to indicate deletions. I did not indicate anything but a change in language from the Model Code, even though the statute itself might have a different number or position from the Model Code. For example, theft by deception is a separate statute under the Model Code, but the language from that statute was incorporated almost verbatim into the Committee's version of section 223.1(2)(f), so I did not underline that language to indicate a change from the Model Code. MODEL PENAL CODE § 223.1(2)(f) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019). Also, if the statute is long, I put it in the footnote to avoid distracting the reader. If the statute is short, I put it in the text. Furthermore, the Committee has decided not to include the titles to subsections provided by Model Code. These have all been removed without indicating a change to avoid confusion. Finally, the Committee has given me authority to make clerical changes to the statutes that we have approved including correcting re-numbering errors.

> Section 223.1 Consolidation of theft offenses; grading; provisions applicable to theft generally.
>
> (1) Conduct denominated theft in this section constitutes a single offense. An accusation of theft may be supported by evidence that it was committed in a manner that would be theft under this section, notwithstanding the specification of a different manner in the indictment or information, subject only to the power of the court to insure a fair trial by granting a continuance or other appropriate relief where the conduct of the defense would be prejudiced by the lack of fair notice or by surprise.
>
> (2) A person is guilty of theft if:
>
> (a) he unlawfully takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof; or
>
> (b) he unlawfully transfers immovable property of another or any interests therein with purpose to benefit himself or another not entitled thereto; or
>
> ~~(c) he purposely obtains property of another by deception; or~~
>
> ~~(d)~~(c) he takes ~~comes into~~ control of the property of another that he knows to have been lost, mislaid, or delivered under a mistake as to the nature or amount of the property or the identity of the recipient if, with purpose to deprive the owner thereof, he fails to take reasonable measures to restore the property to a person entitled to have it; or
>
> ~~(e)~~(d)
>
> (i) he purposely receives, retains, or disposes of movable property of another ~~knowing that it has been stolen, or believing that it has probably been stolen~~ that he knew or should have been aware of a substantial and unjustified risk that it had been stolen, unless the property is received, retained or disposed with purpose to restore it to the owner. "~~Receiving" means acquiring possession, control or title, or lending on the security of the property.~~
>
> (ii) The requisite knowledge or awareness is presumed in the ~~case of a dealer who~~ following cases.
>
> 1. Unless satisfactorily explained, proof of possession of property recentlystolen, coupled with other evidence, such as flight, false statements, or attempts to conceal the property, ~~unless satisfactorily explained~~ give rise to a presumption that the person in possession of the property knew or should have been aware of a substantial risk that the property had been

stolen. ~~(a) is found in possession or control of property stolen from two or more persons on separate occasions; or~~

2. Proof of the purchase or sale of stolen property at a price substantially below fair market value, unless satisfactorily explained, gives rise to a presumption that the person buying or selling the property knew or should have been aware of a substantial risk that the property had been stolen. ~~(b) has received stolen property in another transaction charged; or~~

3. Proof of the purchase or sale of stolen property by a dealer in property, who acquired the property without making reasonable inquiry whether the person selling or delivering the property to him had a legal right to do so, gives rise to a presumption that that person buying or selling the property knew or should have been aware of a substantial risk that it had been stolen. ~~(c) being a dealer in property of the sort received, acquires it for a consideration which he knows is far below its reasonable value. "Dealer" means a person in the business of buying or selling goods including a pawnbroker.~~

~~(f)~~(e) ~~he purposely obtains property of another by threatening to:~~

~~1. inflict bodily injury as defined in Section 210.0 on anyone or commit any other criminal offense; or~~

~~2. accuse anyone of a criminal offense; or~~

~~3. expose any secret tending to subject any person to hatred, contempt, or ridicule, or impair his credit or business repute or~~

~~4. take action or withhold action as an official, or cause an official to take or withhold action; or~~

~~5. bring about or continue a strike, boycott or other collective unofficial action, if the property is not demanded or received for the benefit of group in whose interest the actor purports to act; or~~

~~6. testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or~~

~~7. inflict any other harm which would not benefit the actor.~~

~~It is an affirmative defense to prosecution based on paragraphs (2), (3), or (4) that the property obtained by threat of accusation, exposure, lawsuit or other invocation of official action was honestly claimed as restitution or indemnification for harm done in the circumstances to which such accusation, exposure, lawsuit, or other official action relates, or as compensation for property or lawful services.~~

~~(g)~~(e)

(i) he purposely obtains services that he knows are available to him only for compensation, by deception ~~or threat~~, or by false token or other means to avoid payment for the service, or

(ii) having control over the disposition of services to others, to which he is not entitled, he knowingly diverts such services to his own benefit or to the benefit of another not entitled thereto.

~~(h) he purposely obtains or retains property upon agreement, or subject to a known legal obligation, to make specified payment or other specified disposition, whether from such property or its proceeds or from his own property to be reserved in the equivalent amount, if he deals with the property obtained as his own and fails to make the required payment or disposition. The foregoing applies notwithstanding that it may be impossible to identify particular property as belonging to the victim as the time of the actor's failure to make the required payment or disposition.~~

~~(e)~~(f) he purposely obtains property of another by deception.~~; or~~

~~(2)~~ (3) Theft shall be punished as follows:

(a) Theft is a felony in the 4th degree if the amounts exceed $1,000 or if the property stolen is a firearm or motor vehicle. ~~Theft constitutes a felony in the third degree if the amount involved exceeds $500, or if the property stolen is a firearm, automobile, airplane, motorcycle, motorboat, or other motor propelled vehicle, or in the case of theft by receiving stolen property, if the receiver is in the business of buying or selling stolen property.~~

(b) Theft not within the preceding paragraph constitutes a Class A misdemeanor, except that if

described by the Model Code in sections 223.2-8, to be supported if it was prohibited under any of these sections. As noted, the Committee compiled Model Code sections 223.2–8 into a single section, section 223.1, with multiple subsections containing the same offenses defined by the Model Code,[138] except for extortion under Model Code section 223.4, which was moved to robbery,[139] and Model Code section 223.8, which was not adopted.[140] Besides consolidating the offenses, section 223.1(1), as adopted by the Committee, ameliorates the possible unfairness regarding the specificity of the charges against the actor by encouraging the court to grant relief, such as a continuance, if the actor would be prejudiced by the lack of notice.[141]

There are other general provisions—grading[142] and spousal immunity for theft[143] that apply to all of the theft crimes, which will be addressed at the end of the discussion of theft.[144] I will also discuss the general claim-of-right provision[145] and other defenses that also apply to the theft crimes at the end of the discussion to avoid confusing the reader with a long digression into defenses at this point.[146]

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the property was not taken from the person ~~or by threat~~ or in a breach of a fiduciary obligation, and the actor proves by a preponderance of the evidence that the amount involved was less than $\$100$ ~~$50~~, the offenses constitutes a Class D ~~petty~~ misdemeanor.

~~(c)~~ The amount involved in a theft shall be deemed to be the ~~highest value~~ fair market value, or if the fair market value is not ascertainable, fair value by ~~any~~ a reasonable standard, of the property or services ~~which~~ that the actor stole or attempted to steal. Amounts involved in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the grade of the offense.

(4) Claim of Right ~~It~~ is an affirmative defense to prosecution for theft that the actor:

(a) was unaware that the property or service was that of another; or

(b) acted under an honest claim of right to the property or service involved or that he had right to acquire or dispose of it as he did;

(c) took property exposed for sale, intending to purchase and pay for it promptly, or reasonably believing that the owner, if present, would have consented.

(5) It is no defense that the theft was from the actor's spouse, except that misappropriation of household and personal effects, or other property normally accessible to both spouses, is theft only if the parties are living apart. ~~it occurs after the parties have ceased living together.~~

MODEL PENAL CODE § 223.1 as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019; Feb. 8, 2019; Mar. 8, 2019).

138. *Id.*

139. *Id.* at § 223.1 as adopted by the Committee. Minutes, *supra* note 10 (Mar. 8, 2019). *Compare* MODEL PENAL CODE § 222.1(4) (as adopted by the Committee). Minutes, *supra* note 10 (Aug. 14, 2020), w*ith* MODEL PENAL CODE § 223.4 (AM. L. INST. 1985). *See* Johnson, *supra* note 14, at 258-75.

140. MODEL PENAL CODE § 223.1 as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019). *See infra* II.H.

141. MODEL PENAL CODE § 223.1(1) (AM. L. INST. 1985).

142. MODEL PENAL CODE § 223.1(3) as adopted by the Committee. Minutes, *supra* note 10 (Mar. 8, 2019).

143. *Id.* at § 223.1(5) as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019).

144. *See infra* I.1. Grading and I.2 Spousal Immunity.

145. MODEL PENAL CODE § 223.1(4) as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019).

146. *See infra* II.I.3.

This seemingly straight-forward statute, while simplified in its consolidated state, is complicated by reference to other subsections in section 223 and other statutes concerning definitions of the material elements of the crimes, as well as by incorporation of other criminal statutes, principally describing defenses, some of which change the mens rea required for the crime. These issues will be addressed along with the various crimes at the end of the discussion of theft when I discuss the defenses.[147] Much of the latter gets very in depth and will be unnecessary to an understanding of the theft offenses in the usual case. What most readers will need to know about theft is covered in the following subsections defining the theft crimes, beginning with "theft by unlawful taking." It must be emphasized that, even if it appears complicated, the Committee's proposal is much more simplified than the current treatment of theft crimes, especially in the usual case.

C. Theft by Unlawful Taking

1. Theft of Movable Property

The first and most comprehensive theft crime is section 223.1(2)(a), when the actor "unlawfully takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof."[148] This one simple subsection covers most cases of larceny and embezzlement, along with the next subsection, which deals with immovable property.[149] These two subsections eliminate many of the distinctions that bedeviled larceny and embezzlement.[150] Thus, how the actor came into possession of the property becomes irrelevant. The actor who takes by stealth is as guilty of theft as the actor to whom the property was lawfully entrusted, who later misappropriates the property.[151]

"Unlawful taking," which characterized larceny, is only one method of being guilty of theft. If the actor simply "exercises unlawful control," which characterized embezzlement, with intent to deprive another of his property at some point, he is guilty of theft under section 223.1(2)(a).[152] Asportation and unlawful taking, required for larceny, are no longer required.[153] Likewise, the requirement of being entrusted with the property required for embezzlement is eliminated.[154] Instead, the only requirements for theft are that the actor must exercise sufficient control over the property of another to constitute possession and that possession must be unlawful.[155]

The comments indicate that the unlawful taking or unlawful control occurs when the actor begins to use the property in a way that exceeds his authority,

147. *See infra* II.I.3.

148. *See* MODEL PENAL CODE § 223.1 as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

149. *See infra* II.C.2.

150. *See* MODEL PENAL CODE art. 223 cmt. at 163-66 (AM. L. INST. 1980).

151. *See id.*

152. *See id.* at 163-66.

153. *See id.*

154. *See id.* at 163.

155. *See id.*

which would include the typical embezzlement situation.[156] In addition to the requirement of intent to deprive another of his property, "the critical inquiry is whether the actor had control of the property, no matter how he got it, and whether the actor's acquisition or use of the property was authorized."[157]

The Committee adopted most of the definitions in section 223.0 of the Model Code and added several others.[158] The definitions adopted by the Committee under section 223.0 are fully set out here in the footnotes.[159] Each definition will be discussed when it is pertinent to the discussion.

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156. *See id.* at 166.

157. *See id.*

158. *Compare* MODEL PENAL CODE § 223.0 (AM. L. INST. 1985), *with* MODEL PENAL CODE § 223.0 as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019; Feb. 8, 2019).

159. Section 223.0 Definitions

(1) "Dealer" means a person in the business of buying or selling goods including a pawnbroker.

(2) "Deception" means purposely:

(a) creating or reinforcing a false impression, including false impression of law, value, intention or other state of mind; but deception as to a person's intention to perform a promise shall not be inferred merely from the fact ~~alone~~ that he did not subsequently perform the promise; or

(b) preventing another from acquiring information ~~which~~ that could affect his judgment of a transaction; or

(c) failing to correct a false impression ~~which~~ that the deceiver previously created or reinforced, or ~~which~~ that the deceiver knows to be influencing another to whom he stands in a fiduciary relationship; or

(d) failing to disclose a known lien, adverse claim or other legal impediment to the enjoyment of property that ~~which~~ he transfers or encumbers in consideration for the property obtained. ~~; whether such impediment is or is not valid, or is or is not a matter of official record.~~

The term "deception" does not, however, include falsity as to matters that have no pecuniary significance, or ~~puffing by~~ statements unlikely to deceive ordinary persons in the group addressed.

~~(1)~~ (3) "Deprive" means:

(a) to withhold property of another permanently or for so extended a period as to appropriate a major portion of its economic value, or with intent to restore only upon payment of reward or other compensation, or

(b) to dispose of the property so as to make it unlikely that the owner will recover it; or

(c) to cause damage over ~~$500~~ $1000 to a motor vehicle or to use the motor vehicle in the commission of a felony or flight therefrom.

(4) "Motor vehicle" means motor vehicle as defined by MISS. CODE ANN. § 27-51- 5.

~~(4)~~(5) "Movable property" means property the location of which can be changed, including things growing on, affixed to, or found in land, and documents although the rights represented thereby have no physical location. "Immovable property" is all other property.

~~(5)~~ (6) "Obtain" means:

(a) in relation to property, to bring about a transfer or purported transfer of a legal interest in the property, whether to the obtainer or another, or

(b) in relation to labor or service, to secure performance thereof.

~~(6)~~ (7) "Property" means anything of value, including real estate, tangible and intangible personal property, contract rights, choses-in-action and other interests in or claims to wealth, credit and debit cards, credit extended by any license gaming establishment, admission or transportation tickets, captured or domestic animals, food and drink, and electric or other power.

~~(7)~~ (8) "Property of another" includes property in which any person other that the actor has an interest which the actor is not privileged to infringe, regardless of the fact that the actor has an interest in the property and regardless of the fact that the other person might be precluded from civil

Since unlawful taking or unlawful exercise of control is central to theft in section 223.1(2)(a),[160] it is necessary to briefly explain the term "unlawful," as well as to fully explain the other terms used in that section at this point.[161]

a. Unlawful

The Model Code did not provide for a definition of "unlawful," so the Committee added a definition in section 223.0(13): '"Unlawful" means without a defense under Section 223.1(4) (claim of right), Section 2.11 (consent) or Article 3 (justification)."[162] Thus, there are three defenses, the absence of which indicates that the taking of control is unlawful.[163] The comments suggested this definition,[164] but did not add it to the definitions.[165] The Committee generally thought that leaving important definitions to the comments was not desirable. We agreed that "unlawful" should be a violation of the criminal law, as suggested by the comments[166] to avoid importing tort law or regulatory considerations into the criminal law of theft.

The first defense, "claim of right," is a defense that is peculiar to theft, and it has its own subsection,[167] section 223.1(4). Consent and justification are general defenses under Articles 2[168] and 3,[169] which are applicable to many offenses, other than theft.

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recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband. Property in possession of the actor shall not be deemed property of another who has only a security interest therein, even if legal title is in the creditor pursuant to a conditional sales contract or other security agreement.

(9) "Receiving" means acquiring possession, control or title, or lending on the security of the property.

(10) "Services" means any service available for compensation such as labor, professional service, transportation, telephone or other public service, accommodation in hotels, restaurants or elsewhere, admission to exhibitions, use of vehicles or other movable property. ~~Where compensation for service is ordinarily paid immediately upon the rendering of such service, as in the case of hotels and restaurants, refusal to pay or absconding without payment or offer to pay gives rise to a presumption that the service was obtained by deception as to intention to pay~~.

(11) "Stolen" means the acquisition of property in any manner that constitutes theft as defined by this section or robbery as defined under section 222.1.

(12) "Theft" includes "Embezzlement," "Larceny" and "False pretenses."

(13) "Unlawful" means without a defense under section 223.1(4) (claim of right), section 2.11 (consent) or article 3 (justification).

MODEL PENAL CODE § 223.1 (0) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019; Feb. 8, 2019).

160. *Id.* at § 223.1(2)(a) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

161. *Id.* at § 223.0(13).

162. *Id.*

163. *Id.*

164. *See* MODEL PENAL CODE art. 223 cmt. at 166 (AM. L. INST. 1980).

165. MODEL PENAL CODE § 223.0 (AM. L. INST. 1985).

166. MODEL PENAL CODE art. 223 cmt. at 166 (AM. L. INST. 1980).

167. MODEL PENAL CODE § 223.1(4) as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019). *See infra* II.I.3(a).

168. MODEL PENAL CODE § 2.11 as adopted by the Committee. Minutes, *supra* note 10 (Nov. 5, 2005). *See infra* II.I.3(b).

169. MODEL PENAL CODE art. 3. Minutes, *supra* note 10 (Dec. 9, 2021; Jan. 14, 2022; Feb. 11, 2022; Mar. 11, 2022; Apr. 8, 2022). *See infra* II.I.3(c).

Because the lack of these defenses is an element of the crime for sections 223.1(2)(a) and (b)—both of which contain the word "unlawful"—the prosecution bears the burden of proving the lack of these defenses, once the defendant has raised them.[170] Justification[171] and claim of right are

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170. The Committee adopted the following version of §1.12:

Section 1.12 Proof Beyond a Reasonable Doubt; Affirmative Defenses; Burden of Proving Fact When Not an Element of an Offense; Presumptions.

(1) No person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt. In the absence of such proof, the innocence of the defendant is ~~assumed~~ presumed. Any defense denominated as an affirmative defense shall be considered an element of the offense unless the statute expressly requires the defendant to prove the defense by a preponderance of the evidence.

(2) Subsection (1) of this section does not:

(a) require the disproof of an affirmative defense unless and until there is evidence supporting such defense; or

(b) apply to any defense that the Code or another statute plainly expressly requires the defendant to prove by a preponderance of evidence.

(3) A ground of defense is affirmative, within the meaning of subsection (2)(a) of this section, when:

(a) it arises under a section of the Code that so provides; or

(b) it relates to an offense defined by a statute other than the Code and such statute so provides.~~; or~~

~~(c) it involves a matter of excuse or justification peculiarly within the knowledge of the defendant on which he can fairly be required to adduce supporting evidence.~~

(4) ~~When the application of the Code depends upon the finding of a fact that is not an element of an offense,~~ Unless the Code otherwise provides:

~~(a) the burden of proving the fact is on the prosecution or defendant, depending on whose interest or contention will be furthered if the finding should be made; and(b) the fact must be proved to the satisfaction of the Court or jury, as the case may be.~~

(a)When the application of the Code depends upon the finding of a fact that is not an element of an offense,

(i) the burden of proving the fact is on the prosecution or defendant, depending on whose interest or contention will be furthered if the finding should be made; and

(ii) the fact must be proved to the satisfaction of the court or jury, as the case may be.

(b) The prosecution is not required to prove jurisdiction beyond a reasonable doubt unless and until the evidentiary record shows that the court may lack jurisdiction.

(c) The prosecution must prove venue by a preponderance of the evidence to the satisfaction of the trial judge only when evidence is admitted that affirmatively shows that venue is improper.

(d) The prosecution is required to negative a defense under the statute of limitations beyond a reasonable doubt only if the evidentiary record shows that the prosecution may be barred by the applicable statute of limitations.

(5) When the Code establishes a presumption with respect to any fact that is an element of an offense, it has the following consequences:

(a) when there is evidence of the facts that give rise to the presumption, the issue of the existence of the presumed fact must be submitted to the jury, unless the Court is satisfied that the evidence as a whole clearly negatives the presumed fact; and

(b) when the issue of the existence of the presumed fact is submitted to the jury, the Court shall charge that while the presumed fact must, on all the evidence, be proved beyond a reasonable doubt, the law declares that the jury may regard the facts giving rise to the presumption as sufficient evidence of the presumed fact.

(6) A presumption not established by the Code or inconsistent with it has the consequences otherwise accorded it by law.

MODEL PENAL CODE § 1.12 as adopted by the Committee. Minutes, *supra* note 10 (Oct. 14, 2022).

The Committee defined "element" of the offense as follows: § 1.13 General Definitions In this

denominated affirmative defenses in their own right.[172] Section 1.12(2) requires the defendant to present credible evidence of an affirmative defense in most cases pertinent to this discussion. At this point, the prosecution is required to prove the absence of the defense beyond a reasonable doubt.[173] Consent[174]

Code, unless a different meaning plainly is required:

~~(9)~~ (10) "element of an offense" means ~~(i)~~ such conduct, ~~or (ii) such~~ attendant circumstances, or ~~(iii) such a~~ result ~~of conduct~~ as;

(a) is included in the description of the forbidden conduct in the definition of the offense; or

(b) establishes the required kind of culpability; or

(c) negatives an ~~excuse or justification~~ affirmative defense unless the statute expressly requires ~~provides that~~ the defendant ~~is required~~ to prove the ~~affirmative~~ defense by a preponderance of the evidence. ~~or~~

~~(d) negatives a defense under the statute of limitations; or~~

~~(e) establishes jurisdiction or venue;~~

MODEL PENAL CODE § 1.13(10) as adopted by the Committee. Minutes, *supra* note 10 (Oct. 14, 2022). Although the Committee did not adopt the Model Code's definition of "material element," *id.* at § 1.13~~(10)~~, the prosecution is required to prove every element of the crime beyond a reasonable doubt. *See* Mullaney v. Wilbur, 421 U.S. 684 (1975); In re Winship, 397 U.S. 358 (1969); s*ee also* Apprendi v. New Jersey, 120 S. Ct. 2348 (2000); *United States v. Gaudin,* 515 U.S. 506 (1995). Because justification is an affirmative defense under § 3.01, MODEL PENAL CODE § 3.01 as adopted by the Committee. Minutes, *supra* note 10 (Dec. 10, 2021), it is an element of the crime according to § 1.3(10). Thus, the prosecution bears the ultimate burden of disproving it.

The Committee changed the language in § 1.13(10) and § 1.12(1), making affirmative defenses an element of the crime to reflect its understanding that the prosecution should bear the ultimate burden of persuasion to disprove affirmative defenses, unless the statute indicates otherwise. Minutes, *supra* note 10 (Oct. 14, 2022).

171. *Id.* at § 3.01 as adopted by the Committee. Minutes, *supra* note 10 (Dec. 10, 2021).

172. *Id.* at § 223.1(4) as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019). *See* MODEL PENAL CODE art. 223 cmt. at 177 (AM. L. INST. 1980).

173. *Id.*

174. The Committee adopted § 2.11 Consent as follows:

(1) The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such consent negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense.

(2) When conduct is charged to constitute an offense because it causes or threatens bodily injury, consent to such conduct or to the infliction of such injury is a defense, if:

(a) the bodily injury consented to or threatened by the conduct consented to ~~is not serious~~ does not amount to serious or substantial bodily injury; or

(b) the conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or ~~other concerted~~ lawful activity ~~not forbidden by law~~; or

(c) the consent establishes a justification for the conduct under Article 3 of the Code.

(3) Unless otherwise provided by the Code or by the law defining the offense, assent does not constitute consent if:

(a) if is given by a person who the actor knows is legally incompetent to authorize the conduct charged to constitute the offense; or

(b) it is given by a person who by reason of youth, mental disease or defect or intoxication is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or

(c) ~~it is given by the person whose improvident consent is sought to be prevented by the law defining the offense; or~~

~~(d)~~ it is induced by force, duress or deception of a kind sought to be prevented by the law defining the offense; or

(d) it is against public policy to permit the conduct or the resulting harm, even though assented to.

MODEL PENAL CODE §2.11 as adopted by the Committee. Minutes, *supra* 10 (July 8, 2022).

operates in several different contexts, so it is not denominated as an affirmative defense, as such.[175] However, the effect in the context of theft is essentially that the prosecution bears the burden of persuasion to prove lack of the defense, as will be explained below.[176]

I am going to postpone a full explanation of the general defenses and of the three defenses included in the term "unlawful" until the end of the section on theft to avoid distracting the reader from the main discussion of theft.[177] Many of the complications in subsection 223.1 concern one element, "unlawful," of the first two—and most comprehensive—categories of theft in section 223.1(2)(a) and (b), as we will see.[178]

The next important definitions for section 223.1(2) involve the term of "property."

b. Property

There are three definitions concerning property that apply to section 223.1(2)(a): the definitions of "property,"[179] "movable property"[180] and "property of another."[181] These definitions appear in other sections and apply in the same way.[182] The basic definition of "property" in section 223.0(7) includes anything of value:

> "Property" means anything of value, including real estate, tangible and intangible personal property, contract rights, choses-in-action and other interests in or claims to wealth, credit and debit cards, credit extended by any licensed gaming establishment, admission or transportation tickets, captured or domestic animals, food and drink, and electric or other power.[183]

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175. *See* MODEL PENAL CODE art. 2 cmt. at 394 (AM. L. INST. 1980).

176. *See infra* II.I.3(c).

177. *See infra* II.I.3.

178. *See id.* A significant part of this article is devoted to the intricacies of the defenses and the element "unlawful." However, an understanding of the issue of "unlawful" would only be necessary if there were an issue regarding that element. For this reason, a mastery of the issue would not be necessary in most cases, and a lengthy discussion at this point would be confusing to the main issues that need to be discussed. For this reason, this discussion is deferred until the end of the explanation of the various theft offenses. *See id.*

179. MODEL PENAL CODE § 223.0(7) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2020). This term appears in section 223.1(2)(a), (b), (c), (d), and (f). MODEL PENAL CODE § 223.1 as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019; Feb. 8, 2019; Mar. 8, 2019).

180. *Id.* at § 223.0(5) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019). This term appears in section 223.1(2)(a) and (d). MODEL PENAL CODE § 223.1 as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019; Feb. 8, 2019).

181. MODEL PENAL CODE § 223.0(8) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019). This term appears in section 223.1(2)(a), (b), (c), (d), and (f). MODEL PENAL CODE § 223.1 as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019; Feb. 8, 2019).

182. MODEL PENAL CODE § 223.0(7) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2020).

183. *Id.* at § 223.0(7) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019). *See* MODEL

Since real estate and other types of property could not be stolen under the common law,[184] it was particularly important to clarify that those types of property could now be the subject of theft. The Model Code definition specifically includes real estate, along with intangible interests in property, contract rights, tickets, any kind of captured animal, food, drink and electric or other power.[185] The Committee added credit cards and gaming credits.[186] In short, anything of value may be the subject of theft under section 223.1.[187]

Section 223.1(2)(a) deals with the theft of movable property, which also requires its own definition. "Movable property" under section 223.0(5) is any property, the location of which may be changed,[188] including growing crops, which could not be stolen at common law.[189] Until they were harvested, they were part of the real estate.[190] Unlike at common law, real estate is subject to theft under the Model Code.[191] However, because it is not movable, the land itself and any fixtures are not subject to theft under section 223.1(a), but may be subject to other infractions, such as trespass.[192] Documents that represent property with no fixed location, however, are included as movable property,[193] as well as anything that can be removed from land.[194]

Property that was considered to have no value at common law and therefore not subject to theft, such as domestic animals, is also included.[195] Any other type of property is immovable property[196] and is covered by subsection 223.1(b),[197] where it will be discussed more fully below.[198]

The third definition concerning property is "property of another" in section 223.0(8), which is property that any person other than the actor has an interest in that the actor is not privileged to infringe.[199] Thus, the actor may be guilty of theft of his own property, such as one partner stealing partnership property.[200] Also, he may be guilty of theft of contraband, which is property that may not be legally owned, such as illegal drugs. It is necessary to criminalize the theft of such property to prevent the law of the jungle from applying in such cases.[201]

PENAL CODE art. 223 cmt. at 166 (AM. L. INST. 1980).

184. *See supra* discussion accompanying notes 55-59.

185. MODEL PENAL CODE § 223.0(6) (AM. L. INST. 1980).

186. *Id.* at § 223.0(7) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

187. *Id.*

188. *Id.* at § 223.0(5).

189. *See supra* discussion accompanying notes 56-60.

190. *Id.*

191. *See* MODEL PENAL CODE art. 223 cmt. at 166 (AM. L. INST. 1980).

192. *See id.* at 166-67, 172.

193. *See id.* at 163-66.

194. *See id.* at 172.

195. *See id.* at 166.

196. MODEL PENAL CODE § 223.0(5) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

197. *Id. at* § 223.1(b) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

198. *See infra* II.C.2.

199. MODEL PENAL CODE § 223.0(8) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019); *see also* MODEL PENAL CODE art. 223 cmt. at 168 (AM. L. INST. 1980).

200. *See* MODEL PENAL CODE art. 223 cmt. at 169 (AM. L. INST. 1980).

201. *See id.* at 169.

If the interest in the property is a security interest only, it is not "property of another."[202] Thus, the actor could be guilty of theft if he picks his car up from the repair shop without paying for it because he is not entitled to possession until he pays for it. However, if he sells his car without paying his car note, he would not be guilty of theft.[203] Infringing a security interest only is specifically excluded from the definition of property of another.[204] Although this type of fraudulent transaction is excluded from theft,[205] it is covered by section 224.10 on fraudulent disposition of property subject to a security interest.[206]

Therefore, to understand the definition of property, these three definitions must be read together. The last term to discuss with regard to section 223.1(2)(a), which applies in the same manner to section 223.1(2)(c),[207] is "deprive."

c. Deprive

The material element of "purpose to deprive" has essentially the same meaning that it had at common law, which, although couched in terms of intending to deprive the owner permanently, often allowed for variations on that idea.[208] "Deprive" under section 223.0(3) means to withhold the property permanently or for such an extended time as to destroy most of its value, [209] both of which were considered theft under the common law.[210] In addition, intending to return the item only if compensated for it, was also theft under the common law.[211] These contingencies are covered by section 223.0(3)(a).[212]

Section 223.0(3)(b) extends the definition of "deprive" to the case in which the property is disposed of so that the owner will likely never recover it.[213] This

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202. *See id.* at 170-71.

203. *See id.* at 171.

204. *See* MODEL PENAL CODE § 223.0.(8) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

205. *See* MODEL PENAL CODE art. 223 cmt. at 171 (AM. L. INST. 1980).

206. Section 224.10 Defrauding Secured Creditors

A person commits a *Class A* misdemeanor if he destroys, removes, conceals, encumbers, transfers or otherwise deals with property subject to a security interest with purpose to hinder enforcement of that interest. For purposes of this section, "security interest" means a property interest created by agreement or operation of law to secure performance of an obligation.

MODEL PENAL CODE § 224.10 as adopted by the Committee. Minutes, *supra* note 10 (Apr. 12, 2019).

207. "Purpose to deprive" is required by section 223.1(2)(a) and (c).

208. MODEL PENAL CODE art. 223 cmt. at 174 (AM. L. INST. 1980).

209. MODEL PENAL CODE § 223.0(3)(a) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019). This term appears in section 223.1(2)(a) and (c). MODEL PENAL CODE § 223.1(2) (a) and (c) as adopted by the Committee. Minutes, *supra* note 10 (Jan.14, 2019).

210. *See* MODEL PENAL CODE art. 223 cmt. at 174 (AM. L. INST. 1980).

211. *See id.*

212. MODEL PENAL CODE § 223.0(3)(a) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

213. *Id.* at § 223.0(3)(b).

is intended to include the situation, which is common in embezzlement, where the actor intends to return the money, but spends it in the meantime.[214]

The Model Code did not include in its definition of "deprive" the situation where an automobile is damaged but not to the extent that its value is totally destroyed.[215] The Committee, however, added to the definition of "deprive" in section 223.0(3)(c), so that if the damage to a motor vehicle is over $1000, this would also be theft, as would using the motor vehicle in the commission of a felony.[216] The Committee recognized that this is often the case with taking of automobiles and thought that punishing such conduct as "joy riding"—"unauthorized use" under section 223.2[217]—is insufficient.

The Model Code also intended that cases where property is intentionally destroyed should not be considered theft but should be punished as criminal mischief.[218] The comments indicate that intentional destruction of property should not be considered as withholding or appropriating most of the economic value under the definition of "deprive."[219] The Committee did not change the Model Code definition in this regard.[220]

Thus, under the section 223.1(2)(a), the actor is guilty of theft if he unlawfully takes or exercises unlawful control over movable property of another with the purpose to deprive him of it.[221] The only question that remains is what the actor's state of mind has to be regarding elements of the crime other than purpose to deprive.[222] Section 2.02(3)[223] applies the minimal state of mind of

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214. *See* MODEL PENAL CODE art. 223 cmt. at 175 (AM. L. INST. 1980).

215. *See id.*

216. MODEL PENAL CODE § 223.0(3)(c) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

217. *See infra* III.

218. *See* MODEL PENAL CODE art. 223 cmt. at 175 (AM. L. INST. 1980). See Johnson, *supra* note 14, at III.C. for a complete discussion of criminal mischief, as adopted by the Committee.

219. *See* MODEL PENAL CODE art. 223 cmt. at 175 (AM. L. INST. 1980).

220. MODEL PENAL CODE § 223.0(3)(a) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

221. *Id.* at § 223.1(2)(a).

222. *See* MODEL PENAL CODE art. 223 cmt. at 177 (AM. L. INST. 1980).

223. The Committee adopted the following version of Section 2.02

> (1) Except as provided in section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or criminally negligently, as the law may require, with respect to each material element of the offense.
>
> (2)
>
> (a) A person acts purposely with respect to a material element of an offense when:
>
> (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
>
> (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.
>
> (b) A person acts knowingly with respect to a material element of an offense when:
>
> (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
>
> (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.
>
> (c) A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the

recklessness to all material elements of a crime for which there is no state of mind prescribed by the statute in most cases.[224] However, the comments express the view that the actor must act with knowledge regarding these elements.[225] Thus, if the actor pleaded the defense of claim of right—the absence of which is a material element of theft of movable property[226]—the prosecution would have to prove that he knew that the property was not his.[227] Even if he claimed that he mistakenly thought that the owner consented, he would have to lack knowledge

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> nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.
>
> (d) A person acts criminally negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.
>
> (3) When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto except when the only culpability prescribed by law defining an offense is criminal negligence, criminal negligence shall suffice to establish all material elements.
>
> ~~(4) Prescribed Culpability Requirement Applies to All Material Elements. When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.~~
>
> ~~(5)~~ (4) When the law provides that criminal negligence suffices to establish an element of an offense, such element also is established if a person acts purposely, knowingly or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts purposely.
>
> ~~(6)~~ (5) When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense.
>
> ~~(7)~~ (6) When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.
>
> ~~(8)~~ (7) A requirement that an offense be committed willfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears.
>
> ~~(9)~~ (8) Neither knowledge nor recklessness or criminal negligence as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of an offense is an element of such offense, unless the definition of the offense or the Code so provides.
>
> ~~(10)~~ (9) When the grade or degree of an offense depends on whether the offense is committed purposely, knowingly, recklessly or criminally negligently, its grade or degree shall be the lowest for which the determinative kind of culpability is established with respect to any material element of the offense.
>
> MODEL PENAL CODE § 2.02 as adopted by the Committee. Minutes, *supra* note 10 (Mar. 9, 2018).

224. *Id.* at § 2.02(3). *See* MODEL PENAL CODE art. 223 cmt. at 177 (AM. LAW INST. 1980).

225. *See* MODEL PENAL CODE art. 223 cmt. at 177-78 (AM. L. INST. 1980). See *supra* note 223 for the definition of "knowledge" under section 2.02(6).

226. MODEL PENAL CODE § 223.1(2)(a) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

227. *See* MODEL PENAL CODE art. 223 cmt. at 177 (AM. L. INST. 1980).

before he could rely on the defense.[228] To be guilty of theft, he would also have to have knowledge that the property was not his, but that of another by operation of the definition of deprive.[229] Therefore, because knowledge is the required state of mind for each material element of the crime, he could not "take" or "exercise control of" "movable property" unless he knew he was doing so.[230] This issue will also be addressed with regard to immovable property in section 223.1(2)(b), discussed below.

2. Theft of Immovable Property

Immovable property is property that is defined in relation to "movable" property in section 223.0(5), as being all other property (not defined as movable).[231] The definition of "property" is expansive and intended to include real estate, but theft of real estate is not included in section 223.1(2)(a) because real estate is not movable.[232] However, under theft of immovable property under section 223.1(2)(b), real estate may be the subject of theft, if, for example, a trustee unlawfully transfers title to real estate "with the purpose to benefit himself or another not entitled"[233] to the property.[234] Under section 223.1(2)(b), one who unlawfully transfers any immovable property of another to purposely benefit himself or another not entitled to the property is guilty of theft.[235] However, the comments make it clear that one who is squatting on land to acquire adverse possession is not guilty of theft.[236] Similarly, section 223 was not intended to cover landlord-tenant disputes.[237]

Although both subsections require unlawful behavior with regard to property of another, there is a difference between section 223.1(2)(a) and (b) in the purpose required.[238] Section 223.1(2)(a) requires a purpose to deprive the owner permanently, whereas section 223.1(2)(b) requires a "purpose to benefit himself or another not entitled"[239] to the property. While the requirement of purpose to deprive the owner permanently is required for movable property to eliminate the possibility that temporary deprivations will be included, in transferring immovable property, there is always a threat of permanent deprivation.[240] Therefore, if the actor intends to benefit himself or another not

228. *See id.* at 178.

229. *See id.* at 177.

230. *See id.* at 177-78.

231. MODEL PENAL CODE § 223.0(5) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

232. *Id.* at § 223.1(2)(a).

233. *Id.* at § 223.1(2)(b).

234. *See* MODEL PENAL CODE art. 223 cmt. at 172 (AM. L. INST. 1980).

235. MODEL PENAL CODE § 223.1(2)(b) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

236. *See* MODEL PENAL CODE art. 223 cmt. at 172 (AM. L. INST. 1980).

237. *See id.*

238. *See id.* at 177-78.

239. *Compare* MODEL PENAL CODE § 223.1(2)(a) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019), *with* MODEL PENAL CODE § 223.1(2)(b) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

240. *See* MODEL PENAL CODE art. 223 cmt. at 178 (AM. L. INST. 1980).

entitled to immovable property even with no intent to deprive another permanently, he is sufficiently culpable.[241]

As noted above,[242] there are elements in the theft statute for which there is no mens rea assigned, so section 2.02(3) would operate to supply the state of mind of at least recklessness.[243] However, as with section 223.1(2)(a), considering "unlawfully" together with the claim-of-right defense (the lack of which is a material element of the crime) would indicate that the actor would have to have knowledge under section 223.1(2)(b) that he is transferring immovable property of another.[244] As with section 223.1(2)(a), if the actor pleaded the affirmative defense of claim of right, the prosecution would have to prove that he knew that the property was not his.[245]

Theft by unlawful taking or exercising of control covers most of the conduct that was previously punished as larceny and embezzlement.[246] The next two subsections of section 223.1 that we will discuss relate to situations at common law in which larceny either could not be charged at all, in the case with theft of services;[247] or could only be charged as theft under a contorted analysis, which is the case with theft of property lost, mislaid or delivered by mistake,[248] discussed first below.

D. Theft of Property Lost, Mislaid, or Delivered by Mistake

Common law larceny applied to situations in which the actor misappropriated property he came into possession of that had been lost or mislaid, but not necessarily if the property had been delivered by mistake.[249] Common law larceny required a trespassory taking of possession from another.[250] To criminalize the misappropriation of lost property, the law developed so that the owner retained constructive possession until the finder decided to keep the property. At that point, the finder took possession from the owner by trespass and could be guilty of larceny.[251] It was more difficult to criminalize misappropriation of property delivered by mistake, so a more contrived analysis or legislation was required.[252]

If an actor exercises unlawful control over the property of another (even if it was lost, mislaid or delivered by mistake) with purpose to deprive him of it, that

241. *See id.*
242. *See supra* discussion accompanying notes 223-31.
243. *See* MODEL PENAL CODE art. 223 cmt. at 177-78 (AM. L. INST. 1980).
244. *See id*. at 178 and *supra* discussion accompanying notes 223-31.
245. *See* MODEL PENAL CODE art. 223 cmt. at 177 (AM. L. INST. 1980).
246. *See id.* at 163.
247. *See id.* at 250.
248. *See id.* at 225.
249. *See id.* at 223.
250. *See supra* discussion accompanying notes 48, 66, 72-73.
251. *See id.* at 225.
252. *See id.*

would be theft under section 223.1(2)(a).[253] An argument could, therefore, be made that section 223.1(2)(c) is unnecessary. However, because of the history of the crime, it was necessary to clarify that misappropriation of property lost, mislaid, or delivered by mistake could also be theft.[254]

The Committee adopted the Model Code provision without any changes, except for moving it from a separate statute to a subsection of the consolidated theft statute.[255] Section 223.1(2)(c) provides that the actor is guilty of theft if

> he takes ~~comes into~~ control of the property of another that he knows to have been lost, mislaid, or delivered under a mistake as to the nature or amount of the property or the identity of the recipient if, with purpose to deprive the owner thereof, he fails to take reasonable measures to restore the property to a person entitled to have it.[256]

To avoid applying section 223.1(2)(c) overbroadly, the subsection is limited to "mistake as to the nature or amount of the property or the identity of the recipient."[257] This distinction is necessary to exclude tolerated conduct, such as hard bargaining that might not be scrupulously honest.[258] Therefore, if a buyer purchases property at a price that he knows is significantly lower than the value, he would not be guilty of theft under this subsection, if he did not know that the property was lost, mislaid or delivered by mistake.[259] Thus, simply being aware that the property is being sold below its actual value is not included in the crime.

To be guilty of theft under this subsection, the actor must have knowledge that the property was lost, mislaid or delivered by mistake, and he must also have the purpose to deprive the owner of the property.[260] The Model Code added the requirement that, knowing the property was that of another, he failed to take "reasonable measures to restore the property to the person entitled to have it."[261]

As opposed to common law larceny, an actor may be guilty of theft under this subsection if he took the property with the intent to restore it to the owner, but subsequently changed his mind and decided to keep it. In short, under the proposed statute, the actor's innocent intent when he acquired possession of the property is not dispositive of criminality *vel non*, as it would have been under common law larceny, which required trespassory taking.[262] Under section

253. MODEL PENAL CODE § 223.1(2)(a) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

254. *See* MODEL PENAL CODE art. 223 cmt. at 227 (AM. L. INST. 1980).

255. MODEL PENAL CODE § 223.1(2)(c) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

256. *Id.*

257. *Id.*

258. *See* MODEL PENAL CODE art. 223 cmt. at 226 (AM. L. INST. 1980).

259. *See id.*

260. MODEL PENAL CODE § 223.1(2)(c) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

261. *Id.*

262. *See* MODEL PENAL CODE art. 223 cmt. at 228 (AM. L. INST. 1980).

223.1(2)(c), at some point, the actor must develop the purpose to deprive the owner and fail to take reasonable measures to restore the property.[263]

"Failure to take reasonable measures" was originally more specifically set out in the draft version of the statute, but the drafters of the Model Code decided to simplify it.[264] There was no intent to change the concept, which would have barred liability if the actor complied with legal procedures to preserve and restore the property, or delivered the property to law enforcement officers or to the occupant of the premises where the property was found.[265] These situations and other procedures as well as advertising and posting notices were also cited in the comments as sufficient to satisfy "taking reasonable measures."[266] The Committee endorsed these measures, also without specifying them in the statute.[267]

Under the common law, the amount of the property often provided the clue to ownership because the owner presumably would be looking for valuable property.[268] There is no such explicit requirement in this subsection, although the substantial value of property should provide a clue that the property is that of another and not abandoned.[269]

Finally, the Committee's adoption of the *di minimus* exception in section 2.12,[270] discussed below,[271] should be particularly important in this area. In other words, if the value of the property is inconsequential or trivial, the finder should not be obligated to try to find the owner.

The other type of theft, which would not have been common law larceny, is "theft of services,"[272] and is discussed next.

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263. MODEL PENAL CODE § 223.1(2)(c) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

264. The draft version of the original Model Code included a clue to value, but it was not included in the final draft because it was considered too complicated. The deletion was not supposed to signal a change in the intent of the section, and the comments opine that the original version should guide the interpretation of the final version. *See* MODEL PENAL CODE art. 223 cmt. at 229 (AM. L. INST. 1980). This was the original version:

> In determining what are reasonable measures, account shall be taken of the following factors: the nature and value of the property, the expense and inconvenience of the restoration measures, and the reasonable expectation of compensation to the finder for the expense and inconvenience borne by him . . . . *Id.*

265. *See id.*

266. *See id.* at 230.

267. MODEL PENAL CODE § 223.1(2)(c) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

268. *See* PERKINS, *supra* note 41, at 248-50; *see generally* MODEL PENAL CODE art. 223 cmt. at 229 (AM. L. INST. 1980).

269. *See supra* note 264 and text accompanying notes 263-67.

270. MODEL PENAL CODE § 2.12 as adopted by the Committee. Minutes, *supra* note 10 (July 14, 2017).

271. *See infra* discussion accompanying notes 412-20.

272. *See* MODEL PENAL CODE art. 223 cmt. at 250 (AM. L. INST. 1980).

E. Theft of Services

At common law, the concept of "property" for larceny or false pretenses did not include services, so theft of services was not a criminal offense.[273] The Model Code added this subject to theft in a separate theft of services statute.[274] The Committee adopted the Model Code version with some changes to the definition of services, so the actor may be guilty of theft under section 223.1(2)(e) if:

> (i) he purposely obtains services that he knows are available to him only for compensation, by deception ~~or threat~~, or by false token or other means to avoid payment for the service, or (ii) having control over the disposition of services to others, to which he is not entitled, he knowingly diverts such services to his own benefit or to the benefit of another not entitled thereto.[275]

The actor may be guilty of theft of services under section 223.1(2)(e) in one of two ways. He may be guilty under section 223.1(2)(e)(i) if he "purposely obtains services by deception, or by false token" or by other means to avoid paying for the services.[276] In addition, under section 223.1(2)(e)(ii), the actor may be guilty of theft of services by diverting services he controls to which he was not entitled, either for his own benefit or for another not entitled to them.[277]

The Committee adopted the following definition of services in the definition section 223.0(10), adopted from the Model Code definition of theft of services, except as indicated by additions, which are underlined, and deletions, which are stricken:

> (10) "Services" <u>means</u> ~~includes~~ <u>any service available for compensation, such as</u> labor, professional service, transportation, telephone or other public service, accommodation in hotels, restaurants or elsewhere, admission to exhibitions, use of vehicles or other movable property. ~~Where compensation for service is ordinarily paid immediately upon the rendering of such service, as in the case of hotels and restaurants, refusal to pay or absconding without payment or offer to pay gives rise to a presumption that the service was obtained by deception as to intention to pay~~.[278]

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273. *See id.*

274. MODEL PENAL CODE § 223.7 (AM. L. INST. 1985).

275. *Compare* MODEL PENAL CODE § 223.7 (AM. L. INST. 1985), *with* MODEL PENAL CODE § 223.1(2)(e), *and* § 223.0(10) as adopted by the Committee. Minutes, *supra* note 10 (Mar. 8, 2019).

276. MODEL PENAL CODE § 223.1(2)(f)(i) as adopted by the Committee. Minutes, *supra* note 10 (Mar. 8, 2019; Mar. 8, 2019).

277. *Id.* at § 223.1(2)(e)(ii).

278. *Id.* at § 223.0(10) as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019).

Services include anything that is available for compensation, which was expressed in the comments, but not in the Model Code statute, which simply listed examples of services.[279] The Committee adopted the examples of services, but explicitly defined "services" to mean "any service available for compensation."[280]

Also, the Committee did not adopt the Model Code's presumption of absconding without paying.[281] The Committee thought that, while the fact that the actor left without paying could indicate the actor's intent not to pay, this was something for the jury to consider. In addition, the Committee decided to discuss the issue in this article, which takes the place of comments, rather than complicating the statute with it.

The foregoing has explained the sections that mainly replace larceny and embezzlement—although there is some overlap—and conduct that would be false pretenses at common law may also be included. However, the main provision that takes the place of false pretenses is "theft by deception," discussed next.

F. Theft by Deception

The Committee put theft by deception at the end of section 223.1(2) in subsection (f).[282] Because this crime is the Model Code version of false pretenses—just as theft by unlawful taking or exercising control, discussed above, is the Model Code's version of larceny and embezzlement[283]—we will address theft by deception next to complete the discussion of the statutory replacements for the three main theft crimes traditionally recognized in this country.[284]

The offense is simply stated as "purposely obtaining property of another by deception."[285] The actor must purposely deceive another and purposely obtain his property.[286] False pretenses, as discussed above, required a material misrepresentation of a past or present fact that caused the victim to pass title of his property to the actor who intends to defraud the victim.[287] Unlike false pretenses, theft by deception does not require the misrepresentation to be

279. MODEL PENAL CODE § 223.7 (AM. L. INST. 1985). *See* MODEL PENAL CODE art. 223 cmt. at 251 (AM. L. INST. 1980).

280. MODEL PENAL CODE § 223.0(10) as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019).

281. *Compare* MODEL PENAL CODE § 223.7 (AM. L. INST. 1985), *with* MODEL PENAL CODE § 223.1(2)(e), *and* § 223.0(10) as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019; Mar. 8, 2019).

282. MODEL PENAL CODE § 223.1(2)(f) as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019; Mar. 8, 2019).

283. *See supra* discussion accompanying notes 149-52, 185-93, 232-36.

284. *See supra* II.C.

285. MODEL PENAL CODE § 223.1(2)(f) as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019; Mar. 8, 2019).

286. *See* MODEL PENAL CODE art. 223 cmt. at 181 (AM. L. INST. 1980).

287. *See supra* II.A.3.

material as long as the property of another is obtained by deception.[288] Passage of title at some point is still required for theft by deception because this is not a crime involving possession only,[289] in contrast to theft by unlawful taking, which may be.[290]

Under section 223.1(2)(f), the misrepresentation does not have to be of a past or present fact, but may include a variety of possible deceptions regarding opinion, value, law and other states of mind.[291] There is no additional requirement of intent to defraud, but just that the actor purposely obtain the property of another by deception.[292] If the actor does not actually obtain the property, he could still be guilty of attempt, which carries the same penalty as the completed crime.[293]

The definitions of "property" and "property of another" have been explained above,[294] which leaves two material elements that must be defined: "obtain" and "deception." "Obtain" under section 223.0(6)(a) with regard to property means "to bring about a transfer or purported transfer of a legal interest in the property" to the actor or another.[295] In other words, this definition makes it clear that transfer of possession only would not suffice.[296] However, if the actor acquired possession by deception and later acquired title, that could be theft by deception.[297] The fact that a legal interest must be transferred under this subsection makes a distinction between movable and immovable property unnecessary.[298]

Section 223.0(6)(b) also states that "obtain" also means "in relation to labor or service, to secure performance thereof.[299] Therefore, to be guilty of theft under this subsection, the actor must obtain a legal interest in the property by deception.[300] He may also be guilty if he secures performance of a service by deception, by operation of the definition of "obtain," which includes securing services.[301]

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288. MODEL PENAL CODE § 223.1(2)(f) as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019; Mar. 8, 2019).

289. *Id.* at § 223.0(8) as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019); *See* MODEL PENAL CODE art. 223 cmt. at 182 (AM. L. INST. 1980).

290. *See supra* discussion accompanying notes 111-116.

291. MODEL PENAL CODE § 223.0(2) as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019).

292. *Id.* at § 223.1(2)(f) as adopted by the Committee. Minutes, *supra* note 10 (Mar. 8, 2019).

293. *See* MODEL PENAL CODE art. 223 cmt. at 181 (AM. L. INST. 1980). The Model Code's version of attempt, which the Committee adopted, MODEL PENAL CODE § 5.01 as adopted by the Committee. Minutes, *supra* note 10 (Oct. 4, 1996; Nov. 1, 1996) punishes attempt as severely as the crime intended, unless the crime intended is a first-degree felony, in which case, attempt is a second-degree felony. MODEL PENAL CODE § 5.05 as adopted by the Committee. Minutes, *supra* note 10 (May 1997).

294. *See supra* II.C.b.

295. MODEL PENAL CODE § 223.0(6) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

296. *See* MODEL PENAL CODE art. 223 cmt. at 182 (AM. L. INST. 1980).

297. *See id.*

298. *See id.* at 181.

299. MODEL PENAL CODE § 223.0(6)(b) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 8, 2019).

300. *Id.*

301. *Id.* at § 223.0(6).

The Model Code added the definition of "deception" to the statutory provision governing theft by deception, which was a separate statute.[302] When the Committee decided to consolidate the theft provisions into one statute,[303] we also decided to put the definition of deception in the definition section, section 223.0.[304] Other than the location of the definition, the Committee retained the Model Code's definition of deception with only a few changes.[305]

The definition of deception in section 223.0(2) specifically excludes "statements unlikely to deceive ordinary persons in the group addressed,"[306] which is intended to exclude "puffing" from theft.[307] Puffing is understood to mean an exaggerated view of the actor's wares, which is tolerable and expected.[308] The Committee eliminated the explicit reference to "puffing," but retained the idea.[309] Deception in this case is obvious when the bargaining power between the actor and the victim is equal. However, when there is a broader audience for the statement, the question is whether it would deceive ordinary persons.[310] Obviously, this is a gray area that should be settled by a jury of ordinary people.

In addition, section 223.0(2) further provides that matters that have no pecuniary significance are not "deception" under the section.[311] Theft by

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302. MODEL PENAL CODE § 223.3 (AM. L. INST. 1985).

303. MODEL PENAL CODE § 223.1 as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

304. *Compare* MODEL PENAL CODE § 223.3 (AM. L. INST. 1985), *with* MODEL PENAL CODE § 223.1(2)(f), *and* § 223.0(2) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019; Feb. 8, 2019).

305. (2) "Deception" means purposely:

> (a) creating or reinforcing a false impression, including false impression of law, value, intention or other state of mind; but deception as to a person's intention to perform a promise shall not be inferred merely from the fact ~~alone~~ that he did not subsequently perform the promise; or
>
> (b) preventing another from acquiring information ~~which~~ that could affect his judgment of a transaction; or
>
> (c) failing to correct a false impression ~~which~~ that the deceiver previously created or reinforced, or ~~which~~ that the deceiver knows to be influencing another to whom he stands in a fiduciary relationship; or
>
> (d) failing to disclose a known lien, adverse claim or other legal impediment to the enjoyment of property that ~~which~~ he transfers or encumbers in consideration for the property obtained. ~~, whether such impediment is or is not valid, or is or is not a matter of official record.~~
>
> The term "deception" does not, however, include falsity as to matters that have no pecuniary significance, or ~~puffing by~~ statements unlikely to deceive ordinary persons in the group addressed.

Compare MODEL PENAL CODE § 223.3 (AM. L. INST. 1980), *with* MODEL PENAL CODE § 223.0(2) as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019).

306. MODEL PENAL CODE § 223.0(2) as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019).

307. *See* MODEL PENAL CODE art. 223 cmt. at 195 (AM. L. INST. 1980).

308. *See id.*

309. MODEL PENAL CODE § 223.0(2) as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019).

310. *See* MODEL PENAL CODE Art 223 cmt. at 196 (AM. L. INST. 1980).

311. MODEL PENAL CODE § 223.0(2) as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019).

deception is a theft crime that involves the property of another, so that if the misrepresentation is regarding, for example, the actor's political or social views, unless they have pecuniary significance, the crime is not theft.[312]

The comments indicate that a separate crime of theft by deception might really not be necessary.[313] However, especially because of the complexities of the foregoing regarding the definition of deception, the drafters considered separate treatment desirable,[314] and the Committee agreed.

Although puffing and matters having no pecuniary significance are excluded from the definition of deception, section 223.0(2) specifically includes purposely creating a false impression of "law, value, intention or other state of mind" in section 223.0(2)(a)[315]; preventing another from acquiring necessary information in section 223.0(2)(b);[316] failing to correct a false impression in section 223.0(2)(c);[317] or failing to disclose encumbrances in section 223.0(2)(d).[318] I will discuss each of these situations in more detail.

As discussed above, false pretenses required the *making o*f a false representation of a past or present fact.[319] Section 223.0(2)(a) defines deception as purposely creating or simply reinforcing false impressions regarding law, value, or state of mind.[320] Thus, deception under the first subsection means purposely:

> creating or reinforcing ~~creates or reinforces~~ a false impression, including false impression of law, value, intention or other state of mind; but deception as to a person's intention to perform a promise shall not be inferred merely from the fact ~~alone~~ that he did not subsequently perform the promise; or[321]

The comments to the Model Code make it clear that "creating" and "making" were intended to be considered synonymous terms, and no distinction was intended in that regard.[322] The comments also opine that non-verbal behavior that leaves a false impression, which had generally been accepted in the law, should also be deception.[323] The Committee agreed with the drafters' view.

The Model Code definition of deception in section 223.0(2)(a) encompasses the reinforcing of a false impression, as well as creating a false impression,[324]

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312. *See* MODEL PENAL CODE art. 223 cmt. at 194 (AM. L. INST. 1980).

313. *See id.* at 180.

314. *See id.*

315. MODEL PENAL CODE § 223.0(2)(a) as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019).

316. *Id.* at § 223.0(2)(b).

317. *Id.* at § 223.0(2)(c).

318. *Id.* at § 223.0(2)(d).

319. *See supra* discussion accompanying notes 111-15.

320. MODEL PENAL CODE § 223.0(2)(a) as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019).

321. *Id.*

322. *See* MODEL PENAL CODE art. 223 cmt. at 184 (AM. L. INST. 1980).

323. *See id*.

324. *See id.* at 184-85.

but in either case, some affirmative conduct is required.[325] In the usual case, failure to correct a false impression is insufficient, unless an exception articulated in section 223.0(2)(c) or (d) applies,[326] which is discussed below.[327]

False pretenses required the false representation of a fact, which did not include false statements regarding opinion.[328] However, section 223.0(2)(a) includes misrepresentations regarding opinion, such as misrepresentations of value, which is usually an opinion.[329]

Deception regarding the law is more problematic because of the presumption that everyone is imputed to have knowledge of the law. However, deception requires a purposeful misstatement of the law, so that such a misrepresentation of law is included in the definition as well.[330]

As noted, false pretenses also required a misrepresentation of a past or present fact[331] and did not cover a false promise for fear that failure to perform a promise could always be charged as false pretenses.[332] Theft by deception is not so limited. The definition of deception includes misrepresentation regarding intention and other states of mind.[333] For example, if a repair person promises to make a repair and takes money for it—not intending to make the repair—that would be theft by deception, but not false pretenses.[334] To ameliorate the possibility that every situation of failure to perform could be charged as theft by deception, the Model Code provides that "deception as to a person's intention to perform a promise shall not be inferred merely from the fact alone that he did not subsequently perform the promise."[335] The Committee adopted this language in section 223.0(2)(a), but eliminated the word "alone," considering it to be redundant and confusing. The Committee believed that failure to perform is important evidence of the actor's purpose but should not be sufficient without other evidence of purpose.[336]

The next subsections (b), (c) and (d) of section 223.0(2) defining deception, all cover situations in which the actor has not necessarily created or reinforced the false information, but where he has interfered with the other person's ability to obtain information or when he fails to correct misinformation in some cases or fails to disclose encumbrances.[337]

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325. *See id.* at 184.

326. *See id.* at 185.

327. *See infra* discussion accompanying notes 332-45.

328. *See* MODEL PENAL CODE art. 223 cmt. at 191 (AM. L. INST. 1980).

329. *See id.* at 191.

330. *See id.* at 192-93.

331. *See supra* discussion accompanying notes 113-15.

332. *See* MODEL PENAL CODE art. 223 cmt. at 187 (AM. L. INST. 1980).

333. MODEL PENAL CODE § 223.0(2)(a) as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019).

334. *See* MODEL PENAL CODE art. 223 cmt. at 187 (AM. L. INST. 1980).

335. MODEL PENAL CODE § 223.0(2) (AM. L. INST. 1985).

336. MODEL PENAL CODE § 223.0(2)(a) as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019).

337. *See* MODEL PENAL CODE art. 223 cmt. at 197 (AM. L. INST. 1980).

Section 223.0(2)(b) covers the situation in which the actor purposely prevents "another from acquiring information that could affect his judgment of a transaction."[338] Simply allowing the person to act based on a mistake is insufficient.[339] The actor must take affirmative steps to prevent the person from acquiring the information that could affect his judgment.[340]

Section 223.0(2)(c) applies to a situation in which the actor either created or reinforced a false impression and failed to correct it, which also requires affirmative steps. However, if the actor is in a fiduciary relationship with the person, it would be sufficient if he failed to correct a false impression that he knew was influencing the person without the requirement of any affirmative steps.[341]

The final subsection, section 223.0(2)(d) provides that purposely failing to disclose legal impediments regarding the property may be theft by deception.[342] Specifically, this applies to failure to disclose "a known lien, adverse claim or other legal impediment to the enjoyment of property ~~which~~ that he transfers or encumbers in consideration for the property obtained."[343] The Committee decided to delete the following: "whether such impediment is or is not valid, or is or is not a matter of official record."[344] The Committee thought this was too complicated and unnecessary. If the actor transferred the property while misrepresenting a legal impediment, that should be sufficient.[345]

The Committee also included receiving stolen property in theft crimes. I will explain this offense next.

G. Receiving Stolen Property

The Committee adopted the following version of receiving stolen property in section 223.1(2)(d), which contains some substantial changes to the Model Code version, as noted by the strike-outs and underlining.[346] A person is guilty of theft (by receiving) if:

> (i) he purposely receives, retains, or disposes of movable property of another ~~knowing that it has been stolen, or believing that it has probably been stolen~~ that he knew or should have been aware of a substantial and unjustified risk that it had been stolen, unless the property is received, retained or disposed of with purpose to restore it to the owner. "~~Receiving" means~~

338. MODEL PENAL CODE § 223.0(2)(b) as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019).

339. *See* MODEL PENAL CODE art. 223 cmt. at 197 (AM. L. INST. 1980).

340. *See id.*

341. *See id.*

342. MODEL PENAL CODE § 223.0(2)(d) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

343. *Id.*

344. *Id.*

345. *Id.*

346. *Compare* MODEL PENAL CODE § 223.6 (AM. L. INST. 1985), *with* MODEL PENAL CODE § 223.1(2)(d) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

~~acquiring possession, control or title, or lending on the security of the property.~~

(ii) The requisite knowledge or awareness is presumed in the ~~case of a dealer who~~ following cases:

1. Unless satisfactorily explained, proof of possession of property recently stolen, coupled with other evidence, such as flight, false statements, or attempts to conceal the property, ~~unless satisfactorily explained~~, give rise to a presumption that the person in possession of the property knew or should have been aware of a substantial risk that the property had been stolen. ~~(a) is found in possession or control of property stolen from two or more persons on separate occasions; or~~

2. Proof of the purchase or sale of stolen property at a price substantially below fair market value, unless satisfactorily explained, gives rise to a presumption that the person buying or selling the property knew or should have been aware of a substantial risk that the property had been stolen. ~~(b) has received stolen property in another transaction charged; or~~

3. Proof of the purchase or sale of stolen property by a dealer in property, who acquired the property without making reasonable inquiry whether the person selling or delivering the property to him had a legal right to do so, gives rise to a presumption that that person buying or selling the property knew or should have been aware of a substantial risk that it had been stolen. ~~(c) being a dealer in property of the sort received, acquires it for a consideration which he knows is far below its reasonable value.~~

~~"Dealer" means a person in the business of buying or selling goods including a pawnbroker~~

The Model Code version of the statute provides in essence that the actor is guilty of receiving stolen property if he receives, retains or disposes of movable property of another that he knew had been stolen or had probably been stolen without intending to return it to the owner.[347] The Committee changed the mens

347. MODEL PENAL CODE § 223.0(2)(d) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

rea for the crime, as discussed below,[348] but agreed with the substance of Model Code's version with some changes.[349]

The drafters recognized a need for a separate crime covering receiving stolen property because that conduct had often evaded accomplice liability and traditional definitions of the theft crimes.[350] Larceny, embezzlement and false pretenses generally require a relationship between the one in lawful possession and the one who makes the original misappropriation.[351] Since there may not be a direct relationship between the rightful possessor or owner and the receiver of stolen property, the offense would not be any of those crimes.[352] Similarly, unless the receiver is aiding and abetting the original theft, he would not be guilty of theft.[353] Further, the receiver of stolen property would not usually be guilty of being an accessory after the fact because he was not trying to assist the thief to avoid punishment.[354]

The Model Code conception of theft, that the actor takes "unlawful control over the property of another with intent to deprive" would seem to cover receiving as well, but the drafters thought that a separate section was necessary.[355] Because it is often difficult to determine the thief's role in the crime, prosecutors often charged both the larceny, embezzlement or false pretenses crime, as well as the receiving offense.[356] However, consolidation reduces the chances that the actor's role in the theft will be used as a defense, and the statute also precludes being punished for both.[357] By adding retention of stolen property to the definition, the one who obtains possession innocently and later finds out that the property was stolen may be guilty of receiving, as well, if he continues to exercise control over the property.[358]

The only property that section 223.1(2)(d) applies to is "movable property,"[359] fully discussed above.[360] Although immovable property may not be subject to the offense, civil remedies and other offenses are applicable to acquiring title to real estate fraudulently.[361] The rationale for this limitation is that the existence of "receivers" of immovable property does not facilitate the activities of professional thieves to the same extent as does the existence of receivers of movable property.[362]

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348. *See infra* discussion accompanying notes 370-75.

349. *Compare* MODEL PENAL CODE § 223.6 (AM. L. INST. 1985), *with* MODEL PENAL CODE § 223.1(2)(d) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

350. *See* MODEL PENAL CODE art. 223 cmt. at 232 (AM. L. INST. 1980).

351. *See id.*

352. *See id.*

353. *See id.*

354. *See id*.

355. *See id.* at 163-66.

356. *See id.* at 232.

357. *See id.*

358. *See id.* at 235.

359. MODEL PENAL CODE § 223.1(2)(d) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

360. *See supra* discussion accompanying notes 188-94.

361. *See* MODEL PENAL CODE art. 223 cmt. at 236 (AM. L. INST. 1980).

362. *See id.*

In section 223.1(2)(d), the common law limitations on the type of property that could be the subject of theft have been eliminated, so the subject of receiving stolen property is now expanded to any movable property. Thus, even growing crops, which used to be part of the real estate, may be the subject of theft, as well as receiving stolen property.[363]

The Model Code chose not to define "stolen," but indicated in the comments that it was supposed to mean "the acquisition of property in any manner that constitutes theft."[364] Again, the Committee has always been leery of leaving important definitions to the comments,[365] so we adopted the definition in section 223.0(11), which was suggested in the comments, and added to it:

> "Stolen" means acquired or controlled in any manner that constitutes theft as defined by this section or robbery as defined under section 222.1[366]

There is another reason to specify a definition of "stolen." Under the common law, "stolen" meant that it was the subject of larceny.[367]

The Committee adopted the Model Code's definition of "receiving," which "means acquiring possession, control or title, or lending on the security of the property."[368] Thus, the actor must acquire control either by physical dominion or legal power, and not just by purchase, but by any method of control, including using stolen goods as security.[369]

The Model Code requires that the actor "purposely receives, retains or disposes" of the property "knowing it is has been stolen" or believing "it has probably been stolen."[370] The Committee thought that "probably" was too vague and decided to replace it with a criminal negligence standard,[371] as defined in section 2.02(2)(d).[372] Thus, while the other theft crimes require purpose or knowledge, theft by receiving stolen property requires only criminal negligence with regard to whether the property is stolen.[373] Therefore, the actor

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363. *See id.*

364. *See id.* at 240.

365. For example, we added a definition of theft to robbery, which also relied on the comments for a definition. *See* Johnson, *supra* note 14, at 259-60.

366. MODEL PENAL CODE § 223.0(11) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

367. *See* PERKINS, *supra* note 41, at 925; *see generally* MODEL PENAL CODE art. 223 cmt. at 240-41 (AM. L. INST. 1980).

368. MODEL PENAL CODE § 223.0(9) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019). The definition was contained in the original separate receiving statute. MODEL PENAL CODE § 223.6 (1) (AM. L. INST. 1985).

369. *See* MODEL PENAL CODE art. 223 cmt. at 235 (AM. L. INST. 1980).

370. MODEL PENAL CODE § 223.6 (AM. L. INST. 1985).

371. MODEL PENAL CODE § 223.1(2)(d) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

372. *See supra* note 223.

373. MODEL PENAL CODE § 223.1(2)(d) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

is guilty of theft by receiving stolen property if he "purposely receives, retains, or disposes of property of another that he knew or should have been aware of a substantial and unjustified risk that it had been stolen."[374] There is no requirement that the property in fact be stolen but that the actor ignored a substantial risk—from the viewpoint of a reasonable person—that the property has been stolen.[375]

In addition to the mens rea regarding whether the property is stolen, the Model Code adds that if the actor knows that the property is stolen and retains it, he is guilty of theft, unless "his purpose is to restore it to the owner."[376] The Committee accepted this concept.[377] Thus, the prosecution must prove that the actor did not have the purpose to restore the property to the owner.[378] Proof that the actor retained the property, knowing that it was stolen, and reaped the benefit of the property should be sufficient.[379]

The Model Code provided several presumptions in section 223.1(2)(d)(ii) that the actor had the requisite knowledge or awareness that property had been stolen.[380] Model Code section 1.12, which the Committee adopted,[381] sets out the effect of a presumption:

> Section 1.12
> . . . .
>
> (5) When the ~~Model~~ Code establishes a presumption with respect to any fact that is an element of an offense, it has the following consequences:
>
> (a) when there is evidence of the facts that give rise to the presumption, the issue of the existence of the presumed fact must be submitted to the jury, unless the Court is satisfied that the evidence as a whole clearly negatives the presumed fact; and
>
> (b) when the issue of the existence of the presumed fact is submitted to the jury, the Court shall charge that while the presumed fact must, on all the evidence, be proved beyond a reasonable doubt, the law declares that the jury

374. *Id.*

375. *Cf.* MODEL PENAL CODE art. 223 cmt. at 239 (AM. L. INST. 1980).

376. MODEL PENAL CODE § 223.6 (AM. L. INST. 1985).

377. MODEL PENAL CODE § 223.0(9) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

378. *See* MODEL PENAL CODE art. 223 cmt. at 237 (AM. L. INST. 1980).

379. *See id.*

380. MODEL PENAL CODE § 223.1(2)(d)(ii) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

381. *Id.* at § 1.12(5) as adopted by the Committee. Minutes, *supra* note 10 (Oct. 14, 2022), See *supra* note 170 for the full version of § 1.12.

> may regard the facts giving rise to the presumption as sufficient evidence of the presumed fact.[382]

In short, the effect of a statutory presumption is that the facts are sufficiently established to create an issue for the jury.[383] In addition, the prosecution is entitled to an instruction that the jury may regard the facts as sufficient evidence to prove the presumed facts, although they must still determine whether the defendant had the requisite state of mind beyond a reasonable doubt.[384]

The substance of the Committee's version of the presumptions under section 223.2(d)(ii) differs substantially from the Model Code.[385] The Committee based its presumptions[386] on Arizona's version of the Model Code.[387]

The Model Code applied its presumptions only to dealers, which the Committee rejected, so all but one of the presumptions have general applicability.[388] Under the Committee's version, the following evidence raises the presumption that the actor knew or should have been aware of a substantial risk that the property was stolen.[389]

The first presumption in section 223.1(d)(ii)(1) arises, absent a satisfactory explanation, when there is proof of possession of stolen property, along with other evidence such as flight, false statements or attempts to conceal the property.[390] The second presumption in section 223.1(d)(ii)(2) arises when there

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382. *Id.*

383. *See* MODEL PENAL CODE art. 223 cmt. at 242 (AM. L. INST. 1980).

384. *See id.*

385. *Compare* MODEL PENAL CODE § 223.6(2) (AM. L. INST. 1985), *with* MODEL PENAL CODE § 223.1(2)(d)(ii) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

386. MODEL PENAL CODE § 223.1(2)(d)(ii) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

387. ARIZ. REV. STAT. § 13-2305. Permissible inferences

> In an action for trafficking in stolen property:
>
> 1. Proof of possession of property recently stolen, unless satisfactorily explained, may give rise to an inference that the person in possession of the property was aware of the risk that it had been stolen or in some way participated in its theft.
>
> 2. Proof of the purchase or sale of stolen property at a price substantially below its fair market value, unless satisfactorily explained, may give rise to an inference that the person buying or selling the property was aware of the risk that it had been stolen.
>
> 3. Proof of the purchase or sale of stolen property by a dealer in property, out of the regular course of business, or without the usual indicia of ownership other than mere possession, unless satisfactorily explained, may give rise to an inference that the person buying or selling the property was aware of the risk that it had been stolen.

388. *Compare* MODEL PENAL CODE § 223.6(2) (AM. L. INST. 1985), *with* MODEL PENAL CODE § 223.1(2)(d)(ii) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

389. MODEL PENAL CODE § 223.1(2)(d)(ii) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

390. *Id.* at § 223.1(2)(d)(ii)(1).

is proof of purchase or sale of property substantially below market value, again, absent explanation.[391]

The third presumption in section 223.1(2)(d)(ii)(3) applies only to dealers,[392] which the Committee defined in section 223.0(1) as a "person in the business of buying or selling goods, including a pawnbroker."[393] This definition was adopted from the Model Code definition.[394] This presumption arises if the dealer does not make reasonable inquiry whether the seller or the deliverer of the property has the legal right to do so.[395]

The Committee did not adopt the next section of the Model Code, "theft of funds received."[396] Nevertheless, some explanation of the section is necessary.

H. Theft of Funds Received

The Committee chose not to adopt the Model Code's final theft section, "theft of funds received," which provides in Section 223.8 as follows:

> A person who purposely obtains or retains property upon agreement, or subject to a known legal obligation, to make specified payment or other specified disposition, whether from such property or its proceeds or from his own property to be reserved in the equivalent amount, is guilty of theft if he deals with the property obtained as his own and fails to make the required payment or disposition. The foregoing applies notwithstanding that it may be impossible to identify particular property as belonging to the victim at the time of the actor's failure to make the required payment or disposition. An officer or employee of the government or of a financial institution is presumed: (i) to know any legal obligation relevant to his criminal liability under this Section, and (ii) to have dealt with the property as his own if he fails to pay or account upon lawful demand, or is an audit reveals a shortage or falsification of accounts.[397]

The comments indicate that this section was designed to criminalize an area of law that has caused "difficulty."[398] It applies to a narrow situation that the comments say "arguably constitutes breach of contract rather than appropriation

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391. *Id.* at § 223.1(2)(d)(ii)(2).

392. *Id.* at § 223.1(2)(d)(ii)(3).

393. *Id.* at § 223.0(1).

394. MODEL PENAL CODE § 223.0(6) (AM. L. INST. 1985).

395. MODEL PENAL CODE § 223.1(2)(d)(ii)(3) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019). The comments in this area end with some concerns about whether stolen money would be considered property that may be subject to this section. *See* MODEL PENAL CODE art. 223 cmt. at 246-49 (AM. L. INST. 1980). Because the drafters reached the conclusion that drafting a defense for stolen money used in a legitimate transaction could not easily be fashioned, their musings are better left to a review of their comments. *Id.*

396. MODEL PENAL CODE § 223.1 as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019).

397. MODEL PENAL CODE § 223.8 (AM. L. INST. 1985).

398. *See* MODEL PENAL CODE art. 223 cmt. at 255 (AM. L. INST. 1980).

of property of another:"[399] The actor has to come into possession of property to deal with it on behalf of another, but instead he deals with the property as his own.[400] The comments candidly admit that it is difficult to distinguish in this situation when a person should be sued for breach of contract and when he should be punished for theft.[401] Also, the comments warn that if the section were adopted, courts should be cautioned not to apply it in areas traditionally governed by the law of contracts.[402]

The Committee and most other states decided not to adopt this section because of the possibility of its being applied to innocent commercial situations, turning breach of contract into a crime.[403] For example, it could apply to a situation when the actor becomes insolvent and consequently unable to pay for the property or when he negligently commingles funds.

In addition, the situation should be covered by general theft statutes in appropriate cases. However, as the comments point out, there could be some difficulty because the victim is never in possession of the funds, and the actor might not be said to "obtain" the property;[404] nevertheless, the Committee thought that the risk that this type of conduct would evade the criminal law was outweighed by the possibility of overbroad application.

I. Other General Theft Provisions and Concerns

To summarize, so far the article has covered the following parts of section 223.1: section 223.1(1) that consolidates the theft crimes[405] and 223.1(2) that sets out the different theft crimes.[406] The following subsections will be discussed in this part of the article: section 223.1(3) that grades the theft crimes consistently;[407]section 223.1(4) that provides for a claim-of-right defense[408] only briefly discussed earlier;[409] and section 223.1(5) that eliminates the common law spousal immunity in most cases.[410]

Along with the discussion of claim of right, I will also give a full explanation of the definition of "unlawful" and general defenses, which I saved

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399. *See id.* at 256.

400. *See id.* at 255-61.

401. *See id.* at 256.

402. *See id.* at 266.

403. MODEL PENAL CODE § 223.1 as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019; Feb. 8, 2019; Mar. 8, 2019).

404. *See* MODEL PENAL CODE art. 223 cmt. at 256-62 (AM. L. INST. 1980).

405. MODEL PENAL CODE § 223.1(1) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019). *See supra* II.B.

406. MODEL PENAL CODE § 223.1(2) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019; Feb. 8, 2019; Mar. 8, 2019).

407. *Id.* at § 223.1(3) as adopted by the Committee. Minutes, *supra* note 10 (Mar. 8, 2019).

408. *Id.* at § 223.1(4) as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019).

409. *See supra* II.C.1.

410. MODEL PENAL CODE § 223.1(5) as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019).

until the end to avoid distracting the reader earlier.[411] Before embarking on those discussions, the drafters expressed some additional concerns, only one of which has not been fully addressed in other parts of this article, and that is *di minimus* infractions.[412]

Although not specifically referenced in the statute,[413] the drafters were concerned that trivial misappropriations could be prosecuted as theft.[414] However, they thought that section 2.12 regarding *de minimus* infractions would be especially useful to alleviate this concern by requiring–or allowing under the Committee's version--dismissal in such a case.[415] The Committee adopted the following version of section 2.12, making only a few changes from the Model Code:[416]

Section 2.12 De Minimis Infractions

> The court ~~shall~~ may dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant's conduct:
>
> (1) was within a customary license or tolerance, neither expressly negatived by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense; or
>
> (2) did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or
>
> (3) presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense.
>
> The court shall not dismiss a prosecution under this ~~Subsection (3) of~~] section without ~~filing a written statement of its reasons~~ notice to the prosecutor and an opportunity to be heard and without putting the reasons for the dismissal on the record.[417]

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411. *See supra* discussion accompanying note 147.

412. *See supra* discussion accompanying notes 270-71.

413. MODEL PENAL CODE § 223.1 as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019).

414. *See* MODEL PENAL CODE art. 223 cmt. at 127 (AM. L. INST. 1980).

415. *See id. Compare* MODEL PENAL CODE § 2.12 (AM. L. INST. 1985), *with* MODEL PENAL CODE § 2.12 as adopted by the Committee. Minutes, *supra* note 10 (July 14, 2017).

416. *Compare* MODEL PENAL CODE § 2.12 (AM. L. INST. 1985), *with* MODEL PENAL CODE § 2.12 as adopted by the Committee. Minutes, *supra* note 10 (July 14, 2017).

417. MODEL PENAL CODE § 2.12 as adopted by the Committee. Minutes, *supra* note 10 (July 8, 2022). The Committee adopted § 2.12 with only a few changes. As indicated by the language stricken and underlined above, the Committee made a dismissal permissive and required that the prosecution have notice and an opportunity to be heard. *Id.*

The comments to article 223 cite section 2.12(1), which would allow dismissal of a prosecution in a theft case if the actor's conduct '"was within the customary license or tolerance, neither expressly negatived by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense."'[418] Section 2.12 (2) could also operate in a theft case if the actor did not threaten or cause the harm sought to be prevented by the offense or did so only to an extent too trivial to punish.[419] There is also a catchall in section 2.12(3) for other extenuating circumstances that could apply.[420]

The comments to article 223 also note that consent might be an issue for theft, which does not expressly provide that lack of consent is an element of the crime.[421] However, under section 2.11, consent would be a defense because if it "'negatives an element of the offense or precludes an element of the offense or precludes the infliction of the harm or evil sought to be prevented' by the law of theft."[422] The Committee specifically included lack of consent in the definition of "unlawful,"[423] which will be discussed at length below.[424]

With regard to the remaining general provisions in the statute, there has been an extensive discussion regarding the rationale and method for consolidation above.[425] This section deals with the remaining subsections of section 223.1 that have not been discussed earlier—grading, spousal immunity and claim of right.[426] I will then delve into the other defenses that are included in the term "unlawful," the discussion of which, as noted, has been deferred to the end of this section.

1. Grading

The Committee made several changes in section 223.1(3) to the grading system envisioned by the drafters, as noted by the stricken and underlined portions, as follows:

> ~~(2)~~(3) Theft shall be punished as follows:
>
> > (a) Theft is a felony in the 4th degree if the amounts exceed $1,000 or if the property stolen is a firearm or motor vehicle. ~~Theft constitutes a felony in the third degree if the amount involved exceeds $500, or if the~~

418. *See* MODEL PENAL CODE art. 223 cmt. at 127 (AM. L. INST. 1980).

419. *See id.*

420. *See id.*

421. *See id.*

422. *See id.*

423. MODEL PENAL CODE § 223.0 (13) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

424. *See infra* discussion accompanying notes 493-504.

425. *See supra* II.B.

426. MODEL PENAL CODE § 223.1(3)-(5) as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019; Mar. 8, 2019).

> ~~property stolen is a firearm, automobile, airplane, motorcycle, motorboat, or other motorpropelled vehicle, or in the case of theft by receiving stolen property, if the receiver is in the business of buying or selling stolen property~~
>
> (b) Theft not within the preceding paragraph constitutes a Class A misdemeanor, except that if the property was not taken from the person ~~or by threat~~ or in a breach of a fiduciary obligation, and the actor proves by a preponderance of the evidence that the amount involved was less than $100 ~~$50~~, the offense constitutes a Class D ~~petty~~ misdemeanor.
>
> ~~(c)~~ The amount involved in a theft shall be deemed to be the ~~highest value~~ fair market value, or if the fair market value is not ascertainable, fair value by ~~any~~ a reasonable standard, of the property or services that ~~which~~ the actor stole or attempted to steal. Amounts involved in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the grade of the offense.[427]

The Committee made several changes to section 223.1(3), starting with the value of the property that divides felony from misdemeanor theft.[428] To understand this change, it must be explained that the Committee first made another change that was prompted by the discussion of theft crimes. When considering theft, the Committee decided to add a fourth degree felony[429]

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427. *Id.* at § 223.1(3) as adopted by the Committee. Minutes, *supra* note 10 (Mar. 8, 2019).

428. *Id.*

429. MODEL PENAL CODE § 1.04. Classes of Crimes; Violations.

. . . .

*(2)

(a) A crime is a felony,

(i) if it is so designated in this Code or by any other statute of this State;

(ii) or, if there is no such designation in this Code or by any other statute of this State, if persons convicted thereof may be sentenced ~~[~~to death or~~]~~ to imprisonment for a term that, apart from an extended term, is in excess of one year.

(b) Felonies, identified by degree, are classified in this Code according to the relative seriousness of the offense into four categories: First Degree felonies; Second Degree felonies; Third Degree felonies; and Fourth Degree felonies.

MODEL PENAL CODE § 1.04 as adopted by the Committee. Minutes, *supra* note 10 (Sept 12, 2014). *See also* MODEL PENAL CODE § 6.01 as adopted by the Committee. Minutes, *supra* note 10 (Feb. 12, 2016).

The proposed sentencing scheme for felonies is as follows:

§ 6.06. Sentence of Imprisonment for Felony

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

(a) in the case of a felony of the first degree, for a term the minimum of which shall be fixed by the Court at not less than twenty ~~one year nor more than ten~~ years, and the maximum of which shall be

because the Model Code provides for only three degrees of felony punishment.[430] After dealing with crimes against the person, such as criminal homicide, kidnapping and sex crimes, the Committee thought that theft and other crimes should be punished less severely than negligent homicide, for example, which is a third degree felony.[431] Theft was the first fourth degree felony that the Committee adopted.[432]

The Model Code set the dividing line between felony and misdemeanor theft at $500,[433] which the Committee raised to $1000 in section 223.1(3)(a).[434] The $500 limit was established before the publication of the Model Code in 1961, so the Committee thought that that amount was outdated.[435] Furthermore, the Committee thought that felony theft should be more serious and set the higher amount as the dividing line.[436]

In addition, the Model Code adds the theft of firearms and several types of motor vehicles to felony theft in section 223.1(4)(a).[437] The reason for specifying firearms is because of the potential for lawless use of stolen forearms.[438] Theft of motor vehicles was also specifically included for the same reason, and because they are a special temptation for thieves.[439] The Committee agreed with this scheme; however, rather than cluttering up the statute with particular types of motor vehicles, as the Model Code drafters chose to do, the Committee decided to add "motor vehicles" to the definitions in section 223.0(4)[440] and to reference the current Mississippi Code definition of such vehicles.[441]

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life imprisonment;

(b) in the case of a felony of the second degree, for a term the minimum of which shall be fixed by the Court at not less than ten ~~one year nor more than three~~ years, and the maximum of which shall be ~~ten~~ twenty years;

(c) in the case of a felony of the third degree, for a term the minimum of which shall be fixed by the Court at not less than one year, ~~nor more than two years~~, and the maximum of which shall be ~~five~~ ten years;

(d) in the case of a felony of the fourth degree, for a term the minimum of which shall be fixed by the Court, and the maximum of which shall be five years.

MODEL PENAL CODE § 6.06 as adopted by the Committee. Minutes, *supra* note 10 (Feb. 12, 2016). See *infra* note 445 for fines imposed for felonies, as well as punishments for misdemeanors and violations.

430. MODEL PENAL CODE §6.01 (AM. L. INST. 1985).

431. MODEL PENAL CODE § 210.5 as adopted by the Committee. Minutes, *supra* note 10 (Mar. 9, 2018).

432. *Id.*

433. MODEL PENAL CODE § 223.1(2)(a) (AM. L. INST. 1985).

434. MODEL PENAL CODE § 223.1(3) as adopted by the Committee. Minutes, *supra* note 10 (Mar. 8, 2019).

435. *See* Johnson, *supra* note 1, at 110-13.

436. MODEL PENAL CODE § 223.1(3) as adopted by the Committee. Minutes, *supra* note 10 (Mar. 8, 2019).

437. MODEL PENAL CODE § 223.1(2)(a) (AM. L. INST. 1985).

438. *See* MODEL PENAL CODE art. 223 cmt. at 148 (AM. L. INST. 1980).

439. *See id.*

440. (4) "Motor vehicle" means motor vehicle as defined by MISS. CODE ANN. § 27-51- 5 (2022). MODEL PENAL CODE § 223.0(4) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

441. § 27-51-5 Definitions

The Model Code also added to the felony punishment a receiver who "is in the business of buying or selling stolen property."[442] The Committee did not accept the Model Code's version of this part of section 223.1(3)(a) because of the difficulties of defining one who is in such a business. It was also considered likely that such people would be dealing in felony amounts in any event.[443]

As with felonies, the Committee thought that the Model Code did not divide misdemeanors sufficiently either. The Model Code divided misdemeanors into only misdemeanors and petty misdemeanors.[444] When the Committee started studying more misdemeanor crimes, we decided to divide misdemeanors into four classifications in section 1.04(3), so that misdemeanor theft was further refined as well.[445] In section 223.1(3)(b), we re-classified theft of less than

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. . . .

(a) "Motor vehicle" means any device and attachments supported by one or more wheels which is propelled or drawn by any power other than muscular power over the highways, streets or alleys of this state. The term "motor vehicle" shall not include electric bicycles and electric personal assistive mobility devices as defined in section 63-3-103, or golf carts or low-speed vehicles as defined in section 1 of this act. However, mobile homes which are detached from any self-propelled vehicles and parked on land in the state are hereby expressly exempt from the motor vehicle ad valorem taxes, but house trailers which are actually in transit and which are not parked for more than an overnight stop are not exempted.

. . . .

MISS. CODE ANN. § 27-51-5 (2022).

442. MODEL PENAL CODE § 223.1(2)(a) (AM. L. INST. 1985).

443. MODEL PENAL CODE § 223.1(3)(a) as adopted by the Committee. Minutes, *supra* note 10 (Mar. 8, 2019).

444. MODEL PENAL CODE § 223.1(2)(b) (AM. L. INST. 1985).

445. MODEL PENAL CODE § 1.04 as adopted by the Committee. Minutes, *supra* note 10 (Oct. 10, 2014). Section 1.04. Classes of Crimes; Violations.

. . . .

(3)

(a) A crime is a misdemeanor,

(i) if it is so designated in this Code or by any other statute of this State; or

(ii) if there is no ~~such~~ designation in this Code or by any other statute of this State, persons convicted thereof may be sentenced to imprisonment for a term of which the maximum is one year. ~~than one year.~~

(b) Misdemeanors, identified by class, are classified in this Code according to the relative seriousness of the offense into four categories: Class A misdemeanors; Class B misdemeanors; Class C misdemeanors; and Class D misdemeanors.

~~(4)~~ ~~(5) An offense defined by this Code or by any other statute of this State constitutes a violation if it is so designated in this Code or in the law defining the offense or if no other sentence than a fine, or fine and forfeiture or other civil penalty is authorized upon conviction or if it is defined by a statute other than this Code that now provides that the offense shall not constitute a crime. A violation does not constitute a crime and conviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense.~~

~~[Proposed:~~ (4) ~~(5)~~

(a) An offense defined by this Code or by any other statute of this State constitutes a violation:

(i) if it is so designated in this Code, or in the law defining the offense, or by any other statute of this State;

(ii) or if no penalty or no other sentence than a fine, or fine and forfeiture or other civil penalty, is authorized upon conviction and the offense bears no other designation ~~is not otherwise designated~~ in this Code or any other statute of this State.

(b) A violation does not constitute a crime. ~~and conviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a criminal~~

(5) A conviction for any offense that is not a felony or misdemeanor gives rise to legal disability or disadvantage usually associated with a criminal conviction only when so specified., ~~as defined in~~

$1000 as a Class A misdemeanor in most cases, if the amount is between $100 and $1000.[446] If the amount is less than $100, the offense is a Class D misdemeanor, also in most cases.[447] The "in most cases" requires some explanation.

The drafters of the Model Code excluded some more serious categories of theft from the least serious category, (which the drafters denominated as petty misdemeanors, but which the Committee designated as Class D misdemeanors).[448] Certain non-felony thefts, that might otherwise be Class D misdemeanors, are classified as Class A misdemeanors under section 223.1(3)(b), regardless of the amount involved.[449] The first category of such thefts under the Model Code are "from the person or by threat."[450] The justification for punishing these thefts more seriously than as petty misdemeanors—Class D misdemeanors—is that thefts from the person or by

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~~subsection (1), *other than a felony or misdemeanor,* shall not give rise to any legal disability or disadvantage based on conviction of a criminal offense, unless otherwise specified.~~

MODEL PENAL CODE § 1.04 as adopted by the Committee. Minutes, *supra* note 10 (June 10, 2016). The Committee assigned the following fines for felonies and misdemeanors, as well as other punishments for misdemeanors and violations:

Section 6.03. Fines.

(1) A person who has been convicted of an offense may be sentenced to pay a fine not exceeding:

(a) $50,000, when the conviction is of a felony of the first degree;

(b) $25,000, when the conviction is of a felony of the second degree;

(c) $10,000, when the conviction is of a felony of the third degree;

(d) $5,000, when the conviction is of a felony of the fourth degree;

(e) $4,000, when the conviction is of a class A misdemeanor;

(f) $2,000, when the conviction is of a class B misdemeanor;

(g) $1,000, when the conviction is of a class C misdemeanor;

(h) $500, when the conviction is of a class D misdemeanor;

(i) $250, when the conviction is of a violation;

(j) any higher amount specifically authorized by statute.

(2) The purposes of fines are to exact proportionate punishments and further the goals ofgeneral deterrence and offender rehabilitation without placing a substantial burden on the defendant's ability to reintegrate into the law-abiding community.

MODEL PENAL CODE § 6.03 as adopted by the Committee. Minutes, *supra* note 10 (June 10, 2016).

Section 6.08 provides further punishment for misdemeanors.

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

(1) For a Class A misdemeanor, not more than one year.

(2) For a Class B misdemeanor, not more than six months.

(3) For a Class C misdemeanor, not more than three months.

(4) For a Class D misdemeanor, not more than one month.

(b) A violation is punished by a fine of not more than ~~$200~~ $250.

MODEL PENAL CODE § 6.08 as adopted by the Committee. Minutes, *supra* note 10 (June 10, 2016).

446. *Id.* at § 223.1(3)(b) as adopted by the Committee. Minutes, *supra* note 10 (Mar. 8, 2019).

447. *Id.*

448. *See supra* note 445.

449. MODEL PENAL CODE § 223.1(3)(b) as adopted by the Committee. Minutes, *supra* note 10 (Mar. 8, 2019).

450. MODEL PENAL CODE § 223.1(2)(b) (AM. L. INST. 1985).

threat involve the potential for violence.[451] Since the Committee had moved theft by extortion to robbery,[452] theft by threat was not included here.[453] The Committee did retain "theft from the person" as a Class A misdemeanor.[454] The reason for this is that a "purse-snatching" is theft from the person, but not necessarily robbery, for example.[455]

The second category of Class A misdemeanors in section 223.1(3)(b) under the Model Code is "in breach of fiduciary obligation."[456] The reason for this is that such thefts may be of small amounts over a period of time and difficult to discover and prove.[457] The Committee accepted this category as well.[458]

To be guilty of only a petty misdemeanor under the Model Code, the actor must prove by a preponderance of the evidence that the amount involved was less than $50.[459] The Committee accepted this scheme as well but raised the threshold amount to $100 and classified this as a Class D misdemeanor.[460]

The Committee did not accept the Model Code's scheme for valuation of the stolen property or services.[461] The drafters thought that valuation for grading purposes should be the "highest value, by any reasonable standard."[462] Instead, in section 223.1(3)(c), the Committee adopted the following standard for valuation:

> The amount involved in a theft shall be deemed to be the ~~highest value~~ fair market value, or if the fair market value is not ascertainable, fair value by ~~any~~ a reasonable standard, of the property or services ~~which~~ that the actor stole or attempted to steal.[463]

The Committee thought that this was a better-defined standard and easier to apply. The drafters thought that theft should be punished at the highest value, and if that lead to inequities, other sections of the Model Code would allow for judicial discretion to ameliorate the effect.[464] The Committee did not want to

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451. *See* MODEL PENAL CODE art. 223 cmt. at 148 (AM. L. INST. 1980).

452. *Compare* MODEL PENAL CODE § 223.1 as adopted by the Committee. Minutes, *supra* note 10 (Mar. 8, 2019), *with* MODEL PENAL CODE § 221.1(4) as adopted by the Committee. Minutes, *supra* note 10 (Mar. 8, 2019).

453. MODEL PENAL CODE § 223.1(3)(b) as adopted by the Committee. Minutes, *supra* note 10 (Mar. 8, 2019).

454. *Id.*

455. See Johnson, *supra* note 14, at 258-75 for a discussion of robbery.

456. MODEL PENAL CODE § 223.1(2)(b) (AM. L. INST. 1985).

457. *See* MODEL PENAL CODE art. 223 cmt. at 148 (AM. L. INST. 1980).

458. MODEL PENAL CODE § 223.1(3)(b) as adopted by the Committee. Minutes, *supra* note 10 (Mar. 8, 2019).

459. MODEL PENAL CODE § 223.1(2)(b) (AM. L. INST. 1985).

460. MODEL PENAL CODE § 223.1(3)(b) as adopted by the Committee. Minutes, *supra* note 10 (Mar. 8, 2019).

461. *Id.*

462. MODEL PENAL CODE § 223.1(2)(c) (AM. L. INST. 1985).

463. MODEL PENAL CODE § 223.1(3)(c) as adopted by the Committee. Minutes, *supra* note 10 (Mar. 8, 2019).

464. *See* MODEL PENAL CODE art. 223 cmt. at 141 (AM. L. INST. 1980).

rely excessively on judicial discretion because that could lead to uneven application.[465]

The Committee did accept the drafters' view in section 223.1(3) that amounts of thefts "committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the grade of the offense."[466] The remaining issue regarding grading is the effect that state of mind has on valuation.

The subsection on valuation does not state any mens rea regarding the actor's belief in the value of the property taken.[467] However, as discussed earlier,[468] section 2.02 supplies the mens rea for any material element of a crime that does not have a stated mens rea.[469] Because valuation is a material element of the offense, the minimum culpability for valuation is recklessness,[470] as defined in section 2.02(2)(c).[471] All of this is best explained in terms of the possible mens rea the actor might have.

First, if the actor believes that he is stealing property that is worth less than it actually is, the question is whether he is reckless in his assessment of value. If he is reckless, he is guilty of stealing the actual value of the property.[472]

The second situation is when the actor steals property he believes is worth less, but he is not reckless in that belief. In that case, he may claim mistake as a defense under section 2.04(1)[473] because his belief is not reckless, the mens rea

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465. *See, e.g.*, Johnson, *supra* note 1, at 114-15.

466. MODEL PENAL CODE § 223.1(3)(c) as adopted by the Committee. Minutes, *supra* note 10 (Mar. 8, 2019).

467. *Id.*

468. *See supra* discussion accompanying notes 223-30.

469. MODEL PENAL CODE § 2.02 (AM. L. INST. 1985). This violates the Committee's usual view that mens rea should be stated; however, the Committee recognized that section 2.02 would have to be relied on in some cases to avoid complicating the statutes. *See* Johnson, *supra* note 14, at discussion accompanying notes 221-22. This was one of those cases.

470. *See* MODEL PENAL CODE art. 223 cmt. at 144 (AM. L. INST. 1980).

471. *See supra* note 223.

472. *See* MODEL PENAL CODE Art 223 cmt. at 144 (AM. L. INST. 1980).

473. The Committee adopted the following version of section 2.04 Mistake:

Section 2.04 ~~Ignorance or~~ Mistake.

(1) ~~Ignorance or m~~Mistake as to a matter of fact ~~or law~~ is a defense if:

(a) the ~~ignorance or~~ mistake negatives the purpose, knowledge, belief, recklessness or criminal negligence required to establish a material element of the offense; or

(b) the law provides that the state of mind established by such ~~ignorance or~~ mistake constitutes a defense.

(2) Although ~~ignorance or~~ mistake would otherwise afford a defense to the offense charged, the defense is not available if the defendant would be guilty of another offense had the situation been as he supposed. In such case, however, the ~~ignorance or~~ mistake of the defendant shall reduce the grade and degree of the offense of which he may be convicted to those of the offense of which he would be guilty had the situation been as he supposed.

(3) A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when:

(a) the statute or other enactment defining the offense is not known to the actor and has not been published or otherwise reasonably made available prior to the conduct alleged; or

(b) he acts in reasonable reliance upon an official statement of the law, afterward determined

required for valuation.[474] Therefore, even if he stole property worth more, he is guilty only of theft of the value he non-recklessly believed he was appropriating.[475]

This result is contrary to the common law view that the actor is strictly liable for stealing the property as actually valued, regardless of his mens rea. The drafters rejected this view,[476] as did the Committee, and thought that to be guilty of stealing more than he intended, the actor must be at least reckless regarding the value. If he was not reckless, he is not guilty of stealing property worth the actual amount, but of course, he may be guilty of a less serious theft crime.

However, if the actor realizes his mistake as to the value of the property after the appropriation and retains the property, he is guilty of the theft of the correct higher valuation, so the defense of mistake will not profit him in that case.[477]

The third situation is more complicated, and that is when the actor believes that he is stealing property worth more than the actual value. In this case, since he intends to steal property worth more, the drafters thought that he should be guilty of stealing the higher amount.[478] To implement this position, the actor's culpability is governed by the language of section 223.1(3), which states that the grading of the theft is measured by the value is of the property he "stole or *attempted to steal*" [emphasis added].[479] Since he intended to steal the higher amount and took a substantial step that corroborated his intent—which is required for attempt[480]—he should be guilty of theft of the higher amount. In any event, he would be guilty of attempt to steal an amount higher than the actual value of the property. Because the punishment is the same for attempting to steal that amount and actually stealing it, the result is virtually the same.[481]

The next section, section 223.1(4), that has general application is the claim-of-right defense, which will be discussed at the end of this article,[482] along with other general defenses.[483] The last subsection that has general applicability is "theft from spouse/spousal immunity" and is discussed next.

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to be invalid or erroneous, contained in (i) a statute or other enactment; (ii) a judicial decision, opinion or judgment; (iii) an administrative order or grant of permission; or (iv) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.

(4) The defendant must prove a defense arising under subsection (3) of this section by a preponderance of evidence.

MODEL PENAL CODE § 2.04 as adopted by the Committee. Minutes, *supra* note 10 (July 8, 2022).

474. *See* MODEL PENAL CODE art. 223 cmt. at 145 (AM. L. INST. 1980).

475. *See id.* at 146.

476. *See id.* at 146-47.

477. *See id.* at 145.

478. *See id.* at 146-47.

479. MODEL PENAL CODE § 223.1(3)(c) as adopted by the Committee. Minutes, *supra* note 10 (Mar. 8, 2019).

480. MODEL PENAL CODE § 5.01 (AM. L. INST. 1985).

481. *Id.*

482. *See supra* discussion note 147.

483. *See infra* I.3.

2. Theft from Spouse/ Spousal Immunity

The Committee adopted section 223.1(5) regarding theft from a spouse:

> (5) ~~Theft from Spouse.~~ It is no defense that the theft was from the actor's spouse, except that misappropriation of household and personal effects, or other property normally accessible to both spouses, is theft only if the parties are living apart. ~~it occurs after the parties have ceased living together.~~[484]

At common law married women did not have property rights and spouses were considered one person, so there was no possibility of theft from a spouse.[485] The rather counter-intuitive justification for rendering spouses immune from stealing from each other is that to do otherwise disrupts family unity and injects the criminal law into domestic disputes.[486] There are more modern concerns, which include uncertainty regarding ownership of household items, as well as the possible unreliability of testimony regarding such ownership. Other rationales expressed in the comments are that such misappropriations do not threaten the community, are usually tolerated, and that spouses assume the risk of such conduct.[487]

Regardless of the validity of these views, the Model Code eliminated spousal immunity in most cases.[488] However, the Model Code did retain spousal immunity for theft if the parties were living together and the items allegedly stolen were household items and other property to which both spouses normally had access.[489] The Model Code excepted from the limited immunity the situation where one spouse stole property that was not a common household item but that was clearly separate property of the other spouse.[490] The Committee accepted most of the Model Code's version, except that the language was changed from if theft "occurs after the parties have ceased living together" to "if the parties are living apart."[491]

The last general section to discuss is the defense of claim of right. This leads into a discussion of the other defenses that are included in the term "unlawful," as previewed earlier.[492]

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484. MODEL PENAL CODE § 223.1(5) as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019).

485. *See* PERKINS, *supra* note 41, at 910.

486. *See* MODEL PENAL CODE art. 223 cmt. at 161 (AM. L. INST. 1980).

487. *See id.*

488. MODEL PENAL CODE § 223.1(4) (AM. L. INST. 1985).

489. *Id.*

490. *See* MODEL PENAL CODE art. 223 cmt. at 161-62 (AM. L. INST. 1980).

491. MODEL PENAL CODE § 223.1(5) as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019).

492. *See supra* discussion accompanying note 147.

3. Claim of Right and other defenses

To refresh this discussion, the term "unlawful" is a material element of the theft crimes under section 223.1(2)(a) and (b).[493] The Model Code did not provide for a definition of "unlawful," so the Committee added a definition in section 223.0(13): '"unlawful" means without a defense under section 223.1(4) (claim of right), section 2.11 (consent) or article 3 (justification)."[494] Thus, there are three defenses, the absence of which, indicates that the taking of control is unlawful.[495] The first defense is "claim of right," which is a defense that is peculiar to theft, and which has its own subsection, section 223.1(4).[496] Consent and justification are possible general defenses to all crimes under articles 2[497] and 3.[498]

Because the lack of these defenses is an element of the crime for sections 223.1(2)(a) and (b)—both of which contain the word "unlawful"—the prosecution bears the burden of proving the lack of these defenses, once the defendant has raised them,[499] as discussed earlier.[500] However, all three defenses apply to all of the theft crimes, whether the element of "unlawful" is an element of the crime or not. Justification[501] and claim of right are denominated affirmative defenses,[502] which as explained earlier, means in the case of theft that once the defendant raises the issue, the prosecution is required to prove the absence of the defense beyond a reasonable doubt.[503] Consent operates in several different contexts, so it is not denominated as an affirmative defense, as such.[504] However, the effect in the context of theft is usually that the prosecution has to bear the burden of persuasion to prove lack of the defense of consent. I will explain these defenses, starting with claim of right.

(a) Claim of Right

Claim of Right under section 223.1(4)[505] applies to situations that should not be considered theft because of the actor's honest belief that he had a right to do what he did with the property.[506] The claim-of-right defense may be asserted for other thefts, but it specifically applies to thefts requiring "unlawful" conduct

493. MODEL PENAL CODE § 223.1(2)(a) and (b) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

494. *Id.* at § 223.0(13) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

495. *Id.*

496. *Id.* at § 223.1 as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019).

497. *See infra* II.I.3(b).

498. *See infra* II.I.3(c).

499. *See supra* note 170.

500. *See supra* note 173 and discussion accompanying notes 170-74.

501. MODEL PENAL CODE § 3.01 as adopted by the Committee. Minutes, *supra* note 10 (Dec. 10, 2021).

502. *See id.* at § 223.1(4) as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019); *see also* MODEL PENAL CODE art. 223 cmt. at 177 (AM. L. INST. 1980).

503. *See supra* note 173 and discussion accompanying notes 170-74.

504. *See supra* discussion accompanying notes 170-75; MODEL PENAL CODE § 2.11 as adopted by the Committee. Minutes, *supra* note 10 (Nov. 4, 2005).

505. MODEL PENAL CODE § 223.1(4) as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019).

506. *See* MODEL PENAL CODE art. 223 cmt. at 151 (AM. L. INST. 1980).

because, again, the definition of "unlawful" means without the defenses of claim of right, consent or justification.[507] The Committee adopted the Model Code's version of the claim-of-right defense:[508]

> (4) Claim of Right ~~It~~ is an affirmative defense to prosecution for theft that the actor:
>
> > (a) was unaware that the property or service was that of another; or
> >
> > (b) acted under an honest claim of right to the property or service involved or that he had the right to acquire or dispose of it as he did;
> >
> > (c) took property exposed for sale, intending to purchase and pay for it promptly, or reasonably believing that the owner, if present, would have consented.[509]

There are three occasions for the defense. The first situation, section 223.1(4)(a), is when the actor mistakenly believed that the property was his own[510] or that it did not belong to another, such as when the property was believed to be abandoned.[511] This may seem redundant in many cases because the actor has to take, receive, obtain or transfer property of another in some way under sections 223.1(2)(a), (b), (c), (d), and (f), so that if his belief was mistaken that the property was his and not that of another, or that the property is abandoned, he would not be guilty of theft.[512] Similarly, if he believed that he was entitled to the services under section 223.1(2)(e), he has the defense of claim of right.[513] The defense is included to reiterate that if the actor honestly believed that the property was not property of another or that he was entitled to the services, this honest belief would preclude a charge of theft.[514] Furthermore, the defense is included to emphasize that mere recklessness or criminal negligence with regard to the elements of "obtaining property" and "property of another" are insufficient for culpability,[515] with an exception for immovable property.

Although the claim-of-right defense is unnecessary for theft of movable property or services, the defense elevates the mens rea required for one particular

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507. *Id.* at § 223.1(4) as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019).

508. *Id.* at § 223.1.

509. *Id.* at § 223.1(4). Because claim of right is denominated an affirmative defense, under the Committee's proposal, it would be clear now that the prosecution has the ultimate burden of persuasion to disprove it, unless the statute indicates otherwise. *See supra* note 170.

510. *Id. See* MODEL PENAL CODE art. 223 cmt. at 153 (AM. L. INST. 1980).

511. *See* MODEL PENAL CODE art. 223 cmt. at 152 (AM. L. INST. 1980).

512. *See id.*

513. *See id.*

514. *See id.* at 154.

515. *See id.*

type of theft, discussed more fully above,[516] and that is, when the actor transferred immovable property with the purpose of benefitting himself or another not entitled to it under section 223.1(2)(b).[517] Without the claim-of-right defense, if he had an honest belief that the property was his, but his belief was reckless about the ownership of the property, he could be guilty.[518] The explanation for this is that by operation of section 2.02(3), if an element of an offense has no stated mens rea, the mens rea required is at least recklessness,[519] as explained more fully above.[520] Under the claim-of-right defense in this case, honest belief under section 223.1(4)(a), even if reckless, would be a defense because he must actually be aware or have knowledge of the true ownership to be culpable.[521]

The second situation when the claim-of-right defense applies, section 223.1(4)(b), is when the actor knew that the property was that of another, or that he was not entitled to the service, but honestly believed that he had a claim to it, or he honestly believed that he had a right to deal with the property or service as he did.[522] For example, the claim-of-right defense would cover a situation in which a fiduciary dealt with property beyond his authority, but honestly believed that he had the authority to deal with the property in that way.[523]

Because of the operation of claim of right, the other material elements of the offense have a minimum mens rea of knowledge.[524] Since the prosecution bears the burden of persuasion to disprove this affirmative defense,[525] the prosecution has to prove that the claim of right is false by showing that the actor knew the property was not his—or that he was not entitled to the service—or that he knew that he did not have a right to deal with the property or service as he did.[526] Thus, while the other elements of an offense without a designated mens rea have the minimal mens rea of recklessness by operation of section 2.02(3),[527] the mens rea would be elevated to actual knowledge for these elements because of the operation of the claim-of-right defense.[528]

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516. *See supra* discussion accompanying notes 242-45.

517. MODEL PENAL CODE § 223.1(2)(b) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

518. *See* MODEL PENAL CODE art. 223 cmt. at 154 (AM. L. INST. 1980).

519. *See* MODEL PENAL CODE § 2.02(3) as adopted by the Committee. Minutes, *supra* note 10 (Mar. 9, 2018); *see also supra* note 223 for the full text of § 2.02.

520. *See supra* discussion accompanying notes 222-30.

521. *See* MODEL PENAL CODE art. 223 cmt. at 154 (AM. L. INST. 1980).

522. MODEL PENAL CODE § 223.1(4)(b) as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019).

523. *Id. See generally* MODEL PENAL CODE art. 223 cmt. at 155-56 (AM. L. INST. 1980). The comments mainly deal with situations in which it is not clear whether the defense applies. For example, a fiduciary profits from entrusted property, believing he is entitled to do so. *Id.*

524. *See* MODEL PENAL CODE art. 223 cmt. at 177 (AM. L. INST. 1980); *see also supra* note 223.

525. *See supra* discussion accompanying notes 173-76.

526. *See* MODEL PENAL CODE art. 223 cmt. at 177 (AM. L. INST. 1980).

527. *See supra* note 223.

528. *See* MODEL PENAL CODE art. 223 cmt. at 177 (AM. L. INST. 1980). In addition, the comments indicate that for section 223.1(2)(a) the requirement of purpose and the definition of "deprive" also lead to the conclusion that the actor must have knowledge that the property was that of another. *Id.*

An exception to the elevated knowledge requirement is found in the last subsection of claim of right, section 223.1(4)(c). This is the third occasion when claim of right may be a defense; however, it is limited to the situation where property is held for sale.[529] Thus, the actor would have a defense if he "took property exposed for sale" with the purpose of purchasing and paying for it promptly,[530] or he reasonably believed that "the owner, if present, would have consented."[531] The latter situation is the only type of claim of right in which honest belief does not suffice for the defense, rather the belief must be reasonable. While theft requires purposefulness or knowledge,[532] the defense under section 223.1(4)(c) requires only reasonable belief.[533] Thus, the mens rea for taking of property exposed for sale when the actor believes the owner would have consented would be criminal negligence or recklessness, instead of purposefulness when the claim-of-right defense is raised.[534] The explanation for this is that the general definition of reasonable belief in section 1.13(16), proposed by the Model Code and adopted by the Committee, is as follows: "reasonably believes" or "reasonable belief" designates a belief that the actor is not reckless or criminally negligent in holding."[535] Thus, the prosecution would have to prove only that the actor was at least criminally negligent or reckless in believing that the owner would have consented to actor's taking the property exposed for sale.

To recap, claim of right is a defense applicable to all thefts, but specifically to thefts requiring the element of "unlawful" because that element is defined as without claim of right, consent or justification.[536] I turn now to the defense of consent as it applies to theft.

(b) Consent

Consent is a general defense that applies to theft, as it does to many other crimes.[537] In addition, lack of consent is specifically included in the definition

529. MODEL PENAL CODE § 223.1(4)(c) as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019).

530. *Id.*

531. *Id.*

532. MODEL PENAL CODE § 223.1(2) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

533. *Id.* at § 223.1(4)(c) as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019).

534. *See* MODEL PENAL CODE art. 223 cmt. at 157 (AM. L. INST. 1980).

535. MODEL PENAL CODE § 1.13(16) as adopted by the Committee. Minutes, *supra* note 10 (Dec. 8, 2006). The Committee adopted the Model Code's definition of reasonable belief, clarifying that "negligence" means "criminal negligence."

> Section 1.13 General Definitions
>
> . . .
>
> (15) "criminally negligently" has the meaning specified in section 2.02 and equivalent terms such as "criminal negligence" or "with criminal negligence" have the same meaning, as do the terms "negligence" or "with negligence" unless a different meaning plainly appears;

536. *Id.* at § 223.0(13) as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019).

537. *See* MODEL PENAL CODE art. 2 cmt. at 394 (AM. L. INST. 1985).

of "unlawful" in section 223.0(13).[538] The Committee adopted the following version of consent that may be pertinent to theft in section 2.11:

> Section 2.11 Consent
>
> > (1) The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such consent negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense.
> >
> > . . . .
> >
> > (3) Unless otherwise provided by the Code or by the law defining the offense, assent does not constitute consent if:
> >
> > > (a) if is given by a person who the actor knows is legally incompetent to authorize the conduct charged to constitute the offense; or
> > >
> > > (b) it is given by a person who by reason of youth, mental disease or defect or intoxication is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or
> > >
> > > (c) ~~it is given by the person whose improvident consent is sought to be prevented by the law defining the offense; or~~ it is induced by force, duress or deception of a kind sought to be prevented by the law defining the offense; or
> > >
> > > (d) it is against public policy to permit the conduct or the resulting harm, even though assented to.[539]

Consent is clearly a defense to theft crimes because the law of theft contemplates taking of the property of another without consent.[540] For those theft crimes that do not specifically require taking property without consent, consent under section 2.11(1) nevertheless "precludes the harm or evil"[541] that theft is trying to prevent.[542] Thus, the defense is not always required because

538. MODEL PENAL CODE § 223.0(13) as adopted by the Committee. Minutes, *supra* note 10 (July 8, 2022).

539. *Id.* at § 2.11 as adopted by the Committee. Minutes, *supra* note 10 (July 8, 2022).

540. *See* MODEL PENAL CODE art. 2 cmt. at 394 (AM. L. INST. 1985).

541. MODEL PENAL CODE § 2.11(1) as adopted by the Committee. Minutes, *supra* note 10 (Nov. 4, 2005).

542. *Id.*

theft may not be proven unless the element of consent is lacking.[543] The defense in those cases is just added assurance that theft must be unconsented.

There are some important exceptions to consent, embodied in section 2.11(3). The first is that consent is ineffective if the person assenting is legally incompetent under section 2.11(3)(a).[544] Thus, if the person is not of legal age to consent to the transfer of property, consent would not be a defense because the incompetence referred to here is legal, not mental, incompetence.[545] The Committee agreed with this, but decided to require that the actor has to have knowledge that the person purporting to consent is incompetent before the actor loses the defense.[546]

Mental incompetence is covered in section 2.11(3)(b), so that if the person assenting were known to be mentally incompetent because of youth, mental disease or defect or intoxication and unable to make a reasonable judgment, consent would also be ineffective.[547]

In addition, consent is ineffective if induced by force, duress or deception under section 211(3)(c).[548] Again, since theft by force or duress has been moved to robbery, force or duress would probably not operate in theft, as presently constituted.[549]

Finally, the Committee added in section 2.11(3)(d) that consent is ineffective if it is against public policy to allow the resulting harm, even if there was assent to it.[550] For example, when the actor obtains assent by fraudulent methods, such consent would be ineffective.[551]

Justification in article 3 of the Model Code is the last defense I will discuss that is applicable to theft.[552] There are several justification sections, but only a few of the sections are relevant to theft.

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543. *See* MODEL PENAL CODE art. 223 cmt. at 395 (AM. L. INST. 1980).

544. MODEL PENAL CODE § 2.11(3) (a) as adopted by the Committee. Minutes, *supra* note 10 (Nov. 4, 2005).

545. *See* MODEL PENAL CODE art. 223 cmt. at 398 (AM. L. INST. 1980).

546. MODEL PENAL CODE § 2.11(3)(a) as adopted by the Committee. Minutes, *supra* note 10 (July 8, 2022). The Model Code left the mens rea for this subsection to the operation of section 2.02, so that the actor would have to be reckless. In keeping with the Committee's practice, as discussed earlier, *supra* note 469, we tried to state the mens rea in most cases to avoid leaving mens rea to the operation of § 2.02. *See* Johnson, *supra* note 14, at discussion accompanying notes 221-22.

547. MODEL PENAL CODE § 2.11(3)(b) as adopted by the Committee. Minutes, *supra* note 10 (Nov. 4, 2005).

548. *Id.*

549. *See supra* discussion accompanying notes 139, 451. When the Committee moved theft by threat to robbery, that part of the robbery does not use the word theft in part because that subsection has its own defenses. See Johnson, *supra* note 14, at 258-75 for a complete explanation of the Committee's revisions to the robbery and theft statutes in this regard.

550. MODEL PENAL CODE § 2.11(3)(d) as adopted by the Committee. Minutes, *supra* note 10 (July 8, 2022).

551. *See* MODEL PENAL CODE art. 2 cmt. at 399 (AM. L. INST. 1980).

552. MODEL PENAL CODE art. 3 (AM. L. INST. 1985).

(c) Justification

Justification is a general defense to many crimes, including theft, and specifically to thefts involving the element of "unlawful" conduct.[553] Again, the definition of "unlawful" in section 223.0(13) specifies that, to be unlawful, the conduct must be without one of three defenses, including the defense of lack of justification under article 3.[554] Most of the justification sections would not apply to theft crimes because they are justifying the use of force to protect the actor, the public, another person, or property.[555] There are, however, three justifications that might apply to theft: choice of evils under section 3.02,[556] execution of public duty under section 3.03,[557] and protection of property in section 3.10.[558]

The first section of article 3, section 3.01, provides that justification is an affirmative defense[559] applicable to many crimes, and that would include theft crimes. In addition, as discussed earlier,[560] "unlawful" is an element of some of the theft crimes,[561] so the prosecution bears the burden of proving that the act was unlawful, once the issue is raised.[562] Because affirmative defenses applicable to theft under the Model Code usually operate to cast the burden of disproving the affirmative defense onto the prosecution once the defendant has raised the issue, the effect is essentially not that different, whether justification is raised as a defense or as part of the element of the crime.[563] The first justification that could apply to theft is choice of evils, which I will discuss first.

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553. MODEL PENAL CODE § 223.1(2)(a) and (b) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

554. *Id.* at § 2.23.0(13).

555. The following sections of article 3 would not apply to theft because they all are defenses to use of force: MODEL PENAL CODE § 3.04 Use of Force in Self Protection; MODEL PENAL CODE § 3.05 Defense of Others; MODEL PENAL CODE § 3.06 Use of Force for Protection of Property; MODEL PENAL CODE § 3.07 Use of Force in Law Enforcement; MODEL PENAL CODE § 3.08 Use of Force by Persons with Special Responsibility for Care, Discipline, or Safety of Others. MODEL PENAL CODE § 3.09 Mistake of Law as to Unlawfulness of Force or Legality of Seizure; Reckless or Criminally Negligent Use of Otherwise Justifiable Force. MODEL PENAL CODE Art. 3 as adopted by the Committee. Minutes, *supra* note 10 (Dec. 9, 2021; Jan. 14, 2022; Feb. 11, 2022; Mar. 11, 2022; Apr. 8, 2022).

556. MODEL PENAL CODE § 3.02 as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2022). See *infra* note 564 for the full version of the statute.

557. MODEL PENAL CODE § 3.03 as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2022). See *infra* II.I.3(b)(ii) for a discussion of this section.

558. MODEL PENAL CODE § 3.10 as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2022). See *infra* II.I.3(b)(iii) for a discussion of this section.

559. MODEL PENAL CODE § 3.01 as adopted by the Committee. Minutes, *supra* note 10 (Dec. 10, 2021) provides in pertinent part:

> Section 3.01. Justification an Affirmative Defense; Civil Remedies Unaffected.
>
> (1) In any prosecution based on conduct ~~which~~ that is justifiable under this Article, justification is an affirmative defense.
>
> (2) The fact that conduct is justifiable under this Article does not abolish or impair any remedy for such conduct ~~which~~ that is available in any civil action.

560. *See supra* discussion accompanying notes 171-73.

561. MODEL PENAL CODE § 223.1(2)(a) and (b) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

562. *See* MODEL PENAL CODE art. 2 cmt. at 41 (AM. L. INST. 1985).

563. *See supra* discussion accompanying notes 173-76.

(i) Choice of Evils

Section 3.02, Choice of Evils, is the first justification that could be a defense to theft.[564] If the actor believed that the harm he caused is necessary to avoid a *greater* harm, he may have the defense of choice of evils.[565] There are several conditions to this defense. First, under section 3.02(1)(a), the harm or evil to be avoided must be greater than the harm or evil of the actor's conduct.[566] This balancing is left up to the jury, subject to some public policy decisions that may be made as a matter of law.[567] In addition, the actor's belief must be honest; he must actually believe in the necessity of his conduct to avoid a greater harm.[568] Also, under section 302(1)(b), the defense applies only if no other law prohibits a defense in the situation,[569] or if there is no clear legislative purpose that precludes the defense under section 302(1)(c).[570]

The final subsection under the Model Code limits the choice-of-evils defense in cases where the actor was reckless or criminally negligent[571] in *causing* the situation requiring the choice of evils. In such a case, he may be guilty of crimes requiring criminal negligence or recklessness.[572] The Committee adopted all of the aforementioned parts of section 302(1).[573]

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564. § 3.02. Justification Generally: Choice of Evils.

(1) Conduct ~~which~~ that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:

(a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and

(b) neither the Code nor other law defining the ~~defense~~ offense provides exceptions or defenses dealing with the specific situation involved; and

(c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

(2) When the actor was criminally negligent or reckless in appraising the necessity for his conduct, the justification afforded by this section is unavailable.

~~(2)~~ (3) When the actor was reckless or criminally negligent in bringing about the situation requiring a choice of harms or evils ~~or in appraising the necessity for his conduct~~, the justification afforded by this section is unavailable in a prosecution for any offense for which recklessness or criminal negligence, as the case may be, suffices to establish culpability.

MODEL PENAL CODE § 3.02 as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2022).

565. *Id.*

566. *Id.*

567. *See* MODEL PENAL CODE art. 3 cmt. at 12-13 (AM. L. INST. 1985). While the Model Code does not specifically say that the actor's belief must be honest, that is what is meant by "belief." *See, e.g.*, *id.*

568. *See id*. at 12.

569. MODEL PENAL CODE § 3.02(1)(b) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2022).

570. *Id.* at § 3.02(1)(c).

571. The Model Code uses the term "negligence" to mean criminal negligence, which causes confusion. The Committee made a general change of adding the word "criminal" before negligence in virtually all cases. See Johnson, *supra* note 1, at 119 for an explanation for this change. See *supra* note 535 for the full text of this definition.

572. MODEL PENAL CODE § 3.02(2) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2022). *See* MODEL PENAL CODE Art 3 cmt. at 9 (AM. L. INST. 1985).

573. MODEL PENAL CODE § 3.02 as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2022).

The Committee did make one important change by adding section 3.02(2).[574] Under the Model Code, the actor may claim the choice of evils defense in most cases of theft if he honestly believed in the necessity of his conduct to avoid a greater harm.[575] However, if his belief in *appraising* the situation was criminally negligent or reckless, he could be guilty of crimes requiring those states of mind, but not of crimes requiring purpose or knowledge,[576] which is required for most thefts.[577] In other words, his belief just has to be honest that if, for example, he would starve unless he stole the property of another, in which case, he may claim the defense.[578] Under the Committee's change, the mens rea required for the actor's belief in *appraising the situation* is changed from simple honest belief to recklessness or criminal negligence, so that if the actor is reckless or criminally negligent in his belief—even if honest—that the action was necessary, he may not claim this justification to any crime, including theft.[579] Thus, if his belief was criminally negligent or reckless that he would starve if he did not steal food, he does not have the defense at all.[580]

The Model Code also provides that even if the actor was reckless or criminally negligent in *causing* situation that necessitated the choice of evils, he may claim the defense to crimes requiring purpose or knowledge, such as theft.[581] The Committee did not change this part of the Model Code and thought that the actor should have a defense to such crimes as theft requiring purpose or knowledge, even if he was reckless or criminally negligent in causing the situation.[582] Therefore, if sailors caused a shipwreck because they were criminally negligent or reckless, they could still claim a defense to theft for stealing food from the ship's stores, as long as they were not criminally negligent or reckless in their belief that they would starve otherwise.

The next justification that could apply to theft is execution of public duty, which I will discuss at this point.

(ii) Execution of Public Duty

The purpose of the execution of public duty defense in section 3.03[583] is to provide a defense for persons engaging in what would otherwise be unlawful

574. *See supra* note 137.

575. MODEL PENAL CODE § 3.02 (2) (AM. L. INST. 1985).

576. *Id.* at § 3.02.

577. MODEL PENAL CODE § 223.1 as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019; Feb. 2019; Mar. 2019).

578. *See* MODEL PENAL CODE § 3.02 (2) (AM. L. INST. 1985).

579. MODEL PENAL CODE § 3.02 (2) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2022).

580. *Id.* at § 3.02(3).

581. *See supra* discussion accompanying notes 147, 244-45, 376-79, 467-81, 516-21, 524-27.

582. MODEL PENAL CODE § 3.02(2) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2022).

583. The Committee adopted the following part of section 3.03 that could be applicable to theft:

§ 3.03. Execution of Public Duty.

(1) Except as provided in subsection (2) of this section, conduct is justifiable when it is required or authorized by:

(a) the law defining the duties or functions of a public officer or the assistance to be rendered

conduct while executing public duties,[584] such as a policeman speeding to catch a fugitive, or a sheriff trespassing to execute a warrant.[585] Such prosecutions are rare outside of the use of excessive force, which is beyond the scope of this discussion; nevertheless, the comments indicate that the drafters thought it was important to add the defense.[586]

There may be situations where execution of public duty would otherwise be theft, such as when a sheriff executes an order to repossess property.[587] This would not be unlawful because of the justification of execution of public duty.[588]

Because it would be unwieldy to list all the sources of public duty that would be covered by the section, section 3.03(1) incorporates by reference the law defining the duties of a public officer.[589] If the officer was acting in the scope of those duties, he has a defense under section 3.03.[590] Section 3.03)(1) lists four specific sources of such duties: duties of public officers—and of the duties of private citizens called upon to aid them[591]—duties relating to executing legal process;[592] conduct required by judicial order;[593] and law relating to

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to such officer in the performance of his duties; or

(b) the law governing the execution of legal process; or

(c) the judgment or order of a competent court or tribunal; or

(d) the law governing the armed services or the lawful conduct of war; or

(e) any other provision of law imposing a public duty.

. . . .

(3) The justification afforded by subsection (1) of this section applies:

(a) when the actor believes his conduct to be required or authorized by the judgment or direction of a competent court or tribunal or in the lawful execution of legal process, notwithstanding lack of jurisdiction of the court or defect in the legal process; and

(b) when the actor believes his conduct to be required or authorized to assist a public officer in the performance of his duties, notwithstanding that the officer exceeded his legal authority.

(4) When the applicability of the justification under this section depends on the actor's belief, culpability for offenses requiring recklessness or criminal negligence is not barred if the actor's belief was reckless or criminally negligent.

. . . .

MODEL PENAL CODE § 3.03 as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2022). Section 3.03(2) excepts some situations involving use of force, which is omitted as not applicable to theft. MODEL PENAL CODE § 3.03(2) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2022).

584. *See* MODEL PENAL CODE art. 3 cmt. at 23 (AM. L. INST. 1985).

585. *See id.*

586. *See id.* at 24.

587. *See id.* at 23.

588. *See id.*

589. MODEL PENAL CODE § 3.03(1) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2022).

590. *See* MODEL PENAL CODE art. 3 cmt. at 24 (AM. L. INST. 1985).

591. MODEL PENAL CODE § 3.03(1)(a) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2022).

592. *Id.* at § 3.03(1)(b).

593. *Id.* at § 3.03(1)(c).

military service.[594] Section 3.03(1)(e) adds a catchall for "any other provision of law imposing a public duty."[595]

The execution of public duty justification may apply if the law defining the offense or interpretations of the law might provide an excuse, and mistake of law under section 2.04 provides a defense in some of these cases.[596] Section 2.04 would allow mistake of law to be a defense if the officer did not know about a statute that has not been published or otherwise reasonably made available or if he acted in reasonable reliance on an official statement later found to be erroneous.[597] The statement has to be contained in a statute, judicial opinion, administrative order or official interpretation by the public officer or body responsible for enforcing the particular law.[598] The comments indicate that the officer's mistake of law should not be a defense otherwise because he is required to know the law regarding his duties.[599] In addition, section 3.03(3)(a) specifically provides a justification defense for an unauthorized judgment because the court lacked jurisdiction or if there was a defect in the legal process.[600]

Finally, there is a justification defense in section 3.03(3)(b) for an actor who is called on to assist a public officer who the actor believes is acting within his authority.[601] The Committee thought that honest belief should be sufficient for this defense. However, the Committee added section 3.03(4), so that the actor may be guilty of a crime requiring criminal negligence or recklessness, if his belief that he was acting under authority of law was criminally negligent or reckless.[602] Thus, for a crime requiring knowledge or purpose, such as theft, he could claim the defense if his belief was simply honest.[603] This scheme was proposed by the Model Code by operation of section 3.09, which applies to several of the justification sections.[604] The Committee decided for the sake of

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594. *Id.* at § 3.03(1)(d).

595. *Id.* at § 3.03(1)(e).

596. *See* MODEL PENAL CODE art. 3 cmt. at 26 (AM. L. INST. 1985).

597. MODEL PENAL CODE § 2.04 as adopted by the Committee. Minutes, *supra* note 10 (May 3, 2002).

598. *Id.*

599. *See* MODEL PENAL CODE art. 3 cmt. at 25-26 (AM. L. INST. 1985).

600. MODEL PENAL CODE § 3.03(3)(a) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2022).

601. *Id.* at § 3.03(3)(b).

602. *Id.* at § 3.03(4).

603. The comments indicate that this result could be obtained by applying section 3.09; however, the only part of section 3.09 that applies to section 3.03 is with regard to use of force. MODEL PENAL CODE § 3.09 as adopted by the Committee. Minutes, *supra* note 10 (Dec. 9, 2021).

604. § 3.09. Mistake of Law as to Unlawfulness of Force or Legality of Arrest~~; Reckless or Negligent Use of Otherwise Justifiable Force; Reckless or Negligent Injury or Risk of Injury to Innocent Persons.~~

~~(1)~~ The justification afforded by sections 3.04 to 3.07, inclusive, is unavailable when:

(1)

(a) the actor's belief in the unlawfulness of the force or conduct against which he employs protective force or his belief in the lawfulness of an arrest that he endeavors to effect by force is erroneous; ~~and~~ or

(b) his belief in the unlawfulness of a seizure that he endeavors to effect by force is erroneous; and

(2) his error is due to ignorance or mistake as to the provisions of the Code, any other provision of the criminal law or the law governing the legality of ~~an arrest~~ any seizure or search.

clarity to move the following subsection, inter alia, of Model Code section 3.09 to each of the affected sections, including section 3.03.[605]

> (4) When the applicability of the justification under this section depends on the actor's belief, culpability for offenses requiring recklessness or criminal negligence is not barred if the actor's belief was reckless or criminally negligent.

The two justifications just discussed, choice of evils[606] and execution of public duty[607] are general defenses and apply to many crimes. The last justification that might apply to theft crimes relates specifically to property crimes. I will turn now to section 3.10, "justification in property crimes."

(iii) Justification in Property Crimes

There is a justification relating to use of force against other persons to protect property in article 3, which is not relevant to theft.[608] However, section 3.10 is a specific section devoted to use of force against *property* as a justification in property crimes.[609]

The Committee adopted the following version of section 3.10:

§ 3.10 Justification in Property Crimes

> (1) Conduct involving the appropriation, seizure or destruction of, damage to, intrusion on or interference with property is justifiable under circumstances that would establish a defense of privilege in a civil action ~~justification~~ based thereon, unless:

> ~~(2) Where the applicability of the justification under Sections 3.04 to 3.08 depends on the actor's belief, culpability for offenses requiring recklessness or criminal negligence is not barred if the actor's belief was recklessly or criminally negligently formed. Where the actor believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under Sections 3.03 to 3.08 but the actor is reckless or negligent in having such belief or in acquiring or failing to acquire any knowledge or belief that is material to the justifiability of his use of force, the justification afforded by those Sections is unavailable in a prosecution for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability.~~
>
> ~~(3) When the actor is justified under Sections 3.03 to 3.08 in using force upon or toward the person of another but he recklessly or negligently injures or creates a risk of injury to innocent persons, the justification afforded by those Sections is unavailable in a prosecution for such recklessness or negligence towards innocent persons.~~
>
> MODEL PENAL CODE § 3.09 as adopted by the Committee. Minutes, *supra* note 10 (Dec. 10, 2021).

605. MODEL PENAL CODE § 3.09 and § 3.03 as adopted by the Committee. Minutes, *supra* note 10 (Dec. 10, 2021).

606. *See supra* II.I.3(c)(i).

607. *See supra* section II.I.3(c)(ii).

608. MODEL PENAL CODE § 3.06 as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2022).

609. *See* MODEL PENAL CODE art. 3 cmt. at 155 (AM. L. INST. 1985).

> ~~(1)~~ (a) the Code or the law defining the offense deals with the specific situation involved; or
>
> ~~(2)~~ (b) a legislative purpose to exclude the justification claimed otherwise plainly appears.
>
> ~~(3)~~ (2) When the applicability of the justification under this section depends on the actor's belief, culpability for offenses requiring recklessness or criminal negligence is not barred if the actor's belief was reckless or criminally negligent.[610]

This section applies to situations in which there is interference with property.[611] The Model Code provides a justification if the interference is otherwise justified by the Code[612] or other criminal law or by civil law.[613] For example, if property must be destroyed to stop the spread of a fire, the Model Code would allow civil law to govern.

The Model Code protects certain property interests by imposing penal sanctions for property crimes, but generally does not create new property interests.[614] Thus, reference to property and tort law is more appropriate when dealing with interference with property situations.[615] The alternative is to repeat the civil law in this section.[616]

There are two limitations to the defense of justification in property crimes. One is that if there is a law defining an offense in the specific situation,[617] and the other is if a legislative purpose to exclude the defense plainly appears.[618]

The Committee added the same provision derived from section 3.09(2) to section 3.10 that it added to section 3.03 and other justifications sections; that is, that if the actor's belief was criminally negligent or reckless, he may be guilty of an offense requiring criminal negligence or recklessness.[619] The Committee decided that honest belief was not enough to claim a total defense under any of the justification sections, if the actor's belief was reckless or criminally negligent.[620]

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610. MODEL PENAL CODE § 3.10 as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2022).

611. *See* MODEL PENAL CODE art. 3 cmt. at 156 (AM. L. INST. 1985).

612. Under the Committee's definition, the Code refers to the Mississippi Criminal Code, as ultimately adopted by the legislature. MODEL PENAL CODE § 1.01 as adopted by the Committee. Minutes, *supra* note 10 (Nov. 10, 2014).

613. *See* MODEL PENAL CODE art. 3 cmt. at 156 (AM. L. INST. 1985).

614. *See id*.

615. *See id.*

616. *See id.*

617. MODEL PENAL CODE § 3.10(1) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2022).

618. *Id.* at § 3.10(2).

619. *Id.* at § 3.10(2).

620. MODEL PENAL CODE art. 3 as adopted by the Committee. Minutes, *supra* note 10 (Dec. 9, 2021; Jan. 14, 2022; Feb. 11, 2022; Mar. 11, 2022; Apr. 8, 2022).

This is the end of the discussion of theft and the defenses applicable to the theft crimes. The next section addresses the related crime of "unauthorized use of motor vehicles."

III. CRIME RELATED TO THEFT: UNAUTHORIZED USE OF MOTOR VEHICLES

The Committee adopted the following version of unauthorized use of motor vehicles:

> Section 223.2 Unauthorized Use of ~~Automobiles and Other~~ Motor Vehicles
>
> A person commits a Class A misdemeanor if he knowingly operates another's automobile, airplane, motorcycle, motorboat, or other motor vehicle without consent of the owner. It is an affirmative defense to prosecution under this section that the actor reasonably believed that the owner would have consented to the operation had he known of it.[621]

Unauthorized use is intended to cover use of motor vehicles without the owner's consent. This conduct does not amount to theft because there was no intent to withhold the property from the owner permanently.[622] However, if the motor vehicle was held for an extended period of time or was abandoned in a place where the owner was unlikely to recover it, the offense becomes theft by operation of section 223.1(2)(a)[623] and the definition of "deprive" under section 223.0(3)(a) and (b).[624] Likewise under section 223.0(5)(c), if the actor caused damage of more than $1000 or uses the motor vehicle to commit a crime, the offense would be elevated to theft.[625]

Unauthorized use of a motor vehicle was traditionally termed "joyriding" and not considered very serious.[626] However, the conduct has always been prohibited because of the likelihood of damage to the vehicle and to discourage irresponsible behavior.[627] For this reason, the Committee assigned a Class A misdemeanor punishment to the offense.[628]

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621. MODEL PENAL CODE § 223.2 as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019).

622. *See* MODEL PENAL CODE art. 223 cmt. at 270-71 (AM. L. INST. 1980). Intent to deprive the owner permanently is usually required for theft. *See supra* II.C.1.c.

623. MODEL PENAL CODE § 223.1(a) as adopted by the Committee. Minutes, *supra* note 10 (Jan. 14, 2019).

624. *Id.* at § 223.0(3)(c) as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019). *See supra* discussion II.C.1.c.

625. *Id.*

626. *See* MODEL PENAL CODE art. 223 cmt. at 271 (AM. L. INST. 1980).

627. *See id.*

628. MODEL PENAL CODE § 223.2 as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019).

The Committee limited this section to motor vehicles, as defined by Mississippi law.[629] This is consistent with the comments that indicate that the drafters did not want to extend unauthorized use to other types of property for fear that tolerable conduct, such as borrowing a neighbor's tools, could intrude into the criminal law. In addition, there was no widespread indication that temporary use of other types of property was a significant social problem that should be criminalized.[630]

The section is limited to operating a motor vehicle, rather than any preliminary behavior, such as taking control.[631] The danger to be prohibited is in the joyriding, not the taking.[632] The Committee added the mens rea of "knowingly" to the requirement of operating the motor vehicle of another without consent,[633] so the actor must be practically certain that he did not have the right to operate the motor vehicle.[634]

In contrast, the Model Code intended for the mens rea to be recklessness in the actor's belief that the use of the vehicle was authorized, by operation of the catch-all section 2.02(3), which prescribes the mens rea of recklessness whenever no mens rea is stated.[635] As discussed in an earlier article, the Committee preferred to state the mens rea, rather than to leave it to the operation of section 2.02 whenever possible.[636] The Committee thought that the actor should be practically certain that he did not have consent to operate the vehicle of another, rather than being merely reckless in that belief.

The use is unauthorized if it is without the owner's consent.[637] Thus, mistake under section 2.04[638] could be an affirmative defense if the actor mistakenly believed that the use was authorized.[639] Although since—under the Committee's version—the actor must know that the use is without consent, the need for the defense of mistake is less likely. In addition, the Model Code provides an additional defense, which the Committee adopted. Even if the actor knows that the owner did not consent, he would not be guilty if he reasonably believed that the owner would have consented had he been aware of the use.[640] This would exempt the tolerable conduct of informal borrowing.[641] As discussed earlier, reasonable belief is defined under the Model Code by section 1.13, as adopted by the Committee, as belief that is not reckless or criminally

629. *Id.* at § 223.0(4) as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019).

630. *See* MODEL PENAL CODE art. 223 cmt. at 271-72 (AM. L. INST. 1980).

631. MODEL PENAL CODE § 223.2 as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019).

632. *See* MODEL PENAL CODE art. 223 cmt. at 273 (AM. L. INST. 1980).

633. MODEL PENAL CODE § 223.2 as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019).

634. *See supra* note 223 and discussion accompanying notes 95-96. See Johnson, *supra* note 1, at V.A for a complete discussion of section 2.02 and the mens rea of knowing.

635. *See* MODEL PENAL CODE art. 223 cmt. at 274 (AM. L. INST. 1980).

636. *See* Johnson, *supra* note 14, at discussion accompanying notes 221-22.

637. MODEL PENAL CODE § 223.2 as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019).

638. *See supra* note 473.

639. *See* MODEL PENAL CODE art. 223 cmt. at 274 (AM. L. INST. 1980).

640. MODEL PENAL CODE § 223.2 as adopted by the Committee. Minutes, *supra* note 10 (Feb. 8, 2019).

641. *See* MODEL PENAL CODE art. 223 cmt. at 274 (AM. L. INST. 1980).

negligent.[642] Affirmative defenses are covered in section 1.12, and have been discussed earlier.[643]

IV. CONCLUSION

While theft is not as serious as crimes that I have discussed in prior articles, such as criminal homicide,[644] sex crimes,[645] or robbery,[646] it is an important crime. Theft has a long history in the criminal law and reflects the mores of the times. The Model Code has simplified and modernized the concept of theft crimes, and the Committee has agreed with many of these improvements. Under the Committee's recommendation, one theft statute will replace a very large number of Mississippi statutes, many of which are anachronistic and even quaint.[647]

Part of criminal justice reform should be to modernize the law and ensure that it makes sense in the current environment. The Committee has tried to do that, using the Model Code, but changing what should be changed to meet the needs of the state.

642. MODEL PENAL CODE § 1.13 (16) as adopted by the Committee. Minutes, *supra* note 10 (Dec. 8. 2006).

643. *See supra* discussion accompanying notes 173-76.

644. *See* Johnson, *supra* note 1, at V.B.

645. *See* Johnson, *supra* note 13, at V.

646. *See* Johnson, *supra* note 14, at IV.

647. *See infra* Appendix.

ADDENDUM

A.

Because the Committee's work is ongoing, there will occasionally be changes or clarifications to proposed statutes already discussed. I will address these changes in addenda to current articles. The first change, which the Committee considered important to discuss was a change to the proposed felony murder statute.[648] I am going to repeat the relevant portions of my first article to clarify the issue:

The Model Code eliminates the automatic guilt of criminal homicide if a death occurs while the defendant is committing any felony or misdemeanor.[649] Mississippi retains automatic guilt in both cases.[650] The Model Code recognizes that if the defendant is in the commission of certain listed crimes that endanger lives,[651] and a death occurs, there is a presumption that he is acting recklessly with extreme indifference to the value of human life.[652] However, this presumption is rebuttable under the Model Code. The rebuttable nature of the presumption is accepted by only a few jurisdictions.[653] The Committee agreed that the presumption should not be rebuttable, which is consistent with current Mississippi law.[654] The Committee also did not limit the felony murder presumption to certain listed felonies, as does the Model Code, but rather applies the presumption to any inherently dangerous felony, as follows:[655]

> Section 210.2 Murder
>
> > (1) Criminal homicide constitutes murder, a felony of the first degree, when it is committed:
> >
> > . . . .
> >
> > (b) by any person engaged in the commission or attempted commission of any inherently dangerous felony other than those set forth in Section 210.3(1)(e) or (f).[656]

Even before the Model Code, most jurisdictions limited the felony murder rule in some way to avoid unjust results, such as a killing in the commission of a

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648. *See* MODEL PENAL CODE § 210.2 as adopted by the Committee. Minutes, *supra* note 10 (July 9, 2021).

649. *See* Johnson, *supra* note 1, at discussion accompanying notes 194-99.

650. *See id.*

651. Robbery, sexual attack, arson, burglary, kidnapping or felonious escape. MODEL PENAL CODE § 210.2 (AM. L. INST. 1985).

652. *See* MODEL PENAL CODE art. 210 cmt. at 6 (AM. L. INST. 1980).

653. *See id.* at 8.

654. MODEL PENAL CODE § 210.2 as adopted by the Committee. Minutes, *supra* note 10 (Nov. 10, 2017).

655. *Id.*

656. Section 210.3(e) and (f) reserve these felonies for capital murder. MISS CODE ANN. § 97-3-19 (2017); *see* Johnson, *supra* note 1, at 179-82.

felony where danger to life was unforeseen. For this reason, the felony murder rule was most often either limited to certain dangerous felonies, as under the Model Code[657] or to inherently dangerous felonies.[658] Inherently dangerous felonies usually include burglary, arson, rape, robbery and kidnapping, but there might be others, such as shooting into an occupied dwelling.[659]

Thus, if the underlying felony is not inherently dangerous, the crime would not be automatically murder under the felony murder rule.[660] For example, if a seller makes a felonious sale of liquor, and the buyer drinks it, passes out and dies of exposure, the crime would not be felony murder. The prosecution would have to prove that the seller was at least extremely reckless in disregarding that the sale of the alcohol would cause death.

The Committee decided to reject the current Mississippi language applying the rule to any felony, but to retain the felony murder rule for inherently dangerous felonies, which is likely the most common view.[661] Limiting the rule to inherently dangerous felonies prevents unjust results and is consistent with the view that the defendant's state of mind should be sufficiently serious to merit punishment as a first degree felony. This would also address one of the criticisms of the Mississippi criminal law—an unlimited felony murder rule.[662]

The Committee's proposal rejects the Model Code's view of limiting the rule to certain felonies to allow for development of the law.[663] This permits the courts to decide to apply the rule to other felonies determined to be inherently dangerous to human life.[664]

The Committee addressed all of the foregoing prior to my first article that dealt with criminal homicide.[665] However, the Committee neglected to consider the following: Mississippi has never recognized the merger doctrine for felony murder.[666] The merger doctrine, which is recognized in many states, provides that felony murder may not be based on lesser included offenses to murder, such as aggravated assault or other forms of criminal homicide.[667] Without the merger doctrine, the prosecutor may charge what should be criminally negligent homicide (involuntary manslaughter at common law) or manslaughter (heat of passion manslaughter at common law) as felony murder. The Model Code

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657. *See* MODEL PENAL CODE § 210.2 (AM. L. INST. 1985).

658. *See* PERKINS, *supra* note 41, at 44.

659. *See id.* at 39.

660. *See* MODEL PENAL CODE art. 210 cmt. at 32 (AM. L. INST. 1980).

661. *See* PERKINS, *supra* note 41, at 44.

662. *See* Johnson, *supra* note 1, at 115.

663. MODEL PENAL CODE § 210.2 adopted by the Committee. Minutes, *supra* note 10 (Nov. 10, 2017).

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

665. *See* Johnson, *supra* note 1, at V.B.1 c.ii.

666. *Cf.* Smith v. State, 499 So. 2d 750, 754 (Miss. 1986) (refusing to apply the merger doctrine to the underlying felony of burglary).

667. *See* Russell R. Barton, *Application of the Merger Doctrine to the Felony Murder Rule in Texas: The Merger Muddle,* 42 BAYLOR L. REV. 535 (1990).

avoids this possibility by listing the felonies that felony murder applies to.[668] As noted, the Committee did not limit felony murder to certain felonies, instead the Committee decided to impose a different limitation, so that felony murder could only be charged if based on an underlying felony that is inherently dangerous.[669] This prevents unjust results of imposing felony murder when the underlying felony does not contemplate death or serious bodily injury and allows the courts to decide which felonies are inherently dangerous and should be the subject to the felony murder rule. Unfortunately, the Committee overlooked that this could lead to prosecutors' charging felony murder in any case of criminal homicide or aggravated assault, and that this is, in fact, occurring under the present statutes.[670] To eliminate that possibility, the Committee has proposed the following additional change to felony murder, indicated by underlining:

> Section 210.2 Murder
>
> > (1) Criminal homicide constitutes murder, a felony of the first degree, when it is committed:
> >
> > . . . .
> >
> > (b) by any person engaged in the commission or attempted commission of any inherently dangerous felony other than those set forth in Section 210.3(1)(e) or (f). <u>"Inherently dangerous felony" shall not include any lesser included offense to murder</u>.[671]

This would eliminate the possibility that aggravated assault, negligent homicide or manslaughter could be the basis for felony murder. The prosecution would have to prove that the defendant had the requisite state of mind to be guilty of murder if he were in the commission of one of these crimes. In other words, those felonies could not automatically be murder. This would not affect the ability of the prosecutor to charge felony murder if the underlying felony were another inherently dangerous felony, such as rape, robbery or kidnapping.

B.

In my third article, in the appendix listing the Mississippi statutes that should be repealed by the proposed statutes,[672] I failed to list all the statutes that

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668. *See supra* note 651.

669. MODEL PENAL CODE § 210.2 as adopted by the Committee. Minutes, *supra* note 10 (July 9, 2021).

670. *See e.g.*, indictment of X (name withheld to protect privacy) in Hinds County First District, Jan. term 2020:

> On or about the 22nd day of Feb. 2019 . . .. the defendant . . . did willfully, unlawfully, and feloniously kill, without authority of law . . . [XX] (name again withheld to protect privacy of defendant), while engaged in the commission of any felony [other than the felonies reserved for capital murder]: To-wit X did kill XX while committing the felony of aggravated assault . . . .

671. MODEL PENAL CODE § 210.2 as adopted by the Committee. Minutes, *supra* note 10 (July 9, 2021).

672. *See* Johnson, *supra* note 14, at Appendix A.

should be repealed. The Committee addressed those statutes at a recent meeting and recommends that the criminal mischief statute[673] repeal the following Mississippi statutes:[674]

§ 97-17-67. Malicious mischief

(1) Every person who shall maliciously or mischievously destroy, disfigure, or injure, or cause to be destroyed, disfigured, or injured, any property of another, either real or personal, shall be guilty of malicious mischief.

(2) If the value of the property destroyed, disfigured or injured is One Thousand Dollars ($1,000.00) or less, it shall be a misdemeanor and may be punishable by a fine of not more than One Thousand Dollars ($1,000.00) or imprisonment in the county jail not exceeding twelve (12) months, or both if the court finds substantial and compelling reasons why the offender cannot be safely and effectively supervised in the community, is not amenable to community-based treatment, or poses a significant risk to public safety. If such a finding is not made, the court shall suspend the sentence of imprisonment and impose a period of probation not exceeding one (1) year or a fine of not more than One Thousand Dollars ($1,000.00), or both. Any person convicted of a third or subsequent offense under this subsection where the value of the property is not less than Five Hundred Dollars ($500.00), shall be imprisoned in the Penitentiary for a term not exceeding three (3) years or fined an amount not exceeding One Thousand Dollars ($1,000.00), or both.

673. Section 220.3 Criminal Mischief

(1) A person is guilty of criminal mischief if he:

(a) damages property of another purposely, recklessly, or by criminal negligence in the employment of fire, explosives, or other dangerous means listed in section 220.2(~~1~~); or

(b) purposely or recklessly tampers with tangible property of another so as to endanger person or property.

~~(c) purposely or recklessly causes another to suffer pecuniary loss by deception or threat.~~

(2) Criminal mischief is a felony in the third degree if the actor purposely causes pecuniary loss in excess of $5000, or a substantial interruption or impairment of public communication, transportation, supply of water, gas or power, or other public service. It is a Class A misdemeanor if the actor purposely or recklessly causes pecuniary loss in excess of $100. ~~, or a petty misdemeanor if he purposely or recklessly causes pecuniary loss in excess of $25.~~ The pecuniary losses caused by the same actor may be aggregated. Otherwise criminal mischief is a ~~violation~~ Class D misdemeanor.

MODEL PENAL CODE § 220.3 as adopted by the Committee. Minutes, *supra* note 10 (July 10, 2020).

674. Minutes, *supra* note 10 (July 9, 2021).

(3) If the value of the property destroyed, disfigured or injured is in excess of One Thousand Dollars ($1,000.00) but less than Five Thousand Dollars ($5,000.00), it shall be a felony punishable by a fine not exceeding Ten Thousand Dollars ($10,000.00) or imprisonment in the Penitentiary not exceeding five (5) years, or both.

(4) If the value of the property is Five Thousand Dollars ($5,000.00) or more but less than Twenty-five Thousand Dollars ($25,000.00), it shall be punishable by a fine of not more than Ten Thousand Dollars ($10,000.00) or imprisonment in the Penitentiary not exceeding ten (10) years, or both.

(5) If the value of the property is Twenty-five Thousand Dollars ($25,000.00) or more, it shall be punishable by a fine of not more than Ten Thousand Dollars ($10,000.00) or imprisonment in the Penitentiary not exceeding twenty (20) years, or both.

(6) In all cases restitution to the victim for all damages shall be ordered. The value of property destroyed, disfigured or injured by the same party as part of a common crime against the same or multiple victims may be aggregated together and if the value exceeds One Thousand Dollars ($1,000.00), shall be a felony.

(7) For purposes of this statute, value shall be the cost of repair or replacement of the property damaged or destroyed.

(8) Anyone who by any word, deed or act directly or indirectly urges, aids, abets, suggests or otherwise instills in the mind of another the will to so act shall be considered a principal in the commission of said crime and shall be punished in the same manner.

§ 97-17-83. Injuring shade or ornamental trees

If any person shall willfully injure or destroy any shade tree or any ornamental tree not his own, on any highway or street, or in any yard, garden, or park, he shall, on conviction, be fined not less than five dollars nor more than twenty dollars for each tree so injured or destroyed, or shall be imprisoned in the county jail not less than ten days nor more than thirty days for each offense.

§ 97-17-89. Theft or destruction; vegetation

Any person who shall enter upon the closed or unenclosed lands of another or of the public and who shall willfully and wantonly gather and unlawfully sever, destroy, carry away or injure any

> trees, shrubs, flowers, moss, grain, turf, grass, hay, fruits, nuts or vegetables thereon, where such action shall not amount to larceny, shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding five hundred dollars ($500.00), or be imprisoned not exceeding six (6) months in the county jail, or both; and a verdict of guilty of such action may be rendered under an indictment for larceny, if the evidence shall not warrant a verdict of guilty of larceny, but shall warrant a conviction under this section.

APPENDIX

Mississippi Statutes that would be repealed by proposed article 223:

§ 97-11-33. Extortion; collecting unauthorized fees and fees for services not actually rendered.

§ 97-3-82. Extortion; definitions, violations and penalties

§ 97-17-70. Receiving stolen property; dual charges of both stealing and receiving same property not to be brought against single defendant in same jurisdiction; penalties.

§ 97-17-71. Receiving stolen property; definitions; scrap metal dealers and other purchasers to keep records of purchases of metal property; content of records; metal property to be held separate and identifiable from other purchases for not less than three (3) business days from date of purchase; inspection by law enforcement personnel; hold notice; recovery of metal property by rightful owner; restitution to dealer by unlawful seller; false statement of ownership; cash transactions for purchase of scrap metal prohibited; failure to maintain appropriate records; interstate transportation of metal property; purchase and possession of metal beer kegs and/or metal syrup tanks generally used by soft drink industry prohibited except in limited circumstances; sales and purchases of bronze memorials prohibited except in limited circumstances; purchase of utility access covers or metal property identified as belonging to political subdivision except in limited circumstances; purchases of metal property from minors prohibited; limitation on hours of purchase; penalties.

§ 97-17-73. Removing agricultural products subject to lien from premises where produced.

§ 97-17-75. Removing personal property subject to lien from county, or selling same.

§ 97-17-77. Removing personal property subject to lien out of state

§ 97-17-41. Grand larceny; felonious taking of personal property; felonious taking of property of established place of worship; penalties

§ 97-17-42. Larceny; taking possession of or taking away a motor vehicle; second or subsequent offense.

§ 97-17-43. Petit larceny defined; penalty

§ 97-17-45. Larceny; stealing bond, note, bill, securities, etc.; proof of value

§ 97-17-47. Larceny; severing crops, or parts of improvements or enclosures.

§ 97-17-49. Larceny; shearing wool from dead sheep.

§ 97-17-51. Larceny; stealing dog.

§ 97-17-53. Larceny; knowing and willful stealing or carrying away of livestock; obtaining livestock by means of fraudulent conduct; prima facie evidence of fraudulent conduct; restitution

§ 97-17-55. Larceny; stealing milk from cow.

§ 97-17-59. Larceny; stealing timber; restitution

§ 97-17-60. Payment for timber acquired for resale; penalties.

§ 97-17-61. Larceny; taking and carrying away certain animals or motor vehicles not amounting to larceny.

§ 97-17-62. Larceny; theft of rental property.

§ 97-17-63. Larceny; tenants in common.

§ 97-17-64. Larceny; under lease or rental agreement.

§ 97-19-13. Credit cards; acquisition by theft or artifice; unlawful sales and purchases; receipt of cards issued in another's name.

§ 97-25-54. Theft of telephone and other communication services prohibited; definitions; manufacture and possession of devices to facilitate theft prohibited; penalties.

§ 97-25-11. Railroads; stealing tickets

§ 97-25-29. Railroads; stealing a ride.

§ 97-25-31. Railroads; stealing animal killed or wounded by railroad.

§ 97-25-35. Railroads; stealing or interfering with communications or signaling equipment.

§ 97-19-11. Credit cards; procuring issuance by false statements.

Any person who makes or causes to be made either directly or indirectly any false statement in writing with intent that it be relied upon with respect to his identity or that of any other person, firm or corporation, for the purpose of procuring the issuance of a credit card is guilty of a misdemeanor.

§ 97-19-13. Credit cards; acquisition by theft or artifice; unlawful sales and purchases; receipt of cards issued in another's name.

§ 97-19-19. Credit cards; signing with intent to defraud.

§ 97-19-21. Credit cards; use to obtain things of value or to operate automatic cash dispensing machines with intent to defraud; penalties.

§ 97-19-23. Credit cards; furnishing things of value on forged or unlawfully obtained card; failing to give value represented as given.

§ 97-19-27. Credit cards; receipt of things of value in violation of law.

§ 97-19-29. Credit cards; penalty for violation of Sections 97-19-5 through 97-19-29

§ 97-19-31. Credit cards; use of credit numbers or other credit device to obtain credit, goods, property or services.

§ 97-19-33. False personation; personating another to marry, become bail or surety, confess judgment, acknowledge recorded instrument, or act in suit.

§ 97-19-35 False personation; personating another to receive money or property.

§ 97-19-37. False personation; masquerading as deaf person.

§ 97-19-39. Obtaining signature or thing of value with intent to defraud.

§ 97-19-41. Obtaining signature or thing of value with intent to defraud; penalty for using false negotiable instrument.

§ 97-19-45. Producing child with intent to intercept inheritance.

§ 97-19-49. Registering animal falsely; giving false pedigree.

§ 97-19-47. Receiving deposits when bank is insolvent.

§ 97-19-51. Selling property previously sold or encumbered.

§ 97-19-83. Fraud by mail or other means of communication.

§ 97-19-85. Fraudulent use of identity, Social Security number, credit card or debit card number or other identifying information to obtain a thing of value.

§ 97-23-19. Embezzlement; by agents, bailees, trustees, servants and persons generally.

§ 97-23-21. Embezzlement; evidence of debt negotiable by delivery but not delivered.

§ 97-23-23. Embezzlement; buying or receiving embezzled goods.

§ 97-23-25. Embezzlement; property held in trust or received on contract.

§ 97-23-27. Embezzlement; property borrowed or hired.

§ 97-11-25. Embezzlement; officers, trustees and public employees converting property to own use.

§ 99-11-11. Embezzlement.

§ 99-19-18. Mandatory minimum sentence for embezzlement or other unlawful conversion of public funds

§ 99-7-31. Terms of indictment for larceny or embezzlement of money.

§ 97-11-31. Embezzlement; fraud committed in public office.

§ 99-7-31. Terms of indictment for larceny or embezzlement of money.

§ 97-11-27. Embezzlement; officers and public agents failing to deliver money, records, etc. to successor.

§ 97-25-9. Railroads; embezzlement of tickets.