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A STEP IN THE RIGHT DIRECTION:
PEOPLE V. HAFEEZ
STOPPING THE EXPANSION OF DEPRAVED
INDIFFERENCE MURDER IN NEW YORK
STATE

BRIAN F. ALLEN*

Under New York Law, a person is guilty of murder in the second degree when "under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person."2

Known as depraved indifference murder, this crime punishes unintentional killings where the actor's conduct is so wanton and reckless as to be treated with the same societal condemnation as intentional murder.3 First codified in New York in 1829,4 depraved indifference murder is not a new concept, but one that has been in existence since the common law.5 Early

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2 N.Y. PENAL LAW § 125.25 (2) (McKinney 2003).
3 See People v. Register, 457 N.E.2d 704, 705-06 (N.Y. 1983) (stating that in depraved indifference murder defendant's act is "of such gravity that it placed the crime upon the same level as the taking of a life by premeditated design"); see also WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 7.4 (2d ed. 1986) (describing crime of depraved-heart murder under common law). See generally ROLLINS M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 59-60 (Foundation Press, Inc. 1957) (1982) (providing examples of depraved indifference murder under common law).
4 See 2 N.Y. REV. STAT. PT. IV CH. 1, TIT. 1, § 5 (1829) (codifying depraved indifference murder); see also Register, 457 N.E.2d at 710 (Jasen, J., dissenting) (stating "[§ 125.25 of the NYPL] evolved without substantial change from the Revised Statutes of 1829"). See generally Bernard E. Gegan, A Case of Depraved Mind Murder, 49 St. John's L. Rev. 417, 423 (1975) (discussing origin of depraved mind murder in New York in 1829 statute).
5 See, e.g., SIR MATTHEW HALE, 1 THE HISTORY OF PLEAS OF THE CROWN 476 (Sollom Emlyn of Lincoln's-Inn, Esq. 1800) (providing classic example of deprived indifference murder at common law of riding unruly horse into crowd). See EDWARD HYDE EAST, 1
interpretation by the courts limited depraved indifference murder in scope and application to a narrow category of homicides. However, with the revision of the Penal Law in the 1960's and subsequent analysis by the courts, there has been a major expansion in the application of the crime. Requirements that once limited the application of depraved indifference murder to a small area of specifically defined criminal actions have now been removed, allowing this crime to be applicable in an ever broader range of homicides to a point where it is practically indistinguishable from intentional murder. This shift has led

PLEAS OF THE CROWN 231 (London Professional Books Limited 1972) (1803) (describing homicide as “depraved inclination to mischief, fall where it may”); see also JAMES F. STEPHEN, 3 A HISTORY OF THE CRIMINAL LAW OF ENGLAND 22 (1883) (noting that indifference to human life was considered malice aforethought implied by law). See generally M. CHERIF BASSIOUNI, SUBSTANTIVE CRIMINAL LAW, 232-33 (Charles C. Thomas 1978) (providing general overview of murder at common law).

See Darry v. People, 10 N.Y. 120, 147 (1854) (articulating limitations on application of depraved indifference murder); see also People v. Jernatowski, 144 N.E. 497, 498 (N.Y. 1924) (upholding interpretation articulated in Darry). See generally GEGAN, supra note 4, at 426-27 (providing a discussion of decision in Darry).

Cf. 2 N.Y. REV. STAT. PT. IV CH. 1, TIT. 1, § 5 (1829) (providing original codification of depraved indifference murder), with N.Y. PENAL LAW § 125.25(2) (2003) (articulating modern definition of depraved mind murder). See People v. Roe, 542 N.E.2d 610, 616 (N.Y. 1989) (Bellacosa, J., dissenting) (citing Donnino, Practice Commentaries, MCKINNEY'S CONS. LAWS OF N.Y., Book 39, Penal Law art. 125, at 491) (stating that “[t]he depraved indifference category of murder reflects the Legislature's policy refinement that there is a type of reckless homicide that is so horrendous as to qualify, in a legal fiction way, for blameworthiness in the same degree as the taking of another's life intentionally, purposefully and knowingly.”).

See People v. Poplis, 281 N.E.2d 167, 168 (N.Y. 1972) (interpreting new statute to apply to danger to a single victim); see also People v. Register, 457 N.E.2d 704, 705-06 (N.Y. 1983), cert denied, 466 U.S. 953 (1984) (discussing how “depraved indifference” did not refer to mens rea of depraved indifference murder). See generally Roe, 542 N.E.2d at 611 (stating that subjective intent of defendant is not to be taken into account by the jury in determining “depraved indifference” to human life).

See People v. Sanchez, 777 N.E.2d 204, 223 (N.Y. 2002) (Rosenblatt, J., dissenting) (noting after years of containment statistical increase in crime to routinely charged with intentional murder); see also Roe, 542 N.E.2d at 615 (Bellacosa, J., dissenting) (worrying that depraved indifference holding “finalizes the obliteration of the classical demarcation between murder and manslaughter in this State, not only for juvenile offenders but also for all adult accused.”). See generally GEGAN, supra note 4 at 458 (noting that “throughout [a century and a half]... the depraved mind murder subsection has been retained notwithstanding it anachronistic character.”).

Cf. Darry, 10 N.Y. at 148 (noting that depraved indifference murder statute embraces only those acts which though not intentional endanger lives of multiple persons), with Poplis, 281 N.E.2d at 168 (overriding multiple victim requirement articulated in Darry). See generally GEGAN, supra note 4, at 426-27 (discussing erosion of holding in Darry).

See Sanchez, 777 N.E.2d at 218 (Rosenblatt, J., dissenting) (noting that crimes of depraved indifference and intentional murder are effectively merged); see also Poplis, 281 N.E.2d at 168 (noting that “the new text eliminates the psychiatrically complicating term ‘evincing a depraved mind’ and is a distinct improvement”). But see Register, 457 N.E.2d at 706 (noting that “[t]he crime differs from intentional murder in that it results not from
to a great deal of debate in the courts and among scholars, raising serious questions concerning the direction of the modern interpretation of the depraved indifference murder statute, the proper mens rea required for depraved indifference murder, and the ethical responsibilities for prosecutors when seeking convictions for this ever broadening crime. Recently, the New York Court of Appeals in People v. Hafeez took the first step in limiting the expansion of the crime of depraved indifference murder. In Hafeez, the court found depraved indifference murder should not include the planned killing of a particular individual. This note argues that while Hafeez may present a turning point in the expansion of depraved indifference murder, it does not go far enough. The crime still remains applicable to a range of homicides well beyond that

\[12\] See Register, 457 N.E.2d at 710-14 (Jasen, J., dissenting) (expressing concern for the interpretation of the modern statute); see also Roe, 542 N.E.2d at 615-20 (1989) (Bellacosa, J., dissenting) (warning of prosecutorial advantage allowed by this interpretation). See generally Sanchez, 777 N.E.2d 213-35 (Smith, Rosenblatt, Ciprick, dissenting) (voicing numerous concerns relating to application and interpretation of depraved mind murder statute).

\[13\] See Bernard E. Gegan, More Cases of Depraved Mind Murder: The Problem of Mens Rea, 64 ST. JOHN'S L. REV. 429, 468 (1990) [hereinafter Depraved] (discussing mental culpability issues surrounding modern interpretation of crime of depraved indifference murder); see also Sanchez, 777 N.E.2d at 206-07 (Rosenblatt, J., dissenting) (noting that "the unchanging core requirement of depraved indifference murder is proof of an additional mens rea element to recklessness, that is, the defendant's 'uncommonly evil and morally perverse frame of mind'"). See generally People v. Roe, 542 N.E.2d 610, 615 (N.Y. 1989) (Bellacosa, J., dissenting) (noting that "the tangible content of 'depraved indifference to human life' is thus elusive . . .").

\[14\] See Alan C. Michaels, Note, Defining Unintended Murder, 85 COLUM. L. REV. 786, 795 (1984) (noting other states have had to warn prosecutors not to take advantage of broadness of depraved indifference murder law); see also People v. Roe, 542 N.E.2d 610, 619 (N.Y. 1989) (Bellacosa, J., dissenting) (theorizing that "[p]rosecutors will find the temptation legally and strategically irresistible, and overcharging traditional reckless manslaughter conduct as the more serious murderous conduct will become standard operating procedure in view of the authorized template given for that course of action"). See generally State v. Lagasse, 410 A.2d 537, 540 (Me 1980) (noting that "[i]n fulfilling their ethical responsibility, prosecutors must recognize that depraved indifference murder constitutes a narrow and limited exception to the fundamental principle of our Criminal Code").


\[16\] See id. at 1064 (holding conviction for depraved indifference murder improper where defendant conspired with other to lure victim outside where he was stabbed to death); see also id. at 1064 (Rosenblatt, J., concurring) (stating that "[i]t is reassuring . . . that there are now six Judges of this Court who recognize that even under Sanchez (with which I have disagreed) depraved indifference murder does have its limits"). See generally LAFAYE & SCOTT, supra note 3 at 617 (describing how depraved-heart murder is "unaccompanied by any intent to kill or do serious bodily injury").
intended by the legislature or envisioned under traditional common law notions of the crime.

This note argues that in order to remedy the expansion of depraved indifference murder, greater restraint must be placed upon the use and scope of the crime, either by a more narrow interpretation by the court or by legislative action. Part I explores the origins of the crime of depraved mind murder in New York. Part II discusses the broadening of the crime under the modern Penal Law. Part III analyzes some concerns that have arisen from the broadening use of depraved indifference murder. Part IV presents the case of People v. Hafeez and in light of Hafeez, Part IV presents some possible solutions to the broad application of the statute. Finally, this note concludes that although Hafeez was a step in the right direction, greater restraint by the courts is necessary through realization that the law of homicide in New York did not spring forth anew with the 1967 Penal Code, but is the product of a legal tradition dating back to the common law. If the courts are unwilling to act, legislative action will be necessary.

I. HISTORY OF THE CRIME OF DEPRAVED INDIFFERENCE MURDER IN NEW YORK

A. Common Law Origins

To understand how greatly the crime has expanded in New York, we must begin with an examination of its origins. The concept of depraved indifference murder dates back to the common law in the late 1700s, when it was presented in Hale's Pleas of the Crown. Under the common law, all murders were defined as the killing of another with "malice aforethought."
Such malice could be expressed, as in the crime of intentional murder, or implied, as in the case of depraved indifference murder. At common law, in order to grasp the implied malice requirement, the mens rea of depraved indifference murder was described as "depravity of mind," "an abandoned heart," or simply "depraved mind regardless of human life." While seemingly vague on their face, these colorful terms all attempt to describe a mens rea of universal or general malice, a depraved inclination not directed at a particular individual.
Although this crime described conduct where the actor may not have intended to kill anyone by his dangerous action, at common law scholars debated whether the actor must have been subjectively aware of the risk\textsuperscript{25} or whether it was enough to show objectively that a reasonable person would have understood the very high degree of risk created by the actor's conduct.\textsuperscript{26} Some early writers indicated that the actor must have had a subjective intent to commit some kind of harm or mischief.\textsuperscript{27} In contrast, later writers argued that all that was required was a finding from the objective circumstances that a reasonable person would have understood that the actor's conduct probably would cause death.\textsuperscript{28}

In either case, through a showing of the surrounding circumstance or the subjective awareness of the actor, the jury found the actor appreciated the risk but remained indifferent as to whether a specific individual was killed or not.\textsuperscript{29} It was this and malignant heart); see also Drum, 58 Pa. at 16 (describing malice as mental state that includes ill-will, wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and mind regardless of social duty). See generally WECHSLER, supra note 20, at 703 (stating that malice is implied when act is so reckless as to evince a heart regardless of social duty and fatally bent on mischief).

\textsuperscript{25} Compare STEPHEN, supra note 5, at 22 (arguing that actor must be subjectively aware of risk in order for law to imply malice aforethought), with HOLMES, supra note 18, at 55-56 (suggesting that objective circumstances are enough). See generally MODEL PENAL CODE § 210.2 cmt. 4 (noting general conception that serious felony sanctions should be grounded securely in actor's subjective culpability).

\textsuperscript{26} See HOLMES, supra note 18, at 55-56 (explaining that malice can be inferred from actions "a person of ordinary prudence" would foresee are likely to cause death); see also WILLIAM L. CLARK & WILLIAM L. MARSHALL, A TREATISE ON THE LAW OF CRIMES § 10.06 (7th ed. 1967) (suggesting that liability for murder will fix to defendant who "ought reasonably to know" of risk). See generally LAFAVE & SCOTT, supra note 3, at § 7.4 (acknowledging existence of dispute as to whether defendant must subjectively be aware of great risk which his conduct creates in order to be guilty of murder).

\textsuperscript{27} See People v. Register, 457 N.E.2d 704, 707 (N.Y. 1983), cert denied, 466 U.S. 953 (1984) (noting that focus of depraved mind murder is not on subjective intent but rather upon objective assessment of degree of risk presented by defendant's reckless conduct); see also EAST, supra note 5, at 231 (providing that malice aforethought would be implied when act was done with mischievous intent). But see MODEL PENAL CODE § 210.2 cmt. 4 (acknowledging general conception that serious felony sanctions should fix only when actor is subjectively aware of the risk created).

\textsuperscript{28} See CLARK & MARSHALL, supra note 26, § 10.06 (noting that actor's subjective intent is not examined since it is presumed by "natural and probable consequences of the voluntary act"); see also HOLMES, supra note 18, at 53-54 (offering example of defendant who is aware that act will very certainly cause death and when such probability is common knowledge will be culpable for murder). But see MODEL PENAL CODE § 210.2 cmt. 4 (acknowledging general conception that serious felony sanctions should only fix when the actor is subjectively aware of risk created).

\textsuperscript{29} See Commonwealth v. Malone, 47 A.2d 445, 449 (Pa. 1946) (holding that defendant displayed requisite malice as evidenced by intentional doing of uncalled-for act in callous disregard of its likely harmful effects on others); see also DRESSLER, supra note 19, at §
appreciation of the extreme risk of death caused by the actor's conduct and his indifference to the result, which evinced depravity, and from which malice aforethought could be implied.30

Some examples of the traditional notions of depraved indifference murder include shooting at a house known to be occupied,31 riding an unruly horse through a crowd,32 or opening a lion's cage.33 Although each of these actions illustrate conduct which the actor knew created an extreme risk that death would result, none of these examples presented a specific intent to kill or express malice directed at a particular individual. Rather, the nature of the actor's conduct allowed malice aforethought to be implied in each of these instances by the finding of the mental state described as "general malice or depraved inclination, fall where it may."34
B. Revised Statutes of 1829

In New York, the crime of depraved indifference murder was first codified in 1829.35 Under the original statute, an actor’s conduct was punishable as murder “when perpetrated by an act imminently dangerous to others and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual.”36

The first major examination of this new statute by the Court of Appeals occurred in 1854 with the case of Darry against the People.37 In Darry, the defendant was convicted of murder after beating his wife to death over the course of a week.38 Judge Selden, writing one of three majority opinions, drew on the construction of the 1829 statute in reaching two conclusions to explain the application of depraved indifference murder in New York. At the outset, Judge Selden noted that “each subdivision [of the murder statute] should be construed to provide for a separate and distinct class of cases,”39 that each section should be “construed in light of all the rest”40 and “if possible, that no case or class of cases will fall within more than one branch of the act.”41

With this notion serving as his basis, Judge Selden first explained that “a depraved mind regardless of human life” described the mens rea of the act,42 a mens rea that required a

35 See GEGAN, supra note 4, at 423 (discussing 1829 depraved mind murder statute, which preceded present-day statute); see also People v. Rector, 19 Wend. 569, 606 (N.Y. Supp. Ct. 1838) (stating that killing would be murder even in absence of intent if such killing was perpetrated by act imminently dangerous to others and evincing depraved mind). See generally People v. White, 24 Wend. 520, 533 (N.Y. Sup. Ct. 1840) (holding that act imminently dangerous to others and evincing depraved mind regardless of human life fell within common law definition of malice aforethought).
36 GEGAN, supra note 4, at 423 (quoting 2 N.Y. REV. STAT. PT. IV, CH. 1, TIT. 1, § 5 (1829)).
37 10 N.Y. 120 (1854). See People v. Jernatowski, 144 N.E. 497, 498 (N.Y. 1924) (stating that Darry provided early consideration of newly revised statutes). See generally GEGAN, supra note 4, at 426 (noting Darry as leading case of depraved mind murder in New York).
39 Darry, 10 N.Y. at 140.
40 Id.
41 Id.
42 See id. at 142 (noting that "a depraved mind regardless of human life" describes mental state of crime); see also Jernatowski, 144 N.E. at 498 (listing “depravity” along
showing of general malice. Similar to the common law, under
this idea of "general malice" the actor's deadly conduct was not
directed towards any particular individual but endangered the
lives of many, and was "perpetrated with a full consciousness of
the probable consequences." To make a finding of general
malice, juries could examine the nature or surrounding
circumstances of the actor's conduct to infer depravity of the
actor's actions. Although the actor may even have
intended to take a life, that intent was not directed at any
particular individual but was instead general and indiscriminate.
In reaching this conclusion, Judge Selden drew
the concept of general malice directly from East's Pleas of the
Crown and as a result, the court's interpretation remained in
harmony with the common law understanding of the crime that
had preceded it for hundreds of years.

Judge Selden reasoned that this narrow interpretation, limited
in scope, was necessary to prevent "a sea of uncertainty" surrounding the application of the statute; as it could be applied to every case of homicide "provided a jury can be found to say the
act produced death evincing a ‘depraved mind regardless of human life.’” Judge Selden’s second conclusion, stressing a “danger to many” requirement, provided a strong division between intentional and depraved indifference murder while attempting to capture the idea of general malice under the common law. As a result, Judge Selden’s interpretation of the depraved indifference in *Darry* has been seen by scholars to be a “composite product of historical continuity, statutory interpretation, and moral proportionality.”

C. Continuity in Interpretation though Penal Code Revisions

Judge Selden’s interpretation of depraved indifference murder articulated in *Darry* was reaffirmed by the Court of Appeals seventy years later in *People v. Jernatowski*. In the interim, the Penal Law had been revised on several occasions with the exception of one word; the crime of depraved indifference murder remained the same. In *Jernatowski*, the defendant was convicted after firing several shots into a house known to be occupied, killing the victim. The Court, in upholding the conviction, noted the fulfillment of the “danger to many” requirement, and found general malice by a showing of the defendant’s “wicked and depraved conduct.” The Court of

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49 *Id.*
50 GEGAN, supra note 4, at 437.
52 See *Jernatowski*, 144 N.E. at 498 (reacting that change did not make any difference in application of law); see also *Sanchez*, 777 N.E.2d at 219 (calling statute in *Jernatowski* “almost identical” to statute in *Darry*). See generally *People v. Register*, 457 N.E.2d 704, 710 (N.Y. 1983) (Jasen, J., dissenting) (noting that depraved mind murder statute has undergone little substantive change since its initial enactment).
55 *Jernatowski*, 144 N.E. at 498-99 (finding conviction “amply justified”).
Appeals noted once again the two limited instances in which depraved indifference murder could be applied. The first included "those cases where an intent to take life exists, which is not directed at any particular person but is general and indiscriminate." The second instance, which was thought to be almost identical, embraced conduct "in which death is produced by acts putting the lives of many in jeopardy, under circumstances evincing great depravity and utter reckless regard to human life." In maintaining this interpretation of depraved indifference murder, the application of the crime was confined to a small well-defined subset of all homicides, closely following the understanding of the crime under the common law. This was all to change, however, with the passage of the modern Penal Law in 1967. Under the modern codification, the Court of Appeals in a series of decisions marginalized Judge Selden's opinion in Darry.

II. THE MODERN CODIFICATION AND EXPANSION OF THE CRIME

The modern codification of depraved indifference murder in New York was the product of a study conducted by the Revision Commission of the Penal Law during the 1960's, which was influenced by the American Law Institute's Model Penal Code.

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56 Jernatowski, 144 N.E. at 498 (stating interpretation was first considered in Darry).
57 Id.
58 See id. (noting that interpretation of statute closely mimics common law); see also People v. Sanchez, 777 N.E.2d 204, 209 (N.Y. 2002) (reviewing common law interpretation which notes malice is implied when act was "so reckless as to evince a 'heart regardless of social duty and fatally bent on mischief'"). See generally MICHAELS, supra note 14, at 788 (1985) (discussing common law methods of determining depraved indifference).
Although the 1967 Revised Penal Law marked a major overhaul in the criminal code in New York State,\(^{62}\) the Commission did not disturb the core idea of certain crimes that remained the foundation of the criminal law.\(^{63}\) Rather, the purpose of the Commission was to simplify the law in order to more accurately define criminal acts and to remove ambiguities that had existed in the prior codes.\(^{64}\) During the revision, the wording of the crime of depraved indifference murder was changed to more closely reflect that of the Model Penal Code.\(^{65}\) Although the similarity in wording between the two statutes suggests the Commission may have been adopting the Model Penal Code, this is not likely the case. The Commission Staff notes state that the new statute is "substantially a restatement"\(^{66}\) of the former codification of depraved indifference murder. In light of the

\(^{62}\) See 1962 TEMP. N.Y. STATE COMM'N ON REV. OF THE PENAL LAW AND CRIM. CODE INTERIM REP. 41 at 7 (noting magnitude of Commission's study); see also Sanchez, 777 N.E.2d at 210 (stating Darry no longer "continues to provide the bedrock of our reckless murder jurisprudence. . . our contemporary statutory and decisional law of that form of murder leaves Darry far behind."). See generally GEGAN, supra note 4, at 436 (stating murder provisions of Revised Statutes of 1829 remained substantially same until adoption of new Penal Law in 1967).

\(^{63}\) See 1962 TEMP. N.Y. STATE COMM'N ON REV. OF THE PENAL LAW AND CRIM. CODE INTERIM REP. 41 at 7 (stating core fundamentals of certain criminal provision would be retained); see also MODEL PENAL CODE § 210.2 cmt. 4 at 21 (1960) (noting recklessness as defined "presupposes an awareness of the creation of substantial homicidal risk, a risk too great to be deemed justifiable by any valid purpose that the actor's conduct serves"). See generally Sanchez, 777 N.E.2d at 209 (stating American Law Institutes Model Penal Code is particularly instructive).

\(^{64}\) See 1964 TEMP STATE COMMISSION ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, Proposed New York Penal Law, Sen. Intro. 3918; Assem. Intro. 5376, v (1964) (noting Commission was created to simply and remove ambiguities in Penal Law); see also 1964 STATE OF N.Y. TEMP. COMM'N ON REV. OF THE PENAL LAW AND CRIM. CODE, THIRD INTERIM REP. 14 at 11 (outlining proposed penal law). See generally 1962 TEMP. COMM'N ON REV. OF THE PENAL LAW AND CRIM. CODE INTERIM REP. 41 at 16 (stating "the plan is to reduce the size of the Penal Law; to mold it into a clear, concise and basically comprehensive body of law under a suitable category type of arrangement; and to make numerous substantive changes of both major and minor importance").


\(^{66}\) If the modern codification of deprived indifference murder was meant to make a sweeping change in the law, the Commission Staff Notes of the Proposed Penal Law do not make that evident. Rather, the commission notes only that "Subdivision 2 [depraved indifference murder] presenting the highest crime of reckless homicide, is substantially a restatement of a similar crime defined as first degree murder under the existing Penal Law [§ 1044(2)]". See TEMP N.Y. STATE COMM'N ON REV. OF THE PENAL LAW AND CRIM CODE, Proposed New York Penal Law, Sen. Intro. 3918; Assem. Intro. 5376, 339 (1964).
Commission Staff notes, the similarity in wording may have been for the purpose of achieving greater clarity without a major disruption of the core understanding of the crime.\(^{67}\)

**A. Removal in “danger to many” requirement**

The first major change in the application of the depraved indifference murder statute occurred in *People v. Poplis*.\(^{68}\) In *Poplis*, the Court of Appeals, noting the wording of the new statute, found that depraved indifference murder was now applicable where the harmful conduct was directed at only one person.\(^{69}\) This modification, overriding the interpretation espoused in *Darry*, allowed the scope of the crime to be expanded to areas previously restricted by the courts to actions directed at a single individual.\(^{70}\) The Court, in reaching its decision, found that the holding in *Darry* “turned on a limitation in the statute... which was subsequently corrected by amendment.”\(^{71}\)

Yet, in dismissing *Darry*, the Court of Appeals seems to have overlooked what Judge Selden was attempting to accomplish with the “danger to many” requirement. The “danger to many” requirement presented a means of creating a bright line test is readily apparent to a jury, whereby jurors could grasp the idea of general malice by looking at the surrounding circumstances of


\(^{69}\) See Poplis, 281 N.E.2d at 168 (noting requirement of danger to multiple persons was corrected by amendment to penal law and statute was not applicable where danger was directed at only one person); see also Mills, 2003 N.Y. LEXIS at *10* n.3 (reiterating depraved indifference murder may involve only one victim). See generally People v. Cole, 652 N.E.2d 912, 913 (N.Y. 1995) (holding brutality towards child fit into understanding of depraved indifference to human life).

\(^{70}\) See Poplis, 281 N.E.2d at 168 (convicting defendant for depraved indifference murder when harm aimed at only one person); see also People v. Fink, 674 N.Y.S.2d 793, 794 (3d Dep’t 1998) (upholding conviction when defendant assisted in stabbing single victim to death). See generally People v. Cunningham, 653 N.Y.S.2d 304, 307 (3d Dep’t 1995) (affirming conviction after defendant shot victim in chest with shot gun).

\(^{71}\) Poplis, 281 N.E.2d at 168.
the act to determine whether many people were endangered, in order to establish the actor's depraved mind, regardless of human life.\textsuperscript{72} Criticism of the "danger to many" approach was not that it was unclear, but that it was under inclusive.\textsuperscript{73} Scholars have questioned why extremely reckless conduct was murder when directed at a group of people and not an individual.\textsuperscript{74}

In \textit{Poplis}, the court failed to recognize the need for an alternate means of limiting the application of the crime. Judge Seldon's "danger to many" requirement was not simply created by a casual reading of the statute, but was a means of concretely separating the crimes of intentional and depraved indifference murder. The "danger to many" requirement served as an instrument to prevent abuse by an overbroad application of the crime.\textsuperscript{75} Although \textit{Poplis} did not appreciate the motives behind the "danger to many" requirement, the case did remain committed to the overall analysis of the mens rea of depraved indifference murder articulated by the \textit{Darry} court.\textsuperscript{76}

\textsuperscript{72} See Darry v. People, 10 N.Y. 120, 146-47 (1854) (holding general malice can be inferred from circumstances surrounding defendant's actions if many lives are endangered as opposed to one particular life); see also People v. Darragh, 141 A.D. 408, 413-14 (1st Dep't 1910) (adopting Judge Seldin's holding and reasoning for danger to many requirement). See generally Alan C. Michaels, \textit{Acceptance: The Missing Mental State}, 71 S. CAL. L. REV. 953, 1009 (1998) (emphasizing advantage for jury in finding general malice exists in Judge Seldin's interpretation of depraved indifference).

\textsuperscript{73} It has been argued that the multiple victim approach "ultimately fails because it excludes too much." Michaels, supra note 14, at 799. However, it has been argued that intentional murder acts aimed at one individual is an over-inclusive approach. Kenneth W. Simons, \textit{Rethinking Mental States}, 72 B.U. L. REV. 463, 505-06 n.146 (1992).

\textsuperscript{74} See GEGAN, supra note 4, at 434 (raising questions about danger to many requirement); see also People v. Poplis 281 N.E.2d 167, 168 (N.Y. 1972) (expressing how even court system raised some doubts about necessity for many people to be in danger for higher culpability). See generally Michaels, supra note 14, at 799 (explaining rationale between applying and rejecting multiple victim approach for depraved indifference).

\textsuperscript{75} See Darry, 10 N.Y. at 147 (noting that if statute not limited then crime could be applied to all types of homicides); see also People v. France, 394 N.Y.S.2d 891, 893 (3d Dep't 1977) (recognizing that depraved indifference for others, such as shooting into crowded area, involves neither specific intent nor recklessness). See generally Michaels, supra note 14, at 799 (observing that depraved indifference should be afforded protection from misuse by attorneys and judges and juries).

\textsuperscript{76} See Poplis, 281 N.E.2d at 168 (stressing that both former statute and present one "embrace 'extremely dangerous and fatal conduct performed without specific homicidal intent but with a depraved kind of wantonness'"); see also People v. Sanchez, 777 N.E.2d 204, 220 (N.Y. 2002) (Rosenblatt, J. dissenting) (emphasizing how \textit{Poplis} maintained \textit{Darry}'s interpretation of depraved indifference, but dropped danger to many requirement). See generally France, 394 N.Y.S.2d at 893 (discussing application of \textit{Poplis} and depraved indifference standard of \textit{Darry} as abandonment of concern for those around actor).
B. A Change in Mens Rea

This was all to change eleven years later when the Court of Appeals re-examined the mens rea of the crime. The previous definition of depraved indifference murder required a mens rea of "a depraved mind, regardless of human life." The modern statute, on the other hand, required "recklessness" with "circumstances evincing a depraved indifference to human life." Although Poplis noted that the different phrasing of the statutes reached a very similar effect, the significance of this change in language has been the central focus of the debate surrounding the mens rea requirement under the modern statute. The modern penal law, following the model penal code defines only four mental states: purposely, knowingly, recklessly, and negligently. Since the statute used only the term "reckless," a


80 See Poplis, 281 N.E.2d at 168 (noting that former statute is very similar in effect to present murder statute); see also Register, 457 N.E.2d at 707-08 (noting how concept behind deprived indifference remained in new statute despite change in statutory description). See generally People v. Magliato, 494 N.Y.S.2d 307, 309-310 (N.Y. App. Div. 1985) (outlining common notions behind both statutes, despite their classification of different degrees of murder).

81 See Register, 457 N.E.2d at 276 (discussing significance of “under circumstances evincing deprived indifference to human life”); see also Sanchez, 777 N.E.2d at 206-07 (demonstrating ongoing debate between majority and dissent regarding mens rea requirement of current deprived indifference murder statute in New York). See generally People v. Word, 689 N.Y.S.2d 36, 37 (N.Y. App. Div. 1999) (emphasizing how subject of mens rea for deprived indifference murder in New York is ongoing issue under new statute).

major question remained as to where “circumstance evincing a depraved indifference to human life” fit with in this crime.

The Court of Appeals addressed this question in People v. Register. In Register, the defendant was convicted of depraved indifference murder after firing a gun in a crowded bar room killing two people. On appeal, the defendant argued that because of his extreme level of intoxication he did not have the requisite mens rea to be convicted of the crime. The court, in rejecting this defense held that “under circumstances evincing a depraved indifference to human life” referred to “neither the mens rea or actus reus. If it states an element of the crime at all, it is not an element in the traditional sense but rather a definition of the factual setting in which the risk creating the conduct must occur.” The court further noted that the “focus of the offense was not upon the subjective intent of the defendant...but rather upon an objective assessment of the degree of risk presented by the defendant’s reckless conduct.”

Thus, the only mens rea required for conviction of this crime was “recklessness” and the “concept of deprived indifference was

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84 See id. at 272-73 (discussing facts for which defendant was charged with deprived indifference and why case is now on appeal).
86 See Register, 457 N.E.2d at 707 (discussing how deprived indifference is not traditional element of crime); see also Sanchez, 777 N.E.2d at 207 (reaffirming notion developed in Register that modern deprived indifference standard is not mens rea element in traditional sense). See generally Word, 689 N.Y.S.2d at 37 (emphasizing that deprived indifference is not mens rea element for purposes of determining whether conduct constituted second-degree murder).
retrained in the new statute not to function as a mens rea element but to objectively define the circumstances which must exist to elevate homicide from manslaughter to murder." However, this case did not end the debate over depraved indifference murder's mens rea requirements.

Even with the holding in Register that the only mens rea requirement for deprived indifference murder was "recklessness," there remained some confusion by the courts as to what degree of recklessness ought to be applied. Under Register, the jury must look at the actor's subjective mental state only to establish recklessness, and then the jury must shift to the objective circumstances surrounding the reckless conduct to make a qualitative judgment as to whether those circumstances evince a "depraved indifference to human life." Yet the courts seem to admit that deprived indifference murder requires more than ordinary "recklessness." The courts have charged juries to convict on a finding of conduct that is "beyond being reckless, is so wanton, so deficient in moral sense and concern, so devoid of regard for the life or the lives of others," to equate this conduct with intentional murder. Further, the Court of Appeals has instructed that "a 'wanton indifference to human life or a depravity of mind'... is essential to deprived indifference

90 See Register, 457 N.E.2d at 707 (noting that only mens rea for deprived indifference murder is recklessness); see also People v. Fink, 674 N.Y.S.2d 793, 794 (App. Div. 1998) (stating that "depraved indifference is not akin to mere recklessness"). See generally People v. Fenner, 463 N.E.2d 617, 618 (N.Y. 1984) (noting crime requires "conduct beyond being reckless").
91 Register, 457 N.E.2d at 705-06 (discussing role of jury in finding a person guilty under deprived indifference murder); see also, People v. Brathwaite, 472 N.E.2d 29, 31-32 (N.Y. 1984) (holding it was proper to submit to jury charge of deprived indifference murder upon evidence of accessorial liability). See generally People v. Poplis, 281 N.E.2d 167, 168 (N.Y. 1972) (holding that deprived indifference murder can be decided by jury when defendant beats child to death).
92 People v. Sanchez, 777 N.E.2d 204, 206-07 (N.Y. 2002) (arguing that Register required a significantly heightened recklessness); see also Brathwaite, 472 N.E.2d at 31 (stating that jury was charged that defendant's conduct must be beyond being reckless). See generally Poplis, 281 N.E.2d at 168 (stating that murder prescription requires more than recklessly causing death).
93 Brathwaite, 472 N.E.2d at 842. See People v. Russell, 693 N.E.2d 193, 194 (N.Y. 1998) (stating that deprived conduct must be wanton and void of moral concern); see also Fenner, 463 N.E.2d at 618 (charging jury with proper standard for assessing whether defendant's actions evinced depravity).
murder." How then does this concession by the court that depraved indifference murder requires conduct that is "beyond reckless" reconcile with the argument by the court that the Penal Code admits only four mens rea elements?

Taken together, it appears that the court may have been attempting to capture the idea of implied malice while working within the confines of the statute, requiring that there was some subjective understanding on the part of the defendant that his actions were harmful but then also requiring an objective assessment of the facts surrounding the act to infer a "depraved mind." If this is the case, Register seems to have followed the writing of Justice Holmes, but at the same time the court also admits that the crime of depraved indifference murder requires a mens rea higher than "recklessness." However, if the Register court understood the concept of general malice and of inferring the defendants "depravity" from the surrounding circumstances, later courts appear to have concerned themselves more with the objective circumstances than the subjective mens rea of the defendant.

C. An emphasis of the Objective Circumstance

The Court of Appeals built upon their concern for the objective circumstances surrounding the act in People v. Roe, a case involving a 15-year old boy engaged in a game of "Polish roulette"


95 See HOLMES, supra note 18, at 51 (arguing that although there must be some subjective realization on part of defendant); see also McManus, 496 N.E.2d at 206 (stating that finding of depravity requires inquiry into objectives circumstances of crime). But see STEPHEN, supra note 5 (discussing subjective assessment).

96 Register, 457 N.E.2d at 707 (noting that although only mens rea element is "recklessness" something more is needed to elevate crime from manslaughter to murder); see also People v. Fink, 674 N.Y.S.2d 793, 794 (App. Div. 1998) (stating "depraved indifference is not akin to mere recklessness"). See generally Fenner, 463 N.E.2d at 618 (noting crime requires "conduct beyond being reckless").

97 The extent to which using the objective assessment of the circumstances surrounding the act to quantify the degree of risk breaks from the common law is a matter of debate. Compare HOLMES, JR., supra note 95, which argues for objective assessment, with STEPHEN, supra note 5, finding in favor of a subjective assessment. For a further discussion of both subjective and objective standards for other crimes and defenses, see Kenneth W. Simons, Self-Defense, Mens Rea, and Bernhard Goetz, A Crime of Self-Defense: Bernhard Goetz and the Law on Trial, 89 COLUM. L. REV. 1179 (1989).

with a shotgun. The defendant claimed that he did not intend to harm the victim and was unaware that he had chambered a "live" round, which discharged and killed the victim. However, as the majority explained, "the actor's subjective mental state is not pertinent to a determination of the additional element required in depraved indifference murder." Further, the court rejected any examination of the defendant's emotional condition or mens rea after the act had occurred. Thus, the objective criteria for the jury to base its determination of depravity is limited to the objective circumstances leading up to the act which create a very substantial risk of death. This interpretation is especially troubling when one considers that the mens rea of "recklessness" is the same mental state that is used to define both depraved indifference murder and the crime of manslaughter. The effect, as scholars have argued raised serious questions of fairness, as many actions previously only punishable as manslaughter are now swept into category of depraved indifference murder.

D. Refusal to Allow Defense of "Extreme Emotional Disturbance"

Still, the Court has gone further in refusing to take into account the subjective mental state of the defendant in determining "depraved indifference." In People v. Farden, the court denied the application of the defense of "extreme emotional disturbance" to the crime of depraved indifference murder. In reaching its decision, the Court noted a significant difference

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99 See id. at 613 (stating the facts of the case).
100 See id. (stating that defendant did not realize that how he had loaded gun).
101 Id at 612.
102 See id. (noting defendant's emotional condition after killing is besides point).
103 See id. (holding "evidence of the actor's subjective mental state... is not pertinent to a determination of the additional element required for depraved indifference murder").
104 See Register, 457 N.E.2d at 707 (stating that recklessness is required for depravity and manslaughter); see also People v. Word, 689 N.Y.S.2d 36, 37 (App. Div. 1999) (noting that evidence of mental state is significant only to a threshold determination of recklessness and not relevant to depravity). See generally People v. McManus, 496 N.E.2d 202, 206 (N.Y. 1986) (noting recklessness is mens rea for manslaughter and depravity).
105 See Depraved, supra note 13, at 430 (1999) (arguing depraved indifference murder is not sufficiently distinguishable from manslaughter); see also N.Y. PENAL LAW § 15.05 (2003) (defining culpable mental states as intentional, knowingly, recklessly, and criminal negligence). See generally N.Y. PENAL LAW § 15.05(3) & (4) (2003) (distinguishing recklessness and criminal negligence).
between the common law defense of "heat of passion" and the modern "extreme emotional disturbance," finding that the latter is not applicable to deprived indifference murder.\textsuperscript{107} The court held that the legislature, because of the positioning of the language in the statute, made a policy decision only to include such a defense as part of intentional murder.\textsuperscript{108} Yet such a reading seems to run counter to our understanding of the crime.

Under this reading, an actor who intentionally brings about the death of an individual is allowed the benefit of showing "extreme emotional disturbance" as a mitigating factor to the crime of murder, but a person with the lesser mental state of recklessness, is denied such mitigation.\textsuperscript{109} If depravity of mind is the central core of deprived indifference murder, it does not appear possible to find that such depravity of mind exists while the defendant is under an extreme emotional disturbance.\textsuperscript{110} It is the "unmotivated wickedness" that defines deprived indifference murder.\textsuperscript{111} Evidence of extreme emotional

\textsuperscript{107} See Fardan, 628 N.E.2d at 43 (noting difference between concept of "heat of passion" and "extreme emotional disturbance"); see also People v. Patterson, 347 N.E.2d 898, 907-08 (N.Y. 1976) aff'd, 432 U.S. 197 (1977) (noting difference between heat of passion and extreme emotional disturbance is spontaneous nature of action). See generally People v. Fiorentino, 91 N.E. 195, 196 (N.Y. 1910) (stating heat of passion is immediate reaction to events without time to reflect or deliberate).

\textsuperscript{108} See Fardan, 628 N.E.2d at 44 (observing that legislature included extreme emotional disturbance only as part of intentional theory of murder); see also People v. Harris, 740 N.E.2d 227, 229 (N.Y. 2000) (stating extreme emotional disturbance is available as mitigating defense for intentional murder for situations which deemed worthy of mercy or leniency for defendant). See generally People v. Register, 457 N.E.2d 704, 706 (N.Y. 1983) (noting intentional murder differs from deprived mind murder because it is intent to cause death on conscious level).

\textsuperscript{109} See N.Y. PEnAL LAW § 125.25(1)(a) (creating mitigating factor of extreme emotional disturbance for intentional murder); see also Fardan, 628 N.E.2d at 44 (applying extreme emotional disturbance only to intentional murder and not deprived indifference murder). See generally Register, 457 N.E.2d at 706 (ruling intoxication can not be used as mitigating defense for reckless crimes including deprived mind murder).

\textsuperscript{110} See People v. McManus, 496 N.E.2d 202, 206 (N.Y. 1986) (noting depravity of mind is element of deprived indifference murder); see also People v. Sanchez, 777 N.E.2d 204, 206 (N.Y. 2002) (ruling conduct of defendant met requirement of deprived mind which was requirement for deprived mind murder). See generally Register, 457 N.E.2d at 707 (stating that in addition to element of conduct producing grave risk of death, deprived mind murder requires deprived indifference to human life).

\textsuperscript{111} See People v. Thacker, 570 N.Y.S.2d 516, 520 (App. Div. 1991) (stating deprived indifference homicide is characterized by "unmitigated wickedness, extreme inhumanity, or actions exhibiting a high degree of wantonness"); see also People v. Magliato, 494 N.Y.S.2d 307, 310 (App. Div. 1985) (noting that "there must be an unmotivated wickedness so great as to be indicative of depravity"). See generally People v. Northrup, 442 N.Y.S.2d 658, 660 (App. Div. 1981) (writing "depraved indifference to human life is characterized by unmitigated wickedness, extreme inhumanity, or actions exhibiting a high degree of wantonness").
disturbance provides both an understandable motivation as well as a mitigating factor that would negate finding a "depraved mind."\textsuperscript{112} The court in \textit{Farden} however, found such inquiries unnecessary, holding that the position in the statute places such an affirmative defense only under intentional murder.\textsuperscript{113} Here again we are presented with a question of fundamental fairness, whereby an actor who is acting under an extreme emotional disturbance is to be punished with the same condemnation as in intentional murder, with out the benefit of the same mitigating factors when he is found to be acting with depraved indifference to human life.

What we are left with is a state of confusion. Although the intention was to "limit and crystallize"\textsuperscript{114} the mental states in the criminal law, "the uncertainties are greater now than at the time of \textit{Darry} and much greater than at common law."\textsuperscript{115} What significance then can we give to the comment by the revision commission that the crime of depraved indifference murder is "substantially a restatement" of the old law? The court on one hand goes so far as to say that the crime of depraved indifference murder requires something more than recklessness, even using words such as "wanton" "devoid of regard for human life."\textsuperscript{116} Yet, on the other hand the court has refused to look at such mitigating elements as the defendant's extreme emotional distress or even the actor's subjective mental state when determining the element of "depraved indifference."\textsuperscript{117}

\textsuperscript{112} See \textit{Depraved}, supra note 13, at 457 (1990) (noting that defense of extreme emotional disturbance is built into understanding of crime); see also \textit{People v. Jernatowski}, 144 N.E. 497, 498 (N.Y. 1924) (ruling that defendant's disregard of knowledge on conscious level that act would cause death was required for depraved mind murder conviction). See generally \textit{Darry v. People}, 10 N.Y. 120, 148 (1854) (holding depraved mind murder statute required act to be committed on conscious level).

\textsuperscript{113} See \textit{Farden}, 628 N.E.2d at 44 (holding extreme emotional disturbance is not defense to depraved indifference murder); see also \textit{Harris}, 740 N.E.2d at 229 (noting defense of extreme emotional disturbance can be used to mitigate intentional murder charge). See generally \textit{Register}, 457 N.E.2d 704 (refusing to allow intoxication as extreme emotional disturbance to mitigate depraved mind murder).

\textsuperscript{114} \textit{Register}, 457 N.E.2d at 708.

\textsuperscript{115} \textit{GEGAN}, supra note 4, at 437.

\textsuperscript{116} \textit{People v. Fenner}, 463 N.E.2d 617, 618 (N.Y. 1984) (noting that depraved indifference murder requires conduct so wanton and devoid of regard for human life so as to be treated with same societal condemnation as intentional murder); see also \textit{Register}, 457 N.E.2d at 706 (clarifying depravity of mind to mean "a wanton indifference to human life"). See generally \textit{Jernatowski}, 144 N.E. at 498 (holding act of firing several shots into home demonstrated "wicked and deprived mind").

\textsuperscript{117} See \textit{Farden}, 628 N.E.2d at 44 (holding affirmative defense of extreme emotional disturbance is inapplicable to crime of depraved indifference murder); see also \textit{Register},
E. Merger of Intentional and Depraved Indifference Murder

The result of this confusion is the further expansion of the crime to include practically all homicides. In People v. Sanchez\footnote{777 N.E.2d 204 (N.Y. 2002).} the Court of Appeals upheld a conviction over staunch opposition by three members of the court, holding that "shooting into the victim's torso at point blank range presented such a transcendent risk of causing death that it readily meets the level of manifested depravity needed to establish murder under Penal Law 125.25(2).”\footnote{Id. at 206.}

In reaching its decision, the court noted that since Sanchez and the victim had a social relationship, and Sanchez fired only one shot before fleeing the scene, the jury was free to reject this act as an intentional killing.\footnote{See Sanchez, 777 N.E.2d at 206 (noting defendant's good relations with victim and that only one shot was fired); see also People v. Roe, 542 N.E.2d 610, 612 (N.Y. 1989) (noting determination of whether defendant acted with depraved indifference to human life is performed by trier of facts). See generally Jernatowski, 144 N.E at 498-99 (holding act of firing several bullets into home sufficient to justify jury's finding of depraved mind murder).} Once the jury rejected intent, the court reasoned that there was ample support that the firing of a gun at the victim at a distance of less than 18 inches permitted the jury to rationally "conclude that the defendant demonstrated an indifference to human life so depraved as to be deserving the same punishment as intentional murder."\footnote{Sanchez, 777 N.E.2d at 211.} The majority even seemed to draw strength from evidence that this crime may have been intentional in nature, articulating, "purposeful homicide itself is the ultimate manifestation of indifference to the value of human life.”\footnote{Id at 211.}

The court also found that there was no need for a showing that the defendant's reckless conduct was of a "brutal, barbaric or savage nature" because the crime in this case is "manifestly extreme and unjustified.”\footnote{Sanchez, 777 N.E.2d at 208 (discussing "circumstances manifesting extreme depravity").}

457 N.E.2d at 706 (refusing to allow intoxication as extreme emotional disturbance to mitigate depraved mind murder). See generally Harris, 740 N.E.2d at 229 (stating legislature allowed defense of extreme emotional disturbance to mitigate intentional murder to manslaughter in first degree).
majority cited the case of People v. Roe,\textsuperscript{124} in which the defendant's conviction was upheld without a showing that the defendant's state of mind was "uncommonly evil."\textsuperscript{125} However, as we have seen the standards articulated by the Court in Roe have been met with some troubling criticism.\textsuperscript{126} In any event, in Roe, the depravity of the defendant's actions was objectively proven by the fact that the defendant loaded a mix of "live" and "dummy" shells into a shot gun and fired it at the victim.\textsuperscript{127} The fact that the defendant was not aware of the order in which he loaded the shells into the gun and that he would play such a "game," presented objective circumstances that would show a depraved indifference to human life. Moreover, in Roe there was never any evidence presented by the prosecution that would lead the jury to believe that this was an intentional killing.\textsuperscript{128} In fact, the defendant in Roe did not intent to kill the victim at all and was surprised and dismayed that the gun discharged a live round when he pulled the trigger.\textsuperscript{129}

Yet, how does one reconcile the interpretation of the crime articulated in Sanchez, which now encompasses acts that are intentional, with the statement that the new law is "substantially a restatement" of the old law? This interesting piece of legislative history, which has been stressed very heavily by the members of the dissent, seems to be largely overlooked by the majority of the court. Still, the majority found that the crimes of intentional and depraved indifference murder were clearly distinguishable because of their differing mental states.\textsuperscript{130} The majority held that with proper instruction from

\textsuperscript{124} 542 N.E.2d 610 (1989).
\textsuperscript{125} Sanchez, 777 N.E.2d at 212 (analogizing Sanchez with Roe and rejecting dissent's proposed formulation of mens rea requirement).
\textsuperscript{126} See Roe, 542 N.E.2d at 615-20 (Bellacosa, J., dissenting) (raising some troubling questions about court's decision); see also People v. White, 590 N.E.2d 236, 238 (N.Y. 1992) (distinguishing Roe and focusing on defendant's mens rea). See generally People v. Patterson, 347 N.E.2d 898, 909 (N.Y. 1976) (Breitel, C. J., concurring) (emphasizing modern focus on mens rea, rather than categorical "homicide is homicide is homicide" approach).
\textsuperscript{127} See Roe, 542 N.E.2d at 612-14 (discussing facts of case).
\textsuperscript{128} See id at 613. (characterizing incident as "macabre game," limiting analysis to "whether the crime conduct creates the very substantial risk of death necessary for depraved indifference" without expressly considering whether killing was intentional).
\textsuperscript{129} See Roe, 542 N.E.2d at 616 (Bellacosa, J. dissenting) (giving detailed account of defendant's emotional state immediately following shooting).
\textsuperscript{130} See Sanchez, 777 N.E.2d at 209-10 (distinguishing between intentional or purposeful killing and depraved indifference killing, and noting that modern formulations
the trial judge, the jury would be able to adequately separate the two crimes so that the judicial safeguard of appellate review could prevent any merger of the two crimes. The dissenter were not so confident and in three separate dissents Judges Smith, Ciparick and Rosenblatt expressed their concern over the broadening scope of this crime.

III. CONCERNS FOLLOWING THIS EXPANDED INTERPRETATION

A. Vagueness

Following this series of decisions a number of concerns have arisen relating to the direction of the modern statute. One of the major criticisms that have been articulated concerning the modern interpretation of depraved indifference murder surrounds the meaning of “under circumstances evincing depraved indifference.” As we have seen, this is not the mens rea, but a qualitative analysis made by the jury of the surrounding context of the act. Under this theory the jury is asked to look at the objective circumstances of the defendant's reckless act, and determine whether such conduct is so depraved as to be treated on the same level as an intentional killing.

of “depraved indifference” do not require proof of “uncommonly evil and morally perverse” mens rea in addition to objectively depravedly indifferent conduct).

131 See Sanchez, 777 N.E.2d at 209 (noting that statutory safeguard of appellate review will prevent merger of two crimes).

132 See Sanchez, 777 N.E.2d at 213-35 (Smith, J. dissenting) (echoing concerns raised by J. Bellacosa’s Roe dissent that de-emphasis of mens rea requirement in depraved indifference murder unduly expands crime).

133 People v. Register, 457 N.E.2d 704, 711 (N.Y. 1983) (Jasen, J., dissenting) (arguing that “depraved indifference” was intended by Legislature to constitute culpable state of mind); see also Roe, 542 N.E.2d at 615 (Bellacosa, J., dissenting) (remarking that tangible meaning of depraved indifference is “elusive”). See generally People v. Poplis, 281 N.E.2d 167, 168 (N.Y. 1972) (holding that “the murder definition requires conduct with ‘depraved indifference’ to ‘human life’ plus recklessness”).

134 See Register, 457 N.E.2d at 707 (noting depraved indifference to human life is not mens rea); see also Roe, 542 N.E.2d at 612 (stating additional element “is a qualitative judgment made by the trier of fact”). See generally Sanchez, 777 N.E.2d at 207-08 (stating that “objective circumstances of exceptionally high, unjustified risk of death constitute the primary means by which the Legislature differentiated between the reckless state of mind sufficient to establish the mental culpability of manslaughter and the extreme recklessness of murder under [the] Penal Law”).

135 See Roe, 542 N.E.2d at 612 (“Evidence of the actor’s subjective mental state, however, is not pertinent to a determination of the additional element required for depraved indifference murder”); see also Register, 457 N.E.2d at 706 (noting that defendant’s asserted mens rea is misplaced in this analysis: “objective circumstances [are
The objective-circumstances approach has the advantage that it is an assessment that the jury is able to make by placing the highest societal condemnation upon deadly actions of extreme depravity, based on the surrounding circumstances in which the act was committed.136

Yet, if the courts refuse to look further than the face of the 1967 law, we find that the legislature, though the statute has provided no guidance into what circumstances evince such depraved indifference,137 and therefore no guidance as to what an appellate court should use as a guide to determine whether a reasonable jury could find such depraved indifference.138 Juries using the circumstances approach have convicted persons for depraved indifference murder where the circumstances surrounding the act have showed an unmitigated wickedness, such as denying a child adequate sustenance until it starved to death,139 firing one shot into a crowded street corner,140 playing a game of vehicular “cat and mouse” on a suburban street,141 or

136 See MICHAELS, supra note 14, at 793 (noting that under this approach, jurors would be able to make determination that certain acts would warrant higher offense, while avoiding blurring issue with inquiries into defendant’s mens rea); see also N.Y. PENAL Art. 130 (providing for elevation of sex offenses to “aggravated” status depending on objective circumstances surrounding act). See generally Poplis, 281 N.E.2d at 168 (noting jury’s application of objective standard to find that continued beatings resulted in child’s death as fitting “within the accepted understanding of the kind of recklessness involving ‘a depraved indifference to human life’”).

137 See N.Y. PENAL § 125.25(2) (McKinney 2003) (defining second degree murder, in relevant part, as killing in which a person “under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person”).

138 See MICHAELS, supra note 14, at 795 (noting circumstances approach does not provide any guidance for appellate court to determine whether “reasonable jury” could have reached its conclusion); see also State v. Lagasse, 410 A.2d 537, 540 (Me. 1980) (cautioning prosecutors that vague objective-circumstances approach is not to be used as “catchall” for securing easy murder convictions). See generally People v. Rodriguez, 888 P.2d 278, 283 (Colo. 1994) (discussing similarly worded depraved-indifference murder statute that was declared unconstitutionally vague by Colorado courts and was subsequently clarified by the legislature).


firing a shot into a group of people. Each of these examples seems to be in line with the common law understanding of general malice. Although each portrays conduct that presents a grave risk of death and that is directed at an individual in the case of the child or the general public in the other examples, each illustrates indifference as to whether or not death will occur.

However, there have also been cases where juries have convicted defendants under the depraved mind murder statute where the circumstances tend to support action that is solely intentional in nature. Such cases include killing a victim by striking him on the back of the head with a baseball bat, throwing a baby against a wall, or firing two shots into the victim's chest.


143 See generally State v. Atkins, 87 S.E.2d 507, 509 (N.C. 1955) (affirming correctness of Knotts definition of general malice when used as jury instruction); State v. Burton, 90 S.E. 561, 562 (N.C. 1916) (clarifying that general malice may be shown by threats and premeditation); State v. Knotts, 83 S.E. 972, 977 (N.C. 1914) (defining general malice as "wickedness, a disposition to do wrong, a black and diabolical heart, regardless of social duty and fatally bent on mischief").


Although each of these examples present circumstances of "unmitigated wickedness" this second set of examples present actions that more closely resemble a specific intent to harm another and not general malice.  

It is important to note that the strongest type of depraved indifference to human life is the intentional taking of life. However, the inclusion of these classes of cases with the depraved mind murder statute is beyond that intended by the legislature. Depraved indifference was never intended to encompass an act intended to seriously harm another individual, either under today’s codification or the common law. At common law, Stephen’s classification of murder all required the actor to possess a kind of “wicked mind,” one that was subjectively aware of the risk but committed the act in spite of that risk. Yet his classifications of “malice aforethought” differed because of the


148 See People v. Lerma, 239 N.W.2d 424, 425 (Mich. Ct. App. 1976) (attempting to distinguish specific intent from general malice by stating that specific intent entails "some intent in addition to the intent to do the physical act which the crime requires"); see also Bryan A. Liang & Wendy Macfarlane, Murder by Omission: Child Abuse and the Passive Parent, 36 HARV. J. ON. LEGIS. 397, 412 (1999) (noting that specific intent requires intent to produce specific result, whereas general malice requires only intention to commit action). See generally BLACK’S LAW DICTIONARY 815 (7th ed. 1999) (defining specific intent as “the intent to accomplish the precise criminal act that one is later charged with.”).


150 See People v. Register, 457 N.E.2d 704, 708 (N.Y. 1983) (stating depraved indifference murder “is not and never has been a substitute for intentional murder); see also Sanchez, 777 N.E.2d at 324 (echoing the Register language). See generally Brooks v. Kelly, No. 88-CV-0631E, 1993 U.S. Dist. LEXIS 12608, at *12 (W.D.N.Y. 1993) (denying petitioner’s challenge that his depraved murder conviction was substitute for intentional murder).

151 See Stephen, supra note 5, at 37 (noting that actor must have knowledge of risk created by his conduct in order to be guilty of murder); see also People v. Maghzal, 427 N.W.2d 552, 554 (Mich. Ct. App. 1987) (stating that “an intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm” is element of common law murder). See generally State v. Keele, 644 S.W.2d 435, 439 (Tenn. Crim. App. 1982) (upholding common law murder charge where defendant exhibited that he had “no hesitation whatsoever about committing crimes in which the risk to human life is high”).
way in which that malice was manifested.\textsuperscript{152} With intentional acts of murder, the malice was express; the "wicked mind" was apparent by the intentional taking of life.\textsuperscript{153} However, with depraved indifference the malice is inferred by the nature of the actor's conduct because intent is lacking.\textsuperscript{154} Early judges and lawmakers in New York understood this notion and created a law that was a reflection of the common law understanding of the crime. Today's codification of murder in the second degree is no different. The two theories of murder were never intended to overlap or encompass the same type of conduct, the revision commission was created to remove "ambiguity and duplication" in the law, and the three subdivision of murder reflect three separate aspects of the crime.\textsuperscript{155}

Although modern courts have stressed that depraved indifference murder is not a proxy for intentional murder,\textsuperscript{156} they have not felt compelled to examine neither the common law origins of the statute nor the long history of interpretation that

\begin{footnotes}
\item[153] See McInerney v. Berman, 621 F.2d 20 (1st Cir. 1980) (instructing jury that malice may be properly inferred by the use of deadly weapon); see also State v. Childers, 563 P.2d 999, 1005 (Kan. 1977) (noting that malice is self evident in the use of deadly weapon against another). See generally State v. Hardin, 103 S.E. 557, 557 (S.C. 1920) (instructing that malice is fairly attributed to intentional killing with deadly weapon).
\item[154] See Stephen, supra note 5, at 47 (stating that intent to cause death need not be present in order to find person guilty of depraved indifference murder); see also State v. Casey, No. 20010622, 2003 Utah LEXIS 88, at *35 (Utah 2003) (deeming erroneous jury instruction that attributed purposeful or knowing mens rea to charge of depraved indifference). See generally Charles A. Phipps, Responding to Child Homicide: A Statutory Proposal, 89 J. CRIM. L. & CRIMINOLOGY 535, 590 (1999) (suggesting that flexibility of having both intentional and depraved murder statutes is advantageous).
\item[156] See People v. Register, 467 N.E.2d 704, 708 (N.Y. 1983) (stating depraved indifference murder "is not and never has been a substitute for intentional murder); see also People v. Sanchez, 777 N.E.2d 204, 216 (N.Y. 2002) (echoing Register language). See generally Brooks v. Kelly, No. 88-CV-0631E, 1993 U.S. Dist. LEXIS 12608 at *12 (W.D.N.Y. 1993) (denying petitioner's challenge that his depraved murder conviction was substitute for intentional murder).
\end{footnotes}
has led to the modern codification. The courts look back no further than Register for their understanding of the crime. As a result, we are again confronted with a problem that has been echoed since Judge Selden's opinion in Darry and in the dissents that have been written since Register, that depraved indifference murder can be expanded to all homicides, so long as a jury is willing to find depraved indifference.157

This has led to the modern statute being challenged on the basis that it is unconstitutionally vague. However, in People v. Johnson158 the Court of Appeals rejected this challenge stating, "conduct with depraved indifference to human life is well understood."159 To reach this conclusion the Court of Appeals relied upon its decision in People v. Cole,160 in which the court noted that Register did not unsettle the well-established common law understanding of the "depraved indifference" element, but merely clarified the "element as objective aggravating circumstance rather than a part of the crime's mens rea."161

Yet, if Register did not unsettle the common law understanding of "depraved indifference," subsequent cases have done just that. By disregarding of the idea of general malice as the purpose for the crimes very existence and the refusal to examine the subjective intent of the defendant, today's interpretation of depraved indifference murder is quite different from the crime

157 See Darry v. People, 10 N.Y. 120, 148 (1854) (theorizing that "there is scarcely a case of manslaughter which upon this construction may not be brought within the definition of murder . . . provided a jury can be found to say that act which produced death evinced a 'depraved mind, regardless of human life'"'); see also Register, 457 N.E.2d at 711 (Jasen, J., dissenting) (arguing the majority's opinion "eviscerates the distinction between manslaughter in the second degree and murder in the second degree"). See generally People v. Roe, 542 N.E.2d 610, 615 (N.Y. 1989) (Bellacosa, J., dissenting) (stating "this result finalizes the obliteration of the classical demarcation between murder and manslaughter in this State.").


159 Johnson, 662 N.E.2d at 1067. See People v. Poplis, 281 N.E.2d 167, 88 (N.Y. 1972) (describing conduct which has been rather well understood at common law to involve "something more serious than mere recklessness alone which has had an incidental tragic result"). See generally Darry, 10 N.Y. at 136 (discussing common law root of depraved indifference murder and statute's legislative history and intent).


161 Cole, 652 N.E.2d at 913. Cf. Waters v. State, 443 A.2d 500, 504 (Sup. Ct. Del. 1982) (interpreting words "cruel, wicked, and depraved indifference to human life," in Delaware statute as "intending to define a particular state of mind which must be found to have existed in the defendant at the time the crime was committed—the mens rea"), with People v. Sanchez, 777 N.E.2d 204, 219-20 (N.Y. 2002) (Smith, J., dissenting) (pointing to New York Legislature's clear intent to restate law and not to abrogate State's decisional law on requisite mens rea for depraved indifference murder).
articulated under the common law. *Sanchez* represents the farthest move by the courts in diminishing the common law understanding that depraved indifference murder did not apply to cases where the evidence presented an intentional killing directed at a particular individual.162

Courts in other states that have been confronted with the circumstances approach have come to different conclusions about the specificity of their depraved indifference murder statutes. Colorado declared its state’s depraved indifference murder statute unconstitutional for vagueness.163 In contrast, Maine’s highest court recognized the potential abuse of the circumstances approach and warned prosecutors that depraved indifference murder constitutes a narrow and limited exception to the fundamental principle of the Criminal Code.164

B. Advantage for Prosecutors

For Prosecutors, the expansion of the scope of the depraved indifference murder statute now seen since *People v. Sanchez* provides a marked advantage by affording a fallback provision to achieve a murder conviction. This is possible because under N.Y. CPL § 300.50, “if an indictment contains two inconsistent counts... the court may submit both counts in the alternative and authorize the jury to convict upon one or the other depending upon its findings of fact.”165 Since actions falling under the

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162 See *Sanchez*, 777 N.E.2d at 220-31 (Rosenblatt, J., dissenting) (repeatedly charging majority with making “ordinary recklessness” sufficient to establish depraved indifference murder); see also *People v. Register*, 457 N.E.2d 704, 708 (N.Y. 1983) (noting dissent’s fear that majority’s holding would “result in wholesale depraved mind murder prosecutions for what are essentially intentional murders”). See generally *Depraved*, supra note 13, at 430 (1990) (discussing problem of intent and depraved indifference murder as having already existed more than decade before *Sanchez* decision).


164 See *State v. Lagasse*, 410 A.2d 537, 541 (Me. 1980) (issuing this warning but recognizing excess of caution prosecuting attorney may seek from grand jury an indictment charging murder in alternative form of depraved indifference as well as intentional and knowing murder); see also *State v. Woodbury*, 403 A.2d 1166, 1173 (1979) (pointing out that purpose of statute is to deal with those few instances in which his conduct created such high tendency to produce death that law attributes to him highest degree of blameworthiness) (emphasis added). See generally *Michaels*, supra note 14, at 795 (noting other states have had to warn prosecutors not to take advantage of broadness of depraved indifference murder law).

165 N.Y. CRIM. PROC. LAW § 300.50 (McKinney 2003).
depraved indifference murder statute are treated with the same societal condemnation as intentional murder in the second degree, they are also punished with the same degree of severity. Therefore, with the scope of depraved indifference murder now expanded to include acts that are intentional in nature, prosecutors will be given a double opportunity to convict for murder.

However, this is not a new concern that presents itself with the court's decision in Sanchez. Rather, this issue has been raised for over twenty years as the scope of the depraved indifference murder statute has been expanded. In both Register and in Roe, the dissents have warned of "some very disproportionate miscarriages of justice" stemming from this prosecutorial advantage. In New York, Judge Rosenblatt found this trend to be most startling since Register. According to the Judge's statistics, there has been a substantial increase since 1989 in the number of indictments that charged both intentional and

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166 See Register, 457 N.E.2d at 706 (stating that in depraved indifference murder "conduct through recklessness was equal in blameworthiness to intentional murder"); see also Greenburg, NEW YORK CRIMINAL LAW, § 6:13 (noting "depraved indifference murder is deemed 'equal in blameworthiness' to intentional murder").

167 Both intentional and depraved indifference murder are classified under the same statute, N.Y. PEN. LAW § 125.25 as class A felonies and both carry a maximum sentence of 25 years to life. Cf. N.Y. PEN. LAW § 125.15 (reckless manslaughter) with § 125.25(2) (depraved mind murder). In the Model Penal Code, depraved heart murder and reckless manslaughter involve the same criteria and the distinction between them is one of degree. See Model Penal Code § 210.2 cmt. 4, at 21-22.

168 See People v. Sanchez, 777 N.E.2d 204, 224 (N.Y. 2002) (Rosenblatt, J., dissenting) (noting that trend of twin-count indictments of intentional and depraved indifference murder will only continue with holding of court); see also People v. Weems, 481 N.Y.S.2d 414 (App. Div. 1984) (upholding trial court's refusal to charge jury on manslaughter in second degree as lesser included offense of second degree murder because facts could not support finding of recklessness). See generally People v. Gallagher, 508 N.E.2d 909, 909 (N.Y. 1987) (clarifying "where a defendant is charged with a single homicide in an indictment containing one count of intentional murder and one count of depraved mind murder both counts may be submitted to the jury in the alternative").

169 See Michaels, supra note 14, at 795 (noting other states have had warn prosecutors not to take advantage of breadth of depraved indifference murder law).


171 See Sanchez, 777 N.E.2d at 223 (N.Y. 2002) (Rosenblatt, J., dissenting) (noting statistic increase in charging of depraved indifference murder) (citing People v. Lyons, 721 N.Y.S.2d 179 (2001)) (affirming depraved indifference murder conviction of man who shot his lover's husband in chest and head during a struggle); see also People v. Sawyer, 711 N.Y.S.2d 45, 48 (App. Div. 2000) (affirming the defendant's depraved indifference murder conviction where the "defendant deliberately thrust a steak knife into (the victim's) chest with significant force").
depraved indifference murder – justifying the warning uttered in previous dissents.\footnote{172}

What seems to be most troubling about this trend is the continuing overlap of two crimes with mens rea elements that the Court of Appeals has found to be mutually exclusive.\footnote{173} One cannot, at the same time, act both intentionally and recklessly and thus a jury cannot find a defendant guilty of both intentional and depraved indifference murder. However, since the jury is permitted to examine both counts in the alternative,\footnote{174} the effect of this practice is that the jury is confronted with two theories of the homicide. The prosecution, faced with evidence that points to an intentional killing need not prove the subjective intent of the defendant to obtain a conviction for murder. Rather, this practice allows prosecutors to meet the lesser mens rea standard of recklessness, then present evidence of circumstances surrounding the act that would show a “depraved indifference to human life” in order to convict for murder.\footnote{175}

\footnote{172} Judges have noted that the warning of the dissent in \textit{Roe} and \textit{Register} have come true. \textit{See Sanchez}, 777 N.E.2d at 224 (Rosenblatt, J., dissenting). It has also been pointed out that the Appellate Divisions have considered over 100 convictions stemming from twin-count indictments, the vast majority in the last 10 years. \textit{Id.} at n.14. \textit{See generally BUREAU OF STATISTICAL SERVICES, N.Y. ST. DIV. OF CRIM. JUSTICE SERVICES, N.Y. STATE FELONY PROCESSING PRELIMINARY REPORT, Jan.-Dec. 1999 (Action Type by Offense Category) (Feb. 4, 2000)}.

\footnote{173} \textit{See} \textbf{People v. Gallagher}, 508 N.E.2d 909, 910 (N.Y. 1987) (noting that because intentional and reckless are mutually exclusive, defendant may not be convicted of both depraved indifference murder and intentional murder for same act); \textit{see also} Kenneth W. Simons, \textit{Self-Defense, Mens Rea, and Bernard Goetz}, 89 COLUM. L. REV. 1179, 1179 (1989) (reviewing \textit{GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNARD GOETZ AND THE LAW ON TRIAL (1988)}) (discussing whether one can possess requisite mental states of both intent and recklessness at once in context of now-famous Goetz trial). \textit{See generally} \textbf{People v. McManus}, 496 N.E.2d 202, 206 (N.Y.1986) (holding that justification may be asserted as defense to manslaughter, as well as depraved indifference murder, because they involve same mens rea).

\footnote{174} \textit{See Gallagher}, 508 N.E.2d at 909 (stating that both depraved and intentional theories of murder may be submitted to jury but only in alternative); \textit{see also} \textbf{People v. Robinson}, 538 N.Y.S.2d 122, 122–24 (App. Div. 1989), \textit{aff'd}, 74 N.Y.2d 879 (1990) (explaining that when two inconsistent counts of an indictment are presented to jury, they must be submitted in alternative to each other). \textit{See generally} \textbf{N.Y. CRIM. PRO. LAW § 300.50} (2003) (asserting that “the court in its discretion may, in addition to submitting the greatest offense which it is required to submit, submit in the alternative any lesser included offense if there is a reasonable view of the evidence which would support a finding that the defendant committed such lesser offense but did not commit the greater.”).

\footnote{175} \textit{See} \textbf{People v. Sanchez}, 777 N.E.2d 204, 224 (N.Y. 2002) (Rosenblatt, J., dissenting) (discussing use of lesser mens rea to convict); \textit{see also} \textbf{People v. Roe}, 542 N.E.2d 610, 618-19 (N.Y. 1989) (Bellacosa, J., dissenting) (contending that under this scheme, prosecutors are given an “unjust opportunity for a top count murder conviction and an almost certain fallback for conviction on the lesser included crime of manslaughter”). \textit{See generally} \textbf{People v. Register}, 457 N.E.2d 704, 713 (N.Y. 1983) (Jasen,
That appears to be what had happened in Sanchez, where the prosecution had failed to prove the subjective intent of the defendant’s actions although the evidence of the crime pointed to an intentional killing. In reviewing the case, the Court of Appeals dismissed intent as the only mens rea presented on the theory that the shooting seemed “sudden, spontaneous and not well-designed to cause imminent death.”176 Yet, with this in mind it seems impossible for the court to then uphold the conviction of the defendant for a crime which calls for conduct that is so wanton and blameworthy as to warrant the same liability as the law imposes intentional murderers.177

Further, and more problematically, Judge Rosenblatt notes that under this practice, the jury may be more willing to convict under the depraved indifference murder standard because the implication of a lesser mens rea element might be perceived as a lesser crime.178 Commentators have taken note of the close relation in definitions between depraved indifference murder and simple manslaughter179 and the jury rejecting intentional murder may believe that they are convicting the defendant for a

J., dissenting) (warning that prosecutors will be able to obtain convictions based on lesser mens rea of recklessness).

176 Sanchez, 777 N.E.2d at 206 (2002).

177 See Sanchez, 777 N.E.2d at 206 (2002) (noting that defendant’s conduct was “manifestly destined to result in Range’s death as to deserve same societal condemnation as purposeful homicide.”); see also Robyn Mendelson, New York State Constitutional Decisions: 1999 Compilation: Double Jeopardy: Supreme Court: Bronx County: People v. Mercado, 16 TOURO L. REV. 513, 516 (2000) (stating that depraved indifference murder and intentional murder are not same because they possess different mental states). See generally Richard C. Wesley, Voting and Opinion Patterns on the New York Court Center for Judicial Process, 66 ALB. L. REV. 1067, 1071-72 (2003) (observing that prosecutors will be able to obtain convictions for intentional murders by proving lesser reckless offense).

178 See Sanchez, 777 N.E.2d at 211 (commenting that jurors may confuse depraved indifference murder as lesser charge than intentional murder); see also People v. Hafeez, 792 N.E.2d 1060, 1061-63 (N.Y. 2003) (noting that trial evidence of defendant’s conduct was consistent with intentional murder and not deprived indifference murder). See generally People v. Stephens, 769 N.Y.S.2d 249, 254 (App. Div. 2003) (holding that jury instruction was proper because mere recklessness is not enough to convict defendant under deprived indifference murder and rather jury must find he acted recklessly “under circumstances evincing a depraved indifference to human life” that created “a grave risk of serious physical injury or death to a person...and thereby caused the death of such person.”).

lesser crime. Still, the majority in *Sanchez* rejected this argument, stressing procedural safeguards and proper jury instruction. Yet, this seems to be a questionable response. As we have seen, the Court of Appeals has had trouble concretely defining the mens rea element of the crime, positing varying degrees of recklessness at different times. How is it that the court is so confident that the jury will readily perceive an idea that the courts have had difficulty in explaining?

Finally, with the shift toward upholding depraved indifference murder convictions for intentional acts, how then do we also reconcile *Farden*? If depraved indifference murder encompasses acts that are also intentional in nature, will the affirmative defense of "extreme emotional disturbance" be permitted or will the court allow another marked advantage to prosecutors? If the defense of "extreme emotional disturbance" does not apply and if acts intentional in nature are permitted under depraved indifference murder, it appears that prosecutors will be able to circumvent the defense by simply charging depraved indifference as opposed to intentional murder. The effect would be yet another marked advantage for prosecutors.

**IV. PEOPLE V. HAFEEZ**

However, *Sanchez* would not end the debate and one year after the Court of Appeals decided the case of *People v. Sanchez*, blurring the lines between intentional and depraved indifference murder, the Court would again find itself faced with the question of how far to expand this crime. However, here the Court of Appeals would take a first step in preventing any further expansion of the crime of depraved indifference murder.

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180 See *Sanchez*, 777 N.E.2d at 211 (noting appellate review will provide necessary safeguards); see also *People v. Register*, 457 N.E.2d 704, 711-12 (N.Y. 1983) (observing difficulties in defining mens rea for depraved indifference murder). See generally *People v. Robinson*, 538 N.Y.S.2d 122, 123 (App. Div. 1989) (stating when charges of depraved indifference murder and intentional murder are submitted to jury that they could find defendant guilty of either depraved indifference murder or intentional murder).

181 See *Register*, 457 N.E.2d at 707 (noting that only mens rea of crime of depraved indifference murder is "recklessness," though other courts have interpreted the crime to required a higher standard of recklessness); see also *People v. Fenner*, 463 N.E.2d 617, 618 (N.Y. 1984) (noting crime requires "conduct beyond being reckless"). See generally *People v. Fink*, 674 N.Y.S.2d 793, 794 (App. Div. 1998) (stating "depraved indifference is not akin to mere recklessness").

In *People v. Hafeez*, the Court of Appeals was faced with a defendant who conspired with another to lure the victim, with whom the two had a prior confrontation, out of a Queens bar.\(^{183}\) When the victim came outside, Hafeez threw the victim into a wall and stood by as his friend fatally stabbed the victim in the heart.\(^{184}\) At trial, Hafeez claimed that although he knew his friend had a knife he never thought his friend would use it.\(^{185}\) A jury acquitted him of intentional murder, but convicted Hafeez on the theory of depraved indifference.\(^{186}\) On appeal, his conviction was overturned after the court found that the evidence at trial was consistent only with the crime of intentional murder and that no reasonable jury could find that the proper mental state existed for depraved indifference murder.\(^{187}\)

In declining to further expand the crime of depraved indifference murder, the Court's decision in *Hafeez* presents a turning point for the Court of Appeals. Yet, whatever *Hafeez* does do to limit the application of the crime of depraved indifference murder from being applicable to homicides involving a well thought out, planned killing of a particular individual, *Sanchez* remains the high water mark for the converging definitions of depraved indifference and intentional murder.\(^{188}\) It

\(^{183}\) See *Hafeez*, 792 N.E.2d at 1061 (describing events leading to homicide); see also Austin Fenner, *Second Man Guilty in Stab Slay*, DAILY NEWS (N.Y.), Mar. 15, 2001, at 3 (articulating that co-defendants and victim were involved in pool hall fight). See generally Jill Miller, *Depraved Indifference Murder Conviction Reversed*, DAILY REC. OF ROCHESTER, June 25, 2003 (stating that victim threw pool ball at defendant's eye).

\(^{184}\) See *Hafeez*, 792 N.E.2d at 1061 (noting planned nature of crime); see also FENNER, supra note 183, at 3 (stating that Hafeez pushed victim against wall and Hafeez's friend stabbed him in heart). See generally MILLER, supra note 183 (remarking that Hafeez moved aside to let friend take over).

\(^{185}\) See *Hafeez*, 792 N.E.2d at 1061 (noting that defendant claimed he was aware of weapon but not that co-defendant would use it); see also Austin Fenner, *Crying Killer Gets 17 Years for Slay*, DAILY NEWS (N.Y.), Apr. 3, 2001, at 1 (quoting Hafeez as saying "If I had known what Fredricks had in his mind, I wouldn't have taken part."). See generally MILLER, supra note 183 (stating that Hafeez claimed he did not know his friend was going to use knife).

\(^{186}\) See *Hafeez*, 792 N.E.2d at 1061-62 (noting outcome of trial); see also MILLER, supra note 183 (commenting that defendant was found guilty of depraved indifference murder). See generally Paul Schectman, *No Fireworks But Noteworthy Precedents Set*, N.Y.L.J., Sept. 2, 2003, at s5 (stating that Hafeez was acquitted of intentional murder).

\(^{187}\) See *Hafeez*, 792 N.E.2d at 1062 (describing claims on appeal); see also MILLER, supra note 183 (noting that there was no valid line of reasoning to support requisite mens rea for depraved indifference murder). See generally SCHECTMAN, supra note 186, at s5 (quoting Ciparick's opinion which stated that what occurred was a "quintessentially intentional attack directed solely at the victim").

remains to be seen whether the Court of Appeals will go further and limit its holding in *Sanchez*.

Even now, the Court of Appeals must struggle to defend its decision in the *Sanchez* case. Judge Ciparick, who dissented in *Sanchez*, was forced to enter facts about the case that did not appear in the Court's decision to rationalize the Court's holding in *Sanchez* and to distinguish that decision from *Hafeez*. Ciparick noted that *Sanchez* "involved the sudden shooting of a victim by a defendant who reached around from behind a door and fired into an area where children were playing, presenting a heightened risk of unintended injury." Yet nowhere in the majority opinion in *Sanchez* is depraved indifference found because there were children present. Rather, in his majority opinion Judge Levine concluded that it was rational for some people to find that firing a gun at a distance of twelve to eighteen inches could constitute both intentional and reckless behavior. Mention of children is only noted in connection with the shooting by the dissent, which noted that the People had attempted to argue that the depraved indifference existed because of the presence of children but that the court had rejected such a claim.

That "the Court is limiting *Sanchez* by properly rejecting the incongruous notion that an intentional killing can reflect depraved indifference"; People v. Baptiste, 760 N.Y.S.2d 594, 598 (App. Div. 2003) (stating that jury could have found that defendant killed victim recklessly and not intentionally).

189 See People v. Sanchez, 777 N.E.2d 204, 235 (2002) (Ciparick, J., dissenting) (noting that in *Sanchez* holding, "the once prominent distinction between depraved indifference murder and intentional murder has been regrettably obscured"); see also People v. St. Helen, 742 N.Y.S.2d 640, 641 (App. Div. 2002) (pointing and firing a gun at a victim without first checking to see if their were bullets posed substantial risk of death and thus is sufficient mens rea for depraved indifference murder). But see People v. Callender, 760 N.Y.S.2d 408, 409 (App. Div. 2003) (observing that "firing into a crowd is a classic example of depraved indifference murder").

190 *Hafeez*, 792 N.E.2d at 1063.

191 See *Sanchez*, 777 N.E.2d at 206 (noting that shooting point blank into victim readily meet level of depravity necessary); see also People v. Register, 457 N.E.2d 704, 706-07 (N.Y. 1983) (indicating that modern definitions of murder encompass elements of intention as well as extreme recklessness). See generally People v. Gomez, 478 N.E.2d 759, 761 (N.Y. 1985) (maintaining that depraved indifference necessitates consideration of risk presented by defendant's reckless conduct).

192 See *Sanchez*, 777 N.E.2d at 215 (Smith, J., dissenting) (noting People argued that grave risk went to presence of children but court rejected that argument); see also People v. Poplis, 281 N.E.2d 167, 168-69 (N.Y. 1972) (asserting that because depraved indifference murder is directed at single person so danger to many is no longer necessary element of crime). See generally People v. Kibbe, 321 N.E.2d 773, 776 (N.Y. 1974) (indicating that danger to many is no longer element of depraved indifference murder).
In light of this seemingly inconsistent rational for its holding in Sanchez, the Court of Appeal's decision in Hafeez is a step in the right direction. However, it is only a first step and more must be done to undue the apparent merger of depraved indifference murder and intentional murder caused by Sanchez.

V. POSSIBLE SOLUTIONS TO THE EXPANSION OF DEPRAVED INDIFFERENCE MURDER

A. End Charging Depraved Indifference and Intentional Murder for the Same Act

The seemingly simple solution to this issue would be a move by the legislature to amend the rules of Criminal Procedure or even a policy by the courts not to submit to the jury murder counts of both intentional and depraved indifference murder.193 The present procedural code allows the judge at his discretion not to permit a count to go to the jury where the clear weight of the evidence does not support such a theory.194 However, the practical effect of such a remedy may not answer the entire problem.

Once the practice of submitting both counts of depraved indifference and intentional murder to the jury is complete, prosecutors would have to present their case with one theory in mind and without the advantage of a fall back provision in the event that they were unable to prove the subject intent of the defendant.195 Juries would not be asked to distinguish between two crimes, nor face the possible confusion in attempting to apply

193 See Hafeez, 792 N.E.2d at 1064 (Rosenblatt, J., concurring) (noting that intentional murder cannot be confounded with depraved indifference murder); see also Sanchez, 777 N.E.2d at 215 (Smith, J., dissenting) (warning against use of depraved indifference murder as proxy for intentional murder). See generally MICHAELS, supra note 14, at 811 (hoping to adopt indifference standard).

194 See N.Y. CPL § 300.50 (2003) (allowing judge to refuse to submit count to jury at his discretion); see also People v. Mussenden, 127 N.E.2d 551, 553-54 (N.Y. 1955) (establishing rule that a judge may refuse to submit count to jury). See generally People v. Butler, 644 N.E.2d 1331, 1338 (N.Y. 1994) (supporting concept that it is in court's discretion to refuse to submit count to jury).

195 See Register, 457 N.E.2d at 713 (Jasen, J., dissenting) (commenting that prosecutors would find this advantage too tempting to not use); see also Sanchez, 777 N.E.2d at 215 (Smith, J., dissenting) (indicating potential abuse by prosecutors). See generally MICHAELS, supra note 14, at 795 (noting advantages offered to prosecutors in this regard).
them. However, without more, this limitation would only increase the problem of depraved mind murder merging with intentional murder. Rather than force prosecutors to charge intentional murder when the evidence is consistent only with intentional acts, this limitation may in fact quicken the process of depraved indifference murder taking the place of intentional murder. With the interpretation espoused in Sanchez, prosecutors no longer need to charge both counts in the alternative but can rely on the one charge of depraved indifference to encompass a broad range of homicides. Hafeez has limited this concern somewhat, but not enough to solve the problem.

B. Return to the Darry "Multiple Victim" Requirement

A return to the multiple victim requirement articulated in Darry would certainly provide the necessary limitation on the application of the crime of depraved indifference murder. It would also provide a bright line test for the jury to differentiate intentional from depraved indifference murder. However, the removal of the multiple victim requirement was a change that occurred as a result of legislative action and not judicial decision-making. The removal of the multiple victim requirement

196 See Sanchez, 777 N.E.2d at 227 (N.Y. 2002) (Rosenblatt, J., dissenting) (indicating potential for misleading jury); see also State v. Lagasse, 410 A.2d 537, 540 (Me. 1980) (noting that charging both intentional and depraved indifference murder may lead to jury confusion). See generally GEGAN, supra note 4, 423 (detailing possibilities of jury confusion).

197 See Sanchez, 777 N.E.2d at 225 n.16 (Rosenblatt, J., dissenting) (indicating advantages of matching crime to requisite culpability); see also Register, 457 N.E.2d at 713 (Jasen, J., dissenting) (noting that culpability of defendant should fit crime). See generally Hafeez, 792 N.E.2d at 1064 (Rosenblatt, J., concurring) (detailing unfortunate coalescing of intentional murder and depraved indifference murder).

198 See Darry v. People, 10 N.Y. 120, 120 (1854) (establishing multiple victim requirement of depraved indifference murder); see also MICHAELS, supra note 14, at 799-800 (noting that multiple victim requirement served as distinction between intentional murder and deprave indifference murder). See generally GEGAN, supra note 4, 423 (detailing prior use of multiple victim requirement in depraved indifference murder prosecutions).

199 See MICHAELS, supra note 14, at 799 (discussing benefits of multiple victim requirement); see also RATIONALES, supra note 152, at 88 (preferring use of multiple victim requirement). See generally GEGAN, supra note 4, 423 (detailing use of multiple victim requirement).

200 Cf. N.Y. PENAL LAW. § 125.25(2) (McKinney 2003), with N.Y. PENAL LAW. § 193 (1907) (superseded) (removing multiple victim requirement which was present in latter). See People v. Poplis, 281 N.E.2d 167, 168 (N.Y. 1972) (asserting that because depraved indifference murder is directed at single person that danger to many is no longer
occurred because certain acts, such as child abuse, should have been included in the murder statute but were barred because of the multiple victim requirement.\textsuperscript{201} Yet, the need to include child abuse cases is no longer a valid argument against the "multiple victim" requirement as New York presently has a provision dealing with that specific crime.\textsuperscript{202} Still, any change would require legislative action.

\textbf{C. Increased Mens Rea Requirement}

Another possible solution that would require legislative action would be to increase the \textit{mens rea} requirement of the crime. The series of decisions that have expanded the definition of the crime to include acts that only suggest intent appears to have left the court torn between its prior decisions. On one hand, the court stresses "depravity of mind" as an essential element of the crime, while on the other hand disregards the subjective mental state of the defendant, even in areas that would mitigate a finding of depravity.

Although the Court of Appeals has consistently noted that the modern Penal Law contains only four \textit{mens rea} elements; the court continues to struggle with the degree of "reckless" necessary for depraved indifference murder; one that adequately differentiates between the various types of homicides that use the \textit{mens rea} element of "recklessness" to define the actor's mental state.\textsuperscript{203} As the court continues to grapple with an acceptable definition of the \textit{mens rea} element, it becomes more

\begin{itemize}
  \item \textsuperscript{201} See Rationales, supra note 152, at 76 (noting that child abuse would be excluded from crime of depraved indifference murder with multiple victim requirement); see also MICHAELS, supra note 14, at 792 (indicating potential consequences of multiple victim requirement); see generally GEGAN, supra note 4, at 423 (detailing rationale behind removing multiple victim requirement).
  \item \textsuperscript{203} See People v. Hafeez, 792 N.E.2d 1060, 1063 (N.Y. 2003) (noting that degree of recklessness that ought to be applied is still problematic and looking for heightened recklessness); see also People v. Sanchez, 777 N.E.2d 204, 208 (N.Y. 2002) (indicating use of significantly heightened recklessness standard). See generally People v. Register, 457 N.E.2d 704, 707 (N.Y. 1983) (noting present statute defines crime by reference to circumstances under which it occurs and expressly states that recklessness is required element of mental culpability).
\end{itemize}
apparent that legislative action will be necessary to conclude this debate.

Such action by the legislature should define a mental state specifically to address depraved indifference murder as a unique concept in the criminal law, one that clarifies the ambiguities that have arisen under the modern interpretation of the law and embraces the "depravity of mind" that the Court of Appeals has found to be the core element of depraved indifference murder.

Professor Moreland has argued that any amendment to the depraved indifference murder statute should not include the mens rea of "recklessness" at all. He finds that since recklessness is the same mens rea that is used for the crime of manslaughter, the division between manslaughter and murder would be too close to be properly distinguished. Yet, Professors Wechsler and Michaels find that depraved indifference murder describes conduct of "extremely gross recklessness" distinguishing murder from manslaughter by the greater danger of the act and thus the greater indifference. Professor Moreland however finds adding "extremely" to recklessness does not go far enough to capture the idea of a "depraved mind" required by this crime. Moreover, he finds that this distinction "is like drawing the weight line between a 'big bear' and an 'extremely big bear,'" stressing that if the

204 See Roy Moreland, A Re-Examination of the Law of Homicide In 1971: The Model Penal Code, 59 KY. L.J. 788, 798 (1970-1971) (noting that "recklessly" should be term reserved only for negligent manslaughter); see also Michaels, supra note 14, at 788-90 (indicating possible implications of term "recklessly"). See generally Gegan, supra note 4 (detailing uses of term recklessly in penal law).

205 See Moreland, supra note 204, at 798 (noting that manslaughter and depraved indifference murder are too difficult to distinguish since both crimes require recklessness); see also Michaels, supra note 14, at 797-98 (indicating use term "recklessly" in depraved indifference homicide and in manslaughter). See generally Gegan, supra note 4 (detailing consequences of use of term recklessly in penal law).

206 See Wechsler, supra note 20, at 709 (noting that negligent murder is separated from manslaughter but relatively greater danger of act); see also Michaels, supra note 14, at 788-90 (indicating gradations of mental culpability in penal law). See generally Gegan, supra note 4 (surveying different states of mental culpability in New York and their varied applications).

207 See Moreland, supra note 204, at 798 (indicating difficulty in articulating manageable definition of depraved indifference homicide); see also Michaels, supra note 14, at 801 (detailing varied constructions of recklessness in penal law). See generally Gegan, supra note 4 (noting different difficulty in using term recklessly).

208 Moreland, supra note 204, at 798.
same words are used for manslaughter and murder both judges and juries would have great difficulty separating the crimes.\(^{209}\)

Rather, Professor Moreland argues that the best description of the mens rea of the crime of depraved indifference murder is "'wanton disregard' for the lives and safety of others."\(^{210}\) Wantonness, according to Professor Moreland satisfies the "antisocial requirement found in common law negligent murder, and would capture the idea of general malice or as he bluntly phased the mental attitude of the defendant, as "I don't give a damn if I do kill somebody by my extremely dangerous act."\(^{211}\)

Other commentators have also looked favorably towards a mens rea of depraved indifference murder that is based on "wantonness". Professor Perkins describes this crime as a "wanton and willful disregard of unreasonable human risk"\(^{212}\) and captures the idea of general malice as the actor's "man endangering state of mind."\(^{213}\) Perkins describes this as a mens rea where there is no intent to kill an individual and possibly even a wish that death would be avoided "if willfully done with the knowledge that it may probably cause death or great bodily injury."\(^{214}\) The Model Penal Code however, rejects these arguments in finding that although they remain faithful to the "common law phrasing they do so at a great cost in clarity."\(^{215}\)

Unfortunately, the present New York Statute, which draws its wording from the Model Penal Code, has not brought about the requisite clarity necessary to prevent its ever broadening application.

Professor Michaels finds that a different mental state is required all together, the mens rea of "acceptance."\(^{216}\) Under this

\(^{209}\) See id. (noting judges and juries would have most difficult time separating manslaughter from depraved indifference murder); see also Windham v. State, 602 So. 2d 798, 809 (Miss. 1992) (Banks, J., dissenting) (suggesting that depraved heart murder as interpreted in Mississippi "subsumes" both deliberate design murder and most various manslaughter statutes). But see People v. Register, 457 N.E.2d 704, 707-08 (N.Y. 1983) (stating that depraved indifference murder requires significantly heightened recklessness, distinguishing it from manslaughter).

\(^{210}\) MORELAND, supra note 204, at 797.

\(^{211}\) MORELAND, supra note 204, at 797.

\(^{212}\) Rollin M. Perkins, A Re-Examination of Malice Aforethought, 43 YALE L.J. 537, 555 (1933-34).

\(^{213}\) Id. at 557.

\(^{214}\) Id. at 556.


\(^{216}\) Alan C. Michaels, Acceptance: The Missing Mental State, 71 S. CAL. L. REV. 953, 960-63 (1998) (defining mens rea of acceptance); see also Rationales, supra note 152, at 86
scheme an actor is judged by the question "would you have done it if you would have known?" 217 Although this method requires an almost totally subjective inquiry, it does not differ greatly from the idea of "wantonness." Still, Professor Byrn finds that "wantonness" is the key. 218 Under his formulation, this crime focuses on the subjective intent of the actor involving "a realization and appreciation of the nature and gravity of the risk and a willingness that death should occur." 219 Professor Byrn argues that because this crime punishes conduct found to be "equivalent in spirit to actual intent," the objective circumstances should have no more part in this crime than in the definition of intent. 220 Although the main concern of Professor Byrn is the separation of the crimes of manslaughter and murder, inquiry into the subjective mental state of the defendant would give the jury a better ability to make a finding of the "depravity of mind" required for general malice. 221 This reading of the proper mens rea is consistent with the understanding by the court in that

depraved indifference murder requires a showing of a "wanton indifference to human life." 222

D. Revised Statute

Finally, if the courts are unwilling to impose self-restraint upon the application of the statute, the burden then falls upon the legislature to revise the depraved indifference murder statute entirely to correct the interpretation of the law and to reassert the conclusions of the revision commission. The legislature, in re-drafting the depraved indifference murder law will have to go even further than the creation of a new mens rea element that will differentiate this crime from manslaughter. The legislature will also have limit the application of the crime to prevent broad application and concretely separate it from intentional murder. If a new, revised statute is to be drafted it must incorporate the aims of many of the possible solutions, in order to more clearly define the crime of depraved indifference murder. The revised statute should look as follows:

A person is guilty of murder in the second degree when

Without intent to take the life of a particular person, he wantonly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person.

Wantonly - a person acts wantonly when, without justification or excuse he unreasonably and maliciously risks harm while being utterly indifferent to the consequences. 223

Under this wording, a line is drawn between depraved indifference murder, and both intentional murder and manslaughter. The use of the new mens rea element of wantonness creates a crime that is sufficiently different from manslaughter to avoid the present confusion by providing an


223 BLACK'S LAW DICTIONARY 1576 (7th ed. 1999) (offering definition of wanton).
independent definition of the actor's mental state. The result is a mens rea element that comes closer to the common law idea of general malice and does not require the difficult task to differentiating between "ordinary recklessness" and the present "heightened recklessness." Further, the mens rea of "wantonness" allows for the fact finder to make an inquiry into the subjective mental state of the actor, thus allowing for such mitigating factors as extreme emotional disturbance. Finally, this wording does not allow the crime to be applied when the intent to take life is directed at a particular person, thereby separating this crime from intentional murder. This phrase also addresses the concerns of the Model Penal Code that depraved indifference can be directed at a single individual. However, it also includes a multiple victim requirement when there is intent to take life, thereby capturing the idea of a general or indiscriminate malice.

CONCLUSION

_Hafeez_ presents the first step by the Court of Appeals to end the expansion of depraved indifference murder, however this case is only the beginning. The real solution remains in an interpretation of the law that is consistent with the legislative history of the statute, one that takes into account the long history of judicial interpretation in New York, a history that presents a direct link between the modern codification and its common law origins. This requires an understanding that the law of homicide in New York did not spring forth anew with the 1967 Penal code, but is the product of a legal tradition that dates back to the common law. In _Hafeez_ the Court of Appeals has taken the first step, but there must be others.