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DEPRAVED INDIFFERENCE MURDER IN THE CONTEXT OF DWI HOMICIDES IN NEW YORK

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INTRODUCTION

On a cloudy, drizzly summer night in 2006, Martin Heidgen met a friend for drinks after work. Later in the evening, he attended a party where he continued to drink. By two o'clock in the morning he had become highly intoxicated. He left the party and proceeded to drive home. During the trip, he drove his car onto a divided parkway heading in the wrong direction towards oncoming traffic. He struck a limousine head on, killing the fifty-nine-year-old driver and a seven-year-old girl. He was convicted of second-degree murder.

"Thou shalt not kill."[1] One of the most fundamental and intuitive maxims of human law and morality is the prohibition of murder. The killing of another person has long been regarded as a lurid and intolerable wrong against society. Laws prohibiting murder have existed for thousands of years and have evolved considerably as society and the legal system have become more advanced. The modern understanding of the word *murder* is complex. Even more complex is the law that applies to homicide generally. The law of homicide is a law of degrees, hinging on delicate issues of circumstance, human action, culpability, causation, mental state, emotion, risk, and semantics. This complexity can be a valuable tool for dealing with the infinite number of variables present in the real world: The ability to account for subtle differences and to administer punishment that is custom fitted to the crime committed is an ideal way to achieve fairness and promote justice. Unfortunately, this complexity can

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[1] *Exodus* 20:13.

also cause confusion, resulting in a misapplication of the law and undermining the very purpose these statutes were meant to achieve.

At common law, murder was defined simply as "unlawful homicide done with 'malice aforethought.' "[2] The term malice aforethought encompassed, among other things, killings committed with "extremely reckless indifference to the value of human life (the so-called abandoned and malignant heart)."[3] This brand of murder applied to actions that carried a high likelihood of death without being aimed at anyone in particular, but were perpetrated with a full awareness of the probable consequences.[4] Such killings were considered as culpable as intentional murder.[5] This designation remains in New York's murder statute today, which includes as second-degree murder a reckless killing committed "[u]nder circumstances evincing a depraved indifference to human life."[6]

The depraved indifference murder statute in New York has remained unchanged since 1967, but cases applying this doctrine have caused considerable confusion and resulted in an ongoing debate among judges and others in the legal community. The application of this statute in New York courts has evolved significantly over the last several years. These recent developments have been made in an effort to alleviate the confusion, but have left the courts divided and caused many to question whether this doctrine is being applied as the legislature originally intended.

In severe cases, state prosecutors have sought murder convictions under New York's depraved indifference murder statute for drunk driving fatalities.[7] Families of victims and staunch opponents of drunk driving maintain that these convictions are justified: They see murder convictions as a step

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[2] United States v. Wharton, 433 F.2d 451, 454 (D.C. Cir. 1970) (quoting Fisher v. United States, 328 U.S. 463, 472 (1946)).

[3] BLACK'S LAW DICTIONARY 977 (8th ed. 2004).

[4] Darry v. People, 10 N.Y. 120, 148 (1854), *superseded by statute*, N.Y. PENAL LAW § 125.25(2) (McKinney 2008), *as recognized in* People v. Sanchez, 98 N.Y.2d 373, 383–84, 777 N.E.2d 204, 210, 748 N.Y.S.2d 312, 318 (2002), *overruled on other grounds by* People v. Feingold, 7 N.Y.3d 288, 294, 852 N.E.2d 1163, 1167, 819 N.Y.S.2d 691, 695 (2006).

[5] *Sanchez*, 98 N.Y.2d at 382, 777 N.E.2d at 209, 748 N.Y.S.2d at 317.

[6] N.Y. PENAL LAW § 125.25(2).

[7] *See infra* note 113 and accompanying text.

in the right direction towards greater deterrence and increased punishment for driving while intoxicated ("DWI") offenses.[8] Although one purpose of New York homicide law is surely to punish deaths caused by drunk driving, the administration of this punishment cannot extend beyond the framework of the New York Penal Law ("NYPL"). It is the position of this Note that the overwhelming majority of DWI homicides fail to rise to the level of a depraved indifference to human life, and that to seek a murder conviction in these cases is an overextension and misapplication of New York homicide law.

This Note will proceed in four parts. Part I will give a brief overview of the culpable mental states and homicide crimes in the NYPL in order to explain the various offenses and their relation to one another in terms of conduct, culpability, and punishment. Part II will give a brief history of depraved indifference murder in New York, focusing on the recent developments of the past several years that serve as the doctrinal blueprint for depraved indifference today. Part III will discuss why depraved indifference murder cannot apply to most DWI homicides and address the theoretical problems that arise when prosecutors seek murder convictions in these types of cases. To illustrate these points, Part III will focus on the highly publicized and controversial murder conviction of Martin Heidgen. Part IV will propose a course of action for dealing with DWI homicides that takes into account the theoretical problems and concerns discussed in Part III.

I. NYPL HOMICIDE LAW—AN EXERCISE IN PROPORTIONALITY

A. Theoretical Origins

"All men agree that in general it is desirable to prevent homicide and bodily injury."[9] Unfortunately, the means used to achieve this end are not the subject of such unanimity. The philosophical, ethical, political and legal issues surrounding a unified theory of punishment have been debated for hundreds of

[8] Throughout this Note, the term DWI will refer specifically to driving under the influence of alcohol, but the concepts discussed can be expanded to include driving under the influence of drugs or driving under the influence of a combination of drugs and alcohol.

[9] Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide: I*, 37 COLUM. L. REV. 701, 702 (1937).

years and will continue to be debated.[10] "The dominant approaches . . . are retributive and utilitarian."[11] There are aspects of each theory that are desirable[12] and, for this reason, modern penal codes in the United States have become an admixture of both.[13] The end product is a unified system of criminal punishment with the ultimate goal of achieving justice.

Depraved indifference murder is just one gear in the well-oiled machine of New York homicide law. Article 125 of the NYPL defines over a dozen individual homicide offenses.[14] It is a law of degrees: The subtle distinctions between offenses are the primary vehicle by which the legislature can "differentiate . . . between serious and minor offenses and . . . prescribe proportionate penalties therefor."[15] From both a retributive and utilitarian standpoint, proportionality in punishment is of paramount importance. From a utilitarian standpoint, punishment "ought only to be admitted in as far as it promises to exclude some greater evil."[16] Analogously, from a retributive standpoint, "punishment should be in proportion to . . . moral desert."[17] Because New York law is influenced by both theories, proportionality is a fundamental concern in our modern system of criminal punishment.

Typically, "the severity of criminal punishments is to some degree determined by the extent of the harm caused."[18] This holds true for article 125, even though all of the offenses in that

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[10] *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 20 (4th ed. 2006); *see also* Guyora Binder, *Punishment Theory: Moral or Political?*, 5 BUFF. CRIM. L. REV. 321, 321 (2002).

[11] Kent Greenawalt, *Punishment*, *in* 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 1281, 1284 (Joshua Dressler ed., 2d ed. 2002); *see also* PAUL H. ROBINSON, CRIMINAL LAW: CASE STUDIES & CONTROVERSIES 83 (2005) ("Traditionally, two sorts of justifications for imposing punishment are given: utilitarian and retributivist.").

[12] DRESSLER, *supra* note 10, at 23.

[13] *Id.*; *see also* Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide: II*, 37 COLUM. L. REV. 1261, 1263 (1937) ("There is room for much diversity within a system but, if it is to win respect, it must fit together somehow as an ethical whole.").

[14] N.Y. PENAL LAW §§ 125.00–125.60 (McKinney 2008).

[15] *Id.* § 1.05(4).

[16] JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 158 (J.H. Burns & H.L.A. Hart eds., 1996).

[17] DRESSLER, *supra* note 10, at 24.

[18] Antony Duff, *Theories of Criminal Law*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY, Apr. 14, 2008 [hereinafter *Theories*], http://plato.stanford.edu/entries/criminal-law.

article describe "conduct which causes the death of a person."[19] Thus, while a consideration of the harm may be essential in assessing the severity of offenses and proportionality of punishment between different offenses generally, all offenses within article 125 concern the same harm and are on an equal playing field in this respect. After harm, the severity of punishment also typically depends on "the nature and degree of the offender's culpability for that harm."[20] The term *culpability* refers to how deserving of blame a person is—the wrongness, or evilness of a person's actions.[21] Obviously, greater culpability warrants greater punishment, especially between offenses where the harm is the same.

B. *Article 15—Culpable Mental States*

Each homicide offense contains two elements: (1) conduct that causes the death of another person and (2) the mental state (mens rea) of the offender.[22] It is the mental state of the offender that addresses this question of culpability. The NYPL contains four different culpable mental states: criminal negligence, recklessness, knowledge, and intent—listed in order of increasing culpability.[23] Of these four, recklessness and intent are most pertinent to a discussion of depraved indifference murder.

Recklessness requires an awareness and conscious disregard of a "substantial and unjustifiable risk. . . . The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation."[24] A person acts intentionally when his "conscious objective" is to achieve a specific result or to engage in some type of conduct.[25] This follows intuitively from the plain English definition of the word. It is purposeful,

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[19] N.Y. PENAL LAW § 125.00. There are several offenses in article 125 dealing with abortion. *Id.* This Note will avoid the discussion of unborn children and abortion offenses completely, omitting sections 125.40–125.60 from the discussion of article 125.

[20] *Theories*, *supra* note 18.

[21] AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 442 (4th ed. 2006).

[22] 6 RICHARD A. GREENBERG ET AL., N.Y. PRACTICE SERIES, N.Y. CRIMINAL LAW § 6:1 (3d ed. 2007).

[23] N.Y. PENAL LAW § 15.05(1)–(4).

[24] *Id.* § 15.05(3).

[25] *Id.* § 15.05(1).

deliberate action. The "conscious objective" element of intentional crimes differentiates them from reckless crimes.

> One who acts intentionally . . . with the conscious objective of bringing about [a] result cannot at the same time act recklessly—that is, with conscious disregard of a substantial and unjustifiable risk that such a result will occur. The act is either intended or not intended; it cannot simultaneously be both.[26]

There are two additional provisions of article 15 that are especially germane to a discussion of DWI homicides. The first is section 15.25. This section explains that intoxication may not serve as a complete defense to a crime, but that "evidence of intoxication . . . may be offered . . . whenever it is relevant to negative an element of the crime charged."[27] This passage is crucial, because it allows evidence of intoxication to be used when assessing the mens rea of an offender.[28] Recklessness, however, is the exception: "A person who creates . . . a risk but is unaware thereof solely by reason of voluntary intoxication . . . acts recklessly with respect thereto."[29] This assertion reflects the legislature's unwillingness to allow voluntary intoxication to exculpate a person from criminal liability for crimes involving recklessness.[30]

C. *Article 125—Grading of New York Homicide Offenses*

The NYPL does not explicitly say in article 15 which culpable mental state is most or least culpable. This determination is implicitly stated in the grading of offenses. Culpability is determined largely by the culpable mental state required for the offense and, to a smaller degree, the attendant circumstances surrounding the crime.[31] The specific homicide offenses are set forth in article 125 of the NYPL. Within this

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[26] People v. Gallagher, 69 N.Y.2d 525, 529, 508 N.E.2d 909, 910, 516 N.Y.S.2d 174, 175 (1987) (internal citations omitted).

[27] N.Y. PENAL LAW § 15.25.

[28] GREENBERG ET AL., *supra* note 22, § 1:11 ("Evidence of intoxication may . . . be offered to negate a culpable mental state . . . .").

[29] N.Y. PENAL LAW § 15.05(3).

[30] The theoretical justification for this is that "the element of recklessness itself . . . encompasses the risks created by [a] defendant's conduct in getting drunk." People v. Register, 60 N.Y.2d 270, 280, 457 N.E.2d 704, 709, 469 N.Y.S.2d 599, 604 (1983), *overruled by* People v. Feingold, 7 N.Y.3d 288, 294, 852 N.E.2d 1163, 1167, 819 N.Y.S.2d 691, 695 (2006).

[31] *See supra* notes 18–21 and accompanying text.

article, there are five different grades of offenses ranging from A-I felonies—the highest grade offense in the NYPL—to E felonies—the lowest grade of felony in the NYPL.[32] Higher grade crimes indicate higher culpability, which in turn justify greater punishment. For homicide crimes, greater punishment means longer sentences. Sentences are imposed by judges based on the facts of a case and the grade of the offense. For each grade offense, the sentencing guidelines of article 70 prescribe a range of possible sentences. Even within a specific grade, sentences may vary between offenses to reflect more subtle differences in culpability.[33] The final product is a unified system of law that defines, classifies, and punishes different homicide offenses in a way that is commensurate with the conduct of the offender.

Appendix A organizes the offenses of article 125 and the sentencing provisions of article 70 into table format. The table displays all of the homicide offenses at a glance and shows how each offense is defined, graded, and punished in relation to the others—a working diorama of proportionality. The table contains each homicide offense, the grade of the offense, whether it is considered a violent felony, and the authorized minimum and maximum sentence for the offense per article 70. A short explanation of the conduct required for each offense is also given. The important thing to note about this column is that the distinction between "intentional" and "unintentional" does not refer to the mental state required for the offense. Rather, it refers to whether the killing itself is intentional.[34] For example, a person who acts intentionally to cause serious physical injury may be acting with intent, but not with an intent to kill.

II. A BRIEF HISTORY OF DEPRAVED INDIFFERENCE MURDER IN NEW YORK

The current scheme of New York homicide law is a thorough, accurate, and just means of classifying and punishing homicide offenses. Due to the complexity of the offenses and the subtle differences between them, this scheme must be strictly applied if it is to function as intended. A

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[32] N.Y. PENAL LAW § 125.00–125.60.

[33] *See infra* app. A.

[34] "Of primary importance in determining the character of the actor is the distinction between behavior which is advertently homicidal and that which is only inadvertently so." Wechsler & Michael, *supra* note 13, at 1274.

misinterpretation of an offense can result in a misapplication of law that will throw the whole system off balance, resulting in an unfair and disproportionate administration of punishment. Thus, the depraved indifference murder statute and the cases interpreting it must be approached with caution.

A. *Depraved Indifference Murder Pre-*Register

The concept of depraved indifference murder is rooted in the common law definition of malice aforethought.[35] The term encompasses "(1) the intent to kill, (2) the intent to inflict grievous bodily harm, (3) extremely reckless indifference to the value of human life (the so-called abandoned and malignant heart), or (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule)."[36] The inclusion of depraved indifference or "depraved heart" murder in this formulation occurred in England in the middle of the eighteenth century, and made its way to United States courts shortly thereafter.[37] The doctrine was explicitly incorporated into New York law under the Revised Statutes of 1829.[38] Under these statutes, murder was defined as a killing "perpetrated by any 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."[39]

The leading case applying this statute was *Darry v. People*.[40] In this case, the defendant killed his wife by beating her over a period of several days. Judge Selden, writing "the authoritative opinion" for the court,[41] held that "depraved mind" was a mental state and prohibited the offense from being applied in one-on-one situations such as Darry's.[42] He explained that the statute was meant to apply to cases "where the acts resulting in death are

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[35] United States v. Wharton, 433 F.2d 451, 454 (D.C. Cir. 1970).

[36] BLACK'S LAW DICTIONARY 977 (8th ed. 2004).

[37] Abraham Abramovsky & Jonathan I. Edelstein, *Depraved Indifference Murder Prosecutions in New York: Time for Substantive and Procedural Clarification*, 55 SYRACUSE L. REV. 455, 460–61 (2005).

[38] *Id.* at 462. These statutes included the state's first penal code. *Id.*

[39] 2 N.Y. Rev. Stat. pt. 4, ch. 1, tit. 1, § 5(2) (1829).

[40] 10 N.Y. 120, 148 (1854), *superseded by statute*, N.Y. PENAL LAW § 125.25(2) (McKinney 2008), *as recognized in* People v. Sanchez, 98 N.Y.2d 373, 383–84, 777 N.E.2d 204, 210, 748 N.Y.S.2d 312, 318 (2002), *overruled on other grounds by* People v. Feingold, 7 N.Y.3d 288, 294, 852 N.E.2d 1163, 1167, 819 N.Y.S.2d 691, 695 (2006).

[41] Abramovsky & Edelstein, *supra* note 37, at 462.

[42] *See Darry*, 10 N.Y. at 147–48.

calculated to put the lives of many persons in jeopardy without being aimed at any one in particular, and are perpetrated with a full consciousness of the probable consequences."[43] The opinion was the first in New York to use the word "recklessness,"[44] describing the mental state as an extreme form of recklessness exhibiting "utter wantonness,"[45] "malicious intent,"[46] and "indifference to human life."[47] Judge Selden equated the offense in terms of culpability to intent, stating that depraved killings are "fully equivalent to a direct design to destroy [life]."[48]

In 1967, over a century after *Darry* was decided, a new penal law was adopted in New York. The new section on depraved indifference murder, which was identical to the current statute, stated that a person is guilty of murder when, "[u]nder 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."[49] This language differed slightly from the 1829 version, but the 1964 Revision Commission advised that it was to be "substantially a restatement of the former provision."[50] This new language was put to the test in *People v. Poplis*,[51] where in facts similar to *Darry*, the defendant caused the death of a child by beating him repeatedly over the course of six days.[52] Despite the nearly identical facts and a new statute which was intended to operate as a restatement of the old, the court came to a different result. The court stated that "[t]he actual decision in *Darry* turned on a limitation in the language of that statute which, seeming to require a threat of danger to more than one person, was subsequently corrected by amendment."[53] The language

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[43] *Id.* at 148.

[44] Abramovsky & Edelstein, *supra* note 37, at 462.

[45] *Darry*, 10 N.Y. at 138.

[46] *Id.* at 137.

[47] *Id.* at 148.

[48] *Id.*

[49] N.Y. PENAL LAW § 125.25(2) (McKinney 2008).

[50] People v. Register, 60 N.Y.2d 270, 281, 457 N.E.2d 704, 709, 469 N.Y.S.2d 599, 604 (1983) (Jasen, J., dissenting) (internal quotation marks omitted) (calling this fact a "crucial piece of legislative history"), *overruled on other grounds by* People v. Feingold, 7 N.Y.3d 288, 294, 852 N.E.2d 1163, 1167, 819 N.Y.S.2d 691, 695 (2006).

[51] 30 N.Y.2d 85, 281 N.E.2d 167, 330 N.Y.S.2d 365 (1972).

[52] *Id.* at 87, 281 N.E.2d at 167, 330 N.Y.S.2d at 366.

[53] *Id.* at 89, 281 N.E.2d at 168, 330 N.Y.S.2d at 367.

changed from "any act imminently dangerous to *others*,"[54] to "conduct which creates a grave risk of death to another *person*."[55] Although it appeared that Judge Selden's decision in *Darry* "turned on deeper considerations than the use of a plural noun," the *Poplis* court did away with the danger-to-many requirement of *Darry*.[56] Nevertheless, *Poplis* continued to define depraved indifference as a mental state above and beyond traditional recklessness and stated that murder "requires more than recklessly causing death . . . . The murder definition requires conduct with 'depraved indifference' to 'human life,' plus recklessness. This is conduct of graver culpability, and it is . . . something more serious than mere recklessness alone . . . ."[57]

B. Register *and the Dissenters*

The *Poplis* formulation was the state of the law at the time of the Court of Appeals' seminal decision of *People v. Register*[58] in 1983. The defendant, Bruce Register, was drinking with a friend in a "packed" barroom in Rochester, New York when an argument broke out.[59] Register fired two shots from his pistol, injuring two people. The forty or fifty people in the bar scrambled for the doors, and some tried to remove the injured men. During the commotion, Marvin Lindsey, who was "a friend or acquaintance" of Register, walked by.[60] For no apparent reason, Register turned and fired again, killing Lindsey.[61] The jury acquitted Register of intentional murder but convicted him of depraved indifference murder.[62] On appeal, Register argued that his intoxication prevented him from becoming aware of and thus depravedly indifferent to, the risk associated with his conduct.[63]

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[54] 2 N.Y. Rev. Stat. pt. 4, ch. 1, tit. 1, § 5(2) (1829) (emphasis added).

[55] N.Y. PENAL LAW § 125.25(2) (McKinney 2008) (emphasis added).

[56] *See* Bernard E. Gegan, *A Case of Depraved Mind Murder*, 49 ST. JOHN'S L. REV. 417, 436 (1974).

[57] *Poplis*, 30 N.Y.2d at 88, 281 N.E.2d at 168, 330 N.Y.S.2d at 366.

[58] 60 N.Y.2d 270, 457 N.E.2d 704, 469 N.Y.S.2d 599 (1983), *overruled by* People v. Feingold, 7 N.Y.3d 288, 852 N.E.2d 1163, 819 N.Y.S.2d 691 (2006).

[59] *See id.* at 273–75, 457 N.E.2d at 705–06, 469 N.Y.S.2d at 600–01.

[60] *Id.* at 273, 457 N.E.2d at 705, 469 N.Y.S.2d at 600.

[61] *Id.* at 274, 457 N.E.2d at 705, 469 N.Y.S.2d at 600.

[62] *Id.*

[63] *See id.* at 275, 457 N.E.2d at 706, 469 N.Y.S.2d at 601.

The court held, in a 4-3 opinion, that the mens rea required for depraved indifference murder was simply recklessness,[64] which could not be negated by evidence of intoxication due to section 15.05(3) of the NYPL.[65] As for the phrase "[u]nder circumstances evincing a depraved indifference to human life,"[66] the court held that this language referred to "neither the *mens rea* nor the *actus reus*,"[67] but rather "the objective circumstances in which the act occurs"[68]—"the factual setting."[69] Given this new construction, evidence of Register's intoxication could not be used to negate the mental element of the crime, and the circumstances surrounding his actions were enough to satisfy this new, objective, factual element.[70] His conviction was affirmed.

This decision, "a textbook illustration of how hard cases can make bad law,"[71] took the "depravity out of depraved indifference"[72] and would ultimately set the doctrine of depraved murder back about twenty years. Judge Jasen's dissenting opinion in *Register* analyzed the statutory history of depraved murder, court decisions applying it, and the legislative intent behind the new statute—all of which treated depraved indifference as a culpable mental state—and found "no reason why the majority should reach a different result . . . ."[73] Judge Jasen warned that the majority's formulation "effectively eviscerate[d] the distinction between manslaughter in the second degree . . . and murder in the second degree . . . with respect to the accused's state of mind."[74] For a reckless offender, the difference between murder and manslaughter—a difference of "about 15 years in prison"[75]—now hinged not on the "vicious

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[64] *Id.* at 278, 457 N.E.2d at 708, 469 N.Y.S.2d at 603 (" '[R]ecklessness' is the *mens rea*, and the only *mens rea*, of the crime . . . .").

[65] *See supra* note 29 and accompanying text.

[66] *Id.* § 125.25(2).

[67] *Register*, 60 N.Y.2d at 276, 457 N.E.2d at 707, 469 N.Y.S.2d at 602.

[68] *Id.* at 278, 457 N.E.2d at 708, 469 N.Y.S.2d at 603.

[69] *Id.* at 276, 457 N.E.2d at 707, 469 N.Y.S.2d at 602.

[70] *Id.* at 280, 457 N.E.2d at 709, 469 N.Y.S.2d at 604.

[71] Abramovsky & Edelstein, *supra* note 37, at 466.

[72] *Id.*; *see also* People v. Sanchez, 98 N.Y.2d 373, 407, 777 N.E.2d 204, 227, 748 N.Y.S.2d 312, 335 (2002) (Rosenblatt, J., dissenting), *overruled by* People v. Feingold, 7 N.Y.3d 288, 852 N.E.2d 1163, 819 N.Y.S.2d 691 (2006).

[73] *Register*, 60 N.Y.2d at 282, 457 N.E.2d at 710, 469 N.Y.S.2d at 605 (Jasen, J., dissenting).

[74] *Id.* at 284, 457 N.E.2d at 711, 469 N.Y.S.2d at 606.

[75] *Id.* at 285, 457 N.E.2d at 712, 469 N.Y.S.2d at 607 (citing Gegan, *supra* note 56, at 442).

will"[76] or increased culpability of the offender, but on the "technical distinction between a 'grave' risk and a 'substantial' one."[77] Judge Jasen cautioned that in most cases, the fact that a death occurred would be enough to convince a jury with 20/20 hindsight that the circumstances presented the "grave" risk of death required for a murder conviction.[78] These concerns would prove to be well-founded. *Register* opened the door for prosecutors to use depraved murder as a fallback for intentional murder in those cases where recklessness could be proved, but intent could not.[79]

A similarly discontented and equally prophetic dissenting opinion was written by Judge Bellacosa six years later in *People v. Roe*,[80] a case involving a fatal game of "Polish roulette."[81] In *Roe*, a six judge majority reaffirmed *Register*'s objective risk formulation of depraved murder. Judge Bellacosa expressed concern that the prosecutorial practice of "overcharging traditional reckless manslaughter conduct as the more serious murderous conduct" was becoming standard operating procedure for New York courts.[82] In fact, it was.

Thirteen years later, in *People v. Sanchez*,[83] the defendant, who shot and killed a long-time friend during a scuffle, was acquitted of intentional murder but convicted of depraved indifference murder. The majority again reaffirmed the *Register* formulation and held that the evidence was sufficient to sustain a conviction of depraved indifference murder.[84] The dissenting

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[76] *Id.* at 284, 457 N.E.2d at 711, 469 N.Y.S.2d at 606 (quoting Roscoe Pound, *Introduction* to FRANCIS BOWES SAYRE, A SELECTION OF CASES ON CRIMINAL LAW xxix, xxxvi (1927)).

[77] *Id.* at 285, 457 N.E.2d at 712, 469 N.Y.S.2d at 607.

[78] *Id.* at 287, 457 N.E.2d at 713, 469 N.Y.S.2d at 608.

[79] *See id.* at 287 n.4, 457 N.E.2d at 713, 469 N.Y.S.2d at 608. This is troublesome given the fact that the legislature explicitly categorized reckless homicide as the grade C felony of second degree manslaughter rather than the grade A-I felony of first degree murder. *Id.* at 286, 457 N.E.2d at 713, 469 N.Y.S.2d at 608.

[80] 74 N.Y.2d 20, 542 N.E.2d 610, 544 N.Y.S.2d 297 (1989) (Bellacosa, J., dissenting).

[81] *Id.* at 22, 542 N.E.2d at 610, 544 N.Y.S.2d at 297 (majority opinion). In "Polish roulette," a mix of "live" and "dummy" shells are loaded at random into the magazine of a 12-gauge shotgun. *Id.* The players point the gun at each other and pull the trigger, not knowing whether a live or dummy round is being fired. *Id.*

[82] *Id.* at 35, 542 N.E.2d at 619, 544 N.Y.S.2d at 306 (Bellacosa, J., dissenting).

[83] 98 N.Y.2d 373, 777 N.E.2d 204, 748 N.Y.S.2d 312 (2002), *overruled by* People v. Feingold, 7 N.Y.3d 288, 852 N.E.2d 1163, 819 N.Y.S.2d 691 (2006).

[84] *Id.* at 386, 777 N.E.2d at 212, 748 N.Y.S.2d at 320.

opinions expressed the same concerns as Judges Jasen and Bellacosa, that juries would be asked to decide between crimes that are fifteen years apart in terms of minimum sentences, based on "the razor-thin distinction between 'substantial' and 'grave.' "[85] In addition, the dissenters in *Sanchez* expressed concern that depraved indifference murder was also becoming virtually indistinguishable from intentional murder, given the large amount of cases charging defendants with both crimes. Thus, in theory and in practice, depraved murder, intentional murder, and manslaughter were becoming conflated, and depraved murder was becoming "a tactical weapon of choice"[86] for prosecutors. While the dissenters in *Register* and *Roe* were predicting future problems with the *Register* holding, the dissenters in *Sanchez* were able to reflect on twenty years under *Register* and analyze the actual effect it was having on the penal system. Citing New York indictment statistics, Judge Rosenblatt explained:

> According to the Division of Criminal Justice Services (DCJS), in 1989 only 19% of all Penal Law § 125.25 indictments contained a count of depraved indifference murder. By 2001, prosecutors charged depraved indifference murder in 70% of all murder indictments. During that same period, while the number of murder indictments fell by 50% from 1315 to 666 per year, the number of depraved indifference murder charges nearly doubled from 246 to 468 annually.[87]

At this point, it became fairly clear that the fears and concerns of dissenters had become a reality. *Sanchez* would prove to be the last hurrah for the *Register* doctrine.

C. *The Modern Doctrine: From* Hafeez *to* Feingold

Shortly after *Sanchez*, beginning in 2003, a number of Court of Appeals decisions began pointing the law of depraved indifference murder in a new—or old—direction. In *People v. Hafeez*,[88] *People v. Gonzalez*,[89] and *People v. Payne*,[90] all of the defendants had been acquitted of intentional murder, but found

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[85] *Id.* at 407, 777 N.E.2d at 228, 748 N.Y.S.2d at 336 (Rosenblatt, J., dissenting).

[86] *Id.* at 402, 777 N.E.2d at 224, 748 N.Y.S.2d at 332.

[87] *Id.* at 401, 777 N.E.2d at 223–24, 748 N.Y.S.2d at 331–32 (footnote omitted) (citation omitted).

[88] 100 N.Y.2d 253, 792 N.E.2d 1060, 762 N.Y.S.2d 572 (2003).

[89] 1 N.Y.3d 464, 807 N.E.2d 273, 775 N.Y.S.2d 224 (2004).

[90] 3 N.Y.3d 266, 819 N.E.2d 634, 786 N.Y.S.2d 116 (2004).

guilty of depraved indifference murder. In all three cases, the Court of Appeals held that the evidence was insufficient to support a charge of depraved indifference murder and began re-widening the doctrinal gap between depraved and intentional murder. Fundamentally, these opinions were based on the concept that "[i]ndifference to the victim's life . . . contrasts with the intent to take it."[91]

Finally in 2005, with *People v. Suarez*,[92] the Court of Appeals sought to demarcate the differing statutory categories of homicide and escape the conflated, muddled formulation of these offenses under *Register* and *Sanchez*. The court put its foot down with respect to twin-count indictments—those charging a defendant with both depraved and intentional murder—and solidified the principle that intent to kill is inconsistent with the mental culpability required for depraved indifference murder:

> [T]win-count indictments . . . should be rare. Twin-count submissions to a jury, even rarer. For by the time the proof has been presented, it should be obvious in most cases whether or not the evidence establishes an intentional [killing] . . . . [T]rial courts should presume that the defendant's conduct falls within only one category of murder and, unless compelling evidence is presented to the contrary, dismiss the count that is least appropriate to the facts.[93]

Unless there is "compelling evidence" that supports a theory of both intent and depraved indifference, one of the two charges must be dismissed. Given the contrasting nature of these two mental states,[94] it is difficult to imagine many fact patterns marked by such dexterity.

With regard to one-on-one killings, "when but a single person is endangered,"[95] the court denoted only two circumstances that would support a charge of depraved indifference murder—torture and abandoning a helpless victim.[96]

The line of cases from *Hafeez* to *Suarez* significantly weakened the *Register/Sanchez* formulation of depraved murder,

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[91] *Id.* at 270, 819 N.E.2d at 635, 786 N.Y.S.2d at 117.

[92] 6 N.Y.3d 202, 844 N.E.2d 721, 811 N.Y.S.2d 267 (2005).

[93] *Id.* at 215, 44 N.E.2d at 731, 811 N.Y.S.2d at 277 (internal quotation marks omitted) (citation omitted).

[94] *See supra* note 91 and accompanying text.

[95] *Suarez*, 6 N.Y.3d at 212, 844 N.E.2d at 729, 811 N.Y.S.2d at 275.

[96] *Id.* at 212, 844 N.E.2d at 729, 811 N.Y.S.2d at 275.

but did not overrule it.[97] The 2006 decision of *People v. Feingold*[98] explicitly overruled *Register* and *Sanchez* and distilled the concept that had been part of the judicial fog surrounding depraved indifference murder since Judge Jasen's dissent in *Register*. Judge Smith, writing for the four-judge majority stated quite bluntly, "depraved indifference to human life is a culpable mental state."[99] For the first time, the Court of Appeals of New York explicitly recognized a culpable mental state not contained within article 15 of the NYPL[100] and in doing so, put the depravity back in depraved indifference murder.

The defendant in *Feingold* attempted suicide in his twelfth-floor Manhattan apartment—he sealed the apartment door with tape, turned on his gas stove, took tranquilizers, and went to sleep in front of the oven hoping the gas would kill him.[101] Several hours later, a spark from the refrigerator ignited the gas and caused a large explosion that heavily damaged several neighboring apartments. Miraculously, no one in the building was killed or seriously injured. The defendant survived the explosion and was charged with first degree reckless endangerment,[102] which is identical to the depraved indifference murder statute with the exception of the phrase, "and thereby causes the death of another person."[103] The phrase "under circumstances evincing a depraved indifference to human life" has the same meaning in both offenses.[104] The new construction of this phrase adopted by *Feingold* now required a wholly subjective look at the defendant's state of mind. The court

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[97] Although, the three concurring judges in *Suarez* stated that they would "explicitly" overrule *Register*. *See id.* at 217, 844 N.E.2d at 732–33, 811 N.Y.S.2d at 278–79 (G.B. Smith, Rosenblatt, and R.S. Smith, JJ., concurring).

[98] 7 N.Y.3d 288, 852 N.E.2d 1163, 819 N.Y.S.2d 691 (2006).

[99] *Id.* at 294, 852 N.E.2d at 1167, 819 N.Y.S.2d at 695.

[100] *See* Abraham Abramovsky & Jonathan I. Edelstein, *In Search of the Point of No Return:* Policano v. Herbert *and the Retroactivity of New York's Recent Depraved Indifference Murder Jurisprudence*, 57 SYRACUSE L. REV. 973, 974 (2007).

[101] *Feingold*, 7 N.Y.3d at 290, 852 N.E.2d at 1164, 819 N.Y.S.2d at 692.

[102] N.Y. PENAL LAW § 120.25 (McKinney 2008) ("A person is guilty of reckless endangerment in the first 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.").

[103] *Id.*; *Id.* § 125.25(2).

[104] *Id.* §§ 120.25, 125.25(2); *Feingold*, 7 N.Y.3d at 290, 852 N.E.2d at 1164, 819 N.Y.S.2d at 693.

explained that "a person may [not] be guilty of a depraved indifference crime without being depravedly indifferent."[105]

The judge in the bench trial[106] determined that Feingold did not possess such a depraved state of mind. Because he was "a plainly depressed individual" whose focus was "upon his troubles and himself," the court held that his state of mind did not rise to the level of "wickedness, or abject moral deficiency" required for a finding of depraved indifference.[107] "[D]epraved indifference is best understood as an utter disregard for the value of human life—a willingness to act not because one intends harm, but because one simply doesn't care whether grievous harm results or not . . . ."[108] Even in the presence of such reckless and highly dangerous conduct, it must be proved that the mens rea of depraved indifference is actually present in the offender—there is no such thing as constructive depravity. This holding has important implications for DWI homicides, which will be discussed in Part III.

III. DEPRAVED INDIFFERENCE MURDER IN THE CONTEXT OF DWI HOMICIDES

For as long as the automobile has existed, people have been drinking and driving.[109] For a long time, the problem of drunk driving and its impact on society flew under the radar. The 1980s marked a drastic increase in public concern and awareness of drunk driving.[110] Anti-drunk driving groups were formed,[111] media coverage increased, and legislation was passed to address the problem.[112] Since this time and continuing presently, prosecutors have been bringing charges of depraved indifference

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[105] *Feingold*, 7 N.Y.3d at 295, 852 N.E.2d at 1167–68, 819 N.Y.S.2d at 696.

[106] *Id.*

[107] *Id.* at 295, 852 N.E.2d at 1168, 819 N.Y.S.2d at 696.

[108] *Id.* at 298, 852 N.E.2d at 1170, 819 N.Y.S.2d at 698 (quoting People v. Suarez, 6 N.Y.3d 202, 214, 844 N.E.2d 721, 730, 811 N.Y.S.2d 267, 276 (2005)).

[109] *See* ALAN A. CAVAIOLA & CHARLES WUTH, ASSESSMENT AND TREATMENT OF THE DWI OFFENDER 1 (2002).

[110] *See id.*

[111] Mothers Against Drunk Driving, History, http://www.madd.org/About-Us/About-Us/History.aspx (last visited Sept. 21, 2008); Students Against Drunk Driving, History, http://www.sadd.org/history.htm (last visited Sept. 21, 2008).

[112] National Highway Traffic Safety Administration, *New York STOP-DWI: A Model of Excellence*, TRAFFIC SAFETY DIGEST, Spring 2002, *available at* http://www.nhtsa.dot.gov/people/outreach/safedige/spring02/S02_W05_NY.htm; *see also infra* note 241 and accompanying text.

murder in DWI homicides. These charges are not the norm: They are typically brought in particularly tragic or high-profile cases involving reckless driving, extreme intoxication, or the death of several people where increased punishment is desired.[113] In the media frenzy of the recent murder conviction of Martin Heidgen, statements made by prosecutors, victims' families, and the general public indicated support of murder charges in DWI cases and expressed the opinion that they should be brought with more regularity. It is the position of this Note that given the current state of affairs of depraved indifference murder in New York and the purpose for which the offense was created, the overwhelming majority of DWI homicides do not rise to the level of depraved indifference murder and cannot properly be charged as such. In order for a charge of murder to be brought in the context of a DWI, there must be conscious conduct independent of drunk driving that evinces the depraved state of mind required for a charge of murder.

A. What Is Depraved Indifference Murder?

A person is guilty of depraved indifference murder when "[u]nder 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

[113] *See, e.g.*, People v. Lazartes, 23 A.D.3d 400, 401–02, 805 N.Y.S.2d 558, 560 (2d Dep't 2005) (driver sped and drove recklessly); People v. Hoffman, 283 A.D.2d 928, 928, 725 N.Y.S.2d 494, 496 (4th Dep't 2001) (intoxicated driver led police on high-speed chase); People v. Padula, 197 A.D.2d 747, 748, 602 N.Y.S.2d 737, 738 (3d Dep't 1993) (intoxicated driver sped on a busy street during evening rush hour, ignoring traffic rules); People v. Chamberlain, 178 A.D.2d 783, 783, 578 N.Y.S.2d 270, 271 (3d Dep't 1991) (intoxicated driver struck and killed woman on bicycle and fled the scene); People v. Kenny, 175 A.D.2d 404, 405, 572 N.Y.S.2d 102, 104 (3d Dep't 1991) (intoxicated driver speeding 70–75 mph in medium to heavy traffic on wet road); People v. Thacker, 166 A.D.2d 102, 103–04, 570 N.Y.S.2d 516, 517 (1st Dep't 1991) (intoxicated driver had problem with shifter, failed to break, and ran three red lights); People v. Moquin, 142 A.D.2d 347, 349, 536 N.Y.S.2d 561, 563 (3d Dep't 1988) (female intoxicated driver swerved into oncoming lane); People v. Peryea, No. 33-I-2006, 2006 WL 3913700, at *1 (N.Y. County Ct. Aug. 1, 2006) (intoxicated driver crossed center line and collided head-on with another vehicle); People v. Hopkins, No. 2004-0338, 2004 WL 3093274, at *1 (N.Y. County Ct. Aug. 30, 2004) (conviction upheld where defendant's car sped at 104 miles per hour on a wet road in a 30 mile per hour zone, crashing into the victim's car, which had stopped at a red light).

death of another person."[114] This is a tall order in terms of culpability:

> To constitute depraved indifference, the defendant's conduct must be so wanton, so deficient in a moral sense of concern, so devoid of regard of the life or lives of others, and so blameworthy as to warrant the same criminal liability as that which the law imposes upon a person who intentionally causes the death of another.[115]

Quintessential examples of such extreme conduct include " 'shooting [a gun] into a crowd,[116] placing a time bomb in a public place, or opening the door of the lions' cage in the zoo.' "[117] Other examples include "driving an automobile along a crowded sidewalk at high speed[,] . . . poisoning a well from which people are accustomed to draw water[,] opening a drawbridge as a train is about to pass over it[,] and dropping stones from an overpass onto a busy highway."[118]

The extreme nature of the conduct, combined with a unique mental state, make depraved indifference murder a fairly uncommon brand of homicide. "The vast majority of killings simply do not meet this standard. They are suitably punished by statutes defining intentional murder or manslaughter in the first or second degree or criminally negligent homicide."[119] It is important to understand that intentional murder is

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[114] N.Y. PENAL LAW § 125.25(2) (McKinney 2008).

[115] People v. Suarez, 6 N.Y.3d 202, 211, 844 N.E.2d 721, 728, 811 N.Y.S.2d 267, 274 (2005) (internal quotation marks omitted) (citation omitted).

[116] *See, e.g.*, People v. Fenner, 61 N.Y.2d 971, 973, 463 N.E.2d 617, 618, 475 N.Y.S.2d 276, 277 (1984) (defendant fired at several men attempting to flee a crowded poolroom); People v. Jernatowski, 238 N.Y. 188, 190, 144 N.E. 497, 497 (1924) (defendant fired several shots into what defendant knew was an occupied house); People v. Callender, 304 A.D.2d 426, 426, 760 N.Y.S.2d 408, 409 (1st Dep't 2003) (defendant fired shots down at a crowd of teenagers from a fifteenth-floor balcony).

[117] People v. Feingold, 7 N.Y.3d 288, 293, 852 N.E.2d 1163, 1166, 819 N.Y.S.2d 691, 695 (2006) (quoting People v. Payne, 3 N.Y.3d 266, 819 N.E.2d 634, 786 N.Y.S.2d 116 (2004)).

[118] *Suarez*, 6 N.Y.3d at 214, 844 N.E.2d at 730, 811 N.Y.S.2d at 276; *see also* People v. Gomez, 65 N.Y.2d 9, 10, 478 N.E.2d 759, 760, 489 N.Y.S.2d 156, 157 (1985) (defendant drove a vehicle on a busy city sidewalk); People v. Damiano, 255 A.D.2d 703, 704, 681 N.Y.S.2d 104, 105 (3d Dep't 1998) (defendant dropped fifty-two pound boulder from a traffic overpass onto oncoming traffic, killing a woman instantly).

[119] *Suarez*, 6 N.Y.3d at 211, 844 N.E.2d at 728, 811 N.Y.S.2d at 274; *see also* People v. Peryea, No. 33-I-2006, 2006 WL 3913700, at *2 (N.Y. County Ct. Aug. 1, 2006) ("[I]t is difficult to conceive of many actions resulting in an unintentional murder which should be classified at the same level as intentional murder.").

distinguishable from depraved murder not because it is more culpable or immoral—they are simply different offenses. In fact, intentional murder is viewed as identical to depraved indifference murder in terms of culpability—both are defined as second degree murder, both are non-violent A-I felonies, and both share the same minimum and maximum sentences under article 70.[120] Depraved indifference murder is a crime that is precisely as serious as intentional murder. The distinction between the two is qualitative, not quantitative.

The statutory language that distinguishes depraved murder from other homicide offenses is "a depraved indifference to human life."[121]

> [D]epraved indifference is best understood as an utter disregard for the value of human life—a willingness to act not because one intends harm, but because one simply doesn't care whether grievous harm results or not. Reflecting wickedness, evil or inhumanity, as manifested by brutal, heinous and despicable acts, depraved indifference is embodied in conduct that is "so wanton, so deficient in a moral sense of concern, so devoid of regard of the life or lives of others, and so blameworthy" as to render the actor as culpable as one whose conscious objective is to kill . . . .[122]

The important question that remains then, is whether DWI homicides fit within the highly specialized, substantially limited statutory nook of depraved indifference murder, or whether they are like the "overwhelming majority of homicides that are prosecuted in New York," in which "[d]epraved indifference murder may not be properly charged."[123]

B. Category 1—Those DWI Homicides That Cannot Support a Charge of Murder

There are two types of DWI homicides—those that can sustain a charge of depraved indifference murder and those that

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[120] *See infra* app. A.

[121] N.Y. PENAL LAW § 125.25(2) (McKinney 2008).

[122] *Suarez*, 6 N.Y.3d at 214, 844 N.E.2d at 730, 811 N.Y.S.2d at 276 (quoting People v. Russell, 91 N.Y.2d 280, 287, 693 N.E.2d 193, 194, 670 N.Y.S.2d 166, 168 (1998)). This language was ultimately adopted by the court in *Feingold*. 7 N.Y.3d at 296, 852 N.E.2d at 1168, 819 N.Y.S.2d at 697.

[123] *Suarez*, 6 N.Y.3d at 207, 844 N.E.2d at 725, 811 N.Y.S.2d at 271 (quoting People v. Payne, 3 N.Y.3d 266, 270, 819 N.E.2d 634, 636, 786 N.Y.S.2d 116, 117 (2004)).

cannot. Category 1 represents the overwhelming majority of DWI cases where a charge of murder cannot stand. Category 2 carves out those rare cases that may support a charge of murder.

Category 1 refers to the typical case of drinking and driving. No matter how extreme the drinking or how poor the driving, these cases do not rise to the level of a depraved indifference to human life. "The fact that an individual is driving a vehicle while in an intoxicated condition and, as a result, causes the death of another, cannot, standing alone, sustain an indictment for depraved indifference murder . . . ."[124] This category of cases spans from the mildly drunk to the extremely drunk, and applies to all bad driving that occurs as a result of intoxication whether it be slightly erring in judgment, swerving, speeding, or disregarding traffic control devices. Cases within Category 1 cannot properly be charged as depraved indifference murder because the conduct and risk involved is not indicative of a mental state rising to the level of a "depraved indifference to human life."[125]

1. Conduct

Because we cannot see into the mind of an offender, "the various degrees of culpability specified in [article 15 of the NYPL] are not capable of direct proof. They are, instead, to be inferred from the facts and circumstances proved . . . ."[126] The mental state of "depraved indifference to human life" must be established in the same way.[127] Thus, in an effort to ascertain an offender's state of mind, we must look at his conduct and the facts and circumstances involved in a DWI.

Although depraved indifference murder describes an unintentional killing, there is always conscious, purposeful, and intentional conduct involved. Among the classic examples of depraved murder,[128] none are performed with an intent to kill,

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[124] People v. Peryea, 33-I-2006, 2006 WL 3913700, at *3 (N.Y. County Ct. Aug. 1, 2006).

[125] *Feingold*, 7 N.Y.3d at 296, 852 N.E.2d at 1168, 819 N.Y.S.2d at 697.

[126] People v. Green, 56 N.Y.2d 427, 432, 437 N.E.2d 1146, 1149, 452 N.Y.S.2d 389, 392 (1982) (citing People v. Stanfield, 36 N.Y.2d 467, 473, 369 N.Y.S.2d 118, 122, 330 N.E.2d 75, 78 (1975)).

[127] *Feingold*, 7 N.Y.3d at 296, 852 N.E.2d at 1168–69, 819 N.Y.S.2d at 697 ("The mens rea of depraved indifference to human life can, like any other mens rea, be proved by circumstantial evidence.").

[128] *See supra* notes 117–118 and accompanying text.

but all result in death and qualify as "circumstances evincing a depraved indifference to human life."[129] These examples involve purposeful, conscious conduct from which the abject moral depravity and extreme indifference required for a charge of murder can be inferred.

The act of drinking and driving does not rise to this level of depravity. The first step in making this determination is to identify the conduct—at what point does the offender open the lion's cage, drop the stone, or pull the trigger? The conscious decision made in all DWI homicides is the decision to drive a car in an intoxicated state—this is the culpable act. Driving a car, by itself, does not carry with it any immoral purpose or evil undertone—it is simply a means of transportation and it is a wholly innocent endeavor. It is something that millions of people do every day as early as the age of sixteen.[130] The same cannot be said for shooting a gun, releasing a vicious animal, dropping a large rock from a high place, planting a bomb, poisoning a well, or opening a drawbridge as a train approaches. These actions involve a priori, a high degree of danger and moral wickedness. Choosing to drive while intoxicated is certainly a culpable act, but it does not evince the "depraved indifference to human life" required for murder charge. This is due to a combination of the risk involved and the mental state of the offender.

2. Risk and Mental State

Given the wording of the statute and the new, court-defined mental state of "depraved indifference to human life," it is difficult to separate an assessment of risk from an assessment of the offender's state of mind, because the two are related:

> [A] discussion of the nuances of the actor's mind—how forcibly the likelihood of a fatal result was borne in upon him and his willingness to let come what may—is very much related to the *degree of risk* itself. The more dangerous the act was, the more likely the actor was willing to kill in performing it.[131]

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[129] N.Y. PENAL LAW § 125.25(2) (McKinney 2008).

[130] *See* New York Department of Motor Vehicles, General Information About Driver Licenses, http://www.nydmv.state.ny.us/license.htm (last visited Sept. 21, 2008).

[131] Gegan, *supra* note 56, at 448 (emphasis added).

In DWI cases, the combination of the risk involved and the offender's state of mind make a charge of depraved indifference murder untenable.

a. Risk

To avoid delving into the quagmire of intoxication and mens rea just yet,[132] let us assume that all people making the decision to drive drunk are fully aware of the extent of their own intoxication and are able to recognize the actual degree of risk involved in driving in this condition.

There is always a degree of risk involved in taking a car on the open road, but the decision to drive under the influence of alcohol significantly increases this risk.[133] The degree to which this risk is increased is difficult to quantify and will almost certainly vary among individuals as everyone possesses different driving skills and reacts differently to alcohol.[134] Nevertheless, it is critical to determine, on a general level, the degree of risk involved. In 2002, in the United States, there were 43,005 traffic fatalities, 17,524 (41 percent) of which were alcohol related.[135] In this same year, the estimated number of episodes of alcohol-impaired driving was 159 million.[136] These figures indicate that only .01% of all incidents of impaired driving resulted in a fatality—i.e., for every decision that was made to drive drunk, only about one in every 10,000 resulted in a death. These decisions carry with them a degree of risk, but do not rise to the level of shooting a gun into a crowd, driving over a crowded sidewalk, or poisoning a person's drinking water—actions where the risk is grave, and death is almost certain to occur. Instead of taking a taxi, walking home, or sleeping at a friend's house, an intoxicated person likely makes the decision to drive because he assesses the risk to be low and believes that his chances of killing

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[132] *See infra* Part III.B.2.b.

[133] H. LAWRENCE ROSS & JOSEPH R. GUSFIELD, CONFRONTING DRUNK DRIVING: SOCIAL POLICY FOR SAVING LIVES 35 (1992) ("[D]runk driving greatly increases the risk of a crash, especially a fatal one.").

[134] Scientific studies use statistics to estimate and quantify the increased relative risk over a number of different variables. *See* Paul L. Zador, *Alcohol-Related Relative Risk of Fatal Driver Injuries in Relation to Driver Age and Sex*, 52 J. STUD. ON ALCOHOL 302, 302–10 (1991).

[135] Alcohol Alert, 2005 Drunk Driving Statistics, http://www.alcoholalert.com/drunk-driving-statistics-2005.html (last visited Sept. 21, 2008).

[136] Kyran P. Quinlan et al., *Alcohol-Impaired Driving Among U.S. Adults, 1993-2002*, 28 AM. J. PREVENTIVE MED. 346, 346–50 (2005).

someone are *remote*. The statistics support this assessment—every year, millions of people drive under the influence of alcohol without incident. In *People v. Roe*—the Polish roulette case—Judge Bellacosa addressed the issue of statistical probability in his dissent:

> [T]he murder penalty should be imposed only when the degree of risk approaches certainty; that is, at the point where reckless homicide becomes knowing homicide. Here, defendant's actions cannot be said to have created an almost certain risk of death. The mathematical probabilities, the objective state of mind evidence at and around the critical moment . . . and all the circumstances surrounding this tragic incident all render the risk uncertain and counterindicate depravity, callousness and indifference of the level fictionally equalling premeditated, intentional murder.[137]

Given the statistics cited above, it cannot be said that the risk of death from DWI is "almost certain."[138] While it is well established that "drunk driving greatly increases the risk of a [fatal] crash, . . . the likelihood of a crash fatality on any given trip—even an alcohol impaired one—remains extremely low."[139]

b. Mental State

The foregoing analysis assesses risk with the aid of statistics from an outside, objective standpoint and assumes that all people making a decision to drive drunk are aware both of the extent of their own intoxication and the actual level of risk involved. Even in this hypothetical case of an omniscient offender, the risk is not high enough to support a charge of depraved indifference murder.[140] In *People v. Feingold*, "depraved indifference to human life" became a culpable mental state, moving the analysis to a subjective assessment of the offender's actual state of mind—"a person may [not] be guilty of a depraved indifference crime without being depravedly indifferent."[141] In *Feingold*, the defendant was not found to be depravedly indifferent despite the

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[137] People v. Roe, 74 N.Y.2d 20, 33, 542 N.E.2d 610, 617, 544 N.Y.S.2d 297, 304 (1989) (Bellacosa, J., dissenting) (internal quotation marks omitted) (emphasis omitted) (citation omitted).

[138] *Id.*

[139] ROSS & GUSFIELD, *supra* note 133.

[140] *See supra* Part III.B.2.a.

[141] People v. Feingold, 7 N.Y.3d 288, 295, 852 N.E.2d 1163, 1167–68, 819 N.Y.S.2d 691, 696 (2006).

fact that he filled his apartment with highly flammable gas, intentionally went to sleep, and ultimately caused a large explosion in a densely-occupied building.[142] The factfinder determined that the defendant acted out of depression and sorrow, without the malicious indifference required for a charge of depraved murder.[143] Thus, even an act with an extremely high objective level of risk[144] cannot amount to murder unless the offender recognizes this grave risk of death and "simply doesn't care" if someone dies.[145]

The intoxicated mind of a DWI offender must be analyzed with this in mind. All DWI offenders are intoxicated to some degree, and so this is an appropriate starting point for a discussion of mental state. Article 15 of the NYPL allows evidence of intoxication to negate the presence of culpable mental states[146] with the exception of recklessness.[147] Under *Register*, the mens rea required for depraved indifference murder was recklessness,[148] and so evidence of intoxication was inadmissible.[149] Since *Feingold*, the mens rea is no longer recklessness, and evidence of a defendant's intoxication is no longer statutorily prohibited.[150] The effect of *Feingold* on intoxication has yet to reach the Court of Appeals, but in the Appellate Division case of *People v. Coon*,[151] the court stated that the defendant—who was under the influence of crack cocaine—

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[142] *See supra* note 101 and accompanying text.

[143] *See supra* notes 105–107 and accompanying text.

[144] Feingold's conduct probably meets the requirement of a "grave risk of death," as required by section 125.25(2) of the New York Penal Law, given the fact that it is essentially the same as "placing a time bomb in a public place." *Feingold*, 7 N.Y.3d at 293, 852 N.E.2d at 1166, 819 N.Y.S.2d at 695 (quoting People v. Payne, 3 N.Y.3d 266, 272, 819 N.E.2d 634, 637, 786 N.Y.S.2d 116, 119 (2004)).

[145] *Feingold*, 7 N.Y.3d at 296, 852 N.E.2d at 1168, 819 N.Y.S.2d at 697.

[146] N.Y. PENAL LAW § 15.25 (McKinney 2008); *see also supra* notes 27–28 and accompanying text.

[147] N.Y. PENAL LAW § 15.05(3); *see also supra* note 29 and accompanying text.

[148] People v. Register, 60 N.Y.2d 270, 278, 457 N.E.2d 704, 708, 469 N.Y.S.2d 599, 602–03 (1983), *overruled by Feingold*, 7 N.Y.3d 288, 852 N.E.2d 1163, 819 N.Y.S.2d 691.

[149] *See id.* at 280, 457 N.E.2d at 709, 469 N.Y.S.2d at 604.

[150] *Id.* at 285 n.2, 457 N.E.2d at 712, 469 N.Y.S.2d at 607 (Jasen, J., dissenting) ("While . . . the Legislature could constitutionally exclude intoxication as a factor which negates the element of 'depraved indifference' just as it has with respect to the element of 'recklessness' (see Penal Law, § 15.05, subd. 3), the simple fact is that the Legislature has not done so; indeed section 15.25 of the Penal Law has done just the opposite.").

[151] 34 A.D.3d 869, 823 N.Y.S.2d 566 (3d Dep't 2006).

was "too intoxicated to form a specific criminal intent" and was "incapable of possessing the culpable mental state necessary to prove depraved indifference."[152] Similarly, Judge Jasen's dissent in *Register* explained that if the defendant could show that "as a result of his intoxication he was not aware of what he was doing and the risks involved and was not, therefore, competent to consciously disregard those risks," he could not be convicted of depraved indifference murder.[153] Under *Feingold*, the same must be said for DWI offenders.

In a DWI offense, the culpable act lies not in the offender's poor driving while intoxicated or failure to avoid hazards on the road, but in the decision to drive itself.[154] It is at this moment that the mental state of the offender must be assessed. Intoxicated individuals are certainly aware that they have been drinking and are usually aware that they are intoxicated, to some extent. Most people however—especially those who are highly intoxicated—cannot perform an accurate self-assessment of their own intoxication and are unable to recognize the risks associated with driving in such a state.[155] A product of this is the uncomfortable scene of a person who is clearly intoxicated trying to obtain his keys because he believes that he is "fine to drive home." Another contributor to this belief is the nature of the activity itself. Most people drive all of the time and do not consider it to be a difficult or extremely dangerous activity. Often, they only have to drive a short distance on familiar roads in order to get home. The combination of these factors, combined with the fact that many people do this or know people who do it fairly often without incident, creates the honest belief in intoxicated individuals that they are capable of driving safely. The possibility of causing death rarely enters this calculation on a serious level or presents itself as a plausible consequence. Most people probably see getting pulled over as a more realistic

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[152] *Id.* at 870, 823 N.Y.S.2d at 567.

[153] *Register*, 60 N.Y.2d at 282–83, 457 N.E.2d at 710–11, 469 N.Y.S.2d at 605 (Jasen, J., dissenting).

[154] There may be cases where a drunk driver intentionally engages in an additional culpable (and possibly depraved) act while driving. This will be addressed, *infra* Part III.C.

[155] *See* S. George, R.D. Rogers & T. Duka, *The Acute Effect of Alcohol on Decision Making in Social Drinkers*, 182 PSYCHOPHARMACOLOGY 160, 166–67 (2005) (concluding that alcohol acutely affects decision making and assessment of risk).

risk, but even this is unlikely.[156] Whether death is viewed as impossible, highly unlikely, or improbable makes no difference. None of these assessments evince a disregard for the value of human life. If death is thought to be an improbable result of the act, it cannot be said that the actor "simply does not care" if someone is killed, and it surely cannot be said that this act is as blameworthy as intentional murder. Although this drunken assessment may not be accurate, it is an integral part of the offender's decision to drive and does not speak to a mens rea of a depraved indifference to human life.

> A person may be quite conscious of creating a risk of injury and death yet believe that it will not happen. He is too skillful or clever or lucky to have anything like that happen! When he proves to be wrong, it is manslaughter. This actor is . . . distinguishable from one who is under no illusions, who believes someone will be killed, but just does not care.[157]

In many cases, an intoxicated person may not make such a skewed assessment. Rather, the person does not make an assessment at all. Actions made by intoxicated people are proven to be highly impulsive and rarely well-calculated. People make decisions with little or no thought, in a primitive, somewhat hedonistic manner.

> While most sober people know that if they drink and drive they might get a ticket, get in an accident, or end up killing themselves and someone else, inebriated people are only able to focus on one cue at a time. They are not able to weigh the costs and benefits of their actions. They might only be able to focus on the benefits—"I am tired, I want to go home, and so I will drive home."[158]

Even in cases where the actor decides to drive with no evaluation or assessment of risk, it cannot be said that he is depraved. Depravity is not defined as a failure to assess risk or consider the

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[156] In 2004 there were approximately 1.4 million arrests made for driving under the influence of alcohol or drugs. *Compare* NAT'L CTR. FOR STATISTICS & ANALYSIS, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., TRAFFIC SAFETY FACTS: ALCOHOL 2 (2006), *available at* http://www-nrd.nhtsa.dot.gov/Pubs/810616.pdf, *with supra* note 136 and accompanying text.

[157] Gegan, *supra* note 56, at 444.

[158] Interview with Tara K. McDonald, Ph.D., Professor of Psychology, Queen's Univ. (Ont., Can.) (Aug. 28, 2007); *see also* Tara K. McDonald et al., *Decision Making in Altered States: Effects of Alcohol on Attitudes and Driving*, 68 J. PERSONALITY & SOC. PSYCHOL. 973, 975 (1995).

consequences of one's action—it requires first the recognition of a grave risk and then indifference to it. This point is illustrated in the holding of *Feingold*.[159] If unhappiness and gloom are enough to show that an offender did not act with depraved indifference, surely the much more palpable state of intoxication can do so. Intoxication is medically proven to hinder a person's ability to make decisions, assess risk, and think clearly.[160] A drunk driver who fails to consider the risks or consequences of his actions commits "an extremely reckless and foolish act[,] not because of his lack of regard for the lives of others"[161] but because of his intoxication and inability to validly assess the situation in that state. Such offenders do not exhibit the mental state of a "depraved indifference to human life"[162] and must be punished under one of the lesser and more appropriate homicide felonies of the NYPL.[163]

3. Comparative Culpability

Historically and modernly, depraved indifference murder has been defined as an offense *as culpable as* intentional murder.[164] This is reflected both in the courts' discussion of the crime and the sentencing provisions of article 70 that treat the offenses identically.[165] The level of culpability involved is very much a part of its definition and is at the root of its purpose. Thus, in the interest of proportionality, it is important to examine the culpability involved in a DWI homicide. If a DWI homicide is to rise to the level of depraved indifference murder, it must be as culpable as intentional murder and more culpable than the lesser felonies. An assessment of the various homicide offenses reveals that this is not the case.

"[T]he Legislature has enacted a statutory system in which each category of homicide is defined uniquely and distinctly from every other, thus ensuring that a killer's punishment is

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[159] *See* People v. Feingold, 7 N.Y.3d 288, 296–97, 852 N.E.2d 1163, 1168–69, 819 N.Y.S.2d 691, 697 (2006).

[160] *See supra* note 155 and accompanying text.

[161] *Feingold*, 7 N.Y.3d at 295, 852 N.E.2d at 1168, 819 N.Y.S.2d at 696.

[162] *Id.* at 294, 852 N.E.2d at 1167, 819 N.Y.S.2d at 695.

[163] *See infra* Part IV.B.

[164] People v. Suarez, 6 N.Y.3d 202, 214, 844 N.E.2d 721, 730, 811 N.Y.S.2d 267, 276 (2005); *see also supra* notes 35–36 and accompanying text; *supra* note 120 and accompanying text.

[165] *See infra* app. A.

commensurate with the degree of criminal culpability established by the Penal Law."[166] During this discussion, it will be helpful to look at appendix A. The offenses are listed in order of seriousness based on grade and sentencing, allowing a determination of the appropriate placement of DWI homicides based on culpability. A good starting point is second degree murder—intentional murder.[167] Intentional murder describes conduct where it is the offender's "conscious objective" to cause the death of another person.[168] To conjure examples of this kind of conduct requires only that one choose randomly from a virtually endless throng of cases. Typical cases include those where a victim is purposely shot,[169] stabbed,[170] or beaten[171] to death by an offender. In terms of culpability, an offense of this magnitude is a far cry from a DWI homicide. An intentional killer consciously pulls a trigger or thrusts a knife with the intent to kill, while a drunk driver makes a poor choice in an intoxicated state and accidentally causes a death.

The next offense down the ladder of culpability is first degree manslaughter. First degree manslaughter can be charged when an intentional murder is reduced to manslaughter via the affirmative defense of extreme emotional disturbance ("EED").[172] While an intentional act committed under EED may be less culpable than an intentional act alone, it is still more culpable, more evil, and more wanton than a DWI homicide.[173] The decision to kill another human being is still present, regardless whether it was made on a whim of extreme emotion or after careful premeditation—an intentional murder is simply more culpable. Another form of first degree manslaughter is when an offender intends to inflict serious physical injury on a person, but

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[166] *Suarez*, 6 N.Y.3d at 207, 844 N.E.2d at 725, 811 N.Y.S.2d at 271.

[167] For sake of brevity the discussion of second degree murder will be limited to intentional murder.

[168] N.Y. PENAL LAW §§ 15.05(1), 125.25(1) (McKinney 2008).

[169] *See, e.g.*, People v. Gehy, 238 A.D.2d 354, 354, 656 N.Y.S.2d 58, 59 (2d Dep't 1997) (defendant shot victim five times in the head after ordering him to his knees).

[170] *See, e.g.*, People v. Williams, 275 A.D.2d 967, 967, 713 N.Y.S.2d 422, 422 (4th Dep't 2000) (defendant stabbed victim six times while he knelt and begged for his life).

[171] *See, e.g.*, People v. Vukel, 263 A.D.2d 416, 416, 695 N.Y.S.2d 73, 73 (1st Dep't 1999) (defendant struck victim repeatedly in the head and body with a baseball bat).

[172] N.Y. PENAL LAW § 125.25(1)(a).

[173] *See supra* note 34 and accompanying text.

ends up accidentally killing the person.[174] This too is more culpable than a DWI homicide. This offender may not intend to kill, but does intend to "create[] a substantial risk of death, . . . serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ."[175] While acting to cause such injury, the person over-inflicts to the extent that he or she causes the victim to die. The person intends to seriously injure, but accidentally kills. A DWI offender intends neither injury nor death. While neither are intentional killings, the former involves a malicious intentional act while the latter does not. The former is more culpable.

The crime of aggravated vehicular manslaughter was recently created to address a specific type of egregious DWI homicide. Although it is a grade B felony like first degree manslaughter, first degree manslaughter is a violent crime that is governed by stricter sentencing guidelines.[176] It can be inferred that this is due to the greater culpability involved, which is in line with our analysis that even the most serious DWI homicide is not as culpable as first degree manslaughter.

C. *Category 2—DWI Offenses That Rise to the Level of Depraved Indifference Murder*

Are murder convictions ever just in the context of a DWI homicide? If so, when?

The first question must be answered in the affirmative. A drunk driver is capable of evincing the mental state of "a depraved indifference to human life." However, given the recent changes in the New York vehicular homicide statutes and the Court of Appeals' decision in *Feingold*, a charge of depraved indifference murder in a DWI homicide should be extremely rare. The court in *People v. Peryea*[177] stated:

> The fact that an individual is driving a vehicle while in an intoxicated condition and, as a result, causes the death of another, cannot, standing alone, sustain an indictment for depraved indifference murder . . . . Something more, some aggravating circumstance or circumstances, is needed to raise

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[174] N.Y. PENAL LAW § 125.20(1).

[175] *Id.* § 10.00(10).

[176] *See infra* app. A.

[177] No. 33-I-2006, 2006 WL 3913700 (N.Y. County Ct. Aug. 1, 2006).

> the level of seriousness, first to the crime of manslaughter in the second degree and then to the crime of murder in the second degree.[178]

With the current homicide scheme in place, this analysis can be expanded to include aggravated vehicular homicide. Some aggravating circumstances are needed to raise the level of seriousness first to the crime of second degree manslaughter or first degree vehicular manslaughter, then to aggravated vehicular homicide, then to murder in the second degree.[179]

In order for a charge of murder to succeed, the defendant must engage in conduct from which a depraved mens rea may be inferred. This conduct cannot be an act of bad driving, poor judgment, or slow reaction time that accompanies nearly every DWI fatality.[180] It must be purposeful, wanton, immoral conduct—conduct akin to placing a time bomb in a public place or shooting a gun in a crowded bar—conduct that is as culpable as intentional murder.

> [T]he murder prescription requires more than recklessly causing death which could happen, for example, from gross carelessness in motor vehicle operation.
>
> The murder definition requires conduct with "depraved indifference" to "human life" . . . . This is conduct of graver culpability, and it is the kind 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.[181]

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[178] *Id.* at *2.

[179] *See infra* Part IV.B. *Peryea*, decided before *Feingold*, stated that two such aggravating factors could be the "level of intoxication and the speed of the vehicle." *Peryea*, 2006 WL 3913700, at *2. Now that depraved indifference is a mental state under *Feingold*, these factors would no longer be enough. *See supra* notes 124–125 and accompanying text. These factors may elevate the crime to one of the higher vehicular homicide offenses or reckless manslaughter, *see infra* Part IV, but they do not evince the depraved indifference to human life required by *Feingold*.

[180] *See* Andrew Strickler, *Jury Decision Seen as Vulnerable*, NEWSDAY (Melville, N.Y.), Oct. 18, 2006, at A6 (quoting a New York defense attorney saying that in order to constitute murder, there must be facts which distinguish a case from the "hundreds of other DUI fatalities").

[181] People v. Poplis, 30 N.Y.2d 85, 88, 281 N.E.2d 167, 168, 330 N.Y.S.2d 365, 366 (1972). This language is significant because this case was decided before the Court of Appeals switched to the objective risk formulation of *Register*. This statement rings even truer under the now completely subjective formulation of *Feingold*.

Examples of such conduct could consist of intentionally driving over a crowded sidewalk, through a large crowd of people, into an occupied building, or at other cars.[182] Even in the presence of such conduct, the burden would be on the prosecution to prove beyond a reasonable doubt that an offender engaged in such conduct purposefully—not accidentally. If any of these acts were done accidentally as a result of intoxication, the "willingness to act"[183] or wantonness required for a charge of murder would not be present. If a jury determined that the defendant's conduct was purposeful or deliberate, they would then have to determine whether the defendant engaged in such conduct as the result of a depraved state of mind. If the defendant was rendered unable to accurately assess the risk associated with his conduct by reason of his intoxication or failed to make any assessment of risk at all, the mens rea would not be met. The decision in *Feingold* is a perfect example of this.

Thus, the analysis is threefold. First, was the conduct severe enough—above and beyond ordinary recklessness—to evince a depraved state of mind?[184] Second, was the conduct deliberate and purposeful? Third, was the defendant cognizant of the grave risk associated with the conduct and indifferent to it? If these three questions are not answered in the affirmative, a charge of murder cannot stand. Part III.D will apply this analysis to the case of Martin Heidgen—one of the most recent and controversial DWI murder cases to appear in the New York courts.

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[182] *See, e.g.*, People v. Gomez, 65 N.Y.2d 9, 10–11, 478 N.E.2d 759, 760–61, 489 N.Y.S.2d 156, 157–58 (1985) (non-DWI case where automobile sped down crowded sidewalk hitting numerous pedestrians); People v. Jernatowski, 238 N.Y. 188, 190, 144 N.E. 497, 497 (1924) (firing several shots into what defendant knew was an occupied house); People v. Lazartes, 23 A.D.3d 400, 404, 805 N.Y.S.2d 558, 562 (2d Dep't 2005) (detailing the facts of the *Esposito* case); People v. Esposito, 216 A.D.2d 317, 318, 627 N.Y.S.2d 739, 740 (2d Dep't 1995) (defendant who had been drinking engaged in a game of "cat and mouse" whereby he chased the decedent's car at a high rate of speed, ignored numerous traffic control devices, engaged in repeated bumping, attempted to force the vehicle off the road, and ultimately caused the decedent to strike a tree and die); People v. Kirkpatrick, 177 A.D.2d 508, 509, 575 N.Y.S.2d 718, 718 (2d Dep't 1991) (intoxicated defendant played chicken with cars in opposite lane); People v. S. E-W., 13 Misc. 3d 1050, 1051–52, 827 N.Y.S.2d 557, 558 (Sup. Ct. Nassau County 2006) (defendant who had been drinking drove his automobile at a crowd of bystanders at high speed striking four people).

[183] People v. Feingold, 7 N.Y.3d 288, 296, 852 N.E.2d 1163, 1168, 819 N.Y.S.2d 691, 697 (2006).

[184] *See supra* note 182 and accompanying text.

D. Martin Heidgen

1. The Facts

On July 1, 2005, twenty-four-year-old Martin Heidgen met a friend for drinks after work at the "House of Brews" bar in Manhattan's theatre district.[185] Heidgen left the bar and went home to Long Island where he proceeded to drink scotch.[186] He later attended a party in Merrick where he commiserated with friends and participated in drinking games.[187] At sometime around two o'clock in the morning on July 2, he left the party, got in his 1999 Chevy Silverado pickup, and began to drive home.[188] During the trip, he ended up traveling north on the southbound side of the Meadowbrook Parkway, heading in the wrong direction towards oncoming traffic. It is unclear how far he traveled on the parkway—probably somewhere between an eighth of a mile and three miles.[189] During this time, Heidgen passed at least two cars that were forced to pull to the side of the road, nearly hitting one.[190] Shortly after passing these cars, traveling at a speed of approximately forty-five miles per hour, Heidgen collided head-on with a limousine that was traveling approximately sixty miles per hour.[191]

There were six people in the limo, which was on its way back from a wedding in Bayville.[192] The collision resulted in the death of fifty-nine-year-old driver Stanley Rabinowitz, of Farmingdale, and the decapitation and death of seven-year-old Katie Flynn, of

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[185] Ann Givens, *'Self-Destruct Mode,'* NEWSDAY (Melville, N.Y.), Sept. 20, 2006, at A4 [hereinafter *Self-Destruct Mode*].

[186] *Id.*

[187] *See* Ann Givens, *Wrong-Way DWI Called Death Wish*, NEWSDAY (Melville, N.Y.), Sept. 10, 2005, at A2 [hereinafter *Death Wish*].

[188] *Id.*; *see also* Robert T. Hayden, Affirmation of Indictment 1910N-05, Jan. 31, 2006 [hereinafter Affirmation].

[189] The defense stated that Heidgen was on the road for "about an eighth of a mile." Ann Givens, *Witnesses Tell of Speeding Pickup*, NEWSDAY (Melville, N.Y.), Sept. 22, 2006, at A18 [hereinafter *Witnesses*]. Witnesses for the prosecution indicated that it was about three miles. *Id.* In response to the defense's demand for a bill of particulars, the prosecution stated that Heidgen drove for "well over a mile." Affirmation, *supra* note 188.

[190] *Death Wish*, *supra* note 187; *Witnesses*, *supra* note 189.

[191] Affirmation, *supra* note 188, at 6. The speeds of both vehicles were estimated using footage from the limo's dash camera and various time-distance and momentum formulas. *Id.*

[192] *Self-Destruct Mode*, *supra* note 185.

Long Beach.[193] Katie's father, Neil Flynn, and her grandparents, Chris and Denise Tagney, were seriously injured in the accident. Katie's mother, Jennifer Flynn, sustained less severe injuries.[194] When officers arrived on the scene, they found a hysterical Jennifer Flynn sitting against the median of the parkway, holding her daughter's head in her arms.[195]

Shortly after the accident, Heidgen's blood alcohol content (BAC) was measured at .28%—more than three times the legal limit of .08%.[196] Nassau County prosecutors charged Heidgen with—among other things[197]—two counts of depraved indifference murder (second degree murder).[198] The prosecution alleged that Heidgen "was on a suicide mission" the night of the crash and was driving on the wrong side of the parkway on purpose, in an effort to end his own life.[199] The most significant piece of evidence supporting this theory was an alleged statement made by Heidgen at the hospital to a police officer ten hours after the crash in which he described himself as being in "self-destruct mode."[200] Based on this conversation, the prosecution also proffered testimony from the officer that Heidgen had gotten into an argument with his ex-girlfriend on the phone that evening, that he was having financial problems, and that his mother's remarriage was adding stress to his life.[201] Prosecutors further argued that even if he was unaware of the fact that he was on the wrong side of the road, Heidgen's decision

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[193] *Death Wish*, *supra* note 187.

[194] Affirmation, *supra* note 188, at 1–2.

[195] Ann Givens, *After Fight, Deadly Drive*, NEWSDAY (Melville, N.Y.), Apr. 4, 2006, at A18 [hereinafter *Deadly Drive*].

[196] Michael Frazier, *State Police To Probe Blood Mishandling*, NEWSDAY (Melville, N.Y.), Sept. 21, 2006; Ann Givens, *Lawyer Wants Alcohol Test Out*, NEWSDAY (Melville, N.Y.), Apr. 6, 2006, at A36 [hereinafter *Alcohol Test*]. This BAC reading indicates that Heidgen had approximately fourteen drinks in his system at the time of the crash. Ann Givens, *DNA Testimony Allowed*, NEWSDAY (Melville, N.Y.), Sept. 27, 2006, at A16.

[197] Heidgen was indicted on two counts of depraved indifference murder, three counts of assault in the first degree, two counts of reckless endangerment in the first degree, and two counts of operating a motor vehicle under the influence of alcohol. Nassau County Supreme Court Grand Jury Indictment, Ind. No. 1910N/05, Aug. 31, 2005.

[198] It is important to note that Heidgen's trial began two months after the Court of Appeals' decision in *Feingold*.

[199] *Deadly Drive*, *supra* note 195; *Death Wish*, *supra* note 187.

[200] *Self-Destruct Mode*, *supra* note 185.

[201] *Id.*

to drink to the extreme and then drive established the depravity required for a charge of murder.[202]

The defense countered that Heidgen was in fact happy and in good spirits the night of the crash, but as a result of his intoxication was unable to realize he was on the wrong side of the road until it was too late.[203] Phone records were presented which indicated that there had been no phone conversation with an ex-girlfriend.[204] With regard to his other alleged troubles, the defense stated that Heidgen was in good shape financially as he had just inherited $20,000, and that he had encouraged his mother's marriage.[205] The defense provided testimony from family and friends indicating that Heidgen had "never been depressed in his life" and was in a "great mood" before leaving the party a half hour before the crash.[206] The defense conceded that his actions were criminal[207] but characterized them as "a tragic, unfortunate accident with a 24-year-old trying to get home."[208] In reference to Heidgen, his attorney stated: "[T]his child is not a murderer to be held to the same standard and punishment as someone who intentionally kills another in cold blood . . . ."[209]

The proceedings were as fraught with controversy as they were with emotion.[210] Ultimately, Heidgen was found guilty on

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[202] Warren Diepraam, Eric Kugler & Marcia Cunningham, *Serious Facts Require Serious Charges: Evolving Methods To Prosecute DWI Offenders Who Kill*, 41 PROSECUTOR 34, 35–36 (Apr. 2007).

[203] *See* Ann Givens, *Their Final Seconds on Tape*, NEWSDAY (Melville, N.Y.), Oct. 4, 2006, at A6 [hereinafter *Final Seconds*]; *Death Wish*, *supra* note 187.

[204] *See Self-Destruct Mode*, *supra* note 185.

[205] *Final Seconds*, *supra* note 203.

[206] *Self-Destruct Mode*, *supra* note 185; *Death Wish*, *supra* note 187.

[207] *See* Ann Givens, *Deadly Crash, but Was It Murder?*, NEWSDAY (Melville, N.Y.), Sept. 3, 2006, at A9 [hereinafter *Deadly Crash*]; *see also Final Seconds*, *supra* note 203.

[208] *Death Wish*, *supra* note 187.

[209] *Deadly Crash*, *supra* note 207.

[210] There were many controversial issues that arose during trial and deliberations, such as the mid-trial admission of certain DNA evidence, mishandling of evidence by police, sabotage attempts of a DNA test by the defendant, the decision to allow the jurors to see the mangled remains of the vehicles outside the courtroom, the decision to sequester the jury in the middle of deliberations, and alleged juror misconduct of sharing inadmissible information. *See Alcohol Test*, *supra* note 196; Ann Givens, *Evidence Bungled?*, NEWSDAY (Melville, N.Y.), Sept. 14, 2006, at A5; Ann Givens, *Jury Was Tainted: Lawyer*, NEWSDAY (Melville, N.Y.), Dec. 1, 2006, at A2; William Murphy & Stacey Altherr, *Limo Crash Trial Judge Sequesters Jury; The*

two counts of murder, three counts of first-degree assault, and two counts of driving while intoxicated, and was acquitted on two counts of reckless endangerment relating to the vehicles he passed while on the parkway.[211] Nearly twenty months after the accident, Heidgen received a sentence of eighteen years to life.[212]

2. Analysis

Heidgen's conviction is currently being appealed in the Appellate Division, Second Department,[213] and issues such as how *Feingold* applies to intoxication and when depraved indifference murder is appropriate in the context of DWI homicides will be ripe for discussion. The purpose of this section will be to analyze the facts of this case and determine—in light of the analysis set forth in Parts III.A, B, and C—whether this conviction was justified.

If Heidgen was so intoxicated that he did not realize he was on the wrong side of the parkway, a murder conviction cannot stand.[214] If Heidgen purposefully and deliberately drove his truck towards oncoming traffic, a murder conviction is possible. Driving a car towards oncoming traffic on a parkway is conduct which carries with it a grave risk of death and is capable of evincing a depraved state of mind. Even if the jury found this conduct to be intentional, a murder conviction does not automatically follow. It must then be established, beyond a reasonable doubt, that Heidgen's extremely high level of

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Move to Sequester: Is Judge Coercing Jury?, NEWSDAY (Melville, N.Y.), Oct. 17, 2006 at A5; *Vulnerable*, *supra* note 180.

[211] Press Release, Nassau County Dist. Attorney, Heidgen Convicted of Murder (Oct. 17, 2006), *available at* http://www.nassaucountyny.gov/agencies/da/newsreleases/2006/10-17-06.html [hereinafter Heidgen Convicted].

[212] Denise M. Bonilla, *The Limo Sentence*, NEWSDAY (Melville, N.Y.), Mar. 1, 2007, at A5 [hereinafter *Limo Sentence*]; Press Release, Nassau County Dist. Attorney, Heidgen Sentenced 18–Life (Feb. 28, 2007), *available at* http://www.nassaucountyny.gov/agencies/da/newsreleases/2007/02-28-07.html.

[213] Interview with Jillian Harrington, Heidgen's Attorney on Appeal (Nov. 14, 2007) (on file with author). Ms. Harrington is a defense attorney in Manhattan, who also drafted the defendant's brief in *Feingold* and argued the case before the Court of Appeals of New York.

[214] *See supra* Part III.B.2.b; *see also Deadly Crash*, *supra* note 207 ("They're going to have to establish that there was a reason he was going the wrong way up the Meadowbrook Parkway other than the fact that he was so drunk, he didn't know he was going the wrong way . . . ." (quoting New York defense attorney Stephen Scaring)).

intoxication did not prevent him from assessing and recognizing the risk involved. He must have been aware of the danger of his conduct, aware of a high likelihood of death, and indifferent to it.

The facts of the case are like that of many DWI homicides—police arrive on the scene only to find a terrible accident, fatally injured victims, and a highly intoxicated offender. Under *Feingold*, how are we to determine the offender's state of mind? Circumstantial evidence often only establishes that one party was drinking, that he engaged in poor or reckless driving, and that an accident occurred. Beyond intoxication, this evidence does not take us into the offender's mind.

As discussed in more detail in Part IV, when there is proof of intoxication, recent changes to New York's vehicular homicide statutes create a presumption that intoxication is the cause of the accident, and thus the death.[215] If the prosecution wishes to charge an offender with murder, however, the burden is on the prosecution to produce evidence and to prove beyond a reasonable doubt the mens rea of depraved indifference to human life. In Heidgen's case, there were facts presented by both sides that if true, could support either argument. Ultimately, the case boiled down to a question of fact for the jury, and Heidgen was convicted of second degree murder.[216]

3. The Problem

Heidgen's conviction indicates that the factfinder believed the prosecution and found there to be no reasonable doubt that Heidgen drove on the wrong side of the parkway intentionally, that he had full awareness of the risk and danger involved, and that he was indifferent as to whether or not someone was killed. In a case as publicized and emotionally charged as Hiedgen's, however, such an objective and candid review of the facts does not always occur. For families of victims, unmitigated contempt for the defendant and the agony of a lost loved one make anything but a murder conviction and a maximum sentence inadequate.[217] In the wake of such a horrific tragedy, these

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[215] This presumption applies to second degree vehicular manslaughter, first degree vehicular manslaughter and aggravated vehicular homicide. *See infra* Part IV.A.

[216] Heidgen Convicted, *supra* note 211.

[217] *Alcohol Test*, *supra* note 196 (quoting Neil Flynn—Katie Flynn's Father—calling Heidgen a "filthy child murderer," and a "gutless coward"); *see also Limo*

scornful sentiments can extend to the media, the general public, and dangerously, to jurors and prosecutors. Much of the success in the prosecution of drunk driving fatalities can be attributed to the "horrible facts" which typically accompany such cases.[218] Innocent victims, gruesome crashes, and the sudden, unexpected way in which these things happen are all part of the formula. The result is a general public readiness to throw the book and the dangerous possibility that a defendant's rights will "get lost amid the emotional weight of a terrible crash."[219]

"[I]n the courtroom, murder is defined by more than just a gruesome scene or a mother's agony."[220] The Court of Appeals has stated that depraved indifference murder "applies only to a small, and finite, category of cases."[221] In DWI homicides, as with any other homicide, these rare cases must be promptly distinguished from "the overwhelming majority of homicides"[222] that cannot support a charge of depraved indifference murder.[223] Prosecutors make first contact with these cases and bear the responsibility of deciding "whether there is a valid reason . . . to charge the defendant with murder rather than indicting him under the usual intoxication manslaughter statutory scheme."[224] Under a district attorney ("DA") like Kathleen Rice—the Nassau County DA who was elected on an anti-drunk driving platform—such a prudent review of the facts may not occur.[225] After the Heidgen verdict, Rice stated: "If you get drunk and kill someone, that's murder and you will be held accountable . . . ."[226] Such a

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Sentence, *supra* note 212 (quoting Neil Flynn expressing contempt for the entire criminal justice system and calling the judge "a gutless coward" for not imposing a maximum sentence); Ann Givens, *No Verdict, No Going Home*, NEWSDAY (Melville, N.Y.), Oct. 17, 2006, at A5 ("Anything less than a murder conviction would be an offense to my daughter's memory . . . ." (quoting Neil Flynn)); *cf. Limo Sentence*, *supra* note 212 (quoting Heidgen's father calling the sentence a "lynching").

[218] Ann Givens, *Legacy of the Heidgen Case*, NEWSDAY (Melville, N.Y.), Oct. 22, 2006, at A24.

[219] *Id.*

[220] *Deadly Crash*, *supra* note 207.

[221] People v. Suarez, 6 N.Y.3d 202, 207, 844 N.E.2d 721, 725, 811 N.Y.S.2d 267, 271 (2005).

[222] People v. Payne, 3 N.Y.3d 266, 270, 819 N.E.2d 634, 635, 786 N.Y.S.2d 116, 117 (2004).

[223] *See supra* note 180 and accompanying text.

[224] Diepraam, Kugler & Cunningham, *supra* note 202, at 36.

[225] *See Fatal Limo*, *supra* note 207; Paul Vitello, *Alcohol, a Car and a Fatality. Is It Murder?*, N.Y. TIMES, Oct. 22, 2006, § 4, at 1.

[226] Ann Givens, *Jury Speaks: It's Murder*, NEWSDAY (Melville, N.Y.), Oct. 18, 2006, at A3; *see also* Vitello, *supra* note 225 (" 'We hope that this verdict sends a

blanket statement of law is not only legally incorrect, but makes it seem as though prosecutors are prepared to charge murder in DWI homicides with little or no consideration of whether the defendant was actually depraved. The possibility of scoring a big conviction and strengthening a hard-on-drunk driving image may make the temptation to do so "legally and strategically irresistible."[227] If this is the case, one step forward for drunk driving will come at the cost of two steps backward in proportionate punishment.

If a murder charge is brought in a case where it is not warranted, it is the responsibility of the jury to find the defendant innocent of murder and convict him of the appropriate crime. This is precisely its purpose. In the emotionally charged environment of a DWI fatality, however, this purpose may not be realized. This can be due to a simple misunderstanding of the law[228] or a more conscious reverse form of jury nullification.[229] In Heidgen's case, the jury's job was to look at the facts and determine Heidgen's state of mind. Nevertheless, one juror explained that during deliberations, "[t]here was so much emphasis being put on the little girl and how tragic it was."[230] The facts of the case were horrific: Police officers testified how Jennifer Flynn held her daughter's head in her arms moments after the accident,[231] jurors saw the chilling crash video taken from the dashboard camera of the limo three times during

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message that if you drink and drive and kill somebody[,] you will be prosecuted for murder,' [Rice] said.").

[227] People v. Roe, 74 N.Y.2d 20, 35, 542 N.E.2d 610, 619, 544 N.Y.S.2d 297, 306 (Bellacosa, J., dissenting) (1989).

[228] The court in *Suarez* cited juror confusion as one of the reasons why, in twin-count indictments, "juries . . . convict [a charge of murder] even though the evidence did not support it." People v. Suarez, 6 N.Y.3d 202, 207, 844 N.E.2d 721, 725, 811 N.Y.S.2d 267, 271 (2005).

[229] Typically, jury nullification refers to an acquittal by a jury despite the fact that the elements of an offense have been proven beyond a reasonable doubt. The jurors feel compassion for the accused, ignore the law and judge's instructions, and consciously acquit despite the fact that legally, a conviction is proper. JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 18 (4th ed. 2007). In cases of DWI homicide, the sentiment is very much the opposite—jurors feel compassion for the victims, contempt for the offender, and may convict a defendant of murder when the facts only support a lesser crime. *See infra* note 234 and accompanying text.

[230] Zachary R. Dowdy & Jennifer Smith, *How 12 Angry People Decided*, NEWSDAY (Melville, N.Y.), Oct. 18, 2006, at A2.

[231] *Deadly Drive*, *supra* note 195.

trial,[232] and jurors were taken into the parking lot of the courthouse to look at the mangled remains of both vehicles involved. Given the extreme nature of the case and of the testimony, it is likely that emotion played a large part in the jury's decision. Whether these emotions convicted a reckless man of murder or were simply an added element in a case of true depravity is unknown, and will surely be a topic of discussion on appeal.

Even if a conviction is unjustified—brought by zealous prosecutors and convicted by confused or angry jurors—it is unlikely to elicit any backlash from the general public. The majority of citizens have virtually no conception of what depraved indifference murder is[233] and, as one would expect, there is little public concern about defending the rights of drunk drivers—especially those who cause a death. "[P]eople instinctively want to see the drunken driver charged with murder . . . . There's such public outrage, the public just wants to fry the person . . . . But that doesn't always mean that it was murder."[234]

4. The Solution

In those cases where prosecutors, jurors, and the general public consult their passions and personal beliefs over the law, the courts themselves are the last hope and most important line of defense against an unjust murder conviction. It is the duty of the court to ensure that a charge of depraved indifference murder only goes to a jury in those cases where there is sufficient evidence supporting it. To allow DWI homicides to go to jury on

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[232] The video was presented at trial once before the prosecution rested, *Final Seconds*, *supra* note 203, and twice during closing statements. Ann Givens, *But Is It Murder?*, NEWSDAY (Melville, N.Y.), Oct. 11, 2006, at A05. The video is online at http://www.newsday.com/news/local/longisland/ny-limovideo-main,0,5874567.html story?coll=ny-top-headlines.

[233] A simple Internet search and perusal of various blogs discussing the Heidgen case reveal bloggers and commenters attempting to discuss theoretical issues and use legal terms with very little understanding of the various offenses or the relationship between them. This point is important because juries are simply a cross-section of the general public. Although they are instructed on the law, it would be credulous to believe that twelve people can understand the doctrine of depraved murder and apply it in a vacuum after receiving one jury charge when for the last 150 years, judges, attorneys, and others well-versed in the law have struggled to do so.

[234] *Deadly Crash*, *supra* note 207 (internal quotation marks omitted).

flimsy evidence or highly speculative theories puts defendants at the mercy of a jury's affections in the aftermath of a horrible tragedy. In *Heidgen*, there was a question of fact as to whether Heidgen was merely drunk or both drunk and suicidal. There appeared to be, however, little evidence that he was in fact suicidal. Made from a hospital bed only hours after a terrible car accident, the phrase "self-destruct mode" could have meant a number of things. The prosecution paired this statement with some possible sources of unhappiness in Hiedgen's life and ran with a theory of suicide. Jillian Harrington, Heidgen's attorney on appeal, stated that while "there may be a factual scenario where [a murder charge in a DWI homicide] would be appropriate, [Heidgen's case] certainly does not present that type of factual scenario . . . . Simply stated, you need something more to establish depraved indifference to human life and that something more just is not present here."[235]

In light of all the evidence, judges must determine whether an actual question of fact exists, or whether prosecutors create questions in an otherwise straightforward case of drinking and driving. The *Feingold* standard is a stringent one. There is no such thing as constructive depravity. The analysis is wholly subjective. The mental state is actual. If the prosecution cannot meet this high burden, the defendant does not get off scot-free; he is still charged with a felony and may still serve as many as twenty-five years in prison. To charge a man with the highest grade felony that exists in our penal system and hold him as accountable as an intentional murderer *should* carry a high burden. If the evidence is not strong enough to indicate that a legitimate question of fact exists, it is the duty of the court to preclude a murder charge from being brought in order to protect defendants from unjust and disproportionate convictions.

IV. HOW TO DEAL WITH DWI HOMICIDES IN NEW YORK

With 11,146,368 licensed drivers[236] and 10,551,341 registered vehicles,[237] New York is fourth among states in terms of number

[235] Interview with Jillian Harrington, Heidgen's Attorney on Appeal (Nov. 14, 2007) (on file with author).

[236] New York State Department of Motor Vehicles, NYS DMV—Statistics—NYS Driver Licenses on File—2006, http://www.nydmv.state.ny.us/Statistics/statli06.htm (last visited Sept. 21, 2008).

of drivers.[238] According to the National Highway Traffic Safety Administration, in 2006—the most recent available data—there were 1,454 traffic fatalities in New York, 483 (33 percent) of which involved drivers who had consumed alcohol.[239] New York was the first state in the United States to adopt laws specifically addressing the issue of drunk driving[240] and continues to legislate in an effort to combat it. In 1981, the state adopted a series of very successful STOP-DWI[241] reforms increasing punishment for DWI offenders, allowing counties to create their own unique programs for highway and alcohol safety, and at the same time, raising revenue and saving tax dollars. In 2002, New York abandoned its .10% BAC standard, and adopted the stricter federal standard of .08% BAC as the per se illegal level for intoxication.[242] The most significant changes in New York law pertaining to DWI *homicides* have occurred over the last three years. These changes vastly improve the way in which DWI homicides are categorized and punished and have implications for the use of depraved indifference murder in these types of cases.

A. *Statutory Changes: 2005–2007*

On October 22, 2004, Vasean Alleyne, 11, and Angel Reyes, 12, were crossing the street not far from their homes in Queens,

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[237] New York State Department of Motor Vehicles, NYS DMV—Statistics—Vehicle Registrations in Force—2006, http://www.nydmv.state.ny.us/Statistics/regin06.htm (last visited Sept. 21, 2008).

[238] Federal Highway Administration, United States Department of Transportation, Driver Licensing—Highway Statistics—2005, http://www.fhwa.dot.gov/policy/ohim/hs05/pdf/dl22.pdf (last visited July 29, 2008). New York is exceeded only by California, Texas, and Florida. *Id.*

[239] NHTSA'S NAT'L CTR. FOR STATISTICS & ANALYSIS, TRAFFIC SAFETY FACTS 2006 DATA: ALCOHOL-IMPAIRED DRIVING, *available at* http://www-nrd.nhtsa.dot.gov/Pubs/810801.pdf (including all drivers with a BAC greater than .01g). *But see* getMADD.com, http://www.getmadd.com/ (last visited Sept. 9, 2008) (questioning the accuracy of these statistics).

[240] America's Directory of Qualified DUI Attorneys, *History of California DUI Laws*, http://www.dui.com/dui-library/california/related/dui-legislation (last visited Sept. 21, 2008).

[241] *See supra* note 112; *see also* N.Y. Bill Jacket, 2006 S.B. 8232, ch. 732 ("Between 1980/1981, the last time comprehensive reform was enacted, and 1996, the likelihood of being involved in a crash with a drunk driver was reduced by 69%[.]").

[242] *See* Act of Dec. 23, 2002, Assembly Bill No. 8429, 2002 N.Y. Consol. Laws Adv. Legis. Serv. ch. 3, at 2 (LexisNexis).

New York.[243] The two stepped out from between two parked cars when John Wirta, 56, who was driving with a .13% BAC, struck them with his van. Vasean died as a result of the accident and Angel survived after a week-long coma.[244] At that time, it was well-settled in New York that "[p]roof of intoxication alone [was] not enough to sustain a conviction of criminal negligence."[245] The burden was on the prosecution to establish that "the defendant's intoxication affected his physical and mental capacity to the extent that it caused him to operate his vehicle in a culpably reckless manner."[246] After a four-month investigation, there appeared to be no evidence that Wirta had broken any traffic laws or engaged in any kind of reckless driving. Because criminal negligence was an element of vehicular manslaughter, Wirta could be charged only with the misdemeanor DWI. He served thirty-eight days of a sixty-day sentence, received a $1,000 fine, and had his license suspended for six months.[247]

As the result of lobbying by Vasean's mother and recognition by the state legislature that cases like this present a problem, Vasean's Law was passed.[248] This bill rewrote vehicular homicide in New York and set the stage for a series of statutory changes that would have a significant effect on the prosecution of DWI homicides.[249] Effective June 8, 2005, Vasean's Law removed the

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[243] Corey Kilgannon, *Driver Avoids a Felony Charge in Boy's Death*, N.Y. TIMES, Mar. 12, 2005, at B3.

[244] *Id.*

[245] People v. Bast, 19 N.Y.2d 813, 815, 227 N.E.2d 47, 47, 280 N.Y.S.2d 149, 150 (1967). This became known as the "rule of two," because it required something in addition to DWI alone. *See* Press Release, N.Y.S. Senate, Senate Passes "Vasean's Law" (May 4, 2005), http://www.senate.state.ny.us/pressreleases.nsf/a9c64cb05dda7e7e85256aff006d42c0/20152ec1b2a50e5685256ff7005c1a40?OpenDocument.

[246] *Bast*, 19 N.Y.2d at 815, 227 N.E.2d at 47, 280 N.Y.S.2d at 150; *see also* People v. Phippen, 232 A.D.2d 790, 791, 649 N.Y.S.2d 191, 192 (3d Dep't 1996) (calling causation "an essential element which the People must prove beyond a reasonable doubt" and noting that a mere "probable connection" between intoxication and death requires an acquittal (quoting People v. Stewart, 40 N.Y.2d 692, 697, 358 N.E.2d 487, 491, 389 N.Y.S.2d 804, 807 (1976))).

[247] Scott Shifrel, *Vasean's Killer to Get License*, N.Y. DAILY NEWS, Mar. 11, 2006, at 21; Statement by Queens District Attorney Richard A. Brown, June 23, 2005, *available at* http://queensda.org/ (follow "Press Releases" hyperlink to June 23, 2005).

[248] N.Y. Bill Jacket, 2005 A.B. 6285, ch. 39 (2005).

[249] Historical and Statutory Notes to N.Y. PENAL LAW § 125.12–125.13 (McKinney 2008); Press Release, N.Y. State Senate, *Senate Passes "Vasean's Law,"*

element of criminal negligence from first degree vehicular manslaughter[250] and second degree vehicular manslaughter,[251] and created a rebuttable presumption of causation between intoxication and death:

> If it is established that the person operating such motor vehicle . . . caused such death while unlawfully intoxicated or impaired by the use of alcohol or a drug, then there shall be a rebuttable presumption that, as a result of such intoxication or impairment . . . such person operated the motor vehicle . . . in a manner that caused such death . . . .[252]

If a person has a BAC of .08% or more—is per se intoxicated—and causes the death of another person while driving, there is a rebuttable presumption that the person's intoxication was the cause of the death. This presumption removes any form of mens rea from the vehicular manslaughter statutes and requires prosecutors to prove only (1) that the defendant was intoxicated, and (2) that a death occurred.

While this lowered the standard of proof, it did not remove the requirement of causation. In those cases where intoxication and death occur coincidentally, the offense is not satisfied.[253] The best example of this is drunk driver *A* who is stopped at a red light and is hit from behind by driver *B*. If *B* dies, it cannot be said that *A*'s intoxication was the cause of his death. Similarly, in a case like Vasean's, if a jury found that even a sober driver would have been unable to avoid the children and that the driver's intoxication was not the reason for the accident, the presumption should not be applied. The rebuttable nature of the presumption allows defendants to present evidence establishing that the causal link between intoxication and death was not present. Nevertheless, the presumption is permissive and so a jury is free to apply it or not apply it as it deems appropriate, regardless of whether the defendant presents any evidence.[254]

(May 4, 2005), http://www.senate.state.ny.us/pressreleases.nsf/a9c64cb05dda7e7e85256aff006d42c0/20152ec1b2a50e5685256ff7005c1a40?OpenDocument.

[250] N.Y. PENAL LAW § 125.13(5).

[251] *Id.* § 125.12(3).

[252] *Id.*; *Id.* § 125.13(5).

[253] The offense requires that the death of the victim occur "as a result of . . . intoxication or impairment." *Id.* § 125.12(1).

[254] People v. Baker, 14 Misc. 3d 629, 631, 826 N.Y.S.2d 550, 552 (Essex County Ct. 2006), *aff'd*, 51 A.D.3d 1047, 856 N.Y.S.2d 707 (3d Dep't 2008). The jury instructions for vehicular manslaughter clearly state that the members of the jury

In 2006, the legislature continued its quest to "minimiz[e] the carnage" of drunk driving in New York and respond to a resurgence of DWI fatalities by enacting another comprehensive reform of the state's drunk driving laws.[255] Among the changes was the addition of four new aggravating factors to the crime of vehicular manslaughter in the first degree.[256] Before this enactment, the grade D felony of second degree vehicular manslaughter was elevated to first degree vehicular manslaughter only when the offender's driver's license had been revoked or suspended as a result of a prior DWI conviction or a refusal to submit to a chemical test.[257] The 2006 changes added four more aggravating factors including: (1) a BAC of 0.18% or more, (2) a previous DWI conviction in the last ten years, (3) causing the death of more than one person, and (4) a previous vehicular manslaughter or vehicular assault conviction.[258] These changes made it easier for a charge of second degree vehicular manslaughter to be elevated to the more culpable and more seriously punished grade C felony of first degree vehicular manslaughter.

In 2007, yet another bill was passed continuing the trend of decreased tolerance, increased deterrence, and harsher punishment for drunk drivers in New York. The effect of this legislation was to create the grade B felony of aggravated vehicular homicide,[259] an offense one grade higher than first degree vehicular manslaughter. Aggravated vehicular homicide is most easily defined as first degree vehicular manslaughter plus reckless driving.[260]

"may, but are not required to" apply the presumption. *Id.* at 631, 826 N.Y.S.2d at 552.

[255] N.Y. Bill Jacket, 2006 S.B. 8232, ch. 732 (2006) ("[B]etween 1996 and 2000, the likelihood of being involved in a crash with a drunk driver increased by 21% while arrests and convictions have dropped by over 20%. And that trend has continued unabated over the past five years.").

[256] *Id.*

[257] Historical and Statutory Notes to N.Y. PENAL LAW § 125.13.

[258] *Id.* § 125.13(1), (3)–(5).

[259] *Id.* § 125.14.

[260] *See* N.Y. VEHICLE AND TRAFFIC LAW § 1212 (McKinney 2008).

> Reckless driving shall mean driving or using any motor vehicle, motorcycle or any other vehicle propelled by any power other than muscular power or any appliance or accessory thereof in a manner which unreasonably interferes with the free and proper use of the public highway, or unreasonably endangers users of the public highway.

Id.

B. The Big Picture

The result of these changes is a comprehensive and effective scheme for the punishment and deterrence of DWI homicides. Six offenses on five different levels of culpability address an essentially infinite number of ways in which drinking and driving can result in death. For the most part, the offenses build on one another, with aggravating factors contributing an added degree of culpability, justifying higher classification and warranting greater punishment. Please refer to appendix B for a visual representation of what is explained below.

Second degree vehicular manslaughter, first degree vehicular manslaughter, and aggravated vehicular homicide all contain the presumption of Vasean's law and carry a very low standard of proof for prosecutors. These three statutes apply in cases where a death has occurred and the defendant's BAC has met the per se illegal level of .08%. In the majority of these cases, the statutes are almost self-working. The presence of a death and a .08% BAC are all that is needed for a charge of the grade D felony of second degree vehicular manslaughter. In order to rise to the grade C felony of first degree vehicular manslaughter, one of the five aggravating factors of NYPL section 125.13 must be met.[261] These factors are pure questions of fact that are either present or not and subject to little debate in court. The grade B felony of aggravated vehicular homicide requires the presence of one of these five factors or a sixth factor of causing the death of one person and the serious physical injury of another.[262] It also requires reckless driving.[263] These three offenses neatly administer three different levels of punishment for three levels of culpability in DWI fatalities.

Despite this neat and clear arrangement of vehicular offenses, prosecutors are sure to seek the grade C felony of second degree manslaughter in those cases that do not meet one of the aggravating factors of first degree vehicular manslaughter when there is evidence that the defendant was reckless. Recklessness must be proved beyond a reasonable doubt, and if the defendant truly possessed such a mens rea, a charge of second degree manslaughter would not be theoretically

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[261] *See supra* notes 257–258 and accompanying text.

[262] *See* N.Y. PENAL LAW § 125.14.

[263] *See supra* note 260 and accompanying text.

inappropriate or unjust. Nevertheless, the optimistic defense attorney would argue:

> [I]n light of the 2005, 2006 and 2007 changes to the Vehicular Manslaughter statutes, it appears that there is little reason to resort to a charge of Manslaughter 2nd in a DWI case. . . .
>
> . . . [T]he Legislature has clearly and expressly defined the situations in which it wants a vehicular homicide to be treated as a class C felony.[264]

Theoretically this makes good sense, but if a charge of second degree manslaughter is plausible and advantageous to the prosecution it is sure to be brought.

Now for the high and low ends of the spectrum. In those cases where a defendant has a BAC lower than .08%, or where the Vasean presumption has been rebutted, a charge of second degree vehicular manslaughter cannot stand. If the prosecution can establish criminal negligence, the grade E felony of criminally negligent homicide can be brought. This would bring the analysis back to the pre-Vasean "rule of two,"[265] requiring a showing of something in addition to mere intoxication in order to establish the "gross deviation from the standard of care that a reasonable person would observe."[266] On the high end, in those rare and extreme cases falling within Category 2,[267] a charge of second-degree murder may be brought.

C. Implications for Depraved Indifference Murder

The new framework for the prosecution of DWI homicides discussed in Part IV.B has significant implications in a discussion of depraved indifference murder. Aggravated vehicular homicide filled what used to be a substantial gap between the grade C felonies of first degree vehicular manslaughter or second degree manslaughter and depraved indifference murder. In cases such as Heidgen's, where the conduct is extreme and the resulting violence great, a grade C felony carrying a maximum sentence of fifteen years fails to quench the retributive thirst of a society plagued by DWI tragedy. Where the conduct is extreme, but not depraved,

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[264] PETER GERSTENZANG & ERIC H. SILLS, HANDLING THE DWI CASE IN NEW YORK § 12.16, at 226 (2007–2008 ed. 2007).

[265] *See supra* note 245 and accompanying text.

[266] N.Y. PENAL LAW § 15.05(4).

[267] *See supra* Part III.C.

aggravated vehicular homicide provides a means of distinguishing a case from the less culpable grade C felony. It builds on the lower offense by requiring the additional culpable element of reckless driving, thereby justifying greater punishment. Aggravated vehicular homicide is a clear legislative proclamation that reckless driving, with the presence of intoxication and an aggravating factor constitutes a grade B felony. In the past, this has been the recipe for a murder conviction.[268] In light of the creation of aggravated vehicular homicide and the court's decision in *Feingold*, it is fairly clear that a charge of murder now requires something more—something rarely seen in DWI homicides.

The three vehicular statutes are the ideal and most efficient way to deal with DWI homicides. They describe specific DWI conduct and establish what kind of drunk driving is to constitute a grade B, C, or D felony. There is no intoxication-mens rea debacle, and Vasean's law allows juries to appropriately infer causation in the majority of cases. The fact that these statutes are specifically engineered to handle DWI cases makes for a simple, yet precise application of law, proportionate punishment for offenders, and sends a clear message to the public regarding the legislature's view on DWI killings. The same cannot be said for depraved indifference murder. Murder prosecutions in DWI cases are a backdoor way to punish conduct that is otherwise legislated directly. If the legislature wanted punishment beyond the grade B felony of aggravated vehicular homicide, it likely would have created an offense of *vehicular murder* or an equivalent, describing those DWI offenses that should be punished as A-I felonies. Given the nature of DWI offenses and the adequacy of the current scheme in addressing them, this does not appear to be necessary.

The homicide offenses listed in appendix B and discussed in Part IV.B punish results—the death of a human being. By nature, the punishment of results is more a matter of retributive justice than of deterrence. As we have discussed, the possibility of death rarely enters the calculation of a drunk driver on a serious level, and so the deterrent effect of DWI homicide legislation is questionable. If deterrence is the goal, the conduct should be punished directly. Increased penalties for DWI itself

[268] *See supra* note 113 and accompanying text.

are likely to have a greater effect on decision-making than increased punishment for those DWIs resulting in death.[269] Whatever the future holds for depraved indifference murder and DWI legislation, the legal community must continue to adapt the law in order to achieve societal goals and apply it narrowly in the interest of proportionate punishment.

CONCLUSION

New York homicide law addresses the full spectrum of human culpability and categorizes offenses in an effort to administer punishment that is proportionate to the culpability involved. Depraved indifference murder is an offense created for those unintentional killings so heinous, so wanton, and so immoral that they should be punished as if they were intentional. Classic examples of such conduct include shooting a gun wildly in a crowded barroom or placing a time bomb in a busy public space—conduct that is not intended to kill anyone specifically, but performed with a full awareness that someone is likely to be killed. Over the years, prosecutors have brought charges of depraved indifference murder in those DWI homicides where punishment beyond vehicular manslaughter or reckless manslaughter was desired. While these cases may present horrific facts or elicit public outrage, the overwhelming majority of DWI homicides do not fit the murder prescription. This is due to the nature of the conduct, the risk involved, and the mental state of the offender. The current scheme of New York homicide offenses provides an adequate means of defining, classifying, and punishing deaths caused by drunk driving and eliminates the need to force a charge of depraved indifference murder in DWI homicides where it does not belong.

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[269] *See supra* note 241 and accompanying text.

APPENDIX A:
SUMMARY OF NEW YORK PENAL LAW ARTICLES 70 AND 125

GRADE	OFFENSE	DEFINITION		VIOLENT	SENTENCE	
		INTENTIONAL	UNINTENTIONAL		AUTH. MIN.	AUTH. MAX.
A-I	Murder-1	Intent to kill + Aggravating Factor*		N	20–25 or life w/o parole	Life
	Aggravated Murder	Intent to kill officer		N	Life w/o parole	Life
	Murder-2	Intent to kill victim less than 14 years old during sex felony		N	Life w/o parole	Life
		Intent to kill		N	15–25	Life
			Depraved indifference murder	N	15–25	Life
			Depraved indifference + risk of serious physical injury to victim less than 11 years old	N	15–25	Life
			Felony murder	N	15–25	Life

APPENDIX A (CONTINUED)

B	Aggravated Man-1	Intent to kill an officer + Extreme Emotional Distress ("EED")		Y	10	30
			Intent to inflict serious physical injury on officer	Y	10	30
	Man-1	Intent to kill + EED		Y	5	25
			Intent to inflict serious physical injury	Y	5	25
			Intent to inflict physical injury on victim < 11	Y	5	25
	Agg. Veh. Hom.		Reckless driving + DWI + (**) causes death	N	1 year–1/3 of max	3–25
C	Agg. Man-2		Recklessly killing officer	Y	7	20
	Agg. CNH		Killing officer w/ criminal negligence	Y	3.5	20
	Man-2		Reckless killing	N	1 year–1/3 of max	3–15
	Veh. Man-1		DWI + (***) causes death	N	1 year–1/3 of max	3–15
D	Veh. Man-2		DWI causes death	N	1 year–1/3 of max	3–7
E	CNH		Killing with criminal negligence	N	1 year–1/3 of max	3–4

APPENDIX B:
STATUTORY SCHEME FOR DWI HOMICIDES IN NEW YORK

GRADE	OFFENSE	DEFINITION	SENTENCE	
			AUTH MIN	AUTH MAX
A-I	Murder-2	DWI + Depraved Act (e.g., deliberately driving at people, cars, buildings)	15–25	Life
B	Agg. Veh. Hom.	DWI + (***) + Reckless Driving	1 year–1/3 of max	3–25
C	Man-2	DWI + Recklessness	1 year–1/3 of max	3–15
C	Veh. Man-1	DWI + (**)	1 year–1/3 of max	3–15
D	Veh. Man-2	DWI	1 year–1/3 of max	3–7
E	CNH	Drinking + Negligence	1 year–1/3 of max	3–4

* New York Penal Law lists thirteen aggravating factors. N.Y. PENAL LAW § 125.27 (McKinney 2008).

** (1) a BAC of 0.18g or more, (2) suspended or revoked license as a result of a prior DWI conviction or refusal to submit to a chemical test, (3) a previous DWI conviction in the last ten years, (4) causing the death of more than one person, and (5) a previous vehicular manslaughter or vehicular assault conviction.

*** (1) a BAC of 0.18g or more, (2) suspended or revoked license as a result of a prior DWI conviction or refusal to submit to a chemical test, (3) a previous DWI conviction in the last ten years, (4) causing the death of more than one person, (5) causing the death of one person and the serious physical injury of another and (6) a previous vehicular manslaughter or vehicular assault conviction.