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DOES VOLUNTARY MANSLAUGHTER EXIST IN SOUTH DAKOTA?

GREGORY BRAZEAL†

The American legal tradition generally distinguishes between cold-blooded, premeditated intentional killing and hot-blooded, spontaneous intentional killing. The former has traditionally been categorized as murder and the latter as the lesser crime of “voluntary manslaughter.” South Dakota’s homicide statutes, interpreted based on their plain meaning, depart from this deeply rooted tradition. The closest equivalent to the crime of voluntary manslaughter appears in South Dakota’s first-degree manslaughter statute, which includes a prohibition on homicide “[w]ithout any design to effect death . . . and in a heat of passion, but in a cruel and unusual manner.” The phrase “heat of passion” suggests hot-blooded, voluntary manslaughter. But the phrase “[w]ithout any design to effect death” seems to limit the statute to unintentional killings. South Dakota’s first-degree manslaughter statute seems to refer to involuntary manslaughter, not voluntary manslaughter.

South Dakota inherited the confusing language in its first-degree manslaughter statute from a botched 1829 attempt to codify New York’s homicide law. Every state that adopted this language has since rejected it, with only two exceptions: South Dakota and Oklahoma. It is long past time for South Dakota to revise its first-degree manslaughter statute to clarify that the statute encompasses intentional, and not unintentional, hot-blooded killings. The current definition of first-degree manslaughter has resulted in conflicting judicial rulings, a lack of legal clarity for the public, and the risk of inconsistent and indefensible sentences.

In conclusion, the article notes that if the legislature revisits the state’s homicide statutes, it might also consider conducting an evidence-based study of the state’s extraordinarily punitive and costly sentencing laws, including the availability of life without parole for first-degree manslaughter. South Dakota’s extreme approach to sentencing has never been supported by empirical evidence, places exceptional financial burdens on the public, and may harm public safety in the long term through the destructive side effects of incarceration.

I. INTRODUCTION

It is generally assumed that American criminal law distinguishes between cold-blooded intentional killing, which has traditionally been categorized as murder, and hot-blooded (often “provoked”) intentional killing, which has traditionally been categorized as the lesser crime of voluntary manslaughter.¹ But the long-recognized distinction between cold-blooded and hot-blooded intentional killing does not appear to exist in South Dakota’s homicide statutes, at least when they are interpreted based on their plain meaning.² The closest equivalent to a voluntary manslaughter statute in the state is South Dakota Codified Law (“SDCL”) § 22-16-15(2), which defines first-degree manslaughter in part as homicide “[w]ithout any design to effect death, . . . and in a heat of passion, but in a cruel and unusual manner.”³ Read literally, this language only applies to unintentional killings, not intentional ones. It describes a form of *involuntary* manslaughter, not *voluntary* manslaughter.

This article argues that the South Dakota Legislature should revise the state’s first-degree manslaughter statute to clarify that it applies to intentional hot-blooded killing, and not to unintentional killing.⁴ The argument proceeds as follows. Part II begins by reviewing the typical structure of homicide statutes in the United States. Section III.A then interprets the text of South Dakota’s first-degree manslaughter statute, SDCL § 22-16-15(2), against this background. The plain meaning of the statute supports the conclusion that voluntary manslaughter does not exist as a crime in South Dakota. But whether one follows the plain meaning of the statute or takes a different approach, the statute gives rise to interpretive puzzles and seemingly inexplicable results.

Section III.B analyzes how the South Dakota Supreme Court has responded to the challenge of interpreting SDCL § 22-16-15(2). In general, the Court has treated the statute as though it were a voluntary manslaughter statute but has never persuasively explained how the language of SDCL § 22-16-15(2) can be interpreted to encompass intentional killings.

Because history may be relevant to the meaning of a statute, Section III.C turns to the history of the language in SDCL § 22-16-15(2). South Dakota’s current definition of first-degree manslaughter was created in 1829 by lawyers who were attempting to draft the first criminal code for the state of New York.

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1. See *infra* Part II (reviewing the typical structure of homicide statutes in the United States).

2. See *infra* Section III.A (interpreting the text of South Dakota’s first-degree manslaughter statute, SDCL § 22-16-15(2)).

3. SDCL § 22-16-15(2) (2017). Going forward, I will depart from Bluebook practice by citing South Dakota’s Codified Laws as “SDCL” in the text, and by not including a redundant footnote when the relevant section of SDCL has already been identified. In addition, I will depart from Bluebook Rule 1.2.

4. In the interest of concision and to avoid redundancy, I omit footnotes from the following paragraphs where the roadmap simply summarizes materials appearing in the indicated sections.

Bafflingly, the lawyers failed to account in their statutory scheme for the possibility of intentional but unpremeditated homicide. Although the practical difficulties of applying the lawyers' manslaughter definition were soon recognized, the definition nevertheless spread to other states, in part through the influence of Field's Penal Code. The Dakota Territory Code of 1877 drew heavily on Field's Penal Code, and in doing so incorporated the flawed 1829 manslaughter definition from New York.

In the nearly two centuries since 1829, every state that adopted the 1829 manslaughter definition has abandoned it—except two: South Dakota and Oklahoma. This article focuses on South Dakota. But as a source of comparison, it is worth noting at the outset that Oklahoma's Court of Criminal Appeals, the state's highest court for criminal cases,⁵ has concluded that the state's equivalent of SDCL § 22-16-15(2) does not encompass intentional killings. In other words, Oklahoma's highest criminal court has concluded, based on language that is effectively identical to the language in SDCL § 22-16-15(2), that the crime of voluntary manslaughter does not exist in Oklahoma.

Specifically, in the 1989 case of *Brown v. State*,⁶ the Court of Criminal Appeals stated:

Most jurisdictions hold that first degree or voluntary manslaughter involves an intent to kill accompanied by the “extenuating circumstance . . . that the defendant, when he killed the victim, was in a state of passion engendered in him by an adequate provocation (i.e., a provocation which would cause a reasonable man to lose his normal self-control).” W. LaFare & A. Scott, Jr., *Substantive Criminal Law* § 7.10, at 252 (1986) (footnote omitted). However, Oklahoma, like South Dakota, falls within the minority view which requires that the homicide be perpetrated “without a design to effect death” to constitute first degree or voluntary manslaughter.⁷

Illustrating the serious implications of interpreting “without a design to effect death” to exclude intentional killings, the court then upheld a defendant's conviction for “First Degree Malice Aforethought Murder” in a case that appears to be a paradigmatic example of voluntary manslaughter:

Appellant testified that on the morning of the shooting he discovered the decedent had stolen from him. He suspected the decedent had stolen from him in the past, told the decedent he had had enough, and was going to call the sheriff to get the decedent and his family evicted. Appellant got his gun, test fired it once in the backyard, and then walked around to the frontyard to confront the decedent. According to appellant, the decedent called him a snitch and threatened to kill him.

5. See Stephen E. Henderson, *Oklahoma's Constitutional Search and Seizure—It's Always Time for Enlightenment*, 77 OKLA. L. REV. 429, 429, 433-34 (2025) (describing Oklahoma's “dueling high courts”).

6. 777 P.2d 1355 (Okla. Crim. App. 1989).

7. *Id.* at 1358. Oklahoma has not revised its first-degree manslaughter statute since 1910. See OKLA. STAT. tit. 21, § 711(2) (1910) (defining manslaughter in the first degree as, in relevant part, homicide “[w]hen perpetrated without a design to effect death, and in a heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon; unless it is committed under such circumstances as constitute excusable or justifiable homicide”).

The men exchanged “fighting” words and, when the decedent started to get out of his chair, appellant “lost control” and shot him. Appellant said he was “almost sure” the decedent had a gun, and was in fear for his life when he shot the decedent.⁸

Despite all the evidence of the defendant having been provoked into a heat of passion by the victim, the court concludes that the defendant “was not even entitled to an instruction on first degree manslaughter,” because “the evidence clearly showed [the defendant] had a design to effect death.”⁹ Based on such reasoning, it would appear that all criminally culpable intentional killing in Oklahoma, whether cold-blooded or hot-blooded, is simply first-degree intentional murder, and that no equivalent to the crime of voluntary manslaughter exists in the state.¹⁰

Part IV preemptively addresses a possible objection to the article’s proposal that South Dakota revise SDCL § 22-16-15 to recognize, explicitly, the crime of voluntary manslaughter. Many scholarly critics over the decades have criticized voluntary manslaughter as an arbitrary, often misogynist, and no longer justifiable relic of the common law. Part IV responds to these critiques, arguing that, to the contrary, the distinction between voluntary manslaughter and premeditated murder is a legal reflection of the enduring, morally relevant, biologically grounded difference between “reactive” and “proactive” aggression. In fact, Part IV argues, voluntary manslaughter should be viewed as the norm in cases of intentional killing, with intentional murder reserved for the relatively rare cases of intentional killing that result from cold, calculated deliberation.

Part V concludes by making the case for revising South Dakota’s homicide statutes to recognize the crime of voluntary manslaughter using one of the many perfectly workable definitions already used by other states, such as the definition used in North Dakota. Part V also draws attention to other aspects of South Dakota’s carceral policies that might benefit from reevaluation. Above all, the South Dakota Legislature should consider conducting an evidence-based study of the state’s extraordinarily punitive and costly sentencing laws, including but not limited to the state’s use of life without parole in cases of first-degree manslaughter.

II. A SUMMARY OF TYPICAL U.S. HOMICIDE STATUTES

In order to understand the puzzle presented by South Dakota’s homicide statutes, it is helpful to read them against the background of U.S. homicide law more generally. Each state in the United States has a criminal code that defines various forms of homicide.¹¹ Homicide statutes can also be found in the Model Penal Code (“MPC”), tribal codes, the Uniform Code of Military Justice, and the

8. *Brown*, 777 P.2d at 1356.

9. *Id.* at 1358.

10. The extent to which the opinion’s reasoning reflects actual practice in Oklahoma’s courts, however, is a separate question, and one that this article does not attempt to answer.

11. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 478 (8th ed. 2018).

criminal codes of U.S. territories.¹² Although there is great variation between the details of these homicide statutes, it is possible to identify certain general patterns. These patterns are reflected in criminal law treatises and in the teaching materials for most criminal law courses in law schools.¹³

According to the leading secondary sources, one of the most deeply rooted patterns in the criminal law is that killings carried out with more culpable mental states are subject to greater punishment than killings carried out with less culpable mental states.¹⁴ The label of “murder” is typically reserved for the most blameworthy forms of homicide, while “manslaughter” is typically used for less blameworthy forms of homicide.¹⁵

The MPC scheme, which law students typically learn as part of their criminal law education, and which has been deeply influential in a number of states, provides a particularly clear illustration.¹⁶ Under the MPC, “murder” is a felony in the first degree and is defined as purposeful or knowingly killing, or recklessly killing with “extreme indifference to the value of human life.”¹⁷ “Manslaughter” is a felony in the second degree and is defined as reckless killing, or killing that would be murder except that it was “committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse.”¹⁸ Finally, “negligent homicide” is a felony in the third degree and is defined as negligent killing.¹⁹

Many states continue to use older, historically rooted terms to distinguish the various forms of homicide and the mental states accompanying them. Secondary sources, including teaching materials, sometimes describe these older definitions as a “common law” approach to homicide that can then be contrasted with the MPC approach.²⁰ Casebooks, treatises, and bar preparation materials routinely present something like the following as the “common law” approach to defining homicide: first, “murder” is defined as killing “with malice aforethought,” and is sometimes divided into “express” malice murder, which encompasses the most egregious forms of intentional killing; and “implied” malice murder, which encompasses especially egregious forms of unintentional killing, including killing

12. See, e.g., MODEL PENAL CODE § 210 (A.L.I. 1962); NAVAJO NATION CODE ANN. tit. 17, § 303 (2010); Uniform Code of Military Justice art. 118, 10 U.S.C. § 918; GUAM CODE ANN. tit. 9, § 16.20 (2024).

13. On the standard criminal law curriculum, see generally Gregory Brazeal, *Justice Theater in the Criminal Law Curriculum*, 45 CARDOZO L. REV. 1723 (2024).

14. See DRESSLER, *supra* note 11, at 113, 134.

15. See *id.* at 476, 487, 501.

16. On the MPC, see *id.* at 30-31.

17. MODEL PENAL CODE § 210.2.

18. *Id.* § 210.3.

19. *Id.* § 210.4.

20. See Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631, 1658-59 (2020) (describing the widespread tendency to teach criminal law by contrasting the law “in ‘MPC states’ and ‘common law states[.]’” even though the distinction rests on various fictions).

with a “depraved heart.”²¹ In some states, the intentional murder statute purports to require proof of “premeditation,” but often the premeditation requirement has been emptied of meaning by allowing “instantaneous premeditation,” such that any intentional killing could qualify.²²

Second, “manslaughter” is a lesser form of homicide that refers either to “voluntary manslaughter,” that is, an intentional but provoked killing in a “heat of passion”; or “involuntary manslaughter,” an unintentional killing as a result of recklessness or, sometimes, criminal negligence.²³ The ability of a defendant to downgrade an intentional murder to a voluntary manslaughter (or, more precisely, to obtain a jury instruction allowing a jury to do so) varies by state, with some states being more liberal, and others limiting voluntary manslaughter to a narrower set of circumstances, such as a strictly defined list of provocations.²⁴

As the summary above suggests, beneath the terminological differences there are large similarities between the MPC and the “common law” definitions of various forms of homicide. For example, under both approaches, criminally culpable unintentional killing is typically defined as manslaughter rather than murder, although if it reflects an indifference to human life that is so extreme or depraved as to make the killer no less blameworthy than someone who kills intentionally, then it will likely be treated as a form of murder.

Most significantly for the concerns of this article, both the MPC and the synthetic “common law” approach agree in recognizing a form of criminal homicide that is intentional but less egregious than intentional murder because it is committed under the influence of a certain kind of provoked emotional disturbance that falls short of legal insanity. The common law term for this is “voluntary manslaughter,” and the MPC equivalent is “extreme mental or emotional disturbance” (sometimes abbreviated to “EED”) manslaughter. As will be discussed below in Part IV, the notion that “hot-blooded” killing, especially if provoked, is generally less blameworthy than calculated, “cold-blooded” killing accords with widespread, deeply rooted moral intuitions. It would be surprising if a jurisdiction’s homicide statutes contained no recognition of the difference between the two.

21. See, e.g., DRESSLER, *supra* note 11, at 477. “Felony murder” is another form of unintentional murder. See *id.* at 488-500. This article generally ignores felony murder because it does not contribute to the puzzles in South Dakota’s homicide statutes discussed below.

22. See *id.* at 484.

23. See *id.* at 501-12, 514-17. Some sources, like Dressler, present criminal negligence as the standard mens rea for involuntary manslaughter. See *id.* at 511-12. But a 2024 survey found that only twelve states “define involuntary manslaughter exclusively in negligence terms,” while twenty-three states “require recklessness as a mental state for involuntary manslaughter,” with most of the remaining states requiring something like MPC-style recklessness for their closest equivalents to involuntary manslaughter. See JENS DAVID OHLIN, CRIMINAL LAW: DOCTRINE, APPLICATION, AND PRACTICE 297 (4th ed. 2025) (citing JENS DAVID OHLIN, 2 WHARTON’S CRIMINAL LAW § 22:15 (16th ed. 2024)).

24. See DRESSLER, *supra* note 11, at 502-03.

III. SOUTH DAKOTA'S HOMICIDE STATUTE

A. TEXTUAL ANALYSIS OF THE CURRENT HOMICIDE STATUTE

If one attempts to identify the South Dakota equivalents of the various forms of homicide discussed above—that is, intentional murder, depraved heart murder, voluntary manslaughter, and involuntary manslaughter—difficulties soon emerge, culminating in the puzzle that is the topic of this article: does South Dakota recognize an equivalent of voluntary manslaughter?

In terms of overall structure, Chapter 22-16 of the South Dakota Codified Laws (“Homicide and Suicide”) categorizes various forms of homicide under the following general labels, with the following punishments:²⁵

- “murder in the first degree” (SDCL § 22-16-4) is a Class A felony (SDCL § 22-16-12), with a mandatory minimum sentence of life in prison without parole and a possible sentence of death (SDCL § 22-6-1);²⁶
- “murder in the second degree” (SDCL § 22-16-7) is a Class B felony (SDCL § 22-16-12), with a mandatory minimum sentence of life in prison without parole (SDCL § 22-6-1);
- “manslaughter in the first degree” is a Class C felony (SDCL § 22-16-15), with a maximum sentence of life in prison without parole,²⁷ but no mandatory minimum (SDCL § 22-6-1);
- “[m]anslaughter in the second degree” is a Class 4 felony (SDCL § 22-16-20), with a maximum sentence of ten years imprisonment, but no mandatory minimum (SDCL § 22-6-1);²⁸
- “[e]xcusable homicide,” which appears under the heading “Heat of passion—Provocation—Sudden combat,” is not a crime at all (SDCL §§ 22-16-30, -31), nor is “[j]ustifiable homicide,” such as “[c]apturing or arresting fleeing felons” (SDCL §§ 22-16-32, -33).

If we turn to the various definitions of homicide contained in the preceding statutes, South Dakota’s homicide scheme might at first seem consistent with the general U.S. approach described in the previous section. For example, the definition of murder in the first degree encompasses killing “with a premeditated design”: “Homicide is murder in the first degree . . . [i]f perpetrated without authority of law and with a premeditated design to effect the death of the person

25. South Dakota’s homicide statutes took their modern form in the 1970s, when the legislature engaged in thorough revisions and incorporated many elements from the MPC. *See* State v. Schouten, 2005 SD 122, ¶ 14, 707 N.W.2d 820, 824 (“[O]ur Legislature relied heavily on the Model Penal Code when it revised the South Dakota criminal code in 1976 . . .”). The substantive definitions of the five forms of homicide noted below have not changed since 2005. *See* SDCL § 22-16 (2017).

26. Additional requirements for the imposition of a death sentence are laid out in SDCL § 23A-27A.

27. After South Dakota’s 2023 passage of a “truth in sentencing” law, parole is no longer an option for defendants sentenced to life for first-degree manslaughter. *See* 2023 S.D. Sess. Laws ch. 80 § 1; John Hult, *Truth in Sentencing Bill Advances to Full Senate*, S.D. SEARCHLIGHT (Feb. 7, 2023), <https://perma.cc/P72A-99FM>.

28. Additional sentences for each of the preceding crimes may apply for “habitual offenders” under SDCL §§ 22-7-7 to -8 and -8.1.

killed or of any other human being[.]”²⁹ As noted above, a number of states whose definitions of intentional murder include the term “premeditated” allow this requirement to be satisfied through “instantaneous premeditation,” effectively allowing any intentional killing to satisfy the “premeditation” requirement.³⁰ South Dakota has taken this approach, explicitly stating in a separate statute: “A premeditated design to effect death sufficient to constitute murder may be formed instantly before committing the act.”³¹

Thus, the term “premeditated” is apparently superfluous to the definition of first-degree intentional murder in SDCL § 22-16-4(1). The phrase “with a premeditated design to effect . . . death” seems to mean “with a design to kill,” which presumably means, simply, with intent to kill. SDCL § 22-16-4(1) criminalizes intentional homicide, and South Dakota recognizes no more blameworthy form of homicide. In all these senses, South Dakota’s approach is consistent with the general “common law” approach to defining homicide crimes discussed in the previous section.

Similarly, South Dakota’s definition of second-degree murder parallels the crime of “depraved heart” or extreme reckless murder discussed above. SDCL § 22-16-7 states: “Homicide is murder in the second degree if perpetrated by any act imminently dangerous to others and evincing a depraved mind, without regard for human life, although without any premeditated design to effect the death of any particular person, including an unborn child.” The fact that South Dakota uses the term “depraved mind” rather than “depraved heart” is compatible with the general “common law” approach. States use a variety of often colorful terms to refer to unintentional homicides that result from such blameworthy recklessness that they deserve to be treated as murder.³²

The use of the phrase “without any premeditated design to effect . . . death” in South Dakota’s second-degree murder statute is also consistent with the interpretation of “with a premeditated design” as a synonym for “with intent” in the first-degree murder statute.³³ That is, if the South Dakota Legislature understood “with a premeditated design” to mean “intentionally,” then it would make sense for the Legislature to use the phrase “without any premeditated design” in its *unintentional* murder statute.

Based on the similarities between South Dakota’s first-degree murder statute and the “common law” definition of intentional murder, and between South Dakota’s second-degree murder statute and the “common law” definition of depraved heart murder, it might be assumed that South Dakota’s first-degree manslaughter statute would resemble the “common law” definition of voluntary

29. SDCL § 22-16-4(1) (2017).

30. See DRESSLER, *supra* note 11, at 484. In a recent case, the South Dakota Supreme Court upheld a conviction for first-degree murder against a challenge based on insufficient evidence of premeditated design, noting that “[e]ven if [the defendant] drove to Club David without the intent to kill [the victim], he could have, as a matter of law, formed such intent in the seconds before he fired the gun.” *State v. Bolden*, 2024 SD 22, ¶ 50, 6 N.W.2d 238, 249.

31. SDCL § 22-16-5 (2017).

32. For various examples, see DRESSLER, *supra* note 11, at 486.

33. See SDCL §§ 22-16-4, -7 (2017).

manslaughter, that is, intentional killing in a heat of passion based on provocation. Surprisingly, however, South Dakota defines manslaughter in the first degree as follows:

Homicide is manslaughter in the first degree if perpetrated:

- (1) Without any design to effect death, including an unborn child, while engaged in the commission of any felony other than as provided in § 22-16-4(2);
- (2) Without any design to effect death, including an unborn child, and in a heat of passion, but in a cruel and unusual manner;
- (3) Without any design to effect death, including an unborn child, but by means of a dangerous weapon;
- (4) Unnecessarily, either while resisting an attempt by the person killed to commit a crime or after such attempt has failed.³⁴

Setting aside subsection 4, which effectively places a limit on a defendant's claim of self-defense or defense of property,³⁵ the remaining three subsections all state explicitly that manslaughter in the first degree only applies to homicides in which the killer acted "[w]ithout any design to effect death."³⁶ If we continue to assume, for the sake of argument, that "design" is synonymous with "intent" (more on this below), then the first three subsections of the first-degree manslaughter statute would only apply to homicides committed *without* any intent to kill—that is, unintentional homicides. Read in the most straightforward way, SDCL § 22-16-15(1) to -3) does not seem to be a *voluntary* manslaughter statute at all. It is an *involuntary* manslaughter statute.

But this interpretation would create several puzzling implications. If South Dakota's first-degree manslaughter statute does not refer to voluntary manslaughter, then South Dakota would appear to have no voluntary manslaughter statute at all. Manslaughter in the second degree is clearly not a voluntary manslaughter statute. It is defined as "[a]ny reckless killing of one human being, including an unborn child, by the act or procurement of another which, under the provisions of this chapter, is neither murder nor manslaughter in the first degree, nor excusable nor justifiable homicide, is manslaughter in the second degree."³⁷ A reckless killing is not an intentional killing, and thus does not fall within the traditional definition of voluntary manslaughter. Although the term "involuntary manslaughter" appears nowhere in South Dakota's criminal code, the second-degree manslaughter statute clearly represents South Dakota's equivalent of an involuntary manslaughter statute.³⁸

Could "excusable" or "justifiable" homicide, as defined in the statutory scheme summarized above, represent South Dakota's equivalent to voluntary manslaughter? Parts of the former certainly sound a lot like voluntary

34. SDCL § 22-16-15.

35. For South Dakota's expansive permissions to use force in defense of persons or property, see SDCL §§ 22-18-4 to -6, discussed below in Part V.

36. SDCL § 22-16-15(1) to (3) (2017).

37. SDCL § 22-16-20.

38. SDCL § 22-01 to -49.

manslaughter. SDCL § 22-16-31 defines “excusable homicide” as homicide “committed by accident and misfortune in the heat of passion, upon sudden and sufficient provocation, or upon a sudden combat. However, to be excusable, no undue advantage may be taken nor any dangerous weapon used and the killing may not be done in a cruel or unusual manner.” Although the language of “heat of passion” and “provocation” obviously echoes the traditional definition of voluntary manslaughter, the reference to a homicide “committed by accident or misfortune” seems to imply a lack of intent to kill. It is hard to read the “excusable homicide” statute otherwise because, crucially, excusable homicide in South Dakota is *not a crime*.³⁹ It would be shocking if South Dakota had categorically decriminalized what other states punish as voluntary manslaughter. It would also be contrary to legal tradition and widespread moral intuitions if South Dakota excused *intentional* killing in a provoked heat of passion while still punishing entirely *unintentional* (reckless) killing with up to ten years in prison based on the second-degree manslaughter statute. Most people would presumably say that someone who accidentally kills, even as a result of recklessness, deserves less punishment than someone who kills another human being intentionally and unjustifiably after losing control due to some provocation.

Perhaps we should simply conclude at this point that the crime of voluntary manslaughter does not exist in South Dakota, as Oklahoma’s highest court for criminal appeals decided when interpreting nearly identical language in Oklahoma’s criminal code.⁴⁰ Indeed, the phrase “voluntary manslaughter,” like the phrase “involuntary manslaughter,” appears nowhere in the South Dakota Codified Laws.⁴¹

But the consequence of not having a voluntary manslaughter statute would be that anyone who kills intentionally in South Dakota, even if the killing resulted from a provoked heat of passion, would simply be guilty of first-degree, intentional murder, and thus subject to a mandatory minimum sentence of life without parole, with the possibility of death.⁴² Even the most flagrantly provoked and spontaneous intentional killing would be treated as criminally equivalent to a coldly calculated, deliberately planned murder. Such an approach would lie outside the historical norms of American homicide law and would defy the widely held, deeply rooted intuition that deliberate, predatory, “cold-blooded” killing, in general, is more blameworthy and deserves more punishment than spontaneous, reactive, “hot-blooded” killing.⁴³

39. Justifiable homicide is also not a crime but could not be mistaken for voluntary manslaughter. See SDCL § 22-16-33 (defining justifiable homicide as homicide “necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed, or in lawfully suppressing any riot, or in lawfully keeping and preserving the peace”).

40. See *supra* notes 5-10 and accompanying text.

41. See SDCL § 22-01 to -49 (2017).

42. Of course, this statement assumes that no other defenses, such as self-defense or insanity, apply.

43. For further discussion of these norms, see Part IV. It might be argued that the South Dakota legislature confirmed its intention to reject voluntary manslaughter by passing an additional statute, SDCL § 22-16-6, titled “Anger or voluntary intoxication not reducing degree of crime,” and stating: “Homicide committed with a design to effect death is not the less murder because the perpetrator was in a state of anger or voluntary intoxication at the time.” In a loose sense, the statute sits in tension with the general

In addition, to impose a mandatory minimum sentence of life without parole on a crime that most other states define as voluntary manslaughter would be astonishingly punitive. No other state imposes anything remotely approaching a mandatory minimum sentence of life without parole for the state's equivalent of voluntary manslaughter. In most states, the *maximum* sentence for the state equivalent of voluntary manslaughter is twenty years or less, sometimes significantly less.⁴⁴ The federal government, similarly, imposes a maximum sentence of fifteen years for voluntary, "heat of passion" manslaughter, with no mandatory minimum.⁴⁵

An argument might even be made that imposing a mandatory minimum of life without parole for what other states define as voluntary manslaughter could violate the Eighth Amendment's prohibition on cruel and unusual punishments. The Supreme Court's Eighth Amendment decisions in recent years raise doubts about what it would take for the current Court to hold a sentence "cruel and unusual" based on its length, or whether such a ruling even remains doctrinally possible.⁴⁶ But to the extent that the term "unusual" has anything to do with suppressing punitive outliers, the term might seem to apply to a single state that imposes a mandatory minimum sentence of life without parole for a crime that

notion that reactive, hot-blooded aggression is less morally blameworthy than proactive, cold-blooded aggression. But when read more precisely, the statute may reject only a straw man: no jurisdiction holds that mere "anger" mitigates murder to manslaughter. For a note on South Dakota's ambiguous approach to voluntary intoxication, see *infra* note 186.

44. See, e.g., ALA. CODE §§ 13A-5-6(a)(2), -6-3(2) (2 years minimum, 20 years maximum); ARK. CODE ANN. §§ 5-4-401(a)(3), -10-104 (no minimum, 20 years maximum); CAL. PENAL CODE §§ 192(a), 193(a) (3 years minimum, 11 years maximum); COLO. REV. STAT. § 18-1.3-401(1)(a)(V)(A), 18-3-104 (2 years minimum, 6 years maximum); CONN. GEN. STAT. §§ 53a-35(b)(2), -55 (no minimum, 20 years maximum); DEL. CODE ANN. tit. 11 §§ 632(b), 4205 (2 years minimum, 25 years maximum); FLA. STAT. § 782.07(1), 775.082(3)(d) (no minimum, 15 years maximum). The lowest statutory maximum punishment appears to be New Mexico's. N.M. STAT. ANN. §§ 30-2-3(B), 31-18-15(A)(3) (minimum 18 months, 6 years maximum). In each state, separate statutes allow longer sentences based on, for example, aggravating circumstances, firearm or hate-crime enhancements, or habitual offending. See, e.g., N.M. STAT. ANN. § 31-18-15.1 (allowing increase by up to one-third of basic sentence based on aggravating circumstances). For the relevance of aggravating circumstances to comparisons of sentencing under SDCL § 22-16-15(2) and sentencing for comparable crimes in other states, see *infra* note 48.

45. See 18 U.S.C. § 1112(a).

46. See, e.g., *City of Grants Pass v. Johnson*, 603 U.S. 520, 521 (2024) (emphasizing that the Eighth Amendment's prohibition on cruel and unusual punishments is "directed at the method or kind of punishment a government may" impose (quoting *Powell v. Texas*, 392 U.S. 514, 531-32 (1968) (plurality opinion)); *Bucklew v. Precythe*, 587 U.S. 119, 129-31 (2019) (interpreting scope of Eighth Amendment "cruel and unusual" clause based on analysis of practices "at the time of the founding," and how "a reader at the time of the Eighth Amendment's adoption would have understood" the words); cf. *Ewing v. California*, 538 U.S. 11, 31 (2003) (Scalia, J., concurring in judgment) (reiterating plurality opinion from *Harmelin v. Michigan*, 501 U.S. 957, 984-85 (1991) that "the Eighth Amendment's prohibition of 'cruel and unusual punishments' was aimed at excluding only certain modes of punishment, and was not a 'guarantee against disproportionate sentences'").

Coincidentally, one of the few cases in which the Supreme Court held that a sentence of incarceration violated the Eighth Amendment due simply to its excessive, grossly disproportionate length arose out of South Dakota's sentencing practices. See *Solem v. Helm*, 463 U.S. 277, 303 (1983) (overturning sentence of life imprisonment without parole for six-time nonviolent felony offender convicted of "uttering a 'no account' check for \$100").

other states punish with no mandatory minimums and, in some states, a maximum of as little as six years.⁴⁷

Moreover, if South Dakota's first-degree manslaughter statute refers to unintentional killings, as the language of "without . . . design" seems on its face to suggest, South Dakota would be a punitive outlier in another sense as well. If SDCL § 22-16-15(2) refers to a form of involuntary manslaughter statute, then South Dakota would appear to be the only state other than Washington to allow a sentence of life without parole for involuntary manslaughter.⁴⁸

In fact, South Dakota's first-degree manslaughter statute—read literally—would apparently permit a judge to sentence a defendant to life without parole for a *negligent homicide*, provided that the homicide was committed during the commission of a felony (SDCL § 22-16-15(1)), or in a heat of passion and in a cruel and unusual manner (SDCL § 22-16-15(2)), or with a dangerous weapon (SDCL § 22-16-15(3)). In each of these three types of first-degree manslaughter, the statute specifies no mens rea. The statute would appear to permit conviction based on mere negligence.⁴⁹

47. See *supra* note 44.

48. As a news article stated in 2021, "[i]f you kill someone in South Dakota, even if you didn't intend to do it, you can go to prison for life. South Dakota is one of three states (South Dakota, Oklahoma, Washington) that allow a life sentence for first-degree manslaughter. First-degree manslaughter is a reckless killing" Angela Kennecke, *Manslaughter: Unequal Time*, KELOLAND NEWS (Nov. 15, 2021), <https://perma.cc/ZZ4G-DVGU>.

To be precise, unlike South Dakota, Oklahoma does not appear to allow a sentence of life *without parole* for involuntary manslaughter. As discussed above in Part I, Oklahoma recognizes no equivalent to voluntary manslaughter, treats all intentional killings as intentional murders, and defines unintentional but cruel "heat of passion" killing as a form of first-degree manslaughter. See *supra* note 7; OKLA. STAT. tit. 21, §§ 62.1, 711, 715 (defining first-degree manslaughter as a felony punishable by a minimum of four years and a maximum of life). But defendants convicted of first-degree, unintentional manslaughter are eligible for parole, and the Oklahoma Pardon and Parole Board "has provided that parole for any sentence over 45 years, including a life sentence, is calculated based upon a sentence of 45 years." *Anderson v. State*, 130 P.3d 273, 282-83 (Okla. Crim. App. 2006); see OKLA. STAT. tit. 21 (not identifying first-degree manslaughter as a crime that can be punished by life without parole); *id.* tit. 57, § 332.16 (identifying first-degree manslaughter as eligible for parole).

It might appear at first glance that Washington state, which abolished parole in its 1984 Sentencing Reform Act, allows a sentence of life without parole for any reckless killing. See WASH. REV. CODE § 9.95.009 (abolishing parole); *id.* § 9A.32.060 (defining first-degree manslaughter as "recklessly caus[ing] the death of another person," a class A felony); § 9A.20.021(1)(a) (permitting life imprisonment for class A felonies). But in fact felony sentences in Washington are governed by a grid of sentencing guidelines, according to which a defendant convicted of first-degree manslaughter would face a standard range between roughly seven and twenty years. See *id.* § 9.94A.515 tbl. 2 (identifying Manslaughter 1 as belonging to seriousness level XI); *id.* § 9.94A.510 (felony-sentencing grid). Various statutory factors could increase a sentence beyond the standard range. See, e.g., *id.* §§ 9.94A.535(3), .537 (aggravating circumstances, including "deliberate cruelty"); *id.* § 9.94A.533 (adjustments to standard sentences including firearm enhancements); *id.* § 9.94A.570 (life without parole for persistent offenders). If a jury finds aggravating circumstances under § 9.94A.537, the judge "may sentence the offender . . . to a term of confinement up to the maximum allowed under RCW § 9A.20.021 for the underlying conviction," which, again, would be life without parole for a class A felony such as first-degree (reckless) manslaughter. See *id.* § 9A.32.060. To the extent that "cruel and unusual" killing under SDCL § 22-16-15(2) satisfies the "deliberate cruelty" requirement of § 9.94A.535(3) of Washington's code, it would appear that any crime that could be charged under SDCL § 22-16-15(2) could, in theory at least, receive life without parole under Washington's statutory scheme as well. Thus, Washington appears to be the only state other than South Dakota that allows a sentence of life without parole for the type of offense defined in SDCL § 22-16-15(2).

49. Indeed, standing alone, the first-degree manslaughter statute might even appear to allow strict liability, such that a defendant whose act caused another's death would be guilty of first-degree

The possibility of sentencing someone to life without parole for a negligent homicide would be exceptionally punitive even within the extremely punitive landscape of contemporary American criminal justice.⁵⁰ It would also be difficult to reconcile with other parts of South Dakota's criminal code. For example, South Dakota in general does not treat negligent homicide as a crime.⁵¹ It would be baffling if at the same time South Dakota permitted life imprisonment without parole for negligent homicides whenever they happen to result from the use of a "dangerous weapon," as South Dakota has expansively defined that term.⁵² South Dakota's criminal code defines "dangerous weapon" to include "any firearm, stun gun, knife, or device, instrument, material, or substance, whether animate or inanimate, which is calculated or designed to inflict death or serious bodily harm, or by the manner in which it is used is likely to inflict death or serious bodily harm."⁵³

The inclusion of the broad terms "device, instrument, material, or substance" would appear to make nearly any object a "dangerous weapon" so long as it is used in a way that is likely to inflict death or serious bodily harm. A spoon, for example, could in ordinary language be described as a "device" or at least an "instrument" for eating. Water is a "substance." In previous cases, the South

manslaughter even if the defendant acted with perfect caution and care, provided that the killing took place (for example) "by means of a dangerous weapon." But a separate statute prevents the imposition of strict liability in the preceding manner. SDCL § 22-16-30 states that "[h]omicide is excusable"—and thus, not a crime—"if committed by accident and misfortune in doing any lawful act, with usual and ordinary caution." Thus, at minimum, South Dakota's first-degree manslaughter statute requires proof that the defendant did not use "usual and ordinary caution." That is, the statute requires proof that the defendant was at least negligent. Ordinary tort negligence, rather than any heightened standard of criminal negligence, would appear to be sufficient.

50. On the United States as a punitive outlier, see, for example, Emily Widra, *States of Incarceration: The Global Context 2024*, PRISON POL'Y INITIATIVE (June 2024), <https://perma.cc/U2ZB-AD95> (showing that the United States "has the highest incarceration rate of any independent democracy on earth," with nine states, including South Dakota, having higher incarceration rates than any country on earth other than El Salvador).

51. See SDCL § 22-16; see also Jacey Fortin & Michael Levenson, *South Dakota Attorney General Avoids Jail Time for Fatal Crash*, N.Y. TIMES (Aug. 25, 2021), <https://perma.cc/B4ET-UHL6>; Angela Kennecke, *SD Lacks Negligent Homicide Law*, KELOLAND NEWS (Feb. 19, 2021), <https://perma.cc/MBD4-W9K8>. Although South Dakota recognized negligent homicide as a form of manslaughter as recently as 1976, in 1977 the legislature abolished the crime. Compare 1976 S.D. Sess. Laws ch. 158 § 16-4 (S.B. 29), with 1977 S.D. Sess. Laws ch. 188 § 40 (H.B. 945).

52. See SDCL § 22-1-2(10) (2017). In order to illustrate the extremely punitive results of interpreting the first-degree manslaughter statute as encompassing negligent homicides, the article focuses on SDCL § 22-16-15(3), the "dangerous weapon" provision, rather than SDCL § 22-16-15(1), which creates what might be called a "felony manslaughter" crime for deaths caused "while engaged in the commission of any felony other than" the enumerated felonies in SDCL § 22-16-4(2). The latter provision could also result in shockingly punitive outcomes, especially if the South Dakota Supreme Court declined to adopt the common law rule limiting predicate felonies to those that are "inherently dangerous." Cf. *State v. Kvasnicka*, 2013 SD 123, ¶ 24, 829 N.W.2d 123, 129 (S.D. 2013) (declining to address, based on mootness, whether DUI could serve as a predicate felony for SDCL § 22-16-15(1)); DRESSLER, *supra* note 11, at 492-93. If securities fraud, for example, could serve as the predicate for a felony manslaughter charge, then an individual who accidentally caused a death through a negligent act that happened to take place in the course of engaging in securities fraud could be sentenced to life in prison without parole, while if the same individual had taken the same negligent act and caused the same death, but not while engaged in securities fraud, the individual would not be criminally liable for the death at all. Cf. DRESSLER, *supra* note 11, at 488-92 (discussing similarly controversial outcomes in the context of felony murder).

53. SDCL § 22-1-2(10).

Dakota Supreme Court has held that a plastic broom was a “dangerous weapon,”⁵⁴ as was an automobile.⁵⁵ Thus, an individual who negligently caused the death of another, but somehow did so without using any instrument or substance in a manner likely to cause serious bodily harm, would be guilty of no crime at all. But if the same individual had negligently caused the same victim to die, but had done so by using water, a spoon, or a car in a manner likely to cause serious bodily harm, the individual would be guilty of first-degree manslaughter and potentially subject to a sentence of life in prison without parole. It is hard to conceive of a principled justification for such radically different outcomes.⁵⁶

Interpreting the first-degree manslaughter statute to encompass negligent homicides would also be difficult to reconcile with South Dakota’s vehicular homicide statute. Under SDCL § 22-16-15(3), the “dangerous weapon” provision of the first-degree manslaughter statute, a defendant could in theory be sentenced to life in prison without parole for a negligent vehicular homicide. In such a case, the defendant would be guilty of first-degree manslaughter for having killed someone “[w]ithout any design to effect death, . . . but by means of a dangerous weapon[.]”⁵⁷ where the “dangerous weapon” would be a vehicle that the defendant drove in a manner “likely to inflict death or serious bodily harm[.]”⁵⁸ By contrast, the South Dakota statute explicitly addressing negligent vehicular homicides limits the crime to situations in which the driver was under the influence,⁵⁹ and even then only subjects offenders to a maximum of fifteen years in prison.⁶⁰ It would certainly be odd if the legislature had decided to allow a punishment of life without parole for negligent homicide with a vehicle in general, but had imposed a fifteen-year cap on negligent homicide with a vehicle when the driver was intoxicated.

Allowing negligent vehicular homicides to result in first-degree manslaughter convictions under SDCL § 22-16-15(3)’s “dangerous weapon” provision would also be odd in light of the fact that South Dakota subjects reckless homicide to a maximum sentence of ten years in prison.⁶¹ How could it make sense for a merely negligent killer with a vehicle (or any other so-called “dangerous weapon,” such as water or a spoon used in the required manner) to face the possibility of life without parole, while a more culpable, reckless killer would face at most ten years in prison?

In light of the preceding tensions or inconsistencies, it probably makes sense to conclude that the first-degree manslaughter statute, despite its lack of any

54. *State v. Solis*, 2019 SD 36, ¶¶ 28-32, 931 N.W.2d 253, 260–61.

55. *State v. Kvasnicka*, 2013 SD 123, ¶ 35, 829 N.W.2d 123, 131; *accord* *State v. Stetter*, 513 N.W.2d 87, 91-92 (S.D. 1994).

56. Remarkably, the state’s pattern jury instructions for SDCL § 22-16-15(3), the “dangerous weapon” provision, include no mens rea requirement. *See* S.D. Pattern Jury Instructions § 3-24-28 (2020).

57. SDCL § 22-16-15(3) (2017).

58. SDCL § 22-1-2(10). Again, the South Dakota Supreme Court has held that a vehicle can be a “dangerous weapon.” *Kvasnicka*, 2013 SD 123, ¶ 27, 829 N.W.2d at 130.

59. *See* SDCL § 22-16-41.

60. *See* SDCL § 22-6-1(6).

61. *See* SDCL §§ 22-6-1(7), 22-16-20.

explicit mens rea requirements and its language of “[w]ithout any design to effect death,” is best read as implicitly requiring at least a mens rea of recklessness.⁶² The first-degree manslaughter statute might then be read as a kind of aggravated version of the second-degree manslaughter statute, SDCL § 22-16-20. The latter, we might conclude, prohibits reckless killing in general, while the former prohibits reckless killing with aggravating circumstances such as the use of a dangerous weapon, the commission of another felony, or “a cruel and unusual manner” of killing.⁶³ But an observer might still question whether the legislature could have possibly intended a reckless killer without a “dangerous weapon” (such as a spoon) to receive at most ten years in prison, while allowing a court to give the reckless killer with a “dangerous weapon” up to life in prison without parole. In addition, interpreting first-degree manslaughter as aggravated reckless manslaughter would still leave in place the unusual, exceptionally punitive choice to treat all intentional killings, no matter how spontaneous or provoked, as first-degree murders with a mandatory minimum of life without parole, not to mention the possibility of the death penalty.

Perhaps, then, we should revisit our initial assumption. Is there any way to interpret killing “[w]ithout any design to effect death” as encompassing intentional killing? If so, then we could interpret the first-degree manslaughter statute as (at least in part) a voluntary manslaughter statute after all.

The most plausible approach might be to conclude that “design” refers to something beyond mere intent—something like deliberate calculation or planning. In other words, the phrase “[w]ithout any design to effect death” would exclude from the crime of first-degree manslaughter the kinds of intentional killings that were traditionally described as “premeditated murder,” before the concept of premeditation was loosened to include instantaneous premeditation and thus to encompass intentional killing in general. South Dakota’s first-degree manslaughter statute would then encompass intentional but non-premeditated killings that take place (to reiterate the four options once again) during the commission of certain felonies, “in a heat of passion, but in a cruel and unusual manner,” by means of a dangerous weapon, or “[u]nnecessarily, either while resisting an attempt by the person killed to commit a crime or after such attempt has failed.”

But this interpretation gives rise to problems of its own. First, and perhaps most troublingly for a textualist, interpreting “design” in the first-degree manslaughter statute to mean “premeditated design” would lead to an apparent inconsistency with the first-degree murder statute. As we saw, the term “premeditated design” in South Dakota’s first-degree murder statute means simply “design” (intent) based on SDCL § 22-16-5, which states explicitly that a

62. The South Dakota Supreme Court recently seemed to endorse this approach, upholding jury instructions (for the first time so far as I am aware) permitting a conviction for first-degree manslaughter based on a mens rea either of recklessness or intent. See *infra* text accompanying notes 83-86 (discussing *State v. Pfeiffer*, 2024 SD 71, 14 N.W.3d 636).

63. SDCL § 22-16-15(1)-(3) (2017).

“premeditated design to effect death . . . may be formed instantly before committing the act.”⁶⁴

In other words, if we attempt to read the first-degree manslaughter statute as a voluntary rather than involuntary manslaughter statute by interpreting “design” as “premeditated design,” we would have to conclude that:

- (1) “premeditated design” in the first-degree murder statute means “design,” while
- (2) “design” in the first-degree manslaughter statute means “premeditated design.”

Such an approach would seem to conflict with the demands of the “*in pari materia*” canon of statutory interpretation,⁶⁵ or at least with common sense.⁶⁶ A textualist might even criticize this outcome as a fairly blatant example of ignoring the text in order to reach results that the interpreter thinks are desirable, such as avoiding the practical consequences of South Dakota’s first-degree manslaughter statute covering, and only covering, unintentional killing.⁶⁷

Second, to the extent that practical consequences are relevant to statutory interpretation, interpreting the term “design” in the first-degree manslaughter statute to mean “premeditated design” does not entirely avoid counterintuitive

64. It is less clear that interpreting “design” in SDCL § 22-16-15 to mean “premeditated design” would lead to a tension with the use of the phrase “without any premeditated design to effect . . . death” in the second-degree, depraved mind murder statute. On the one hand, based on the standard organization of American homicide law described in Part II, it would be reasonable to assume that South Dakota’s second-degree, “depraved mind” murder statute does not apply to intentional killings. If so, then when the second-degree murder statute refers to “without any premeditated design to effect . . . death” (SDCL § 22-16-7), the phrase “without any premeditated design,” as in the first-degree murder statute, would appear to mean simply “without design” (without intent). Let us call this Interpretation A of SDCL § 22-16-7. Interpretation A creates a sharp tension with the interpretation of “design” in SDCL § 22-16-15 to mean “premeditated design.” In the former, “premeditated design” would mean “design,” while in the latter, “design” would mean “premeditated design.”

On the other hand, in practice, the South Dakota Supreme Court has upheld second-degree murder convictions even in cases where the evidence of intentional killing appeared overwhelming, such as where a defendant shot the victim, “an unarmed man, at close range in the chest.” *State v. Little Long*, 2021 SD 38, ¶ 74, 962 N.W.2d 237, 260. The Court reasoned that the defendant’s “conduct evinces depravity of mind, which requires the accused to act ‘without regard for human life.’” *Id.* The Court’s reasoning suggests that any evidence sufficient to sustain a conviction for first-degree murder would almost certainly also be sufficient to sustain a conviction for second-degree murder, in the sense that intentionally killing someone displays a lack of regard for human life. In other words, it appears that in practice, the South Dakota Supreme Court approves of treating all first-degree murders as also second-degree murders, but not vice versa, because second-degree murders may be unintentional. Let us call this Interpretation B of SDCL § 22-16-7. Interpretation B is not entirely consistent with the interpretation of “design” in SDCL § 22-16-15 to mean “premeditated design.” But the tension is lessened. Under Interpretation B, “premeditated design” in SDCL § 22-16-7 means “premeditated design,” and “design” in SDCL § 22-16-15 means “premeditated design” as well.

65. “It is a canon of construction that statutes that are *in pari materia* [“[o]n the same subject”] may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject.” *In Pari Materia*, BLACK’S LAW DICTIONARY 807 (8th ed. 2004). South Dakota courts have “consistently used” the canon of *in pari materia* “to interpret statutes through the lens of other statutes relating to the same topic.” Neil Fulton, *South Dakota Legisprudence: A Catalog and Analysis*, 68 S.D. L. REV. 334, 364 (2023).

66. “The South Dakota Supreme Court rejects interpretations of a statute that will produce ‘absurd’ results.” Fulton, *supra* note 65, at 360.

67. According to a recent analysis, South Dakota is an intentionalist rather than a textualist jurisdiction. *Id.* at 336.

outcomes. To begin with, even if the statute applies to intentional killing, it remains an imperfect equivalent of the “common law” approach to voluntary manslaughter. Above all, the statute contains no provocation requirement. The statute would thus downgrade intentional murder to manslaughter whenever the defendant killed “in a heat of passion” (and in a cruel and unusual manner—more on that in a moment), regardless of whether the heat of passion was provoked in any way.

But the South Dakota Supreme Court has addressed the lack of an explicit provocation requirement by interpreting the term “heat of passion” to itself contain a provocation element. In a 2019 case, the Court wrote:

“Heat of passion” is . . . defined in the South Dakota Pattern Jury Instruction . . . : “‘Heat of passion’ which will reduce a killing from murder to manslaughter in the first degree means a suddenly formed passion which was caused by reasonable and adequate provocation on the part of the person slain, causing a temporary obscurity of reason rendering a person incapable of forming a premeditated design to kill and which passion continues to exist until the commission of the homicide. ‘Heat of passion’ is such mental disturbance or condition as would so overcome and dominate or suspend the exercise of the judgment of the defendant as to render his mind for the time being deaf to the voice of reason, make him incapable of forming and executing the distinct intent to take human life, and to cause him, uncontrollably, to act from impending force of the disturbing cause rather than from any real wickedness of heart or cruelty or recklessness of disposition. The sufficient provocation must be such as would naturally and reasonably arouse the passion of an ordinary person beyond his power to control.”⁶⁸

68. *State v. Swan*, 2019 SD 14, ¶ 14, 925 N.W.2d 476, 480 (discussing SDCL § 22-16-15(2)). I note that the South Dakota Pattern Jury Instructions are not law and in general do not seem to provide clarity regarding the questions addressed in this article. For example, there is an instruction that seems to present “cruel and unusual manner” as a distinct form of first-degree manslaughter that may, but does not necessarily, involve “heat of passion” as an element. See S.D. Pattern Jury Instructions § 3-24-25 (2023). In support, the instruction’s comments cite *State v. Edmunds*, the opaque 1905 decision discussed below in Section III.B., and an overruled 1944 case addressing a provision of South Dakota’s homicide code that no longer exists. Cf. *State v. Edmunds*, 104 N.W. 1115 (S.D. 1905); *State v. Painter*, 17 N.W.2d 12, 13 (S.D. 1944), overruled by *State v. Waff*, 373 N.W.2d 18 (S.D. 1985) (citing “SDC 13.2016,” according to which “manslaughter in the second degree includes all forms of criminal homicide which are neither murder nor manslaughter in the first degree”).

In general, the South Dakota Pattern Jury Instructions may not be an entirely reliable source of legal guidance. To take another example, the instruction on joint responsibility for conspiracy suggests that South Dakota has adopted the expansive *Pinkerton* rule for conspiracy liability, stating:

“Every conspirator is legally responsible for an act of a co-conspirator that is a probable and natural consequence of the object of the conspiracy even though it was not intended as a part of the original plan and even though the conspirator was not present at the time the act was committed.”

S.D. Pattern Jury Instruction § 3-2-15 (2023); see DRESSLER, *supra* note 11, at 462-64 (discussing *Pinkerton* doctrine). The pattern jury instruction cites no South Dakota sources. Instead, it cites California’s jury instructions and a legal encyclopedia. See S.D. Pattern Jury Instructions § 3-2-15. Nothing in South Dakota’s criminal code suggests an acceptance of the *Pinkerton* rule, and a review of the twenty-six South Dakota cases in Westlaw that include the word “*Pinkerton*” reveals no judicial acceptance of the rule. See SDCL § 22-3 (2017). In fact, a recent scholarly review of state conspiracy doctrine lists South Dakota among the six states that reject the *Pinkerton* rule, although the review supports

Thus, the Court has interpreted the words “heat of passion” as implicitly containing a “reasonable and adequate provocation” requirement, which addresses the concern that an interpreter committed to the “common law” approach to voluntary manslaughter might have with a killing being downgraded from murder to manslaughter simply because it was carried out in a rage, even if that rage was utterly unprovoked and unreasonable.

More troubling is the role of the phrase “but in a cruel and unusual manner” in the “heat of passion” subsection of the first-degree manslaughter statute.⁶⁹ Even if we assume that this subsection encompasses intentional killings and contains an implicit provocation requirement, it would still differ from the “common law” approach to voluntary manslaughter through the requirement that the killing be carried out in a “cruel and unusual manner.” The practical effect of this unusual added requirement would be that if a person killed intentionally and in a provoked heat of passion but *not* in a cruel and unusual manner, then the person would be guilty of intentional murder. Only if a person *did* kill in a cruel and unusual manner would they receive the benefit of a first-degree manslaughter charge.

To appreciate how inexplicable the result is, consider two defendants. Both intentionally killed in a provoked heat of passion. They are identically situated in every way—except that the first defendant killed by torturing the victim with an unusual instrument, while the second defendant killed with a single gunshot. The “cruel and unusual manner” requirement of SDCL § 22-16-15(2) would seem to entail that the first defendant should receive the benefit of a first-degree manslaughter jury instruction while the second should not. In other words, the more brutal killing could paradoxically lead to a lesser conviction where the first defendant would be guilty of first-degree manslaughter and could in theory receive no time in prison, while the second defendant would be guilty of first-degree murder and would receive at minimum life in prison without parole. It is difficult to see how it could make sense to reward an intentional homicide defendant with a lesser charge only if the defendant kills in a cruel and unusual manner.

Thus, interpreters of South Dakota’s first-degree manslaughter statute appear to be faced with a dilemma. On the one hand, they can interpret the statute according to its plain meaning, and consistently with the state’s first-degree murder statute. Following this approach, the first-degree manslaughter statute is limited to unintentional killings, South Dakota has no voluntary manslaughter statute, hot-blooded killings based on provocation must be treated as intentional murders, and the first-degree manslaughter statute permits life without parole for certain types of negligent or at least reckless killing. On the other hand, interpreters can disregard the plain meaning of the first-degree manslaughter

this claim only with an unexplained citation to South Dakota’s accomplice liability statute. See ROBINSON & WILLIAMS, *infra* note 166, at 121, 127 n.7 (citing SDCL § 22-3-3).

69. SDCL § 22-16-15(2). The South Dakota Supreme Court has placed significant weight on the phrase in the past, reversing a conviction based on the conclusion that a homicide was not cruel or unusual where death resulted from “an ordinary drunken street brawl in which the defendant only used his bare hands in throwing the victim once to the pavement.” *State v. Lange*, 152 N.W.2d 635, 638-39 (S.D. 1967).

statute and treat the statute as applying to various forms of intentional killing. Following this approach, South Dakota has a voluntary manslaughter statute, but one that limits “heat of passion” manslaughter to cases involving “cruel and unusual” methods, with the result that heat of passion killings are subject to less punitive treatment when they are cruel and unusual. In addition, under this approach, unusually, the term “design” in the first-degree manslaughter statute would mean “premeditated design,” while the term “premeditated design” in the first-degree murder statute would mean “design.”

The next section looks to South Dakota case law in order to discern which horn of the dilemma South Dakota courts have chosen.

B. JUDICIAL INTERPRETATIONS OF THE FIRST-DEGREE MANSLAUGHTER STATUTE

The previous section considered various ways that South Dakota’s first-degree manslaughter statute could be interpreted, and the problems that might result from various interpretations. How have courts actually interpreted the statute?⁷⁰

The South Dakota Supreme Court has on a handful of occasions referred to “voluntary manslaughter” as though it exists in South Dakota.⁷¹ But in only one opinion, issued over a century ago, has the Court attempted to explain how the language currently in SDCL § 22-16-15(2) could be understood as a definition of voluntary manslaughter.⁷² Because of the unique relevance of the opinion to the concerns of this article, I will discuss the Court’s reasoning at length.

The 1905 case of *State v. Edmunds* is an appeal from a first-degree manslaughter conviction for the killing of “one Willie J. Williams with a certain wooden club” in Clay County, South Dakota.⁷³ Edmunds used the club to inflict a “mortal bruise and wound” on Williams’ head, and Williams died from the wound the next day.⁷⁴ In the course of addressing Edmunds’ challenge to his

70. Unfortunately, the research in this section will be limited to South Dakota Supreme Court opinions. The South Dakota Unified Judicial System (UJS) maintains a database of trial-court criminal dockets including filings and opinions, but there is, apparently, no way to search the contents of the PDFs in the database for specific words. After the UJS generously provided a list of case numbers involving first-degree manslaughter charges, I attempted, and then a research assistant attempted, to manually review the filings in some of the cases on a public terminal, but the process was too time-consuming to justify further effort.

71. See, e.g., *State v. Ramos*, 1996 SD 37, ¶ 8, 545 N.W.2d 817, 820 (“The South Dakota Legislature allows a sentence of life imprisonment for voluntary manslaughter.”); *State v. Pulfrey*, 1996 SD 54, ¶ 7, 548 N.W.2d 34, 36 (identical phrasing); *Matter of Guardianship I.L.J.E.*, 2018 SD 81, ¶ 8, 921 N.W.2d 463, 467 (“By the time of the October 6 hearing, Irving had pleaded guilty to voluntary manslaughter, and he remained incarcerated pending sentencing.”); cf. *Lufkins v. Solem*, 716 F.2d 532, 534 (8th Cir. 1983) (referring to a defendant “convicted of voluntary manslaughter in a South Dakota state trial court,” in a case where the defendant was convicted of first-degree manslaughter). Although there are ten South Dakota cases on Westlaw including the phrase “voluntary manslaughter,” not all of them recognize the existence of voluntary manslaughter in South Dakota. See, e.g., *State v. Black*, 494 N.W.2d 377, 387 (S.D. 1993), *on reh’g*, 506 N.W.2d 738 (S.D. 1993) (dissent quoting a Colorado Supreme Court case).

72. See *Edmunds*, 104 N.W. at 1116-17.

73. *Id.* at 1116.

74. *Id.*

indictment, the Court offers an interpretation of “Rev. Pen. Code §§ 241, 254,” the predecessor of SDCL § 22-16-15.⁷⁵ The definition of “heat of passion” manslaughter in the earlier statute is effectively identical to the language in SDCL § 22-16-15(2) today. It defines first-degree manslaughter in relevant part as homicide “perpetrated without a design to effect death and in a heat of passion, but in a cruel and unusual manner.”⁷⁶ After quoting this language, the Court begins its interpretation by immediately turning, in the next sentence, to a lengthy quotation from a treatise addressing “[t]he distinction between murder and voluntary manslaughter at common law.”⁷⁷ The immediate transition from the Court’s quotation of the predecessor of SDCL § 22-16-15(2) to a treatise discussion of voluntary manslaughter may suggest that the Court did not even consider the possibility that the statute might not be a voluntary manslaughter statute.

The Court quotes the following definition of voluntary manslaughter from the treatise:

“Voluntary manslaughter is homicide intentionally committed under the influence of passion, suddenly arising from adequate cause, but neither justified nor excused by law. It is distinguished from murder solely by the absence of malice as a constituent element of the crime. It is *not the intent to kill*, nor the character of the weapon used, which determines the grade of a homicide, but simply the inquiry whether such intent or the use of such weapon proceeded *premeditatedly* from that wickedness of disposition and hardness of heart which the law denominates ‘malice,’ or whether the intent was formed *suddenly*, under the influence of some violent emotion, which for the instant overwhelmed the reason of the slayer. If from the former, the crime is murder; if from the latter, it is manslaughter only. . . .”⁷⁸

The Court then concludes:

Having these principles in mind, it would seem that the words “when perpetrated without a design to effect death and in a heat of passion” were employed by the Legislature merely to express the distinction between manslaughter in the first degree and the more serious crime of murder. If this be so, the phrases “in a heat of passion” and “without a design to effect death” should be considered as one clause, descriptive of that “wickedness of disposition and hardness of heart” constituting the “malice aforethought” which has always been regarded as an essential element in the crime of murder.⁷⁹

It may be worth pausing here to note that the Court’s argument appears to contain a serious omission, or at least scrivener’s error, with the result that the Court seems to be saying the opposite of what it presumably meant to say. The Court presumably meant to include a phrase like “the absence of,” as in the following revision: “the phrases ‘in a heat of passion’ and ‘without a design to

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* (quoting 21 AM. & ENG. ENCY. L. 172 (2d Ed. 1902)) (emphasis added).

79. *Id.*

effect death’ should be considered as one clause, descriptive of *the absence of* that ‘wickedness of disposition and hardness of heart’ constituting . . . ‘malice aforethought.’” With the addition of the phrase “the absence of,” the Court can be understood as arguing that killing while overcome by passion and without a (prior, premeditated) *design* to effect death negates the possibility of killing with malice *aforethought*. As noted in the previous section, this is likely the most plausible way to interpret the language of SDCL § 22-16-15(2) as encompassing at least some intentional killings: the interpreter reads “without a [or any] design to effect death” as meaning something like “without a *premeditated* intent to kill,” where “premeditation” requires intent at some point meaningfully prior to the moment of killing.

Consistent with the notion that the above passage from *Edmunds* should have contained “in the absence of,” the Court continues:

It is therefore the absence, rather than the presence, of a certain mental condition [that is, the malice aforethought described in the preceding sentence], which is intended to be expressed by the words under discussion. So, when one human being kills another in a cruel or unusual manner under circumstances which neither excuse nor justify the killing, or where one human being kills another by means of a dangerous weapon under circumstances which neither excuse nor justify the killing, the crime is at least manslaughter in the first degree, and may be murder if the killing is done with the malice essential to that offense.⁸⁰

The Court’s method of interpreting the statute in *Edmunds* could be summarized as follows. Step 1: quote the text of South Dakota’s first-degree manslaughter statute, which does not contain the term “voluntary manslaughter,” and which refers to killings “without a design to effect death.” Step 2: assume that South Dakota’s first-degree manslaughter statute is a voluntary manslaughter statute, despite the phrase “without a design to effect death,” and on that basis turn to a scholarly account of the common law definition of voluntary manslaughter to clarify the meaning of the statute. Step 3: in order to reconcile the South Dakota statute with the common law definition, interpret the phrase “without design to effect death” to mean “without malice aforethought,” where the latter presumably means, in this context, “suddenly,” that is, “without premeditation,” as the treatise quotation above suggests.

There are at least two problems with the Court’s interpretation. First, as Section III.C. below will argue, the language in South Dakota’s first-degree manslaughter statute derives ultimately from a New York homicide statute that was explicitly intended to *reject* the common law definition of voluntary manslaughter, not to reflect it. Thus, to the extent that the phrase “without a design to effect death” is ambiguous, it would be peculiar to interpret it to accord with the common law rule that it rejected.

Second, the Court does not explain how its interpretation of “design to effect death” as meaning something like “with premeditation, that is, not suddenly” can be reconciled with the South Dakota statute, inherited from the 1877 Dakota

80. *Id.* at 1117.

Territory code, stating that “[a] design to effect death sufficient to constitute murder, may be formed instantly before committing the act by which it is carried into execution.”⁸¹ If the South Dakota Legislature explicitly decided that “a design to effect death . . . may be formed instantly” in the context of murder, on what basis does the Court conclude that “a design to effect death” in the context of manslaughter may not be formed instantly, but instead requires prior calculation?

Since 1905, as far as my research was able to determine, the South Dakota Supreme Court has made no further attempt to clarify the meaning of the “without . . . design” language in the first-degree manslaughter statute. Moreover, while *Edmunds* has been cited eight times since its publication, the South Dakota Supreme Court has only once cited *Edmunds* in a way that could be construed as supporting the conclusion that first-degree manslaughter encompasses intentional killing.⁸²

In a 2024 case, the Court issued another opinion that might be read as implying that the first-degree manslaughter statute encompasses intentional killings.⁸³ In *State v. Pfeiffer*, the trial court judge had offered the jury a modified version of South Dakota Pattern Jury Instruction § 1-21-1 (“Intent – General”), which states “the defendant must have criminal intent” to be convicted, and that “[w]hen a person intentionally does an act which the law declares to be a crime, the person is acting with criminal intent.”⁸⁴ The trial court judge revised the

81. S.D. REV. CODE § 17-248 (1903); *cf.* THE REVISED CODES OF THE TERRITORY OF DAKOTA: A.D. 1877 § 244 (George H. Hand ed. 1883) [hereinafter 1877 DAKOTA TERRITORY CODE].

82. Even that citation is ambiguous. In the 1967 case of *State v. Lange*, the Court cited *Edmunds* for the proposition that first-degree manslaughter requires that “the acts which caused the death were intentional and not accidental or by mistake.” *State v. Lange*, 152 N.W.2d 635, 637 (S.D. 1967). Presumably, the Court meant that according to *Edmunds*, first-degree manslaughter requires proof that the defendant intended her act to cause death, rather than causing death by accident or mistake. Call this Interpretation A. But read literally, the language only says that according to *Edmunds*, first-degree manslaughter requires proof that the defendant’s acts themselves were intentional, and not that the fatal consequence of the acts were intended. Call this Interpretation B. Consider a defendant who kills a friend by pointing a gun at the friend’s head and squeezing the trigger. If the trigger-pull was unintentional, then the defendant is not guilty of first-degree manslaughter under either Interpretation A or B. If the trigger-pull was intentional, but the defendant wrongly assumed the gun was empty and did not intend to kill the friend, then the defendant would be guilty of first-degree manslaughter (specifically, SDCL § 22-16-15(3), the “dangerous weapon” subsection) under Interpretation B but not A. If the trigger-pull was intentional and the defendant intended to kill the friend, then the defendant would be guilty of first-degree manslaughter under Interpretation A and B.

83. See *State v. Pfeiffer*, 2024 SD 71, ¶ 44, 14 N.W.3d 636, 649.

84. S.D. Pattern Jury Instructions § 1-21-1 (2023). Ordinarily, one would expect the mens rea for a crime to be stated among its elements in the jury instruction defining that crime. But as noted above, the pattern jury instruction for the “dangerous weapon” version of first-degree manslaughter includes no mens rea. See *id.*; *supra* text accompanying note 56. Perhaps it was for this reason that the trial court in *Pfeiffer* felt compelled to draw on, and then alter, the “criminal intent” jury instruction. In *Pfeiffer*, the South Dakota Supreme Court does not remark on the absence of a mens rea element in the pattern jury instruction for first-degree “dangerous weapon” manslaughter, instead simply approving the trial court’s unusual approach, noting that at least the jury instructions included a mens rea (“this is not a case wherein the circuit court failed to instruct the jury on the applicable mens rea”). *Pfeiffer*, 2024 SD 71, ¶ 39, 14 N.W.3d at 647-48. The Court also states approvingly that the trial court “specifically recognized that the State has the burden of proving criminal intent and that recklessness is the minimum mens rea.” *Id.* at 647 n.3. But the Court does not explain how “recklessness” could qualify as a form of “intent.” Based on the usual understanding of the categories of mens rea, “recklessness” and “intent” are categorically opposed, such

instruction to permit conviction for first-degree manslaughter based on “intentionally or *recklessly*” doing the criminal act.⁸⁵ Without addressing the novelty of, or citing any prior decision in support of, the idea that recklessness could be a sufficient mens rea for a first-degree manslaughter conviction, the Supreme Court concluded “that the circuit court’s instructions as a whole correctly stated the law on mens rea.”⁸⁶

On other occasions, however, the Court has seemed to suggest that an intentional killing cannot provide the basis for a first-degree manslaughter conviction. In the 1992 case of *State v. Burtzlaff*,⁸⁷ there was evidence that the defendant, before shooting her husband, had said “Larry, I’m going to kill you”—which, it seems safe to say, would ordinarily qualify as strong evidence of an intent to kill.⁸⁸ In an outcome that at first glance might seem like a confirmation that an intentional killing *can* result in a first-degree manslaughter conviction, the South Dakota Supreme Court upheld the defendant’s first-degree manslaughter conviction against the defendant’s argument that her words showed “there was design to effect death,” thus negating the element of SDCL § 22-16-15(3) that “requires the perpetrator to be without design to effect death.”⁸⁹ But the Court did not uphold the conviction by clarifying, once and for all, that an intentional killing can provide the basis for a first-degree manslaughter conviction. Rather, the Court emphasized that there was evidence in the record that the killing had *not* been intentional:

[T]he record discloses that Burtzlaff also testified that she did not shoot her husband intentionally. This, combined with her testimony that she did not remember actually carrying the shotgun, presented the finder of fact with sufficient evidence that Burtzlaff had no design to effect death, and thus will sustain a conviction of first degree manslaughter beyond a reasonable doubt.⁹⁰

The preceding reasoning quite clearly seems premised on the assumption that an intentional killing *cannot* form the basis for a first-degree manslaughter conviction, and that Burtzlaff’s conviction could only be sustained because of the evidence that she did not kill intentionally. The Court assumes, here at least, that “no design to effect death” means “no intent to kill.”⁹¹

that to do something “recklessly” means it was *not* done “intentionally.” See DRESSLER, *supra* note 11, at 117-18, 130.

85. *Pfeiffer*, 2024 SD 71, ¶ 39, 14 N.W.3d at 648 (emphasis added by the South Dakota Supreme Court).

86. *Id.* at 649; *accord id.* (stating that to sustain Pfeiffer’s conviction under SDCL § 22-16-15(3), the “dangerous weapon” provision of the first-degree manslaughter statute, “the evidence must establish that Pfeiffer acted with criminal intent, namely that he acted recklessly”). For a further discussion of interpreting SDCL § 22-16-15 as an aggravated reckless manslaughter statute, see text above accompanying note 85.

87. 493 N.W.2d 1 (S.D. 1992).

88. *Id.* at 3.

89. *Id.* at 4.

90. *Id.*

91. Immediately before the quoted passage, the Court also seems to attempt to explain away the clear evidence of intent to kill in the statement “Larry, I’m going to kill you.” See *id.* The Court offers the following observation: “[A]n admission to shooting is not an automatic confession to killing with a

Similarly, in the 1987 case of *State v. Gregg*,⁹² the South Dakota Supreme Court seemed to accept the reasoning of a trial court judge who interpreted “without . . . design to effect death” as meaning “without intent to kill.”⁹³ In that case, the defendant Gregg was charged with first-degree manslaughter under SDCL § 22-16-15(3) (the “dangerous weapon” provision) for having fatally stabbed the victim with a knife in a Rapid City park.⁹⁴ Gregg testified that he and the victim had been “chased through the park by threatening individuals until, during the chase, exhausted and intoxicated, [he] fell asleep,” and that when he awoke, he discovered that the victim had been stabbed with his knife.⁹⁵

When Gregg’s lawyer requested a second-degree (reckless) manslaughter jury instruction, the trial court judge refused.⁹⁶ The trial court judge explained that through the first-degree manslaughter charge, Gregg was already charged “with a homicide without intent to kill, with a deadly weapon, so he’s not charged with the intent, just a deadly weapon.”⁹⁷ The judge suggested that in order for Gregg to be entitled to a second-degree manslaughter instruction, there would have to be evidence that the killing was “without a deadly weapon.”⁹⁸ In other words, the trial court judge denied an instruction for a form of unintentional homicide (that is, second-degree manslaughter) based on the assumption that Gregg was already charged with unintentional homicide with a deadly weapon (that is, first-degree manslaughter), and would only be entitled to a different instruction on the lesser form of unintentional homicide if there were evidence that he had killed unintentionally *without* a deadly weapon. The South Dakota Supreme Court upheld the denial of the second-degree manslaughter instruction, offering no criticism of the trial court judge’s reasoning on this point.⁹⁹

premeditated design. “While it proves the fact that the defendant pulled the trigger, it does not concede guilt in murder or first degree manslaughter.” *Burtzloff*, 493 N.W.2d at 4 (quoting *State v. Dokken*, 385 N.W.2d 493 (S.D. 1986)). But *Burtzloff* did not simply admit, after the fact, to shooting her husband. Certainly, such an admission standing alone would only tend to prove that she shot her husband, and not that she did so intentionally. Rather, *Burtzloff* admitted, after the fact, to saying, before the fact, “Larry, I’m going to kill you,” which clearly *is* a confession to killing with “premeditated design” as South Dakota uses that term—that is, as a synonym for “intentionally.” See *supra* text accompanying notes 31, 64.

92. 405 N.W.2d 49 (S.D. 1987).

93. *Id.* at 51. I note, anecdotally, that when I presented the basic outline of this article’s argument regarding South Dakota’s first-degree manslaughter statute at a conference of South Dakota state court judges in 2024, at least one judge stated that he understood the statute to refer to unintentional killings, and none of the other judges volunteered any disagreement with his interpretation.

94. *Id.* at 50.

95. *Id.*

96. *Id.* at 51.

97. *Id.*

98. *Id.*

99. *Id.* at 51-52. On the other hand, the trial court judge’s words are consistent with an interpretation of the first-degree manslaughter statute that reads as encompassing *both* reckless *and* intentional homicides, similar to the approach taken in the jury instructions in *Pfeiffer*. See *supra* text accompanying notes 83-86. The South Dakota Supreme Court seemed to take a similar approach to second-degree (“depraved mind”) murder in the 1996 case *State v. Satter*, which states:

While the intent to kill is the distinguishing factor between premeditated murder and depraved mind murder, the absence of intent to kill does not operate in the reverse. *Satter* has not cited any cases which support his claim that the charged offense could be true *only if* there was an absence of intent to kill.

Other, even more ambiguous cases, can be found in which the Court's language and reasoning could be understood either as implying that first-degree manslaughter encompasses intentional killing, or that it does not.¹⁰⁰ The Court's most extensive recent analysis of the first-degree manslaughter statute appeared in the 2019 case of *State v. Swan*.¹⁰¹ In *Swan*, the Court did not explicitly address whether first-degree manslaughter encompasses intentional killing, unintentional killing, or both, but the record of the case suggested that the jury was invited to convict Swan even if they thought his killing was unintentional.¹⁰² In addition, as already quoted above,¹⁰³ the Court in *Swan* includes a lengthy quotation from the South Dakota Pattern Jury Instruction on "heat of passion," which refers to a heat of passion not only as "a temporary obscurity of reason rendering a person incapable of forming a premeditated design to kill," but also, more obscurely, as a passion that makes a person "incapable of forming and executing the distinct intent to take human life," and that "cause[s] him, uncontrollably, to act from impending force of the disturbing cause rather than from any real wickedness of heart or cruelty or recklessness of disposition."¹⁰⁴

What are we to make of this language? The psychological categories in the pattern jury instruction, and their arrangement, are difficult to reconcile with the

State v. Satter, 543 N.W.2d 249, 252 (S.D. 1996) (emphasis added); see also *supra* note 64 (noting that *State v. Little Long* similarly treats second-degree murder as encompassing both unintentional and intentional killing). The Court suggests here, against the standard approach to depraved heart murder discussed above in Part II, that South Dakota's "depraved mind" murder can include intentional killings. The Court has also defined "depraved mind" in an expansive way that includes any person "who is indifferent to the life of others." *State v. Primeaux*, 328 N.W.2d 256, 258 (S.D. 1982). Thus, at least if we (reasonably) assume that any person who intentionally kills displays an indifference to the life of the person killed, it would seem that second-degree murder in South Dakota is not merely a lesser included offense of first-degree murder, but may be understood as two distinct crimes, one of which simply is first-degree murder. That is, a conviction for second-degree murder in South Dakota under SDCL § 22-16-7 can be based either on an intentional killing, or an unintentional (presumably at least reckless) killing displaying an indifference to the life of others.

Interpreting South Dakota's "depraved mind" murder statute as encompassing both intentional and unintentional killings might also help to explain the Court's statement, in another case, that "[t]he crucial distinction between second-degree murder and manslaughter in the first degree is that the former requires a 'depraved mind' as an element of the crime, while the latter does not." *Primeaux*, 328 N.W.2d at 258. From the perspective of the standard understandings of American homicide law laid out above in Part II, the quoted statement might seem confusing. From the standard perspective, the most significant and obvious distinction between depraved mind murder and voluntary manslaughter is that the former is unintentional, while the latter is intentional. But if, in South Dakota, both the second-degree murder statute and the first-degree manslaughter statute (including its various subsections) encompass both intentional and unintentional killing, then it would make sense to say that the clearest difference between the statutes is that the former requires a "depraved mind."

100. The 1993 case of *State v. Black*, for example, states the distinction between first-degree murder and first-degree manslaughter in a way that simply recreates the ambiguity contained in the statutes: "The boundary line between first-degree murder and first-degree manslaughter in South Dakota is premeditated design to effect the death of a person. In murder, you have such design whereas in manslaughter there is no design to effect the death of a person." *State v. Black*, 494 N.W.2d 377, 386-87 (S.D. 1993) (Amundson, J., dissenting).

101. *State v. Swan*, 2019 SD 14, ¶ 19, 925 N.W.2d 476, 481.

102. See *id.* ¶ 18, 925 N.W.2d at 481 (noting that the prosecution said, in closing arguments: "And he stomps on her neck and he ends her life. Maybe he didn't mean to, but he did.>").

103. See *supra* text accompanying note 102.

104. *Swan*, 2019 S.D. 14, ¶ 14, 925 N.W.2d at 481.

standard mens rea concepts discussed above in Part II. If we imagine a specific example of hot-blooded killing, such as a defendant who is repeatedly insulted in a bar and in a sudden rage kills his opponent in some cruel and unusual manner not involving a dangerous weapon, such as by gripping and crushing the opponent's trachea, how should a jury decide whether the defendant had "the distinct intent to take human life"? If the defendant testified that he did not intend to kill the victim, or was not even aware of a risk that he might kill the victim, would such testimony be relevant? Is it possible to intend to kill someone and still be incapable of forming "the *distinct* intent to take human life"?

Rather than attempting to speculate about the answers to such questions, I would simply note that there would be no need for such speculation if the South Dakota Legislature adopted one of the well-established, standard approaches to defining the required mental states for the various forms of criminal homicide, including first-degree manslaughter, as recommended below in Part V.

In sum, from *Edmunds* onward, the South Dakota Supreme Court has sometimes seemed inclined toward concluding that South Dakota's first-degree manslaughter statute encompasses intentional killings. But outside of the opaque and questionable reasoning in *Edmunds*, the Court has never squarely addressed how a conviction for first-degree manslaughter based on an intentional killing can be reconciled with the "without . . . design to effect death" language in the first-degree manslaughter statute. Moreover, the Court has sometimes, as in *Burtzlaff* and *Gregg*, seemed to call into question whether the first-degree manslaughter statute can encompass intentional killings at all.

C. HISTORICAL ANALYSIS OF THE FIRST-DEGREE MANSLAUGHTER STATUTE

One way to shed light on the meaning of an unclear statute is to look at its history. The following sections will describe how language drafted by a small group of New York lawyers in the 1820s ended up defining manslaughter in South Dakota nearly two hundred years later. The history suggests that, contrary to *Edmunds*, the language currently located in SDCL § 22-16-15(2) was *not* originally intended to reflect the definition of "voluntary manslaughter" under the common law. In line with its plain meaning, the language was originally intended to capture especially egregious forms of unintentional killing.

1. *New York's Revised Statutes of 1829*

The language currently contained in SDCL § 22-16-15(2) has its origins in the legal codification movement of the early nineteenth century United States.¹⁰⁵ Inspired by Jeremy Bentham's critique of the common law's disorder, the codification movement attempted to replace verbose public legislation and scattered judicial decisions with clear, publicly accessible, comprehensive

105. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 293-308 (3d ed. 2005); JOSEPH L. GERKEN, THE INVENTION OF LEGAL RESEARCH 81-113 (2016).

statutory laws organized into a single, published code.¹⁰⁶ In 1825, the New York legislature appointed lawyers John Duer, Benjamin F. Butler, and Henry Wheaton (later replaced by John C. Spencer) to create a draft code for the legislature to review.¹⁰⁷ Their work, after amendment, provided the basis for the New York Revised Statutes of 1829, the first legal code in the United States.¹⁰⁸

The revisers carried out their task with an extraordinary degree of latitude.¹⁰⁹ Their codification of homicide law, and particularly the law of manslaughter, illustrates the extent of their discretion. First, as they observe in their notes to the New York legislature, the term “manslaughter” does not appear in any prior piece of legislation in the state of New York.¹¹⁰ But they include the crime of manslaughter in their codification based on the assertion that the existence of the crime is implied by a passing reference in an 1813 act to “any felony other than such as are herein above enumerated, and directed to be otherwise punished, and above the degree of petit larceny.”¹¹¹ Second, instead of simply codifying something like Blackstone’s widely consulted definitions of murder and manslaughter,¹¹² the revisers took it upon themselves to invent new definitions in new language. For example, in their definition of murder, the revisers replaced the traditional term “malice aforethought” with the term “premeditated design.”¹¹³

The revisers explained their departures from common law conceptions of homicide in part by lamenting the lack in such sources of “a settled line of distinction between murder and manslaughter,” which “are now so nearly connected, and run into each other so much, that courts and juries often mistake [*sic*], and a lamentable uncertainty prevails.”¹¹⁴ The revisers’ notes also express concern regarding the increasingly mild punishments imposed in cases of manslaughter in England, as described by Blackstone and others.¹¹⁵ The revisers observe that the result has been “a constant effort to bring the offence [of manslaughter] within the description of murder, so that the offender shall not escape all punishment.”¹¹⁶ They continue:

It is obvious therefore that the reasons upon which the courts in that country proceed, are not applicable to this state, and hence a very just

106. See FRIEDMAN, *supra* note 105, at 302.

107. See Appendix, *Containing Extracts from the Original Reports of the Revisers*, in 3 REVISED STATUTES OF THE STATE OF NEW YORK 401, 403, 409, 413 (1836) [hereinafter 3 REVISED STATUTES]; GERKEN, *supra* note 105, at 97-113.

108. See GERKEN, *supra* note 105, at 82, 97, 112.

109. “In effect, the revisors were given nearly plenary powers to redesign, reformulate, and redevelop the whole body of New York statute law, which had been a century and a half in the making, to say nothing of received British statutes of a longer lineage.” CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM* 141 (1981).

110. See Appendix, *supra* note 107, at 811.

111. See *id.*; 1 LAWS OF THE STATE OF NEW YORK, REVISED AND PASSED AT THE THIRTY-SIXTH SESSION OF THE LEGISLATURE 409 (1813).

112. See 4 WILLIAM BLACKSTONE, COMMENTARIES *191-202.

113. Compare 2 REVISED STATUTES OF THE STATE OF NEW YORK 657 (1829) [hereinafter 2 REVISED STATUTES]; with BLACKSTONE, *supra* note 112, at *198-99.

114. 3 REVISED STATUTES, *supra* note 107, at 808-9.

115. See *id.*

116. *Id.* at 811.

doubt arises, whether the rules founded on those reasons, should be deemed law here. These considerations urge the indispensable necessity of an attempt to define, arrange and classify the different grades of manslaughter, and assign to each, the proper punishment. That attempt is made in this Article¹¹⁷

Thus, the revisers chose not to follow Blackstone's approach to manslaughter, which constituted a central source of the "common law" approach to manslaughter discussed above in Part II, and which focused on the distinction between voluntary and involuntary manslaughter.¹¹⁸ According to Blackstone, manslaughter is "the unlawful killing of another, without malice either express or implied: which may be either voluntarily, upon a sudden heat; or involuntarily, but in the commission of some unlawful act."¹¹⁹ In this approach, derived from a lengthy history of judicial decisions, the most basic distinction in the law of manslaughter is the relatively clear distinction between intentional (voluntary) and unintentional (involuntary) killing.

Instead of following Blackstone, Duer and the other New York revisers developed their own, novel definitions of manslaughter.¹²⁰ One of their forms of second-degree manslaughter contains, as far as I am aware, the first usage of "without a design to effect death" in a definition of manslaughter. Specifically, the revisers wrote: "The killing of a human being, without a design to effect death, in a heat of passion, but in a cruel and unusual manner, unless it be committed under such circumstances as to constitute excusable or justifiable homicide, shall be manslaughter in the second degree."¹²¹ Similarly, one of their forms of third-degree manslaughter states: "The killing of another, in the heat of passion, without a design to effect death, by a dangerous weapon, in any case except such wherein the killing of another is herein declared to be justifiable or excusable, shall be deemed manslaughter in the third degree."¹²² The phrase "without a design to effect death" also appears in their version of misdemeanor manslaughter.¹²³

Although the revisers do not elaborate on the meaning of "without a design to effect death," their definition of murder includes a killing "[w]hen perpetrated from a premeditated design to effect the death of the person killed, or of any human being."¹²⁴ If there is such a thing as *premeditated* design, then "design"

117. *Id.* The revisers make clear that their motive in departing from English law is that it does not punish manslaughter harshly enough: "In this instance, and in this only, is our code more severe than that of England." *Id.*

118. See BLACKSTONE, *supra* note 112, at *191-92.

119. *Id.* at *191.

120. See 2 REVISED STATUTES, *supra* note 113, at 661.

121. *Id.* § 10.

122. *Id.* § 12; see also *id.* § 13 ("The involuntary killing of a human being . . . while such other person is engaged in the commission of a trespass or other injury private rights or property, or engaged in an attempt to commit such injury, shall be deemed manslaughter in the third degree.").

123. *Id.* § 6. Not all of the revisers' forms of manslaughter involve unintentional killing. For example, they recognize forms of first-degree manslaughter based on "deliberately assisting another in the commission of self-murder," or "the willful killing of an unborn quick child." *Id.* §§ 7-8.

124. *Id.* § 5. Similarly, section five defines felony murder as: "[w]hen perpetrated without any design to effect death, by a person engaged in the commission of a felony." *Id.*

standing alone presumably does not imply premeditation.¹²⁵ Thus, it would seem that the definitions of manslaughter including the phrase “without a design to effect death” were intended to refer to *unintentional* killings, and not merely to unpremeditated killings.

This conclusion is strengthened by the revisers’ definition of one of their two forms of fourth-degree manslaughter: “The *involuntary* killing of another, by any weapon, or by means neither cruel nor unusual, in the heat of passion, in any cases other than such as are herein declared to be excusable homicide, shall be deemed manslaughter in the fourth degree” (emphasis added).¹²⁶ Their other form of fourth-degree manslaughter is a catch-all encompassing “[e]very other killing of a human being, by the act, procurement or culpable negligence of another” that is neither justifiable nor excusable, nor murder, nor another form of manslaughter.¹²⁷ By contrast, the forms of excusable (and therefore non-criminal) homicide include killing “[b]y accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any undue advantage being taken, and without any dangerous weapon being used, and not done in a cruel and unusual manner.”¹²⁸

The structure of the statute suggests that the term “involuntary” in the fourth-degree manslaughter definition is meant to be a synonym for “without a design to effect death.” When read in this way, the statute has a fairly comprehensible organization: an unintentional killing in a heat of passion by cruel and unusual means is second-degree manslaughter; an unintentional killing in a heat of passion with a dangerous weapon is third-degree manslaughter; an unintentional killing in a heat of passion by a non-dangerous weapon and without cruel and unusual means is fourth-degree manslaughter; an unintentional killing in a heat of passion without a dangerous weapon, without cruel and unusual means, without undue advantage, and with adequate provocation is excusable homicide; and, finally, an unintentional killing in a heat of passion that does not satisfy all of the requirements for an excusable homicide, but that also does not fit any of the previous definitions (for example, an unintentional killing in a heat of passion without any weapon and without cruel and unusual means, but with undue advantage, or without adequate provocation) would fall under the catch-all definition of fourth-degree manslaughter.

At the same time, the revisers’ definitions of manslaughter are not a model of logical clarity and concision. For example, the first definition of fourth-degree manslaughter seems unnecessary in light of the second, catch-all definition. But

125. Possible further support for this conclusion can be found in the fact that the revisers juxtapose, in the definition of murder, “without any premeditated design to effect . . . death” in their definition of depraved mind murder, and “without any design to effect death” immediately after in their definition of felony murder. *Id.* § 5(2)-(3). In other words, the drafters may have been conscious of a difference between “premeditated design” and “design,” and may have used the former to refer to premeditated intent and the latter to intent without premeditation.

126. *Id.* at 662 § 18.

127. *Id.* § 19.

128. *Id.* at 661 §§ 4-5 (making clear in marginal note that “justifiable or excusable” means “not guilty”).

the parallel structure of the definitions suggests that the drafters intended “without a design to effect death” in the second- and third-degree manslaughter definitions to be synonymous with “involuntary” in the fourth-degree definition.

The revisers’ notes further strengthen the sense that they conceived of the phrases “without a design to effect death” and “involuntary” as synonymous. The notes present the difference between the second-, third-, and fourth-degree manslaughter definitions discussed above as residing solely in the difference between killing in a cruel and unusual manner, killing with a dangerous weapon, and killing “with a weapon not dangerous.”¹²⁹ That is, the revisers’ notes make no reference to a break between second- and third-degree manslaughter, on the one hand, and fourth-degree manslaughter, on the other, based on the former potentially encompassing intentional (but unpremeditated) killing and the latter being limited to unintentional killing.

Simply put, there is every indication that the lawyers who wrote the New York Revised Statutes of 1829 thought of heat of passion killing in general as unintentional killing, and not merely as unpremeditated killing. This is a significant departure from the traditional common law definition of manslaughter offered by Blackstone, according to which heat of passion manslaughter is *voluntary*, that is, a form of intentional killing.¹³⁰ The revisers’ departure from the substance of Blackstone’s definition of manslaughter sits uncomfortably beside their acceptance of the substance of Blackstone’s definition of murder.¹³¹ The result is an awkward gap, leaving it unclear how they thought an *intentional* heat of passion killing should be categorized under their homicide code.¹³² Because it is not premeditated, it cannot be murder; because it is intentional, it cannot be any of the enumerated forms of manslaughter. Its only remaining home

129. 3 REVISED STATUTES, *supra* note 107, at 812-13.

130. See BLACKSTONE, *supra* note 112, at *191-92 (contrasting examples of voluntary manslaughter, such as when a man kills an aggressor in response to a “great indignity,” with examples of involuntary manslaughter, such as when, “in a country village, where few passengers are,” after having “call[ed] out to all people to have a care,” “a workman flings down a stone or piece of timber into the street, and kills a man”).

131. See 3 REVISED STATUTES, *supra* note 107, at 809.

132. One way to fill the gap might be to say that intentional heat of passion killings fall under the revisers’ “depraved mind” murder statute, even though depraved mind murder is traditionally thought of as a form of *unintentional* killing. The revisers’ definition of depraved mind murder leaves open the possibility that it might encompass intentional killings, because it uses the phrase “without any *premeditated* design to effect . . . death.” 2 REVISED STATUTES, *supra* note 113, at 657 § 5(2) (emphasis added). The use of “premeditation” seems to have been intentional based on the omission of the term from the immediately following definition of felony murder. See *id.* But if the revisers intended such a novel reworking of traditional homicide definitions, they left no indication of it in their revisers’ notes. See 3 REVISED STATUTES, *supra* note 107, at 791-92.

Incidentally, further evidence that the revisers thought of manslaughter in general as paradigmatically unintentional appears in their commentary on manslaughter based on killing unnecessarily while resisting a felony or after an attempted felony has failed: “If the killing be voluntary in such case, or done with premeditated design, it would be murder. Although an involuntary act, it is still an offence.” 3 REVISED STATUTES, *supra* note 107, at 813. The text of the statute says nothing about whether the killing is voluntary or involuntary. See *id.* The revisers simply assume the killing must be involuntary, strengthening the sense that they assume manslaughter to be involuntary unless stated otherwise.

would seem to be the catch-all definition of fourth-degree manslaughter¹³³—with the implausible, but seemingly unavoidable, result that an *intentional* killing in a heat of passion *without* adequate provocation would be treated as a lesser crime than an *unintentional* killing *with* adequate provocation, provided that both involved a dangerous weapon or cruel and unusual means.

It is not surprising that, as one historical summary notes, “[t]he New York courts experienced great difficulty in applying the 1829 statutes to the cases before them.”¹³⁴ But it is perhaps surprising that instead of categorizing intentional but unpremeditated killings under the catch-all definition of fourth-degree manslaughter, New York courts ultimately opted to treat such killings as murders—even though this effectively required the “deletion of the word ‘premeditated’ from the murder statute.”¹³⁵ In other words, the failure of the 1829 revisers to address intentional but unpremeditated killings resulted in New York courts, at least as early as 1852,¹³⁶ recognizing the arguably oxymoronic idea of “instantaneous premeditation” discussed in Part II above. Because the 1829 statutory definition of “heat of passion” manslaughter seemed to encompass only

133. A 1937 New York homicide law revision commission reached the same conclusion. See Thomas H. Baldikoski & William L. Church, *The Required State of Mind under Wisconsin’s Manslaughter Statute*, 1963 WIS. L. REV. 636, 638 n.13 (1963) (quoting REPORT OF THE LAW REVIEW COMMISSION OF NEW YORK, COMMUNICATION OF THE LAW REVISION COMMISSION TO THE LEGISLATURE—RELATING TO HOMICIDE 551 (1937)). But see *id.* (noting the contrary view of J. W. Edmonds, 7 ALBANY L.J. 247-48 (1873), which “suggest[ed] that the omission of ‘premeditated’ from the phrase ‘without design to effect death’ in the New York manslaughter statutes was mere inadvertence”).

134. Baldikoski & Church, *supra* note 133, at 637. Baldikoski’s and Church’s article is in many ways a precursor to the present work. At the time of their writing, Wisconsin had a homicide statute defining one form of manslaughter as “‘without intent to kill and while in the heat of passion.’” *Id.* at 636 (quoting WIS. STAT. § 940.05(1) (1961)). After tracing the language “back to early New York legislation,” they note “some of the problems that were encountered in New York,” “problems [that] have been carried forward unsolved under the present Wisconsin statute.” *Id.* They describe how Wisconsin courts have struggled to maintain a consistent interpretation of the manslaughter statutes and have sometimes “reached dubious factual conclusions in order to permit or sustain a desired verdict.” *Id.* at 640. They quote a chief justice of Wisconsin’s Supreme Court lamenting as early as the 1870s that the state’s homicide statutes “‘are, in some instances, somewhat inaccurate and ill framed. We fear that they need revision.’” *Id.* at 640 n.18 (quoting *Hogan v. State*, 36 Wis. 226, 243-44 (1874)). They describe how the Judiciary Committee of the Wisconsin Legislative Council recommended a revision of the manslaughter statute in 1953, but that “for reasons not entirely clear, the proposed statute was never enacted.” *Id.* at 639-40. Finally, they propose revising the manslaughter statute to “provide that even intentional killings may be punished as less than murder if they are committed under mitigating circumstances,” and they recommend “[t]he draft of the *Model Penal Code* . . . as an example of such a statute.” *Id.* at 648.

Wisconsin finally disposed of the flawed 1829 New York statutory language in 1988. See Walter Dickey, David Schultz & James L. Fullin, Jr., *The Importance of Clarity in the Law of Homicide: The Wisconsin Revision*, 1989 WIS. L. REV. 1323, 1335 (1989). In an indication of the detrimental effects of the prior manslaughter statute, the authors note that “[s]ome prosecutors said that they never charged manslaughter because of confusion about what was required for a conviction.” *Id.* at 1327; see also *id.* at 1339 n.64 (collecting cases indicating that between 1964 and the 1988 revision, Wisconsin courts came to treat the “without intent to kill” language in the manslaughter statute “as a legal fiction” so that “manslaughter could be correctly characterized as an intentional crime”).

135. Baldikoski & Church, *supra* note 133, at 638.

136. *Id.* at 637-38 (citing *People v. Sullivan*, 7 Seld. 396 (N.Y. Ct. App. 1852); *People v. Clark*, 7 Seld. 385 (N.Y. Ct. App. 1852)).

unintentional killings, the courts treated intentional killings in a heat of passion as murder.¹³⁷

In 1860, the New York legislature responded to the failure of the 1829 statutes to address unpremeditated intentional killings by dividing murder into two degrees, with the second degree finally being defined in 1881 as killing “intentionally but without deliberation and premeditation.”¹³⁸ But by then the handiwork of the 1829 revisers had already taken on a life of its own.

2. *Field’s Penal Code of 1865*

Instead of fading into history as a well-intentioned but botched attempt to clarify the law of homicide, the puzzling redefinition of manslaughter by Duer and the other New York revisers ended up spreading across the United States. One of the vectors of contagion arrived through the efforts of another New York lawyer and codification enthusiast, David Dudley Field II. As the chair of a New York codification commission, Field first drafted an innovative and widely influential code of civil procedure, completed in 1848.¹³⁹ Then another codification commission chaired by Field produced a penal code, drafted by William Curtis Noyes and published in 1865.¹⁴⁰ The definition of manslaughter in what is often called “Field’s Penal Code” is based on the New York Revised Statutes rather than the common law—understandably, given that the penal code was intended to be adopted by the New York legislature.¹⁴¹ In language that the reader will by now find all too familiar, Field’s Penal Code § 248(2) states that “[h]omicide is manslaughter in the first degree . . . [w]hen perpetrated without a design to effect death, and in a heat of passion, but in a cruel and unusual manner or by means of a dangerous weapon”¹⁴²

Although the various parts of the Field Code were created by and for the state of New York, they ended up being used as a resource for the creation of codes in many different states, including newly created territories and states in the West.¹⁴³ In addition, even before the publication of Field’s Penal Code in 1865, the criminal code contained in New York’s Revised Statutes provided a source for imitation.

137. See *supra* note 136; see also Baldikoski & Church, *supra* note 133, at 638 n.13 (quoting a New York law revision commission’s conclusion that “the death penalty was inflicted on those who had killed in the heat of passion or in sudden combat regardless of provocation so long as the intent to kill had existed,” and that “[t]he term ‘premeditated’ lost all significance and became substantially equivalent to the words ‘actual intent’”).

138. See Note, *The Doctrine of Merger in Felony-Murder and Misdemeanor-Manslaughter*, 35 ST. JOHN’S L. REV. 109, 112-13 nn.32, 34 (1960).

139. See FRIEDMAN, *supra* note 105, at 293-98.

140. See Mildred V. Coe & Lewis W. Morse, *Chronology of the Development of the David Dudley Field Code*, 27 CORNELL L.Q. 238, 244-45 (1942).

141. See THE PENAL CODE OF THE STATE OF NEW YORK: REPORTED COMPLETE BY THE COMMISSIONS OF THE CODE iii, 84-88 (1865) [hereinafter FIELD’S PENAL CODE].

142. *Id.* at 84.

143. See FRIEDMAN, *supra* note 105, at 295-96; Kellen Funk & Lincoln Mullen, *The Migration of the Field Code* (Feb. 17, 2016), <https://perma.cc/62Y6-C9ZE> (unpublished working paper).

For example, in 1849, the newly formed state of Wisconsin “copied verbatim the New York statutes of 1829.”¹⁴⁴

The language of Field’s Penal Code departed from the definitions of murder and manslaughter in the 1829 New York Revised Statutes in various ways, including through the definition of negligent homicide as a form of second-degree manslaughter.¹⁴⁵ But the main innovation of Field’s Penal Code for the purposes of this article was to add a further confusion to the definition of manslaughter. The 1829 statutes had not explicitly addressed the question of whether premeditation can be instantaneous, and had implied through the distinction between “premeditated design” and “design” that it cannot.¹⁴⁶ As already noted, New York courts had responded to the failure of the 1829 revisers to provide an express home for intentional but unpremeditated killing by recognizing the possibility of instantaneous premeditation and thus enabling intentional but unpremeditated killing to be categorized as murder.¹⁴⁷ But in 1860, years before the publication of Field’s Penal Code, the New York legislature, also as already noted, had addressed the lack of a provision for intentional but unpremeditated killing by identifying such killings as second-degree murder¹⁴⁸—thus obviating the need for courts to read the word “premeditated” out of the murder statute. By the time Noyes drafted Field’s Penal Code, there was no need to adopt the fiction of instantaneous premeditation. Noyes could have simply followed New York by identifying intentional but unpremeditated killing as second-degree murder.

Instead, a note in Field’s Penal Code objects to New York’s 1860 division of murder into two degrees.¹⁴⁹ After observing that only first-degree murder is “punishable with death,” the note states:

The practical result of introducing such a distinction will be that jurors influenced by unwillingness to unite in a capital conviction, will always find the prisoner guilty of the second degree only. The Commissioners are of opinion that the simplicity of the definition of murder in the Revised Statutes should be restored.¹⁵⁰

With these considerations in mind, the drafters of Field’s Penal Code define murder in relevant part as homicide “with a premeditated design to effect . . .

144. Baldikoski & Church, *supra* note 133, at 638.

145. See FIELD’S PENAL CODE, *supra* note 141, at 86 § 252. Field’s Penal Code also reduced the degrees of manslaughter to two from the 1829 Revised Statute’s four degrees. Compare *id.* at 84-88; with 2 REVISED STATUTES, *supra* note 113, at 661-63. But Field’s Penal Code preserved the catch-all manslaughter provision from the 1829 Revised Statutes, meaning that an intentional but unpremeditated killing that is not justifiable or excusable would be second-degree manslaughter under Field’s Penal Code, just as it would be fourth-degree manslaughter under the 1829 Revised Statutes. See FIELD’S PENAL CODE, *supra* note 141, at 86 § 252; 2 REVISED STATUTES, *supra* note 113, at 662 § 19. By contrast, the absence of a catch-all manslaughter provision in South Dakota’s current homicide statutes creates the troubling possibility, discussed in Section III.A, above, that an intentional but unpremeditated homicide that is not justifiable or excusable could best be categorized as a first-degree intentional murder.

146. See 3 REVISED STATUTES, *supra* note 107, at 808.

147. See *supra* text accompanying notes 133-34.

148. See 2 REVISED STATUTES, *supra* note 113, at 662 § 19.

149. See FIELD’S PENAL CODE, *supra* note 141, at 83.

150. *Id.*

death.”¹⁵¹ In addition, Field’s Penal Code includes a definition of “heat of passion” manslaughter that suggests, through the phrase “without a design to effect death,” that it only applies to unintentional killing. The code also includes a definition of premeditated murder that explicitly allows for instantaneous premeditation, stating that “[a] design to effect death sufficient to constitute murder, may be formed instantly before committing the act by which it is carried into execution.”¹⁵² Reading these provisions together suggests that intentional killings in a “heat of passion” are legally indistinguishable from premeditated murder. Voluntary manslaughter does not exist under Field’s Penal Code. The final pieces of the statutory puzzle in SDCL § 22-16-15(2), as described in Section III.A, have fallen into place.

3. *From the 1877 Dakota Territory Code to Today*

In 1877, the Dakota Territory adopted a revised code that copied the definitions of murder and manslaughter largely verbatim from Field’s Penal Code.¹⁵³ Earlier, in 1862, the territory had published an official collection of the laws passed at the first session of its legislative assembly.¹⁵⁴ The 1862 laws contain fairly traditional common law homicide definitions, distinguishing between voluntary and involuntary manslaughter in a manner echoing Blackstone.¹⁵⁵ But when Territorial Secretary George H. Hand led the drafting of the 1877 Revised Codes, he chose to follow the ready-made model of Field’s Penal Code instead.¹⁵⁶

In the intervening century and a half, the definition of manslaughter in South Dakota has remained surprisingly stable.¹⁵⁷ As detailed in Section III.A. above, South Dakota continues to use the phrase “without a design to effect death”

151. *Id.* at 82.

152. *Id.* at 83.

153. See 1877 DAKOTA TERRITORY CODE, *supra* note 81, at 660.

154. See GENERAL LAWS, AND MEMORIALS AND RESOLUTIONS OF THE TERRITORY OF DAKOTA, PASSED AT THE FIRST SESSION OF THE LEGISLATIVE ASSEMBLY, 160-81 (1862). The 1862 statutes seem to reflect local concerns in the Dakota Territory in a way that Field’s Penal Code obviously could not. See e.g., *id.* at 165 § 43 (“If any person shall unlawfully cut out or disable the tongue, put out any eye, slit the nose, ear, or lip, or disable any limb or member of another, or shall voluntarily and of purpose put out an eye or eyes, every such person shall be guilty of mayhem”); § 44 (“Depriving of testicles. Penalty for.”).

155. See *id.* at 160-63.

156. In his preface, Hand proudly describes the 1877 code as “embrac[ing] the best results of legislation in this country, and also [expressing] the weight of the latest and most enlightened judicial learning and judgment. In them the territory, or the future state, has an invaluable public heritage which should be changed only with intelligent conservatism” See 1877 DAKOTA TERRITORY CODE, *supra* note 81, at v. Hand specifically states that the Penal Code was drafted “according to the latest and best examples of legislation, with such provisions as are required by our peculiar circumstances.” *Id.*

157. As the South Dakota Supreme Court stated in 1971, “[o]ur present statutes defining homicide, murder and manslaughter in the first and second degrees . . . as well as those relating to excusable and justifiable homicide, are the same as they originally appeared in the 1877 Revised Codes of Dakota Territory.” *State v. Grooms*, 186 N.W.2d 889, 893 (S.D. 1971).

(although “a” became “any” in 2005), and it continues to require that heat of passion manslaughter be carried out in a “cruel and unusual manner.”¹⁵⁸

In sum, the problems in South Dakota’s homicide statutes, as detailed above in Sections III.A-B, were directly inherited from Field’s Penal Code. Even when, in the 1970s, South Dakota revised many aspects of its criminal code to incorporate ideas from the Model Penal Code, the state left the definition of first-degree “heat of passion” manslaughter unchanged.¹⁵⁹

This article will not attempt to provide a comprehensive account of the spread, mutation, and eventual elimination of the 1829 New York definition of “heat of passion” manslaughter across each of the various U.S. states and territories over the last two centuries.¹⁶⁰ But as an indication of the extent of the rule’s propagation, as late as 1950 a survey of manslaughter statutes found that seven states still continued to use language closely resembling the definition in Field’s Penal Code: Kansas, Minnesota, New Hampshire, North Dakota, Oklahoma, South Dakota, and Wisconsin.¹⁶¹ Since 1950, all of these states have abandoned the 1829 New York manslaughter definition except South Dakota and Oklahoma.¹⁶²

IV. A DEFENSE OF VOLUNTARY MANSLAUGHTER DOCTRINE

Before turning in Part V, below, to proposing statutory changes that would confirm the existence of the crime of voluntary manslaughter in South Dakota, it may be worthwhile to address a potential objection: would South Dakota be better off without a voluntary manslaughter statute? After all, voluntary manslaughter doctrine has been subjected to decades of scholarly criticism. If recognizing voluntary manslaughter as a criminal offense is a bad idea, then the absence of a clear equivalent to voluntary manslaughter in South Dakota’s homicide statutes could be seen as advantageous. South Dakota’s courts could simply follow Oklahoma by rejecting *Edmunds* and concluding, definitively, that voluntary manslaughter does not exist under state law.

This section will argue, however, that the distinction between premeditated murder and voluntary manslaughter reflects a biologically rooted distinction between cold-blooded and hot-blooded killing that is relevant to criminal punishment and should be reflected in substantive criminal law.

158. SDCL § 22-16-15(2) (2017); see 2005 S.D. Sess. Laws, ch. 120. It is unclear what the purpose was for changing “[w]ithout a design to effect death” to “[w]ithout any design to effect death.”

159. See *State v. Schouten*, 2005 SD 122, ¶ 14, 707 N.W.2d 820, 824.

160. For an indication of the difficulties of such a project, see generally Funk & Mullen, *supra* note 143; Kellen Funk & Lincoln A. Mullen, *The Spine of American Law: Digital Text Analysis and U.S. Legal Practice*, 123 AM. HIST. REV. 132 (2018) (describing the difficulties of tracing the spread and mutation of the Field Code across jurisdictions).

161. Charles Gromley, *Voluntary Manslaughter under State Statutes*, 39 KY. L.J. 113, 116 n.6 (1950).

162. Compare OKLA. STAT. tit. 21, § 711; and SDCL § 22-16-15; with KAN. STAT. ANN. § 21-5404; MINN. STAT. § 609.20; N.H. REV. STAT. ANN. § 630:2; N.D. CENT. CODE § 12.1-16-01(2); and WIS. STAT. § 940.05.

Scholarly criticisms of voluntary manslaughter have generally fallen into two rough categories. First, some critics have alleged that voluntary manslaughter is a historical relic that may once have had some justification, but no longer does.¹⁶³ Second, other critics have argued that voluntary manslaughter is fatally tainted by its historical association with violence by men against women.¹⁶⁴ This section responds to both critiques, and concludes that voluntary manslaughter, far from being abolished, should be seen as the default form of intentional killing and should be made very broadly available to defendants, as the drafters of the Model Penal Code similarly concluded.

According to the first critique of voluntary manslaughter, the doctrine may historically have served a purpose as a way for English judges to avoid the imposition of capital punishment in certain mitigated cases of intentional killing.¹⁶⁵ But today, “the underlying rationale for the traditional doctrine appears hopelessly unclear,” and voluntary manslaughter “lacks theoretical coherence in terms of the goals of criminal law.”¹⁶⁶ The heat of passion defense reflects “a mistaken paradigm of human behavior” by assuming “that the heat of passion defendant is less culpable than another killer, when, in reality, the justifications for incarcerating the ‘typical’ heat of passion defendant are usually every bit as compelling as for most other defendants.”¹⁶⁷ This line of criticism suggests that

163. See, e.g., LaFave *infra* note 165.

164. See, e.g., Gruber *infra* note 179.

165. See 2 WAYNE R. LAFAYE, SUBSTANTIVE CRIMINAL LAW § 15.2(h) (3d ed. & Oct. 2024 supp.). For a more detailed history of voluntary manslaughter, see Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 421-32 (1982).

166. Elise J. Percy, Joseph L. Hoffman & Steven J. Sherman, *Sticky Metaphors and the Persistence of the Traditional Voluntary Manslaughter Doctrine*, 44 U. MICH. J. L. REFORM 383, 392 (2011). The authors note, and attempt to explain, the puzzling persistence of traditional common law voluntary manslaughter doctrines, with all of their flaws, despite “more than a half-century of seemingly compelling empirical and normative arguments in favor of doctrinal reform,” and despite the ready availability of the MPC’s clearer, more normatively appealing “extreme mental or emotional disturbance” (EED) alternative. *Id.* at 383, 394-95. According to the most recent edition of the leading criminal law casebook, “roughly 20 states now employ some version of the EED test,” although only five states adopted the MPC’s EED rule “almost verbatim.” SANFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, CRIMINAL LAW AND ITS PROCESSES 499 (11th ed. 2022); cf. PAUL H. ROBINSON & TYLER SCOT WILLIAMS, MAPPING AMERICAN CRIMINAL LAW: VARIATIONS ACROSS THE 50 STATES 47 (2018) (stating that only ten states had adopted something close to the MPC’s EED test).

Percy et al. make a compelling case that traditional voluntary manslaughter doctrine and its associated metaphors are “grounded in the male experience,” with the result that “the voluntary manslaughter doctrine is applied more frequently to murders that are committed out of anger (usually by men) than to those committed out of fear (often by women).” Percy et al., *supra*, at 403, 417. To relate the arguments of Percy et al. to the arguments of this article, it may be worth noting, however, that in the biological distinction between reactive and proactive aggression, the former encompasses both “fear” and “anger.” See, e.g., RICHARD WRANGHAM, THE GOODNESS PARADOX: THE STRANGE RELATIONSHIP BETWEEN VIRTUE AND VIOLENCE IN HUMAN EVOLUTION 34 (2019) (“Reactive aggression is an immediate response to an imminent threat that involves anger, fear, or both.”). Thus, a definition of voluntary manslaughter that aligned with the definition of reactive aggression would not be subject to Percy et al.’s gender-based critiques of traditional voluntary manslaughter doctrine.

167. Deborah E. Milgate, Note, *The Flame Flickers, but Burns On: Modern Judicial Application of the Ancient Heat of Passion Defense*, 51 RUTGERS L. REV. 193, 226 (1998); see also Nicole A.K. Matlock, *Reasonable Rage: The Problem with Stereotypes in Provocation Cases*, 6 WASH. U. JURISPRUDENCE REV. 371, 372 (2014) (rejecting provocation because “the claimed ‘loss of control’ is not an actual loss of control,” and claiming “that citizens (and juries) nevertheless recognize it because of stereotypes ingrained in our culture”). Stephen Morse, one of the leading theoretical defenders of harsh retribution during the

it is simply arbitrary to define intentional “heat of passion” killing as a lesser crime than other forms of intentional killing. The criticism suggests that “voluntary manslaughter” should be abandoned like so many other vestigial concepts in criminal law, such as the archaic distinction between “constructively present second-degree principals” and “accessories before-the-fact.”¹⁶⁸

The general distinction between “hot-blooded” and “cold-blooded” killing, far from being an arbitrary cultural relic or merely the product of judicial exigencies in early modern England, reflects a well-established biological phenomenon: the distinction between “reactive” and “proactive” aggression. In the words of biological anthropologist Richard Wrangham:

Since the 1960s, . . . many different scientific efforts to understand the biology of aggression have converged on the same important idea. Aggression, meaning a behavior intended to cause physical or mental harm, falls into two major types, so distinct in their function and biology that from an evolutionary viewpoint they need to be considered separately. Reactive aggression is a response to a threat. . . . It is readily seen in sports matches when players lose their temper with one another or with the referee. . . . It is shown more by men than by women, and is associated with high levels of testosterone. . . . Proactive aggression is . . . characterized as premeditated, predatory, instrumental, or ‘cold.’ Unlike reactive aggression, it involves a purposeful attack with an external or internal reward as a goal, rather than an effort to remove a source of fear or threat. . . . Because proactive aggression involves a conscious choice, we tend to judge those who are guilty of it more harshly than those who commit acts of reactive aggression.¹⁶⁹

Wrangham notes that “many other word pairs connote the same sense” as proactive and reactive aggression: “cold and hot, offensive and defensive, or premeditated and impulsive.”¹⁷⁰ Another common synonym for proactive is “instrumental” aggression.¹⁷¹ The two types of aggression appear to be produced by “different neural pathways,”¹⁷² and can be distinguished across a wide variety of animal species, from cats to rodents.¹⁷³

In practice, there are often significant differences between, on the one hand, various formulations of the legal distinction between voluntary manslaughter and premeditated murder, and, on the other hand, the behavioral or biological

era of racialized mass incarceration, characteristically argues for the abolition of voluntary manslaughter because “[m]ost intentional killers deserve little sympathy.” Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1, 33-34 (1984). For alternatives to thinking about crime and punishment in terms of individual blame and retribution, see Brazeal, *supra* note 13, at 1755-59, 1767-80.

168. On common law principals and accessories, see DRESSLER, *supra* note 165, at 438-41.

169. WRANGHAM, *supra* note 166, at 25-31.

170. *Id.* at 32.

171. See, e.g., Reid Griffith Fontaine, *Disentangling the Psychology and Law of Instrumental and Reactive Subtypes of Aggression*, 13 PSYCH. PUB. POL’Y & L. 143, 144 (2007).

172. WRANGHAM, *supra* note 166, at 42. For example, in a laboratory study of cats and rats, “[s]timulation of the mediobasal part of the hypothalamus produced ‘defensive’ reactive aggression; activation of the lateral part of the hypothalamus produced ‘quiet biting attack’ proactive aggression.” *Id.* at 40.

173. *Id.*

distinction between reactive and proactive aggression.¹⁷⁴ Perhaps most notably, the former distinction often requires proof of provocation, while the latter does not. The MPC's EED doctrine comes closer than traditional common law voluntary manslaughter doctrine to a definition of manslaughter based on reactive aggression, but still does not precisely mirror the latter concept. Specifically, the MPC definition of EED is broader than reactive aggression, in the sense that it includes killings based on extreme mental and emotional disturbances other than the fear and anger involved in reactive aggression; and the definition is narrower than reactive aggression, in the sense that it would exclude instances of killing based on reactive aggression where there was no "reasonable explanation or excuse."¹⁷⁵

Of course, the mere fact that proactive and reactive aggression are biologically distinct phenomena would not, by itself, imply that the criminal law should treat the former more harshly than the latter. But if criminal law should reflect the widely shared moral intuitions of a community, then it is worth noting that there appears to be a very widespread and longstanding moral intuition that cold-blooded killing is generally more blameworthy, and thus deserving of greater punishment, than hot-blooded killing.¹⁷⁶

Depending on one's preferred theoretical justifications for criminal punishment, this intuition could be theoretically defended in any number of ways. For example, an individual retribution-based theory of criminal punishment might note that someone is more responsible for an action after he has thought about it and calmly chosen to take the action. If an individual proceeds with a killing after calm deliberation, the killing might be seen as more reflective of the individual's character. As a result, the individual might be seen as more deserving of blame than someone whose fatal act can be plausibly seen not as a reflection of their character but as the result of a momentary "loss of control." The latter loss of control, especially if it occurred in response to some threat, could plausibly be seen under a liberal individualist theory of retribution as a partial excuse for the killing.¹⁷⁷ An individual who calmly chooses to kill another human being, after

174. See generally Fontaine, *supra* note 171 (emphasizing the differences between, on the one hand, the legal distinction between malice murder and "heat of passion" manslaughter, and, on the other hand, proactive—or in his words "instrumental"—and reactive aggression).

175. MODEL PENAL CODE § 210.3 (1962). The MPC EED definition "was designed primarily to do two things":

(1) emphasize the doctrine's proper characterization as a partial excuse defense, with the primary focus on the defendant's state of mind, rather than a partial justification defense that depends on the wrongfulness of the victim's conduct; and (2) broaden the scope of the doctrine beyond the traditional paradigms of mutual combat and witnessing adultery, as well as beyond the traditional emotion of anger.

Percy et al., *supra* note 166, at 395.

176. See, e.g., Fontaine, *supra* note 171, at 151.

177. To be clear, there are good reasons to question theories of criminal punishment based on individual blame and retribution. See Brazeal, *supra* note 13, at 1755-58, 1767-80 (collecting sources). But those debates do not need to be addressed here.

deliberation, might also be seen as more dangerous and in need of incapacitation or rehabilitation than someone who kills in a sudden outburst.¹⁷⁸

On the other hand, as with nearly any moral abstraction, one can think of intuitively appealing counterexamples that might push against the assumption that cold-blooded killings deserve greater punishment than hot-blooded killings. Some examples of cold-blooded killing might be seen as less blameworthy than some forms of hot-blooded killing. For example, a cold-blooded mercy killing, revenge killing of a horrific abuser, or act of legally unjustified self-help in an area where the state has failed to provide safety or justice might be seen as less blameworthy than a hot-blooded killing of a particularly vulnerable victim, such as a child. Rather than taking such counterexamples as an indication that the criminal law should draw no general distinction between the punishment of cold-blooded and hot-blooded killing, however, the counterexamples might be better seen as illustrations of the almost inevitable underinclusiveness and overinclusiveness of moral and legal rules. Establishing a higher range of punishment for cold-blooded killing than for hot-blooded killing, at least as a default, could still be defended if it is the case that most cold-blooded killings are, in fact, more morally egregious than most hot-blooded killings.

In any case, against the criticism that the distinction between premeditated murder and voluntary manslaughter is an arbitrary, unjustifiable relic of the common law, the scientific research collected by Wrangham suggests that the distinction roughly corresponds—and could be made to correspond more precisely—to a biologically grounded, deeply culturally rooted distinction that can plausibly be defended as relevant to criminal punishment.

A second longstanding critique of voluntary manslaughter objects that it “perpetuate[s] a violent form of male subordination of women.”¹⁷⁹ As Aya Gruber summarizes the objection:

178. On the other hand, it might be argued that, in theory, at least some hot-blooded killers are *more* in need of incapacitation than some cold-blooded killers, because the former cannot be deterred, while the latter can be. To the extent that the hot-blooded killer lost control and is “not fully responsible” for the action that resulted in death, who is to say that he will not lose control and kill again? By contrast, the cold-blooded killer, to the extent that he rationally weighed the costs and benefits of the killing beforehand, would seem especially susceptible to deterrence if the state could threaten a sufficient likelihood of detection and severity of punishment. Thus, even if the retributive and deterrent rationales for criminal punishment generally argue for greater punishment of cold-blooded killings, the incapacitative rationale might, under some set of conditions, argue for greater punishment of hot-blooded killings.

In response, however, a skeptic might object that such evidence-free theoretical speculations are a grotesquely irresponsible and illegitimate basis for making decisions about the caging of human beings. See generally Brazeal, *supra* note 13, at 1735 n.27, 1738–58. For the purposes of this article, it is sufficient to say that someone inclined to offer a theoretical defense of the widespread intuition that cold-blooded killings generally deserve more criminal punishment than hot-blooded killings could almost certainly do so to their own satisfaction.

179. Emily L. Miller, Comment, *(Wo)manslaughter: Voluntary Manslaughter, Gender, and the Model Penal Code*, 50 EMORY L.J. 665, 668 (2001); see Aya Gruber, *A Provocative Defense*, 103 CALIF. L. REV. 273, 277 n.21 (2015) (collecting similar critiques); Victoria Nourse, *Passion’s Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1331 (1997). In Gruber’s words, “the feminist critique of the provocation defense is so devastating that few question the now common assertion that broad formulations of the defense, and particularly the Model Penal Code’s (MPC) expansive defense of extreme emotional disturbance (EED), are ‘anti-woman.’” Gruber, *supra*, at 277 (footnotes omitted).

It is common wisdom that the provocation defense is, quite simply, sexist. For decades, there has been a trenchant feminist critique that the doctrine reflects and reinforces masculine norms of violence and shelters brutal domestic killers. The critique is so prominent that it appears alongside the doctrine itself in leading criminal law casebooks.¹⁸⁰

But Gruber herself has offered a persuasive response to the feminist critique, and one that has only grown in persuasiveness as the harms of American mass incarceration have received greater recognition. As she wrote in 2014, “efforts to utilize criminal punishment to express an anti-masculinity, anti-violence message may, in the end, reinforce destructive masculine norms, exacerbate racial hierarchies, justify extant unequal power distributions, and, ironically, increase violence and suffering.”¹⁸¹ The primary likely effect of abolishing voluntary manslaughter today would be to increase the use of intentional murder charges and the extraordinarily lengthy sentences that often accompany them in the United States, including in South Dakota.¹⁸²

V. CONCLUSION

South Dakota’s first-degree manslaughter statute is deeply unclear and should be revised. Well-crafted, politically viable alternatives already exist in any number of states, including in North Dakota. Drawing inspiration from the MPC, North Dakota defines its equivalent of voluntary manslaughter as “[i]ntentionally or knowingly caus[ing] the death of another human being . . . under the influence of extreme emotional disturbance for which there is reasonable excuse.”¹⁸³ The sooner South Dakota’s statute is revised, the greater the likelihood that the state will be able to avoid the costly litigation, and potentially irreversible injustices, that could result from the interpretive dilemma embedded in the current statutory text.

I close by noting that if the South Dakota Legislature revisits the state’s manslaughter statutes, it might also consider conducting a broader review of the state’s criminal code, and more generally of its approach to public safety and

180. Gruber, *supra* note 179, at 273 (italics removed).

181. *Id.*

182. For evidence of long sentences in the United States and in South Dakota, see RAM SUBRAMANIAN & ALISON SHAMES, SENTENCING AND PRISON PRACTICES IN GERMANY AND THE NETHERLANDS: IMPLICATIONS FOR THE UNITED STATES 9-10 (Vera Inst. Just., 2013); LILA KAZEMIAN, COUNCIL ON CRIM. J., LONG SENTENCES: AN INTERNATIONAL PERSPECTIVE (2022); SDCL § 22-6-1, -16-14 (2017) (defining first-degree murder as a Class A felony with a mandatory minimum of life in prison without parole). For additional critical discussions of mass incarceration as a response to gender-based violence, see generally LEIGH GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE (2018); Aya Gruber, *The Feminist War on Crime: The Unexpected Role of Women’s Liberation in Mass Incarceration*, 92 IOWA L. REV. 741 (2020); Benjamin Levin & Kate Levine, *Redistributing Justice*, 124 COLUM. L. REV. 1531 (2024).

183. N.D. CENT. CODE § 12.1-16-01(1)-(2) (West 1973 & Supp. 1993). The crime is a “class A” felony, punishable by up to twenty years in prison. N.D. CENT. CODE § 12.1-32-01(2) (West 1973 & Supp. 2013). North Dakota labels this crime as a form of “murder,” but its language is nearly identical to one of the forms of “manslaughter” under the MPC. Compare *id.*, with MODEL PENAL CODE § 210.3(1)(b) (1962).

criminal punishment. With regard to the criminal code, the current definitions of crimes and defenses contain a number of puzzling, extreme, or unclear provisions in addition to the manslaughter definition discussed in this article. For example, South Dakota's self-defense statute appears to permit the use of deadly force in response to relatively minor crimes.¹⁸⁴ The plain meaning of the statutory text seems to permit someone to kill in order to prevent, among other things, the commission of a second-degree robbery, which could be as minor as a person grabbing an inexpensive item from someone else, pushing them, and running away.¹⁸⁵ Perhaps the legislature intended to allow South Dakotans to kill other South Dakotans in order to prevent the snatching of a candy bar, but if not, it might be worth reconsidering the language in the statute.¹⁸⁶

184. See SDCL § 22-18-4.1 (2017) (allowing the use of deadly force if “the person reasonably believes that using or threatening to use deadly force is necessary . . . to prevent the imminent commission of a forcible felony”); SDCL § 22-18-3.1 (defining a “forcible felony” to include “arson, assault, burglary, kidnapping, manslaughter, murder, rape, and robbery, and any other felony that involves the use of or the threat of physical force or violence against a person”).

185. SDCL §§ 22-30-1, -6, -7 (defining second-degree robbery to include “the intentional taking of personal property, regardless of value, in the possession of another from the other’s person or immediate presence, and against the other’s will, accomplished by means of force or fear of force”).

Similarly, the statute appears to permit the use of deadly force to prevent the commission of a second-degree burglary, which could apparently include a chronically homeless person trying to steal copper wire from an unoccupied building on a construction site. SDCL § 22-32-8 (defining second-degree burglary to include “enter[ing] or remain[ing] in an unoccupied structure . . . with intent to commit any crime”). Admittedly, some other states have similarly expansive statutes permitting the use of deadly force. For a survey, see ROBINSON & WILLIAMS, *supra* note 166, at 141-49. In addition, South Dakota’s current statute is in fact less extreme than it was in the recent past. Prior to the 2021 revision creating the current statute, the portion of South Dakota’s self-defense statute previously located at SDCL § 22-16-34 appeared to permit, among other things, the use of deadly force against anyone who threatened to commit any felony “on a house” in which one was dwelling, as well as against anyone who presented an imminent threat of committing any felony against one’s “mistress” or “servant.” Compare 2005 S.D. Sess. Laws ch. 120 § 165 (“Homicide is justifiable if committed by any person while resisting any attempt . . . to commit any felony upon him or her, or upon . . . any dwelling house in which such person is.”), and § 166 (“Homicide is justifiable if committed by any person in the lawful defense of . . . his or her . . . master, mistress, or servant if there is reasonable ground to apprehend a design to commit a felony . . . and imminent danger of such design being accomplished.”), with 2021 S.D. Sess. Laws ch. 93 § 3 (creating current self-defense statute at SDCL § 22-18). Thus, under the plain meaning of South Dakota’s self-defense statute prior to 2021, it was apparently not a crime to shoot and kill someone to prevent him or her from committing securities fraud on one’s mistress.

186. For another example of an unclear provision in the criminal code, consider the treatment of voluntary intoxication. Two sentences in the criminal code seem to suggest that South Dakota has abolished voluntary intoxication as a defense. SDCL § 22-16-6 states that “[h]omicide committed with a design to effect death is not the less murder because the perpetrator was in a state of anger or voluntary intoxication at the time.” SDCL § 22-5-5 similarly begins by stating that “[n]o act committed by a person while in a state of voluntary intoxication may be deemed less criminal by reason of such condition.” But then the statute continues, in apparent contradiction of its first sentence:

But if the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time in determining the purpose, motive, or intent with which the accused committed the act.

SDCL § 22-5-5. It would appear based on the latter statement that a defendant could, in fact, use evidence of voluntary intoxication to negate the mens rea requirement for a crime of intent (presumably excluding intentional murder based on SDCL § 22-16-6), with the result that the defendant’s act would be “deemed less criminal.” For example, a defendant could use evidence of voluntary intoxication to negate the intent requirement for arson, SDCL § 22-33-9.1 to -9.3, with the apparent result that the defendant would not be guilty of arson.

With regard to South Dakota's approach to public safety and criminal punishment in general, the time is ripe for a thorough, evidence-based review. In September 2025, the state legislature approved \$650 million for the construction of a new men's prison.¹⁸⁷ The prison will be "the most expensive taxpayer-funded project since the state's founding in 1889."¹⁸⁸ A consultant's report in May 2025 suggested that unless South Dakota reins in its unrestrained approach to criminal sentencing, the state's taxpayers may need to spend a total of around \$2 billion on prison construction by 2040.¹⁸⁹

South Dakota has long been an outlier in its costly, destructive reliance on incarceration. It has the ninth highest incarceration rate in the United States.¹⁹⁰ In 2016, South Dakota had the highest rate of jail admissions in the country.¹⁹¹ In 2021, South Dakota had the highest rate of prison admissions in the country.¹⁹² If South Dakota were its own country, its incarceration rate of 812 per 100,000 residents would be higher than any country in the world other than El Salvador, a

Some of the other questionable substantive provisions in South Dakota's criminal code, like the state's felony murder doctrine, have parallels in other states but remain difficult to defend. Imagine, for example, that an eighteen-year-old high school student allows her boyfriend to use her car so that he can break into an apparently unoccupied house. Assume that she is not present during the break-in, but that the owner of the house turns out to be home, falls downstairs in a panic and dies. Under South Dakota's felony murder statute, the young woman would appear to be guilty of first-degree murder—the same crime that she would have been convicted of if she had intentionally murdered someone in cold blood, with a mandatory minimum sentence of life without parole. See SDCL § 22-16-4(2) (defining felony murder); SDCL § 22-3-3 (defining accomplice liability).

Many other states have felony murder laws that could be used to produce similar results, but the frequency of such laws does not make the results any easier to defend. See ROBINSON & WILLIAMS, *supra* note 166, at 53-63 (surveying felony murder laws); DRESSLER, *supra* note 11, at 488-90 (summarizing longstanding criticisms of the felony murder rule); Abbie VanSickle, *Can It Be Murder If You Didn't Kill Anyone?*, THE MARSHALL PROJECT (June 27, 2018), <https://perma.cc/9DY3-LZXZ> ("[T]he United States remains the only country where the felony murder doctrine still exists."). The MPC does not recognize felony murder, and several states have abolished it in recent years, including Hawaii, Kentucky, Massachusetts, Michigan, and California. See *id.*; OHLIN, *supra* note 23, at 344-35.

South Dakota's felony *manslaughter* statute is arguably even more peculiar because it appears to provide a potentially broad back door to criminal punishment for negligent homicide, so long as the homicide took place "while engaged in the commission of any felony," including a nonviolent felony such as securities fraud. SDCL § 22-16-15. When combined with the fact that South Dakota has no general negligent homicide statute, the result would seem to be that if someone negligently kills another with a car while driving sober and providing investment advice over the phone, the driver has committed no crime at all—but if the investment advice was fraudulent, then she would be guilty of first-degree manslaughter and could potentially be subject to life in prison without parole—perhaps even if she was driving carefully. See *id.*; SDCL § 47-31B-502 to -508 (2007) (prohibiting fraudulent investment advice as a Class 4 felony). It is hard to arrive at a principled defense for imposing so much extra liability on an individual simply because her felony happened to cause a death, even if the death was unintended and arose through no fault of her own.

187. Sarah Raza, *South Dakota to Replace One of the Country's Oldest Prisons*, AP NEWS (Sept. 24, 2025), <https://perma.cc/P3XS-7T8B>.

188. *Id.*

189. Lee Strubinger, *Report: State Needs \$2B Worth of Prison Expansion to Deal with Inmate Growth*, SDPB (May 15, 2025), <https://perma.cc/HM5A-Z75Y>.

190. See WIDRA, *supra* note 50.

191. Ethan Corey & Raven Rakia, *South Dakota Leads Nation on Jail Admissions, New Report Finds*, THE APPEAL (Sept. 18, 2019), <https://perma.cc/AE6Z-E7KY>.

192. CSAT Prisoners: Corrections Statistical Analysis Tool, BUREAU OF JUST. STAT., <https://perma.cc/SM7B-HDJX>.

quasi-authoritarian state that has been under a “state of emergency” since 2022.¹⁹³ South Dakota also has a higher incarceration rate than any surrounding state.¹⁹⁴ North Dakota’s incarceration rate is only 560 per 100,000, and Minnesota’s is 323, although those rates are still higher than in Massachusetts (241), and far above the rates in other developed democracies such as Canada (109), the United Kingdom (144), Norway (54), and Iceland (36).¹⁹⁵

During the writing of this article, it emerged that South Dakota has the highest female incarceration rate of any state in the country, a rate that is also higher than any country in the world.¹⁹⁶ In addition, enormous racial disparities exist in South Dakota’s use of incarceration. In 2021, the state’s population was officially 8% Native American, but the prison population was 35% and the jail population was a staggering 47% Native American.¹⁹⁷ The incarceration rate for Native women in the state is, astonishingly, even higher: while Native women make up around 10% of the state’s female population, they represent 63% of the incarcerated female population.¹⁹⁸ African American incarceration rates are also extremely skewed: while African Americans are only 2% of the South Dakota population, they make up 8% of the prison population and 7% of the jail population.¹⁹⁹ In 2005, South Dakota had the highest incarceration rate for African Americans in the nation.²⁰⁰ South Dakota also had, as of 2022, the second-highest percentage of people incarcerated primarily for a drug offense.²⁰¹

193. See WIDRA, *supra* note 50; Jonathan Pollak, *Emotional Authoritarianism: Bukele’s El Salvador and Fear-Driven Backsliding*, COLUM. POL. REV. (Mar. 2, 2024), <https://perma.cc/2J9C-H3WA>.

194. See CSAT *Prisoners*, *supra* note 192.

195. See *id.* I leave aside other punitive aspects of South Dakota’s approach to criminal justice that have drawn national attention, such as the state’s requirement that indigent defendants repay the cost of their representation. See JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 154 (2017) (“In South Dakota, poor defendants are required to pay \$92 an hour for a public defender, and payment is due even if the defendant is found not guilty. Failure to pay is itself a crime that can result in the defendant getting locked up.”). A recent state-commissioned report found that in the seven counties studied, no judge reported having presided over the constitutionally required “hearing for determining an indigent defendant’s ability to pay recoupment.” SIXTH AM. CTR., THE RIGHT TO COUNSEL IN SOUTH DAKOTA 19-20, 45 (2024). The report also documents routine violations of the Sixth Amendment right to counsel, such as in courts where judges provide a group advisement of rights at initial appearance, and then “the magistrate judge allows the state’s attorney to individually meet with defendants to discuss their case and negotiate a plea *before* the defendant is given the opportunity to request appointed counsel.” *Id.* at 18. “Stakeholders across the state reported that a significant number of defendants (an estimated range of 40-75%) are unrepresented through these critical stages at initial appearance.” *Id.* at 21.

196. Emily Widra & Aleks Kajstura, *States of Women’s Incarceration: The Global Context 2025*, PRISON POL’Y INITIATIVE (Sept. 2025), <https://perma.cc/3B6F-W87Z>.

197. See *South Dakota Profile*, PRISON POL’Y INITIATIVE, <https://perma.cc/2AQ3-QB5R>.

198. See S.D. LEGISLATIVE RES. COUNCIL, STATE COMPARISON REPORT: INCARCERATION RATES AND PRISON POPULATIONS IN MT, ND, SD, AND WY (2025), <https://perma.cc/56R3-HQEB>.

199. See *id.*

200. See MARC MAUER & RYAN S. KING, SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 8 (2007).

201. E. Ann Carson, *Prisoners in 2022—Statistical Tables*, BUREAU OF JUST. STAT. 31-32 tbl. 18 (Aug. 29, 2025), <https://perma.cc/Q5SE-ZT32>.

There is a well-established menu of policy options that South Dakota could consider as possible ways to reduce its incarceration rates.²⁰² “Front-end” decarceral reforms include decriminalizing or reducing the punishment for low-level drug possession, further increasing the use of diversion and problem-solving courts, reducing the use of pre-trial confinement, reducing various felonies to misdemeanors, reducing maximum prison sentences in general, and experimenting with restorative justice as an alternative to incarceration. “Back-end” decarceral reforms include the expanded use of parole, or offering a regular second look to all incarcerated individuals to determine whether their continued incarceration is necessary for protecting public safety, especially for those who have “aged out” of likely criminal activity, beginning with the elderly.²⁰³ More ambitious structural reforms could include establishing a politically insulated commission to create evidence-based sentencing policies, or appointing state prosecutors at the state level rather than through local county elections.²⁰⁴ One of the most socially beneficial ways to reduce incarceration rates would be to reduce the likelihood of criminal harms by addressing the social causes of crime, such as concentrated socioeconomic disadvantage, the lack of access to housing, and the lack of access to adequate mental health and substance abuse treatment.²⁰⁵ Rather than waiting for criminal harms to take place and then spending enormous sums on punishment—an approach that can never undo the original harm, and that typically results in the creation of new harms and new victims—the state could focus on proactive, evidence-based policies to prevent harms from arising in the first place, including through social programs (like those mentioned above) and

202. See Sarah Staudt, *Winnable Criminal Justice Reforms in 2025*, PRISON POL’Y INITIATIVE (Nov. 2024), <https://perma.cc/KU5A-YFA4>; PFAFF, *supra* note 195; RACHEL LOUISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION (2019); KATHERINE BECKETT, ENDING MASS INCARCERATION: WHY IT PERSISTS AND HOW TO ACHIEVE MEANINGFUL REFORM (2022).

203. See Dana Goldstein, *Too Old to Commit Crime?*, N.Y. TIMES (Mar. 20, 2015), <https://perma.cc/DJG2-CRVW>.

204. “The United States is the only country in the world that elects its local prosecutors.” Brazeal, *supra* note 13, at 1740 n.46 (citing EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 79 (2020)). On the potential advantages of democratically delegating various aspects of criminal justice policy to relatively politically insulated professionals, with the goal of making public safety policy more like public health policy, see Brazeal, *supra* note 13; John Rappaport, *Some Doubts About “Democratizing” Criminal Justice*, 87 U. CHI. L. REV. 711 (2020).

205. See ELLIOTT CURRIE, A PECULIAR INDIFFERENCE: THE NEGLECTED TOLL OF VIOLENCE ON BLACK AMERICA 135-77 (2020) (discussing concentrated disadvantage as a determinate of crime); ROBERT M. SAPOLSKY, BEHAVE: THE BIOLOGY OF HUMANS AT OUR BEST AND WORST 294-95 (2017) (discussing “poverty amid plenty” as a determinant of crime); ALEX VITALE, THE END OF POLICING 90-107 (2017) (discussing the criminalization of chronic homelessness); WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR xiii-xxiii (1996) (discussing concentrated disadvantage as a determinant of crime); Sam McCann, *Trump’s Medicaid Cuts Would Be a Disaster for Crime and Safety*, VERA INST. (Mar. 18, 2025), <https://perma.cc/4VKG-R4X3> (discussing lack of health care access as a determinant of crime); Emily Widra, *Addicted to Punishment: Jails and Prisons Punish Drug Use Far More than They Treat It*, PRISON POL’Y INITIATIVE (Jan. 30, 2024), <https://perma.cc/V93V-245M> (discussing the criminalization of substance abuse disorders). Of course, the role of firearms in serious and especially lethal violence also deserves mention as a determinant of crime. See THOMAS ABT, BLEEDING OUT: THE DEVASTATING CONSEQUENCES OF URBAN VIOLENCE—AND A BOLD NEW PLAN FOR PEACE IN THE STREETS 134-43 (2019).

legitimate, effective policing and alternatives to policing.²⁰⁶ South Dakota could also expand its own innovations, such as the Oyate Court in Pennington County, “a criminal justice partnership between state prosecutors and tribal representatives” that has received widespread praise but remains limited in scope.²⁰⁷

There is a relatively recent precedent for South Dakota engaging in a criminal justice reform process. In the early 2010s, state leaders were concerned by projections of an expanding prison population, accompanied by hundreds of millions of dollars in additional costs.²⁰⁸ Governor Dennis Daugaard, with the support of Chief Justice David Gilbertson, initiated a reform effort that culminated in the passage of Senate Bill 70, the Public Safety Improvement Act (“PSIA”), in 2013.²⁰⁹ In retrospect, however, it appears that the PSIA was not aggressive enough to achieve the promised reductions in incarceration.²¹⁰ Although the legislation expanded the state’s treatment courts and created a system of “presumptive probation” that likely had a downward influence on incarceration rates, it also contained punitive provisions, such as creating a felony offense for the ingestion of a controlled substance.²¹¹ The share of the South Dakota prison

206. See Timothy W. Bjorkman, *A State in Shackles: The Effect of a Dysfunctional Childhood on Crime and Imprisonment*, 62 S.D. L. REV. 211 (2017) (proposing a variety of specific programs through which South Dakota could likely decrease crime and promote public safety through increased funding); Stu Whitney, *Sioux Falls Starts Homeless Outreach Effort that Was Used in Rapid City*, S.D. NEWS WATCH (Apr. 12, 2023), <https://perma.cc/5HHZ-5LQG>; ABT, *supra* note 205, at 81-156 (synthesizing evidence-informed strategies for reducing lethal urban violence through policing). It may be that increased social spending of the kind that Bjorkman proposes is not politically plausible under current conditions. Cf. Brazeal, *supra* note 13, at 1757 n.116. But in a relatively small state such as South Dakota, government may be “sufficiently small that it can be responsive to the exertions of a visionary leader.” Dashka Slater, *North Dakota’s Norway Experiment*, MOTHER JONES (July/August 2017), <https://perma.cc/Y7Q9-TU79> (describing how a North Dakota prison official successfully pushed for reforms after exposure to Norway’s more humane approach to incarceration).

207. C.J. Keene, *Oyate Court Program to Expand Reach*, SDPB (Jan. 10, 2023), <https://perma.cc/Y6Y3-SQXH>.

208. See Bjorkman, *supra* note 206, at 240.

209. See *id.* at 241. In 2015, the legislature also passed a juvenile justice reform bill that reduced the number of youth sentenced to the state Department of Corrections by over eighty percent. See Danielle Ferguson, *Juvenile Justice Reforms Working, But Not as Well for Minority Offenders in South Dakota*, S.D. NEWS WATCH (Aug. 4, 2021), <https://perma.cc/WB53-A93F> (showing sudden decline from 1013 youth in 2014 to 243 in 2015, followed by gradual decline to 86 in 2019).

210. See Bjorkman, *supra* note 204, at 243; *South Dakota Profile*, PRISON POL’Y INITIATIVE, <https://perma.cc/RT2T-75E5> (showing generally rising jail incarceration rates since 2013 and sharp fluctuations in prison incarceration rates); *Some States Have Largely Ended the War on Drugs. Other States, Not So Much*, PRISON POL’Y INITIATIVE, <https://perma.cc/Q3VY-F7UH> (showing that as of 2024, 30% of the South Dakota prison population is serving a sentence for a drug offense, triple the rate in New York, which has declined from above 30% since 2000 while South Dakota’s rate has risen).

211. See Bjorkman, *supra* note 206, at 242-43. Until the legislature finally revised the felony ingestion statute in 2025, making ingestion a misdemeanor for the first two offenses, South Dakota was the only state in the United States with a felony ingestion statute. See John Hult, *South Dakota Governor Signs Bill Loosening One of Nation’s Harshes Drug Laws*, S.D. SEARCHLIGHT (Mar. 12, 2025), <https://perma.cc/ZZKH-6JF4>. In general, the state has tended in recent years to pass highly punitive legislation that is likely to increase incarceration rates, such as a “truth in sentencing” law abolishing parole for certain crimes and a “three strikes” law for juvenile offenders. See Gregory Brazeal, *Rural Mass Incarceration and the Politics of Punitiveness*, 85 MD. L. REV. 642, 677 nn.155-57 (2026). The truth in sentencing law in particular “is a major reason why” “South Dakota will need a third more prison space than it has now by 2036.” John Hult, *Report: Tough-on-Crime Policies Could Push Prison Construction*

population serving a sentence for a drug offense soared immediately after passage of the PSIA in 2013.²¹² In addition, locally elected prosecutors retained their usual influence over state incarceration rates through their ability to engage in harsh plea bargaining and charging decisions.²¹³ Perhaps most significantly, despite the involvement of the federal Justice Reinvestment Initiative in the reform process, the state continued to resist investing in social programs that could prevent criminal harms from happening in the first place.²¹⁴ If the PSIA shows that criminal justice policy reform was politically possible in South Dakota in the relatively recent past, it also offers a cautionary tale about the limits of relatively small-scale reforms.

The urgency of addressing South Dakota's projected prison construction costs provides an opportunity for a renewed, more aggressive attempt at evidence-based criminal justice reform. Given what is known about the criminogenic effects of incarceration,²¹⁵ and the fact that more than 95% of incarcerated people are eventually released,²¹⁶ continuing on South Dakota's current course will not only be enormously costly to the state's taxpayers, but will likely harm public safety. The criminogenic effects of incarceration will result in new victims, and the harms they suffer may lead to new demands for even harsher punishments, creating a spiral of retribution and harm with no obvious end. There is another path. If South Dakota's legislators turn their attention to revisions in the criminal code, they should consider a broader, evidence-based reevaluation of criminal justice policy in the state.

Costs as High as \$2.1 Billion, S.D. SEARCHLIGHT (May 16, 2025), <https://perma.cc/YB2F-K338>; *see also* ARRINGTON WATKINS ARCHITECTS, SOUTH DAKOTA MEN'S CORRECTIONAL FACILITY MASTER PLAN REFRESH 22 (May 13, 2025), <https://perma.cc/DWG2-JCHP> (concluding that "[r]oughly half" of the projected growth in South Dakota's prison population between 2025 and 2036 "is attributed to the effects of 2023 SB 146," the truth in sentencing law).

212. *See Some States*, *supra* note 210.

213. On the role of prosecutors in promoting mass incarceration, see Brazeal, *supra* note 13, at 1728 n.9.

214. *See generally* Bjorkman, *supra* note 206 (describing failures of investment and proposing additional spending on a number of programs).

215. *See* Brazeal, *supra* note 13, at 1745 n.61 (collecting sources). For an accessible recent account of a classic study showing the criminogenic effects of even a short period of incarceration, see James Forman Jr., *What Happened When America Emptied Its Youth Prisons*, N.Y. TIMES (Feb. 21, 2025), <https://perma.cc/RPT5-WW6K> (discussing Anna Aizer & Joseph J. Doyle, Jr., *Juvenile Incarceration, Human Capital and Future Crime: Evidence from Randomly-Assigned Judges*, 130 Q. J. ECON. 759 (2015)).

216. *See* Brazeal, *supra* note 13, at 1745 n.60.