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More Cases of Depraved Mind Murder: The Problem of Mens Rea

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I. INTRODUCTION

Some years ago, the New York Court of Appeals decision in *People v. Kibbe*¹ prompted me to write an article discussing depraved mind murder.² In addition to murder with intent to kill and felony murder, the New York Penal Law provides that a person is guilty of murder when: "Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person."³ In *Kibbe*, two robbers drove off af-

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³ N.Y. PENAL LAW § 125.25(2) (McKinney 1987). My use of the expression "depraved mind" in referring to murder, as defined in N.Y. Penal Law section 125.25(2), is a carryover from the exact language of all former versions of the crime as stated in the predecessors of the Revised Penal Law of 1967 (e.g., former Penal Law § 1044(2): "a depraved mind, regardless of human life"). The present statute speaks of "a depraved indifference to human life," without using the word "mind." See id. § 125.25(2). If this signalled a substantive change, it did so without the conscious participation of the Revisers, who said that the new statute was "substantially a restatement" of the old. Temporary State Comm'n on Revision of the Penal Law and Criminal Code, Proposed N.Y. PENAL LAW § 339 (1964). My use of traditional terminology in the title of my previous essay reflected my agreement with the Revisers that "indifference" is a condition of the mind. See Gegan, *supra* note 2, at 417. If the holding of People v. Register, 60 N.Y.2d 270, 457 N.E.2d 610, 544 N.Y.S.2d 599 (1983), cert. denied, 466 U.S. 953 (1984), establishes that this assumption was erroneous, my use of the same terminology in the present essay may be unjustified. It is, however, consistent with the substance of my analysis and I am content to have the title stand or fall with the contents.

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ter leaving their victim standing in a snowbank alongside a rural two-lane highway approximately one-quarter mile from a gas station. The victim was so intoxicated (0.25% blood alcohol) that he made his way to the middle of the road and sat down. Twenty minutes later he was run over by a pickup truck and fatally injured.

While conceding that the defendants should have been convicted of second degree manslaughter for “recklessly caus[ing] the death of another person,” I protested the decision’s substantial and inappropriate enlargement of the scope of depraved mind murder. More generally, I expressed misgivings about the vague contours of the crime, its apparent overlap with reckless manslaughter, and its disproportion in comparison with manslaughter in the first degree, committed with a specific intent to do “serious physical injury.”

The New York Court of Appeals has decided several depraved mind murder cases in the intervening years, most notably, People v. Register and the recent People v. Roe. That the crime continues to stir controversy is evidenced by unusually outspoken dissents in both cases. I should say at once that none of the recent cases on their facts are as troubling as the Kibbe case. That case remains for me the high-water mark of depraved mind murder’s encroachment on situations properly belonging to lesser homicide categories. The court’s recent opinions nevertheless raise legal issues of ongoing interest and prosecutors are thoroughly awake to the advantages of this form of homicide indictment.

Register, decided in 1983, is unquestionably the “leading

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5 Id. § 125.20(1).
8 Although it is likely that this category of murder was originally designed to cover only cases of violence not directed at a particular target, see Gegan, supra note 2, at 432, ever since People v. Poplis, 30 N.Y.2d 85, 281 N.E.2d 167, 330 N.Y.S.2d 365 (1972), it is settled that it applies to individually targeted fatal assaults. It has become increasingly common to indict defendants under both; one count charging intentional murder and a second count charging depraved mind murder. For a procedural discussion, see People v. Gallagher, 69 N.Y.2d 525, 528-31, 508 N.E.2d 909, 910-11, 516 N.Y.S.2d 174, 175-76 (1987). Since depraved mind murder is by definition an unintentional killing, one recent case has held (on doubtful facts) that it is improper to submit the depraved mind count to the jury where the People’s proof admits of only one inference—an intent to kill. See People v. Gonzalez, 554 N.Y.S.2d 506, 508 (1st Dep’t 1990).
case,” judging by how frequently it is cited and quoted. In Register, the defendant took a pistol into a bar and predicted that he was “going to kill somebody tonight.” After considerable drinking, he fired at a man with whom he was arguing, missing him but wounding another. He then shot and wounded the first man. Shortly thereafter, he fired again, killing a third man. On the trial of an indictment charging both intentional murder and depraved mind murder, Register’s counsel requested jury instructions on the effect of intoxication. The judge instructed the jurors that they should consider whether the defendant’s intoxication prevented him from forming an intent to kill, but refused to charge that intoxication could affect the *mens rea* of depraved mind murder. The jury acquitted Register of murder with intent to kill, but convicted him of depraved mind murder.\[^{10}\]

The statutory definition of depraved mind murder requires that the accused “recklessly” create a “grave” risk of death “[u]nder circumstances evincing a depraved indifference to human life.”\[^{11}\] Insofar as “recklessness” is the *mens rea*, intoxication is not a defense. According to the general definition in the New York Penal Law, one acts recklessly with respect to a proscribed result (i.e., death) “when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur.”\[^{12}\] But the statute further provides that “[a] person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto.”\[^{13}\] Therefore, one accused of manslaughter in the second degree, in which the *mens rea* is simply recklessness, cannot escape conviction merely because intoxication clouded his otherwise clear perception of the risk. Drunken negligence is equated with sober recklessness as a matter of statutory policy.

Register argued on appeal that depraved mind murder requires a *mens rea* greater than simple recklessness, and that it was reversible error for the trial judge to foreclose jury inquiry into the effect of intoxication on the “recklessness-plus” state of mind. The New York Court of Appeals rejected this argument, approved the trial judge’s refusal to give the requested instruction, and affirmed

\[^{9}\] Register, 60 N.Y.2d at 275, 457 N.E.2d at 706, 469 N.Y.S.2d at 601.
\[^{10}\] Id. at 270-71, 457 N.E.2d at 705, 469 N.Y.S.2d at 601.
\[^{11}\] N.Y. PENAL LAW § 125.25(2) (McKinney 1987).
\[^{12}\] Id. § 15.05(3).
\[^{13}\] Id.
The court reasoned that the difference between reckless manslaughter and depraved mind murder lies solely in the objective elements of the two crimes, and not in the mental element, recklessness, which is identical in both. Therefore, since intoxication cannot negate the *mens rea* of second degree manslaughter, neither can it negate the *mens rea* of depraved mind murder. The three dissenting judges in *Register* contended that the murder statute required "a mens rea more culpable than recklessness alone and nearly as culpable as intent." They accused the majority of eviscerating the distinction between manslaughter and murder and defying a basic principle of fairness.

II. THE COURT’S TREATMENT OF MENS REA

The predecessor of the present statute did not contain the word “reckless.” It applied to death caused by an act “imminently dangerous to others, and evincing a depraved mind, regardless of human life.”

From the very beginning, courts had interpreted this provision to require proof that the defendant was fully conscious of the likelihood of a fatal result—which is precisely how recklessness is defined in the present law. However, an unbroken series of precedents also required an aggravated kind of recklessness that equated in blameworthiness with the unmitigated wickedness of one who intentionally takes the life of another. The court in *Register* reasoned that the legislature’s express addition of “reckless” impliedly repealed the additional dimension of mental culpability previously understood to belong to the crime of depraved mind murder. The court recognized the difference in blameworthiness between reckless manslaughter and reckless murder, but stated that the greater blameworthiness is accounted for by the external facts, not the state of mind.

This conclusion was buttressed by the court’s reference to the

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14 *Register*, 60 N.Y.2d at 271, 457 N.E.2d at 704-05, 469 N.Y.S.2d at 599.
15 *Id.* at 285, 457 N.E.2d at 712, 469 N.Y.S.2d at 607 (Jasen, J., dissenting).
16 See former N.Y. PENAL LAW § 1044(2) (repealed 1965) (cited in People v. Jernatowski, 238 N.Y. 188, 190, 144 N.E. 497, 497 (1924)).
18 See cases cited supra note 17.
19 *Register*, 60 N.Y.2d at 278, 457 N.E.2d at 708, 469 N.Y.S.2d at 603.
Penal Law’s general definitional section that sets out four “culpable mental states,” consisting of: intentional, knowing, reckless, and criminally negligent. According to the court, this enumeration was intended to “limit and crystalize” the recognized forms of mens rea. Since the listing “includes recklessness as one of those culpable mental states but it does not list ‘depraved indifference,’ the latter is not a culpable mental state.

The court thus settled the issue of what “depraved indifference” is not, leaving unanswered the question of what it is. As to this, the court experienced some difficulty:

This additional requirement refers to neither the mens rea nor the actus reus. If it states an element of the crime at all, it is not an element in the traditional sense but rather a definition of the factual setting in which the risk creating conduct must occur—objective circumstances which are not subject to being negated by evidence of defendant’s intoxication.

It is an intriguing suggestion that the statutory language “under circumstances evincing a depraved indifference to human life” might not be an element of the crime at all. Could it be a preamble, a kind of legislative throat-clearing? Nominally, the

20 N.Y. Penal Law § 15.05 (McKinney 1987). The statute defines “culpable mental states” as follows:

1. “Intentionally.” A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct.

2. “Knowing.” A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists.

3. “Recklessly.” A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. 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. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto.

4. “Criminal negligence.” A person acts with criminal negligence with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

Id.

21 Register, 60 N.Y.2d at 278, 457 N.E.2d at 708, 469 N.Y.S.2d at 603.

22 Id. at 276, 457 N.E.2d at 707, 469 N.Y.S.2d at 602.
court backed away from this jurisprudential novelty by interpreting the phrase as part of the circumstantial elements of the crime. "The concept of depraved indifference was retained in the new statute not to function as a *mens rea* element, but to objectively define the circumstances which must exist to elevate a homicide from manslaughter to murder." By this interpretation, the only operative difference between reckless manslaughter and reckless murder appears to turn on the degree of risk created by the defendant. As the court stated: "Because of an inability to quantify homicidal risks in precise terms, the Legislature structured the degree of risk which must be present in nonintentional killings by providing that in a depraved mind murder the actor's conduct must present a grave risk of death whereas in manslaughter it presents the lesser substantial risk of death." Although the court again equated "circumstances evincing a depraved indifference to human life" with the difference between "the substantial risk present in manslaughter" and the "very substantial risk present in murder," it is difficult to see how the meaning of the murder statute would change if the controversial phrase were deleted altogether. The difference in the degrees of risk to life is sufficiently expressed in the terms "substantial risk" in manslaughter and "grave risk" in murder.

If one were to accept the court's premise that section 15.05 of the New York Penal Law exhaustively and exclusively defines four, and only four, culpable mental states, then the rest of the court's opinion would follow more easily. The premise, however, is shaky. While the legislature may reasonably be understood to gather into one place uniform definitions of standardized terms that can then be used throughout the rest of the statute, it is not sensible to suppose that the standardized terms necessarily suffice for the statement of all specific crimes. If the legislature wants to create some non-standard, culpable mental state *ad hoc* in a particular crime, it should not be hobbled in doing so. To interpret the definitional section in an exclusive manner converts it from a tool for the legislative drafter into his master. The legislature’s desire not to be tied down to the standardized definitions appears plain from another general section that assists in statutory construction. This section

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23 *Id.* at 278, 457 N.E.2d at 708, 469 N.Y.S.2d at 602.
24 *Id.* at 276, 457 N.E.2d at 707, 469 N.Y.S.2d at 602.
25 *Id.* at 277, 457 N.E.2d at 707, 469 N.Y.S.2d at 602 (emphasis in original).
provides that when specific crimes require a particular mental state, such mental state is ordinarily designated by the statute’s use of the terms “intentionally,” “knowingly,” “recklessly,” or “criminal negligence.” In light of this provision, why can we not accept depraved indifference to human life simply as an instance out of the “ordinary”? The Model Penal Code uses standardized definitions of culpable mental states, but acknowledges that its reckless murder provision specifically adopts a culpability requirement beyond the standard terms used elsewhere in the Code.

Unless depraved indifference is acknowledged to be a real part of the mens rea, we are left with a common mens rea of recklessness for both manslaughter and murder, exactly the court’s conclusion as to the legislative intent. Since we are not dealing with a traditionally regulatory or malum prohibitum offense, but with the gravest felony known to the law, it is anomalous that this should be the case. How can it be just to punish for murder, one offender whose mental culpability is no greater than that of another guilty only of manslaughter—thereby exposing the former to an additional fifteen years of imprisonment?

I hesitate to conclude that the New York Court of Appeals would admit these inferences or deny that in malum in se felonies, the offender’s guilty mind must correspond to the gravity of the crime. Despite its resolute limitation of the mens rea of murder, the court in Register waffled when it acknowledged that the jury “had to determine from the evidence if defendant’s conduct, though reckless, was equal in blameworthiness to intentional murder.” The court demonstrated further ambivalence in People v. Fenner, when it characterized as “proper” a jury instruction that:

depraved indifference to human life required that they find defendant’s “conduct, beyond being reckless . . . 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

27 See Model Penal Code § 210.2(1)(b) (1980). In this murder section, the Model Penal Code defines such recklessness as “circumstances manifesting extreme indifference to human life.” Id. “Recklessly” is defined elsewhere in the Code to mean that the actor consciously disregards a substantial and unjustifiable risk amounting to a “gross deviation” from due care. See id. § 2.02(2)(c).
28 Register, 60 N.Y.2d at 275, 457 N.E.2d at 706, 469 N.Y.S.2d at 601.
intentionally causes the death of another."

If a jury is to determine a defendant’s “moral sense of concern” and the quality of his lack of “regard” for the lives of others, and thereby ascribe to him a degree of “blameworthiness” equal to the “blameworthiness” of an intentional killer, then it does no good to deny the relevance of the defendant’s subjective mental state. Rather, his mental state should become the jury’s central focus; all other facts assume merely evidentiary significance. The murder statute, after all, does not declare that the objective circumstances surrounding a homicide are depraved indifference to human life. It provides that these circumstances “evince” such a quality in the actor.

So tenuous is the court’s rationale for refusing to recognize depraved indifference as a *mens rea* element, and so superfluous did its interpretation render the statutory language, that one can speculate that the court was simply reaching a desirable result on the precise issue before it: whether evidence of intoxication can negate the necessary mental element of depraved mind murder. I submit that the court should and could have resolved the issue without mangling the traditional distinction between *mens rea* and *actus reus*.

Persuasive reasons can be advanced to support the holding in Register. Proof of intoxication is admissible “whenever it is relevant to negative an element of the crime charged.” Statutory policy refuses to diminish the culpability attached to recklessness because the actor lacks awareness of risk due to intoxication. Surely, that same policy applies equally to the “grave” risk in the murder statute as to the “substantial” risk in the manslaughter statute. It is less clear, however, whether intoxication is irrelevant to the mental state embraced in the phrase “depraved indifference to human life.”

In order to determine whether intoxication negates a culpable mental state, it is necessary to define the mental state sought to be negated. Here, the legislature may be faulted for failing to give the court adequate tools; unlike the four standard culpable mental states, “depraved indifference to human life” is used without further definition. One may sympathize with the court’s difficulty in extracting the meaning of this archaic expression, without approv-

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30 Id. at 973, 463 N.E.2d at 618, 475 N.Y.S.2d at 277.
31 N.Y. PENAL LAW § 15.25 (McKinney 1987).
ing its ducking the question by denying the expression any significance whatsoever as a form of mens rea. Murder with a depraved indifference to human life derives from the common-law concept of malice. Express malice entailed a specific intent to kill or inflict grievous bodily injury. But an equivalent degree of blame, under the rubric of implied malice, was imputed to one who endangered human life by grossly unjustified risk-taking, albeit without a specific intent to kill. Of course, not all risk-taking is blameworthy. The general who sends troops to take a hostile beach or the surgeon who performs a dangerous operation are esteemed as public benefactors, not condemned as criminals. Thus, we draw a line between justified and unjustified risks to life. When the risk to life is both substantial and unjustified, it is condemned as manslaughter, provided that the actor knew the risk and nonetheless chose to take it. His blameworthy choice is the mens rea of the crime.

Unjustified risk-taking becomes blameworthy on an ascending scale, according to the degree of the risk, the degree of unjustifiability, and perhaps such other factors as the helplessness of the victim and the actor's breach of a special duty owed to the victim. Blameworthy recklessness, exhibited in any single act which substantially and unjustifiably endangers human life, can be further aggravated by some combination of factors recognized by the jury. It may become clear that the actor has a character flaw more blameworthy than that shown by a single indiscretion; it may even be established that he simply holds human life without value. This is not a specific mental state formed at the moment of action, such as intent or reckless disregard. Rather, it is an immoral predisposition to harm, referred to in older cases as a condition or disposition of the mind as opposed to a specific operation of the mind. A well-known case put it as follows:

[T]he act must be prompted by, or the circumstances indicate that it sprung from, a wicked, depraved or malignant mind—a mind which, even in its habitual condition, and when excited by no provocation which would be liable to give undue control to passion in ordinary men, is cruel, wanton or malignant, reckless of human life, or regardless of social duty.

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34 See id.; Mayes v. People, 106 Ill. 305, 312, 313 (1883).
34 See G. Fletcher, Rethinking Criminal Law 266 (1978); W. LaFave & A. Scott, Criminal Law 618-19 (2d ed. 1986) [hereinafter LaFave & Scott].
35 Maher v. People, 10 Mich. 212, 218 (1862). This statement is consistent with New
A conscious endangering of human life springing from such total indifference is a more blameworthy choice than "mere recklessness alone which has had an incidental tragic result."\(^3\) This, I submit, is the proper understanding of "depraved indifference to human life" as used in the murder statute. It is an additional aspect of mens rea, but not one negatived by intoxication. One's lack of concern for human life exists before one gets drunk, subsists during drunkenness, and continues after one sobers up.\(^7\) Given the potential for redemption, I will not insist that depraved indifference is necessarily a permanent condition, but neither is it a transitory specific intent capable of being negatived by intoxication at the time of a particular risky action. This was the common-law position with respect to implied malice, from which root our present depraved indifference standard is derived.\(^8\) If the Register court had viewed depraved indifference in this light, the decision would be less open to criticism and the potential for future injustice substantially diminished.

A recent amendment, adding two parallel murder and manslaughter sections, highlights the futility of attempting to distinguish depraved mind murder from reckless manslaughter solely ac-

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\(^7\) The statement in the text, as a statement of fact, does not overlook the further fact that persons who are drunk or drugged often act in a manner more dangerous than when sober. Intoxicants operate to diminish inhibitions, but this does not exculpate the impulses thus released. The law does not respond to Jekyll-Hyde imagery. The antecedent fault of getting drunk offsets any diminished fault at the time of acting dangerously while under the influence. This is a policy judgment that enjoys wide acceptance. See MODEL PENAL CODE § 2.08 comment at 357-59 (1980); Paulsen, Intoxication as a Defense to Crime, 1961 U. ILL. L.F. 1, 2-3; Director Pub. Prosc. v. Majewski, 2 All E. R. 142, 151 (H.L. 1976).

according to the difference in the degree of risk. In order to deal with the special problem of child abuse, both subsections apply to someone eighteen or over who causes the death of a child under eleven. It is murder if death results from conduct recklessly creating a grave risk of serious physical injury and under circumstances evincing a depraved indifference to human life. It is manslaughter in the first degree if there is an intent to cause some physical injury and reckless creation of a grave risk of serious physical injury.

It will not be possible to distinguish these two crimes on the basis of the degree of risk: both expressly require proof of a "grave" risk of serious physical injury and resulting death. In addition, the manslaughter provision requires proof of an actual intent to cause physical injury. Is it possible that the legislature intended a greater measure of mental culpability for manslaughter than for murder? Such absurdity can be avoided only by acknowledging that "depraved indifference to human life" means more than a superfluous restatement of a heightened degree of risk. If this conclusion is forced upon the court in the context of the newly-enacted child abuse murder provision, can the same phrase continue to be interpreted differently in the generic depraved mind murder provision?

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39 See N.Y. Penal Law § 125.25(4) (1990) (added by ch. 477, § 4, [1990] N.Y. Laws). A person is guilty of murder in the second degree when, "[u]nder circumstances evincing a depraved indifference to human life, and being eighteen years of age or more the defendant recklessly engages in conduct which creates a grave risk of serious physical injury or death to another person less than eleven years old and thereby causes the death of such person." Id.

40 See id. § 125.20(4) (added by ch. 477, § 3, [1990] N.Y. Laws). A person is guilty of manslaughter in the first degree when, "[b]eing eighteen years old or more and with intent to cause physical injury to a person less than eleven years old, the defendant recklessly engages in conduct which creates a grave risk of serious physical injury to such person and thereby causes the death of such person." Id.

41 The murder subsection seems to contain an element additional to the manslaughter subsection in that it speaks of a grave risk of serious physical injury or death, whereas manslaughter covers only a grave risk of serious physical injury. This seeming distinction is wholly illusory. First, the reference in the murder provision is in the alternative: a grave risk of either death or serious physical injury suffices. Second, by definition in Penal Law section 10.00(10), any injury which risks death is serious physical injury. Id. § 10.00(10) (McKinney 1987). Thus, the only real difference in the two provisions is the requirement in manslaughter for a specific intent to cause some physical injury.
The difficulty with the analysis in Register intensifies when its reasoning is applied to cases in which intoxication is not at issue. In such cases, the subjective nature of the "recklessness" test must be squarely faced. As defined in New York Penal Law section 15.05(3), recklessness requires that the actor be aware of and consciously disregard a substantial and unjustifiable risk. For manslaughter, the mens rea exactly corresponds with the actus reus. If the actor in fact created a substantial and unjustifiable risk of killing someone and in his own mind was aware of that risk but acted anyway, he is guilty. According to Register, while the mens rea of depraved mind murder is identical to that of manslaughter, the difference lies in the actual degree of risk created by the actor's conduct. To some undefined extent, presumably left without further guidance to the jury, manslaughter becomes murder when a substantial risk becomes a very substantial one. Thus, the meaning of grave risk in the murder provision enlarges on the substantial risk in the manslaughter provision.

One issue remains unresolved: whether the court's acknowledgement that the mens rea is the same for both crimes means similarity in both type and degree, or similarity in type, but variance in degree. In other words, combining the definition of recklessness in section 15.05(3) with the definition of murder in section 125.25(2), the resulting definition of murder may be read in two ways, as follows: (1) Being aware of and consciously disregarding a substantial and unjustifiable risk of death to another person, he creates a grave risk of death to another person and thereby causes the death of another person; (2) Being aware of and consciously disregarding a grave and unjustifiable risk of death to another person, he creates such a risk and thereby causes the death of another person.

These two possible interpretations may be explored in two hypothetical cases.

Case (1): A corrupt building inspector takes a bribe to overlook a contractor's use of materials known by the inspector to be of sub-code quality. What the inspector does not know is that the materials are not only sub-code, but completely rotten. The building collapses and people are killed. If we assume that the risk knowingly taken by the inspector was "substantial" and that the risk actually created by his complicity was "grave," may he be con-
vicited of murder?

Case (2): In a college fraternity hazing, a cup of caustic emetic is administered to an unknowing, blindfolded pledge. Unknown to his tormentors, the apparently healthy pledge suffers from serious stomach ulcers and dies from hemorrhage and shock. Suppose that a jury is prepared to find that the substance administered was known by the defendants to be dangerous enough to amount to a "substantial" risk to any ordinary person. In fact, given the victim's peculiar susceptibility, the risk was "grave." May the defendants be convicted of murder?

Neither the Register case nor any subsequent holding definitively resolves this issue; however, sweeping dictum in the cases emphasizes the divorce of the mental element of murder from its external elements. People v. Gomez affirmed the murder conviction of a man who deliberately drove his car at a high speed along a crowded city sidewalk, striking several people and killing two. The court held that such conduct satisfied the requirement of recklessness, i.e., conscious disregard of a substantial and unjustifiable risk. The court said: "The phrase '[u]nder circumstances evincing a depraved indifference to human life' is not a mens rea element focusing on the subjective intent of the defendant but rather involves 'an objective assessment of the degree of risk presented by defendant's reckless conduct.'"43

The New York Court of Appeals recently decided People v. Roe, a particularly tragic case in which a fifteen-year-old boy killed his thirteen-year-old companion while playing a type of Russian roulette with a shotgun loaded with both live and dummy shells. The defendant was convicted of depraved mind murder after a bench trial, and the sole question on appeal was the legal sufficiency of the evidence. The court affirmed the conviction in an opinion by Judge Hancock, over a wide-ranging and impassioned dissent by Judge Bellacosa. The court summarized the prior decisions in the following way:

43 Id. at 11, 478 N.E.2d at 766, 489 N.Y.S.2d at 158. A certain ambivalence may be detected in the court's resolution to objectify the crime, because elsewhere in its brief opinion it observed: "The focus of the depraved mind murder statute is to allow a trier of fact to discern depravity of mind from the circumstances under which an object or instrumentality is used." Id. at 12, 478 N.E.2d at 762, 489 N.Y.S.2d at 159. This seems to be a sensible observation, but it remains confusing as to how it appears in the same opinion which denies that depraved indifference is part of the mens rea.
The only culpable mental state required for murder under subdivision (2) of Penal Law § 125.25 (depraved indifference murder), we have made clear, is recklessness—the same mental state required for manslaughter, second degree, under subdivision (1) of Penal Law § 125.15 (see, People v. Gomez, supra at 11; People v. Register, supra, at 278). In a trial for murder under Penal Law § 125.25 (2), proof of defendant's subjective mental state is, of course, relevant to the element of recklessness, the basic element required for both manslaughter in the second degree and depraved indifference murder (see, Penal Law § 15.05 [3]). Evidence of the actor's subjective mental state, however, is not pertinent to a determination of the additional element required for depraved indifference murder: whether the objective circumstances bearing on the nature of a defendant's reckless conduct are such that the conduct creates a very substantial risk of death (see, People v. Register, supra, at 276-277; People v. Gomez, 65 N.Y.2d 9, 11, supra).45

Putting aside the special problem of intoxication, in none of the post-Register cases did the evidence show any gap between the risk actually created and the defendant's corresponding awareness and conscious disregard. This issue, therefore, was not before the court. The facts in Roe, however, came close to presenting it. The defendant loaded two live shells and two dummies into the magazine of his father's twelve gauge shotgun. He pointed the gun at his friend and pulled the trigger. The first round fired, inflicting the fatal wound. Shortly after the shooting, police investigators noted that the defendant was shocked that the gun operated on a "first in—last out" order of fire. This suggested that he believed that he had chambered a dummy to fire first. If so, we would have a situation where a defendant consciously created some risk but was unaware of a circumstance that greatly increased the risk. At his trial, however, the defendant testified that he had loaded the shells at random. This testimony, the court noted, made irrelevant his mistake concerning the shotgun's order of fire.46

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45 Id. at 24-25, 542 N.E.2d at 612, 544 N.Y.S.2d at 299 (emphasis in original).
46 Id. In his dissent, Judge Bellacosa characterized the defendant's state of mind as no greater than reckless, and not depraved, even on the basis of having loaded the shells at random. He supported his conclusion by pointing to various factors: the defendant's youth, his shock and remorse immediately after the shooting, and the brief time taken by his action compared to the facts of earlier cases that involved prolonged patterns of cruel behavior. Id. at 30-33, 54 N.E.2d at 615-17, 544 N.Y.S.2d at 303-04 (Bellacosa, J. dissenting). For example, in Commonwealth v. Malone, 354 Pa. 180, 47 A.2d 445 (1946), the famous Russian roulette case cited by the majority, the accused loaded his revolver with one bullet, pointed
Should a case squarely raising this issue come before the court, stare decisis would permit the court to limit the sweeping language in its prior decisions to their facts, and adhere to the basic principle that for a person to be held criminally responsible for a particular result it must be shown that he had a culpable mental state with respect to that result. To be guilty of recklessly creating a "grave" risk of death, a defendant should be proven to have acted with a conscious awareness and disregard of that grave risk, not some lesser risk.

The less we recognize the importance of the actual subjective quality of an actor's choice and the more we concentrate on the purely external facts of a case, the more we unhinge the criminal law from its moral moorings. Some positivists and behaviorists who see common morality as an alien intruder and an obstacle to putting law on a purely utilitarian, scientific basis would champion this as a progressive trend. But these prophets of a "Brave New World" have found few converts. Even Oliver Wendell Holmes, the great advocate of external standards in the law, recognized the necessary connection between criminal punishment and blameworthiness. "It is not intended to deny that criminal liability, as well as civil, is founded on blameworthiness. Such a denial would shock the moral sense of any civilized community . . . ." Holmes nevertheless asserted that blameworthiness should refer to the standard of the average person. In speaking of murder by reckless conduct,
he said:

If the known present state of things is such that the act done will very certainly cause death, and the probability is a matter of common knowledge, one who does the act, knowing the present state of things, is guilty of murder, and the law will not inquire whether he did actually foresee the consequences or not. The test of foresight is not what this very criminal foresaw, but what a man of reasonable prudence would have foreseen.\textsuperscript{50}

As a matter of sixteenth and seventeenth century legal history, Holmes was almost certainly right,\textsuperscript{51} although by the time he wrote in 1881, there was reason to question his accuracy.\textsuperscript{52} In any event, his objective standard equates with what the New York Penal Law calls "criminal negligence," which, if it causes death, is a class E felony.\textsuperscript{53} Neither murder nor manslaughter in the second degree can exist without conscious disregard of a perceived risk of fatal consequence. To recognize that the serious class C felony of manslaughter requires blameworthiness in a more aggravated subjective sense is a valuable bulwark for maintaining proportion in culpability for the most serious crimes.

In speaking of murder, even Holmes recognized that culpable negligence was a necessary condition of a rule that would not shock the moral sense of a civilized community. Perhaps such a test might justify convicting the hypothetical building inspector in case (1) who should have foreseen the possibility of rotten materials. However, it could not justify convicting the fraternity hazers in case (2), who had no way of foreseeing the pledge's peculiar sus-

\textsuperscript{50} Id. at 53-54.

\textsuperscript{51} The presumption that people intend the natural and probable consequences of their acts, see 9 J. WIGMORE, EVIDENCE §§ 2491, 2511a (3d ed. 1940), did not imply that judges and juries were indifferent to an actor's state of mind; rather, it reflected a practical necessity in an era when the rules of evidence were undeveloped and an accused was not competent to testify on his own behalf. See 2 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 111 (London 1883); Michael & Wechsler, A Rationale of the Law of Homicide: I, 37 COLUM. L. REV. 701, 709-11 (1937). This presumption was scorned by Holmes as a legal fiction, disguising the "truth" that blame was assessed according to an objective standard. See Commonwealth v. Pierce, 138 Mass. 165, 178 (1884). Holmes's elegant reductionism itself disguised another truth to which he himself had given classic expression: "The life of the law has not been logic: it has been experience." O.W. HOLMES, supra note 48, at 1; see also J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 156 (1st ed. 1947).

\textsuperscript{52} 2 J. STEPHEN, supra note 51, at 79; Turner, The Mental Element in Crimes at Common Law, 6 CAMB. L.J. 31, 39 (1938).

\textsuperscript{53} N.Y. PENAL LAW § 125.10 (McKinney 1987).
ceptibility. According to the New York Court of Appeals, an extra degree of risk separates the lesser "substantial" risk of manslaughter from the greater "grave" risk of murder. That extra degree of risk is a material element of the actus reus of murder—indeed, it may well be the only material element distinguishing the two crimes.

Unless the court requires a defendant's conscious and blameworthy disregard to extend to the extra degree of risk separating "substantial" from "grave," then as to a material element of the crime of murder, there will be no culpable mental state. The New York Penal Law provides that "if an offense or some material element thereof does not require a culpable mental state on the part of the actor, such offense is one of 'strict liability.'" This would seemingly classify depraved mind murder as a "strict liability" crime.

Indeed, if simple recklessness with respect to substantial risk serves to make a murderer of an actor who inadvertently creates a "grave" risk from which death results, we will have enacted by judicial fiat a new and unusual form of felony murder—an unintentional homicide in the course of the felony of reckless endangerment. Our existing felony murder statute does not list reckless endangerment or manslaughter among the enumerated predicate felonies. And even the former Penal Law, which was not limited to a list of enumerated felonies, was interpreted by the courts to apply only to killings in the course of felonies independent of an assault on the victim. This doctrine, called merger, was contrived for the purpose of preserving the moral proportionality of the distinctions between murder and lesser forms of homicide.

At a minimum, therefore, the conscious disregard of the actor in a reckless murder case must extend to the full gravity of the risk

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54 Id. § 15.10 (emphasis added).
55 Id. § 125.25(3).
to life created by his conduct. Both the underlying premises of penal sanctions in a civilized community, and the specific language of section 15.15 support this conclusion. Even though recklessness is defined generally as a conscious disregard of a "substantial and unjustifiable" risk, the murder statute's reference to a "grave" risk should require the jury to find conscious disregard of the level of the risk which establishes the actus reus of the offense.

This examination of the relation between the extent of the risk and the actor's conscious disregard thereof should not overshadow another essential point—distinctions of degree with respect to unjustified risk-taking. Various sections of the Penal Law set forth the standards dividing justified from unjustified conduct. Since there are no degrees of innocence, all conduct falling on the right side of the dividing line is the same for the law's purposes. On the criminal side of the line, however, there are two homicide crimes based on unjustified risk-taking. If we are to maintain a morally meaningful distinction between manslaughter and murder, future cases will require the courts to recognize distinctions in degrees of unjustifiability, just as they have already recognized distinctions of degree in the likelihood of fatal outcome. The two aspects are co-variables.

Both the Model Penal Code and the New York courts have

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57 See N.Y. PENAL LAW § 15.15 (McKinney 1987). Section 15.15 provides that when one culpable mental state, such as "recklessness," is used in the definition of an offense "it is presumed to apply to every element of the offense unless an intent to limit its application clearly appears." Id.

58 Id. §§ 35.00, 35.05 (justification generally).

59 LAFAVE & SCOTT, supra note 34, at 619-32. The crime of felony murder demonstrates the deep-rooted connection between the qualitative element of unjustifiability and the quantitative element of the extent of risk. Committing a felony is grievously unjustifiable, even if no apparent risk to life is created. Since this qualitative variable looms so large, it makes up for a relative lack in the extent of risk to life. In other words, even if a felon refrains from force likely to kill, he is guilty of murder if death unforeseeably results from a low-risk action in pursuit of such a reprehensible goal: Id. at 622-25. Where the apparent risk to life is almost nonexistent and the death seems purely accidental, however, a murder conviction solely predicated on the felonious unjustifiability of the death-causing conduct troubles many observers and courts. See Fletcher, Reflections on Felony Murder, 12 Sw. U.L. Rev. 413, 413-15 (1981) (discussing Model Penal Code's attempts to deal with murder statutes); see also Commonwealth v. Matchett, 386 Mass. 492, 503 n.12, 436 N.E.2d 400, 407-08 n.12 (1982) (citing cases and statutes abolishing or limiting felony murder rule); People v. Aaron, 409 Mich. 672, 728, 299 N.W.2d 304, 326 (1980) (discarding distinct doctrine of felony murder). The Model Penal Code treats killings in the course of a felony as a special kind of reckless murder. While felony murder in its traditional formulation gives too much weight to the element of unjustifiability, the current thinking of the New York courts regarding depraved mind murder may give too little.
emphasized that common morality recognizes certain unintended killings to be as blameworthy as intentional killings. Note that all commentators start out with the intentional killing as the paradigm of the greatest culpability. Why? As the Model Penal Code comments, an intent to kill demonstrates the grossest form of indifference to human life. Where there is an intent to kill, the law is not concerned with the degree of risk ex ante. If an actor aims a rifle at a person standing at extreme range, it is unlikely that the bullet will hit the victim. However, if it is proven that the actor's "conscious object" was to kill, and he succeeded, he is guilty of murder. Only in the case of an unintended killing does the law concern itself with the degree of risk ex ante.

This unique culpability attached to intent may be useful in distinguishing two kinds of unjustified risk-taking. The notion of intent combined with the notion of recklessness facilitates our distinguishing the actor who intended neither the risk nor the result, although consciously disregarding both, from the actor who, although not intending the result, intended to create the risk. A hunter, in his eagerness to bag a deer, may fire although he sees a dwelling in close proximity. Another actor, motivated by racial bigotry, may fire at a dwelling to "send a message" to the occupants that they should move out. Although the second actor may not have intended to kill anyone in the dwelling, he did have as his "conscious objective," the goal of frightening the occupants with the risk of being killed. To the reckless hunter, the risk to the occupants was quite collateral to his "conscious objective."

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61 See Duff, Recklessness, 1980 Crim. L. Rev. 282, 287 (1980); Duff, Implied and Constructive Malice in Murder, 95 L.Q. Rev. 418, 440 (1979). The grossly unjustifiable action of the terrorist whose goal entails the creation of risk to human life supports a legal distinction from other forms of recklessness—wholly apart from any quantitative distinction based on the extent of the risk. Id.

The example of the terrorist illustrates the kind of indiscriminate endangerment to which depraved mind murder was formerly limited under Darry v. People, 10 N.Y. 120, 145 (1854). Under Poplis, this crime was extended to deadly physical force directed at a specific victim. Poplis, 30 N.Y.2d at 89, 281 N.E.2d at 168, 330 N.Y.S.2d at 364. Even without a specific intent to kill, it nevertheless appears to fall within the scope of grossly unjustifiable conduct. If a mobster shoots an informer in the kneecaps, he may not intend to kill, but he intends to put his victim's life at risk. A serious incongruity arises when the murder statute is compared with manslaughter in the first degree, committed with a specific intent to cause serious physical injury. See N.Y. Penal Law § 125.20(1) (McKinney 1987). If the knee-
At the opposite end of the spectrum of unjustified risk-taking, future cases doubtless will provide examples of mitigating factors that diminish the blameworthiness of one who endangers human life because of the stress of the circumstances. Here, again, common morality may find such factors of greater significance than fine-spun distinctions between “substantial” risks and “very substantial” ones. For example, one man receiving sudden news of his mother’s heart attack may lose his usual self-control and regard for the safety of others; he may drive at high speeds through traffic lights on crowded city streets to reach his mother’s bedside. Another man may drive in exactly the same manner just for the thrill of terrifying people. The degree of risk is the same in both cases. Even if the degree of risk to the lives of others could be characterized as “grave,” the extenuating circumstances in the first case and their effect on the actor’s mental culpability dictate mitigation to manslaughter. However, the second actor’s reckless disregard occurs in circumstances evincing a depraved indifference to human life. These contrasting illustrations lead to a discussion of an important unresolved issue: whether extreme emotional disturbance should be allowed as a mitigating factor.

IV. DEPRAVED MIND MURDER AND EXTREME EMOTIONAL DISTURBANCE

Changing the facts of Register slightly, let us suppose that Register had been taunted and physically harassed by other patrons of the bar before drawing his gun in a rage and firing the fatal shots. Although he was indicted for both intentional murder and depraved mind murder, on the count charging intent to kill, the statute expressly creates an affirmative defense if he:

acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant’s situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other
capped victim dies, is the mobster guilty of manslaughter one? Of depraved mind murder? Both? See Gegan, supra note 2, at 438-40 (comparison of depraved mind murder with intent to injure).
crime.\textsuperscript{63}

The statute provides a liberalized version of the old common-law notion of heat of passion caused by great provocation. Thus, even should the jury find that Register acted with the actual intent to kill, it could, with proper instruction, mitigate the crime from murder to manslaughter, if persuaded by a preponderance of the evidence that he was overcome by strong emotion.

Suppose that the jury acquits on the intentional murder count. In deliberating on the depraved mind murder count, what effect should it give to the circumstances of provocation and the defendant's excited reaction? The extreme emotional disturbance affirmative defense quoted above is annexed to New York Penal Law section 125.25(1), which defines intentional murder. No such mitigating factor is annexed to subdivision (2), which defines depraved mind murder. As of this writing, two Appellate Division cases, without extensive opinion, have interpreted the statute to exclude the mitigating factor from depraved mind murder.\textsuperscript{64}

This statutory interpretation is seemingly plausible. If the legislature had intended to allow extreme emotional disturbance to mitigate depraved mind murder, why did it not expressly so provide as it did for intentional murder? Such an interpretation seems similarly faithful to the language and reasoning of the Register line of cases. If a defendant's subjective mental state "is not pertinent"\textsuperscript{65} to the distinction between reckless murder and reckless manslaughter, then it may indeed be irrelevant that his self-control was overcome by extreme emotional disturbance, whatever the provocation. Notwithstanding these arguments, I submit that such an interpretation almost certainly misconstrues the legislative intent, legal history, and rational policy.

The depraved mind murder provision did not originate in the 1967 recodification of the Penal Law. It represents a "rather well understood"\textsuperscript{66} category of homicide that has been part of our law

\textsuperscript{63} N.Y. Penal Law § 125.25(1)(a) (McKinney 1987).
\textsuperscript{65} Roe, 74 N.Y.2d at 24, 542 N.E.2d at 612, 544 N.Y.S.2d at 299.
from the earliest codification in 1829, and before that, in the common law of crimes.

In contrast to modern penal codes, with their precisely defined homicide categories based on specific mental states, the common law knew but one murder indictment: killing another with malice aforethought (sometimes referred to as malice prepense). All other unlawful killings were denominated manslaughter. Unconstrained by statute, the common-law judges developed the concept of malice aforethought according to their perceptions of who deserved hanging and who did not. The concept, as judicially interpreted, encompassed intent to kill, intent to do grievous bodily harm, intent to commit a felony, and wanton recklessness. Professor Perkins aptly summarized it as a "man-endangering state of mind." But whatever type of mental culpability existed in a given case, both judges and commentators agreed: if the accused were seriously provoked and lost control of himself in a heat of passion, he did not act with malice aforethought.

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67 See 4 W. Blackstone, Commentaries 195, 202 (1769) (discussing Coke's definition of murder); 3 E. Coke, Institutes of the Laws of England 47 (6th ed. 1680). "Murder is when a man of sound memory, and of the age of discretion, unlawfully killeth . . . any reasonable creature . . . with malice forethought. . . ." Id.; see also Perkins, A Re-examination of Malice Aforethought, 43 Yale L. J. 537, 545 (1934) (malice aforethought covered all forms of homicide and seems to have meant only intentional wrongdoing).


69 3 J. Stephen, supra note 51, at 22.

70 Perkins, supra note 67, at 557.

71 See 3 J. Stephen, supra note 51, at 81 (examining effect of provocation at common law). No writer ever has suggested that the mitigating effect of provocation and passion was limited to cases of express malice (intent to kill). It consistently has been assumed that it applied equally to negate implied malice—the forerunner of the present depraved mind provision. See id.; see also R. Perkins & R. Boyce, supra note 32 (malice aforethought requires "absence of every sort of . . . mitigation"); LaFave & Scott, supra note 34, at 553 (if one in the heat of passion intends serious bodily injury to his tormentor, but causes death, this is voluntary manslaughter not murder). Numerous cases either hold or assume that provoked heat of passion would negate the malice of depraved mind murder. See Waters v. State, 443 A.2d 500, 505 (Del. 1982) (quoting State v. Winsett, 205 A.2d 510, 515-16 (Del. Super. Ct. 1972)); Ramsey v. State, 114 Fla. 766, 768, 154 So. 855, 866 (1934); Dunaway v. People, 110 Ill. 333, 339 (1884); People v. Cowen, 68 Ill. App. 3d 437, 442, 386 N.E.2d 435, 439 (1979); Robinson v. State, 307 Md. 738, 746, 517 A.2d 94, 98 (1986); Maher v. People, 10 Mich. 212, 218 (1862); State v. Poth, 108 Wis. 2d 17, 21, 321 N.W.2d 115, 117 (1982); Hogan v. State, 36 Wis. 226, 236 (1874); see also People v. Johnson, 1 Park. Cr. R. 291, 297 (N.Y. Gen. T. N.Y. County 1851) (if death is in heat of passion it cannot be classified as murder); Bradley v. State, 485 S.W.2d 847, 851 (Tex. Crim. App. 1985); Rex v. Thomas, 7 Car. & P. 817, 818-19, 173 Eng. Rep. 356, 357 (1837).
Only in light of this proposition can one comprehend the evolution of the element of "prepense" or "aforethought" traditionally annexed to the word "malice." Although it would appear that early common law viewed deliberate advance planning as essential, it later became settled that no significant space of time or planning need be established to prove murder. Had "prepense" become a meaningless formal pleading requirement? Over time, the common-law judges realized that some impulsive killers deserved to be hanged just as much as their more deliberate counterparts in wickedness. If, on the other hand, a person suddenly flew into a homicidal passion after grievous provocation, he was more weak than wicked and did not deserve hanging. The body of case law on passion and provocation represented an attempt to draw a rough line between those who kill because they are driven to do it on a particular occasion, and those who kill because they are predisposed to be killers. One so predisposed is equally blameworthy whether he planned a given murder in advance or decided to do it on a sudden impulse. Thus, the "prepense" aspect of malice came to signify the predisposition to harm imputed by law to one whose man-endangering state of mind was unprovoked.

Indeed, a review of the old cases, both English and American, leaves the vivid impression that in expounding the evolution of malice prepense from its original descriptive meaning to its normative significance as a term of art, the judges were more concerned

72 See 3 J. Stephen, supra note 51, at 63; see also Perkins, supra note 67, at 545-46 ("aforethought" meant "design meditated upon for a substantial period of time in advance").

73 Perkins, supra note 67, at 546 (time element of malice aforethought eventually whittled away).

74 See 3 J. Stephen, supra note 51, at 94:

As much cruelty, as much indifference to the life of others, a disposition at least as dangerous to society, probably even more dangerous, is shown by sudden as by premeditated murders. The following cases appear to me to set this in a clear light. A., passing along the road, sees a boy sitting on a bridge over a deep river and, out of mere wanton barbarity, pushes him into it and so drowns him. A man makes advances to a girl who repels him. He deliberately but instantly cuts her throat. A man civilly asked to pay a just debt pretends to get the money, loads a rifle and blows out his creditor's brains. In none of these cases is there premeditation unless the word is used in a sense as unnatural, as "aforethought" in "malice aforethought," but each represents even more diabolical cruelty and ferocity than that which is involved in murders premeditated in the natural sense of the word.

Id. (footnote omitted). Accord G. Fletcher, supra note 34, at 254 (one definition of premeditation involves time and reflection; others wish to include all heinous killings in first degree murders).
with the presence or absence of provocation than with any other single element. Specifically, the subjective operations of an actor's cognition and volition seldom troubled the common-law judges. If an accused committed an act of serious violence toward another person, especially if he used a weapon, the common law was unconcerned with his mental processes at the time; unless he had been acting under the influence of adequately provoked passion, he was adjudged to have acted "of malice." This conclusion was usually accompanied by allusions to a "depraved or malignant mind" or "a heart regardless of social duty, and fatally bent on mischief." The same malignity or depravity was extended to one who, without directing his violence at any particular person, randomly lashed out with deadly force, fall where it might. Writing in 1762, Foster typified the common-law position when he spoke of a case in which a house dweller killed a crown officer who had come to serve legal process. Foster suggested that the officer may have acted unlawfully in breaking into the house, and discussed the defendant's violent response:

[A]dmitting that a trespass in the house with an intent to make
an unjustifiable arrest on the Owner, could be considered as some
provocation to a Stander by: yet surely the knocking a Man’s
brains out, or cleaving him down with an Ax on so slight a Prov-
cation, savoreth rather of Brutal rage, or, to speak more properly,
of Diabolical Mischief, than of Human Frailty. And it ought al-
tways to be remembered, that in all cases of Homicide on Sudden
Provocation, the Law indulgeth to Human Frailty, and to that
alone .... And where the circumstances of Deliberation and Cru-
elty concur, as they do in this Case, the Fact is undoubtedly Mur-
der; as flowing from a wicked heart, a Mind grievously depraved,
and acting from motives highly criminal, which is the genuine no-
tion of Malice in our Law.80

Malice aforethought at common law was thus a complex, mor-
ally sensitive compendium of elements which gradually developed
over a long period of time. It incorporated not only the actor’s
man-endangering thoughts and intentions at the moment of action,
but also took into account, in however crude a fashion, his moral
character, as measured by the judge’s sense of blameworthiness
and accountability.81

Drafters of modern criminal codes have disassembled this
complex compendium and reconstructed its bits and pieces, as the
aggravating and mitigating factors, in separate statutory sections.
The drafters generally have eschewed the common-law concepts
and vocabulary; instead, they have used presumably more scientific
terms to describe “culpable mental states.”82 Subdivision 2 of New
York Penal Law section 125.25 (depraved indifference murder),
however, is exceptional in that it carries forward a basic common-
law concept in language recognizable to lawyers and judges two
hundred years ago. The serious question is whether it is recogniza-
ble to lawyers and judges today.

As anyone who has put together a child’s bicycle or tinkered
with other machinery well knows, it is easier to take a complex
thing apart than to put it back together again. Pieces tend to get
lost or put back in the wrong place. To illustrate, let me recount an
obscure piece of legal history.

When New York first codified the criminal law in the optimis-

80 M. Foster, supra note 78, at 138.
81 See 3 J. Stephen, supra note 51, at 71-73.
82 See, e.g., Robinson & Grall, Element Analysis in Defining Liability: The Model Pe-
nal Code and Beyond, 35 Stan. L. Rev. 681, 683 (1983) (“common law and older codes often
defined an offense to require only a single mental state”).
tic era of Benthamite rationality, the Revised Statutes of 1829 defined murder as follows:

§ 5. Such killing, unless it be manslaughter or excusable or justifiable homicide, as herein after provided, shall be murder in the following cases:

1. When perpetrated from a premeditated design to effect the death of the person killed, or of any human being:

2. When 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:

3. When perpetrated without any design to effect death by a person engaged in the commission of any felony.  

Manslaughter was defined as the taking of a human life "without a design to effect death, in a heat of passion." This statutory scheme not only omitted altogether the specific intent to do grievous bodily harm, but, even more inexplicably, it inserted the mitigating effect of heat of passion in the wrong place: the unintentional crime of manslaughter! What happened to intentional killing done in a heat of passion upon extreme provocation? Did it slip through the statutory cracks?

One court suggested that evidence of heat of passion would negate the "premeditated design to effect death" required for murder in section 5(1). While plausible, this explanation left unresolved the question of where provoked intentional killing fit in the statutory scheme. It could not fall within the definition of manslaughter since that covered only unintentional killing, and heat of passion at common law negated "malice," not intent to kill. As Chief Justice Shaw stated in Commonwealth v. Webster:

Manslaughter is the unlawful killing of another without malice; and may be . . . voluntary, as when the act is committed with a real design and purpose to kill, but through the violence of sudden passion, occasioned by some great provocation, which in tenderness for the frailty of human nature the law considers suffi-

83 COMM’N REP., supra note 56, at 848-49 (quoting 1 N.Y. Rev. Stat. pt. IV, ch. 1, tit. 1, § 5 (1829)).
84 Id. at 850-51 (quoting N.Y. Rev. Stat. pt. IV, ch. 1, tit. 2, art. 1, §§ 10, 12 (1829)).
cient to palliate the criminality of the offence...

In the event, the New York courts dealt with the anomaly and filled the gap by interpreting the word “premeditated” to mean only that the thought must precede the act by some finite space of time. This effectively made “premeditation” a dead letter, and intent to kill became the fixed dividing line between murder and manslaughter; if the jury found such an intent, heat of passion was legally irrelevant. As an additional dividend of poor draftsmanship, heat of passion became an aggravating element of manslaughter committed without an intent to kill; its absence precluded a manslaughter conviction.

The macabre twist to this story is found in a passing observation made by a distinguished nineteenth century judge, John W. Edmonds. Near the end of his life, he wrote in reference to the 1829 revision:

I know from conversations with two of the revisers (Messrs. Duer and Butler), that it was far from the intention of the revision to make capital punishments more frequent, but on the contrary, the design was to diminish them. That was expected to be attained by the abolition of “implied malice,” and would have been attained, but for the inadvertent omission of the word “premeditated” in the definition of manslaughter.

If the manslaughter sections had indeed read: “The killing of a human being, without a [premeditated] design to effect death, in a heat of passion,” then the case of a sudden intentional killing in

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87 Id. at 304; accord Smith v. State, 83 Ala. 26, 28, 3 So. 551, 552 (1888); State v. Kennedy, 169 N.C. 288, 294, 84 S.E. 515, 518 (1915); State v. Henderson, 24 Ore. 100, 103, 32 P. 1030, 1030-31 (1893); Seals v. State, 62 Tenn. (1 Heisk.) 459, 462-63 (1874); Quarles v. State, 33 Tenn. (1 Sneed) 407, 410-11 (1853). Heat of passion may also negate an intent to kill in a particular case, as with intoxication. Chief Justice Shaw's point is that the mitigating effect of provocation and passion does not depend on its negating any specific mental state.

88 See People v. Clark, 7 N.Y. 385, 393 (1852); People v. Sullivan, 7 N.Y. 396, 397 (1852).

89 See COMM’N REP., supra note 56, at 551.

Thus through the seeming failure of the Revisers to provide for homicides committed with intent to kill formulated at the instant of killing, the word “premeditated” was construed contrary to all ordinary usage, and the death penalty was inflicted on those who had killed in the heat of passion or in sudden combat regardless of provocation so long as the intent to kill had existed.

Id. (footnote omitted).


the heat of passion could readily have been read out of the murder section and into the manslaughter sections. Advocates of capital punishment may well ponder the significance of this chilling glimpse of legal history. How many defendants who would have been spared the rope at common law were executed for murder in New York because a single word may have been inadvertently omitted from a statute?92

This excursion back into legal history furnishes some perspective by which to interpret the present statutory scheme. In the 1967 Penal Law revision, extreme emotional disturbance was expressly restored as an affirmative defense to intentional murder. Thus, one mistake of the past was corrected. However, no such affirmative defense is expressly annexed to subdivision 2 of section 125.25, which defines depraved mind murder. If we neglect the common law background and our prior statutory development, we may too easily conclude that such omission means that extreme emotional disturbance is irrelevant to depraved mind murder. The more likely explanation is that extreme emotional disturbance is equally applicable to both murder categories but that the legislature thought an express reference was necessary with respect to intentional murder but superfluous with respect to depraved mind murder. Remember Chief Justice Shaw’s point: heat of passion negates “malice,” not intent to kill; when the legislature reached into the common law grab bag of murder to extract a defined category of intent to kill, it, out of necessity, expressly excepted cases of

92 See COMM’N REP., supra note 56, at 554-60. After two abortive attempts in 1860 and 1862, the legislature, in 1873, enacted a statute creating a second degree of murder (non-capital) if the killing was done with intent to kill, but without deliberation and premeditation. See id. The courts continued to allow convictions for first degree murder based on very short periods for premeditation. See People v. Majone, 91 N.Y. 211, 211-12 (1883); People v. Leighton, 88 N.Y. 117, 120 (1882). Nevertheless, the addition of a non-capital form of intentional murder facilitated mitigation (if life imprisonment can be so considered) in cases of intentional killings done in a heat of passion. See People v. Caruso, 246 N.Y. 437, 446, 159 N.E. 390, 445-46 (1927); People v. Fiorentino, 197 N.Y. 560, 563-65, 91 N.E. 195, 196-97 (1910); People v. Barberi, 149 N.Y. 256, 267, 43 N.E. 635, 637-38 (1896).

This harsh, incomplete, and confusing distortion of the common law dichotomy between murder (with malice) and manslaughter (upon provocation and passion) is what Cardozo criticized in his famous essay “What Medicine Can Do for the Law.” B. CARDOZO, What Medicine Can Do for the Law, in LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES (1931). He wrote: “What we have is merely a privilege offered to the jury to find the lesser degree when the suddenness of the intent, the vehemence of the passion, seems to call irresistibly for the exercise of mercy. I have no objection to giving them this dispensing power, but it should be given to them directly and not in a mystifying cloud of words.” Id. at 100.
heat of passion.\textsuperscript{93} Depraved indifference to human life, on the other hand, is an expression carried forward intact from the common law. It comes with all the common law exceptions and exclusions already built in, thereby obviating the need to restate them as distinct defenses, affirmative or otherwise. Indeed, under \textit{Mullaney v. Wilbur}\textsuperscript{94} and \textit{Patterson v. New York}\textsuperscript{95} it would probably be unconstitutional to restate as an affirmative defense (to be proved by the accused) a factual element necessarily excluded in the basic definition of the crime.\textsuperscript{96}

The New York Court of Appeals recently had to struggle with such an overlap between mental elements in the definition of crime and mental elements in an affirmative defense. In \textit{People v. Kohl},\textsuperscript{97} the court considered the constitutionality of a 1984 amendment that changed mental disease or defect from an ordinary "defense," to be disproved by the prosecution beyond a reasonable doubt, to an "affirmative defense," to be established by the defendant by a preponderance of the evidence.\textsuperscript{98} The court held the amendment constitutional on its face because insanity is a mental condition not necessarily inconsistent with statutory \textit{mens rea} definitions, such as intent to kill. Therefore, a defendant who intentionally killed a human being because of an insane delusion that God or-

\textsuperscript{93} The Model Penal Code's mitigating provision is made expressly applicable to any homicide which would otherwise be murder. \textit{Model Penal Code} § 210.3(1)(b) (1980). As a matter of substance, this fully accords with this author's view of New York law. As a matter of form, it was necessary for the Model Penal Code to make mitigation expressly applicable to \textit{all} forms of murder because the Code's definitions of murder completely eschew the common law concepts. The Code speaks of murder "committed recklessly under circumstances manifesting extreme indifference to the value of human life." This is a purely descriptive statement. The New York formula, "depraved indifference to human life," incorporates the common law's normative standard by which implied malice was the antithesis of a killing done in a heat of passion under adequate provocation. \textit{Compare} \textit{Mullaney v. Wilbur}, \textit{421 U.S. 684}, 704 (1975) (prosecution in homicide case must prove beyond a reasonable doubt the absence of heat of passion on sudden provocation) \textit{with} \textit{Patterson v. New York}, \textit{432 U.S. 197}, 210 (1977) (in New York, defendant in prosecution for murder in second degree must prove by preponderance of evidence the affirmative defense of extreme emotional disturbance to reduce crime to manslaughter). Should the New York Legislature wish, as a matter of policy, to make extreme emotional disturbance an affirmative defense to depraved mind murder, it could do so in conformity with the Constitution. It would need only to eliminate the existing common law terminology from the definition of murder, and adopt the Model Penal Code definition, with the affirmative defense annexed.

\textsuperscript{94} \textit{421 U.S. 684} (1975).
\textsuperscript{95} \textit{432 U.S. 197} (1977).
\textsuperscript{96} \textit{See supra} note 93 and accompanying text.
\textsuperscript{98} \textit{N.Y. Penal Law} § 40.15 (McKinney 1989).
dered him to do so, would have to prove the affirmative defense. The court, however, recognized that the statute could not constitutionally be applied where the particular type of insanity necessarily negatived the necessary culpable mental state of intending to kill another person. Presumably, then, the state would bear the burden if the defendant claims that insanity caused him to think that he was killing the devil disguised as a human being.

It is difficult to justify the way the cases presently draw the line between what is and is not constitutionally permissible by way of shifting to a criminal defendant the burden of proof on a critical fact. If the conclusions drawn in the two hypothetical examples of insanity stated above are correct, there is something fundamentally capricious in the Mullaney-Patterson-Kohl test. Be that as it may, my point is that the absence of a separate and distinct provision for an affirmative defense of extreme emotional disturbance in the depraved mind section of the statute should not mislead courts into overlooking the strong probability that New York’s definition of depraved mind murder implicitly includes such a provision.

Since the mitigation defense frequently is linked in practice to claims of self defense, it is worth examining New York’s leading case on the relationship between depraved mind murder and self defense. The court, in State v. Goodall, stated:

"Person" is defined in section 10.00(7) as a human being. Id. § 10.00(7). The only decision to the contrary is found in Maine; the steps leading to that conclusion are instructive. See State v. Lafferty, 309 A.2d 647, 662 (Me. 1973). The state of Maine, for a long time, had a murder statute drawn in common law terminology, i.e., malice aforethought. There had never been any suggestion that provocation and passion would not reduce murder to manslaughter. See supra note 71. The burden of showing this mitigating factor, however, was on the defendant. See Lafferty, 309 A.2d at 662. When the burden of proof built into this statute was held unconstitutional by the United States Supreme Court in Mullaney the Maine Legislature cobbled together a new set of homicide statutes, combining such provisions as the Model Penal Code’s definition of reckless manslaughter and the concept of traditional depraved mind murder. In construing the manslaughter section, the Supreme Court of Maine applied the subjective test, i.e., whether the defendant was aware of the risk. State v. Goodall, 407 A.2d 268, 278 (Me. 1979). Depraved mind murder, on the other hand, was construed according to Holmes’s objective test: whether the defendant should have foreseen the risk. State v. Woodbury, 403 A.2d 1166, 1171 (Me. 1979). In addition, since the defense of extreme emotional disturbance was appended to the new intentional murder provision, but not to the depraved mind murder provision, the court held that the defense was unavailable to one charged with depraved mind murder—an unprecedented finding under Maine law. State v. Michaud, 513 A.2d 842, 852 (Me. 1986). Such are the fruits of reform!
defense. In People v. McManus, a young man fired a shot at a group of youths, killing one. The defendant was indicted for intentional murder and depraved mind murder. Although there was conflicting evidence, the defendant insisted that he had fired the shot to "scare off" the youths, who were beating and robbing his friend. The trial judge instructed the jury on the use of deadly physical force in defense of self or another as it applied to intentional killing, but refused to instruct on justification with respect to the count charging depraved mind murder. The jury acquitted the defendant of intentional murder, but convicted him of depraved mind murder.

The Appellate Division unanimously affirmed the conviction, agreeing with the trial judge that justification was alien to depraved mind murder. The court sensibly observed that the definition of depraved recklessness murder necessarily excludes the elements of justification; but that is surely no reason to refuse to instruct the jury on the defense as applied to the evidence in the case. What the court inexplicably overlooked is that the coin has two sides: if depraved mind murder excludes justification, then justification excludes depraved mind murder. On further appeal, the New York Court of Appeals reversed the conviction and granted a new trial.

However, the Court of Appeals failed to address the Appellate Division's faulty reasoning; instead, it bypassed the question of inherent inconsistency between the elements of justification and the elements of the crime charged. The court perceived the statutory defense of justification, by its terms, as applicable to any crime based on the use of deadly physical force, whatever the mens rea or actus reus, and that justification trumps all criminal offenses. The court stated: "The defense must not be viewed as one that

103 The trial justice explained his refusal to charge justification to counsel: "In order for you to have justification, you must have intent. You are admitting that you killed somebody. You did it because you were justified. How can you have a reckless depraved indifference and say you were justified[?] I don't think it applies." People v. McManus, 108 A.D.2d 474, 476, 489 N.Y.S.2d 561, 563 (2d Dep't 1985), rev'd, 67 N.Y.2d 541, 496 N.E.2d 202, 505 N.Y.S.2d 43 (1986).
104 Id. at 478, 489 N.Y.S.2d at 565 (citing Register, 60 N.Y.2d at 270, 457 N.E.2d at 704, 469 N.Y.S.2d at 599). The court reasoned that the test of unjustified depravity in the murder statute is objective, while section 35.15(2) defining the justified use of force is a subjective test based on the actor's "reasonable belief." Id.
operates to negate or refute an aspect of the crime charged. Rather, if the People fail to disprove justification, the use of force is deemed lawful (Penal Law section 35.15) and the defendant is entitled to an acquittal.\textsuperscript{105} The court elsewhere emphasized that “[d]efense of oneself or one’s relations, deemed a natural, inalienable right at common law, justified the use of force, making even homicide lawful.”\textsuperscript{106} This right is carried forward in section 35.15, which “affirmatively permits the use of force under certain circumstances.”\textsuperscript{107}

The court’s ringing endorsement of the right of self-defense emphasized the distinction between justification and excuse, between conduct that is objectively lawful, and conduct that, although objectively unlawful, is withdrawn from penal sanction because the harm-doer is subjectively free from blame. This distinction has a long and venerable lineage, though its practical significance is minimal.\textsuperscript{108} Even its theoretical validity is questionable in certain close cases.\textsuperscript{109} Moreover, given that justification can be based on the actor’s reasonable though mistaken belief in the

\textsuperscript{105} McManus, 67 N.Y.2d at 548-49, 496 N.E.2d at 206-07, 505 N.Y.S.2d at 47-48.

\textsuperscript{106} Id. at 546, 496 N.E.2d at 205, 505 N.Y.S.2d at 46.

\textsuperscript{107} Id. at 545, 496 N.E.2d at 204, 505 N.Y.S.2d at 45.

\textsuperscript{108} See J. Miller, Handbook of Criminal Law 199, 255-56 (1934); 3 J. Stephen, supra note 51, at 11.

\textsuperscript{109} The classic test case for placing justification on purely objective grounds is the policeman who shoots a fleeing robber. If the policeman was not aware that the man was fleeing a robbery and shot him from malicious impulses, may he claim justification based on the objective facts? The cases say no. In order to claim the privilege the actor must consciously act with knowledge of the facts that establish the privilege. See Collett v. Commonwealth, 296 Ky. 267, 271-72, 176 S.W.2d 893, 896 (1943); People v. Burt, 51 Mich. 199, 202, 16 N.W. 378, 379 (1883); Reg. v. Dadson, 169 Eng. Rep. 407, 407 (1850).

A growing number of scholars have criticized this result as violative of the basic principle of legality. They argue that justification, as contrasted with excuse, establishes that no criminal \textit{actus reus} occurred. If the accused did not commit a criminal act he should not be convicted for having a \textit{mens rea}. \textit{See} A.T.H., Smith, \textit{On Actus Reus and Mens Rea}, in Reshaping the Criminal Law 95, 102 (Glazebrook ed. 1978); G. Williams, Criminal Law: The General Part \textsection 12, at 23-27 (2d ed. 1961); \textit{see also} Robinson, \textit{A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability}, 23 UCLA L. REV. 266, 288-89 (1975) (allowing punishment for attempt but not substantive crime).

This author would support the traditional position by distinguishing the act element of the total \textit{actus reus} from the result element. The law does not regard the death of a human being, even a robber, as a social good. What may be justified is the act, despite, not because of, its harmful result. In considering whether the act is justified, one can look to the actor’s knowledge and intent. If, in light of the facts known to the actor, his act was unjustified when performed, and the result is a recognized legal harm, his conviction accords with legitimate principles of legality. He is not punished for his evil intent alone. \textit{Cf.} G. Fletcher, \textit{supra} note 34, \textsection 7.4; J. Hall, \textit{supra} note 51, at 232-33.
necessary facts,\textsuperscript{110} there appears to be a generous dose of excuse mixed in with the real article.\textsuperscript{111} The \textit{McManus} case, nonetheless, leaves unresolved the issue of whether the absence of extreme emotional disturbance is implied in the definition of depraved mind murder.\textsuperscript{112}

V. CAN HISTORY, RATIONAL POLICY AND RECENT PRECEDENT BE RECONCILED?

A. History

At common law, an intentional killing was murder with express malice.\textsuperscript{113} An unintentional killing with extreme recklessness was murder with implied malice.\textsuperscript{114} This extension recognized that, in extreme cases, wanton disregard of human life rose to the same level of blameworthiness as the deliberate taking of life. Malice could never be found where the accused lost self-control under the stress of fear, anger, or other passion caused by extreme provocation sufficient to arouse the average person.

B. Policy

Criminal sanctions operate both to deter and to remove dangerous persons from the rest of society and incapacitate them from doing further harm. Persons who temporarily lose self-control under the stress of great provocation are both less likely to be de-

\textsuperscript{110} N.Y. PENAL LAW § 35.15 (McKinney 1989).


\textsuperscript{112} Since the justifiable use of force in defense of a person is presently denominated a “defense” under the New York Penal Law section 35.00, no practical difference exists between the reasoning of the \textit{McManus} case and the proposition that justification is necessarily excluded from the definition of any crime based on recklessness. Under either view, once the evidence has uncovered the issue of justification, the judge must instruct the jury that it is for the people to disprove beyond a reasonable doubt. The \textit{McManus} case does, however, constitute an invitation to the legislature to modify justification from a defense to an affirmative defense, to be proved by the defendant. Under the logic of \textit{Mullaney-Paterson}, the burden of proving an issue extraneous to the definition of the crime charged may constitutionally be shifted to the defendant. If this were to happen, then the court would have to more closely examine whether there is an overlap between the elements of justification necessarily excluded in the definition of a recklessness-based crime and the elements embraced in the separate affirmative defense. \textit{See R. Perkins & R. Boyce, supra} note 32, at 79-80. This would embroil the court in the same dilemma that it finessed in \textit{Kohl}, 72 N.Y.2d at 191, 527 N.E.2d at 1182, 532 N.Y.S.2d at 45.

\textsuperscript{113} See R. Perkins & R. Boyce, supra note 32, at 71.

\textsuperscript{114} See \textit{id.}; Mayes v. People, 106 Ill. 306, 313-14 (1889).
terred by the threat of punishment and present less of a threat of further harm than those who commit the same acts as an unforced expression of their normal characters. Hence, we mitigate the punishment upon a showing of extreme emotional disturbance. The policy is similarly applicable to those who kill intentionally or through gross recklessness. Indeed, it seems actually perverse to allow mitigation only to those who intentionally do the greatest harm known to the law but deny it to those who, however reckless, did not actually intend the harm.

C. Precedent

In distinguishing reckless manslaughter from depraved reckless murder, the New York Court of Appeals has attempted to objectify the distinction completely: the sole difference lies in external circumstances, the culpable mental state of both crimes being identical. At the same time, the statute expressly mitigates murder with intent to kill to manslaughter in cases of extreme emotional disturbance for which there is a reasonable explanation or excuse. The problem is whether the precedents objectifying depraved mind murder preclude mitigation based on extreme emotional disturbance. History and policy together indicate that mitigation should be allowed: Are the recent cases irrevocably opposed?

One way to resolve the question would be to abandon the ratio decidendi of the Register line of cases which equate the culpable mental state of depraved reckless murder with that of reckless manslaughter. This, to me, would be the soundest solution for the long term. When a statute provides that a defendant’s reckless act becomes murder when committed “under circumstances evincing a depraved indifference to human life,” it requires proof of a “guilty mind” and “vicious will” much worse than ordinary recklessness. The jury should not be told that the only mental culpability is the same as that for manslaughter and they should not be told that greater blameworthiness can be found in the external circumstances alone. First of all, the jury is unlikely to accept a proposition so counter-intuitive; only the legal mind can accomplish such a feat. Secondly, not having legally-trained minds, jurors must be mystified when, after receiving such an instruction from the trial judge, they are further instructed, in the language of the Fenner case, to decide whether the “defendant’s ‘conduct, beyond being reckless[, was] 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.\textsuperscript{115} Even if we set aside for a moment all the legal history of malice aforethought upon which our depraved mind murder provision has been built, there seems to be a distinction on the face of the present statutes between “conscious disregard” of the risk of killing someone (manslaughter) and a “depraved indifference” to human life itself. One may have the normal respect for life and still act in disregard of the risk on a particular occasion, especially under extraordinary stress. Indifference to the lives of others, on the other hand, connotes a predisposition or character trait in which the lives of other people count for nothing in the actor’s scheme of things; in the vernacular, he couldn’t care less. This requires the jury to make a normative finding on \textit{mens rea} that transcends any of the four statutory culpable mental states defined in section 15.05, particularly recklessness. Each of the four standard terms focuses on the actor’s knowing and choosing at the precise moment he commits a voluntary act, not his vicious predisposition.\textsuperscript{116} The jury charge approved in \textit{Fenner} directs the jury to make precisely such a normative judgment of blameworthiness and accountability.

Undoubtedly, the degree of risk is important evidence on this point, as would be the total absence of any redeeming legitimate purpose for the defendant's behavior. The jury’s task may doubtless become difficult in particular cases, but it does not help to set them to it with “a mystifying cloud of words”\textsuperscript{117} from the trial

\textsuperscript{115} \textit{Fenner}, 61 N.Y.2d at 973, 463 N.E.2d at 618, 475 N.Y.S.2d at 277.

\textsuperscript{116} See \textit{supra} note 20 and accompanying text.

The distinction between specific active operations of the mind versus a static disposition of the mind finds an analogy in the imposition of criminal liability for negligence. Since negligence consists in a failure to think or foresee, some critics have insisted that it is not a real mental state and should not be the basis for criminal liability. J. \textit{Hall}, \textit{supra} note 51, at 166-67; G. Williams, \textit{supra} note 109, at 102-03. If, however, it is acknowledged that inadvertence under circumstances that cry aloud for care is a manifestation of an underlying culpable attitude towards others, the supposed difficulty is overcome. If a bridegroom fails to appear at the wedding ceremony, is he absolved from blame when he exclaims “I forgot”? See G. \textit{Fletcher}, \textit{supra} note 34, at 398-400; Duff, \textit{Recklessness}, \textit{supra} note 62, at 282.

When the law, under appropriate circumstances, imposes a duty to act, there may arise criminal liability for failure to act. G. \textit{Fletcher}, \textit{supra} note 34, § 8 (criminal omissions). The law may likewise impose a duty to advert to the consequences before one chooses to act. It can be said then, that omitting to think when one should think may be as culpable as omitting to act when one should act.

\textsuperscript{117} B. \textit{Cardozo}, \textit{supra} note 92.
That a \textit{Register} instruction and a \textit{Fenner} instruction now may be given in the same case exposes a fundamental ambivalence in our understanding of the guilty mind in depraved mind murder. But ambivalence, and even confusion, is better than clear-cut wrongheadedness; a \textit{Register} instruction coupled with a \textit{Fenner} instruction is far superior to a \textit{Register} instruction standing alone. That the subjective culpability of a defendant be addressed under a pseudonym, or even as a nameless orphan of the divorce of \textit{mens rea} from \textit{actus reus}, is better than not addressing it at all.

My difference with the court's doctrine on \textit{mens rea} cannot be reduced to a mere problem of semantics. It goes to the heart of how a lay jury is to be guided in thinking about a defendant's guilt. However, we must recognize the force of stare decisis; the New York Court of Appeals is unlikely to depart from a position repeatedly taken in a series of recent cases. If extreme emotional disturbance is to be recognized as a mitigating factor in depraved mind murder, it should be reconciled with existing doctrine.

A second possible solution would be to relate the "reasonable explanation or excuse" component of mitigation to the objective circumstances attending the homicide and conclude that such mitigating circumstances negate the aggravating circumstances that elevate reckless manslaughter to reckless murder. This solution has some attractions. It would allow the court to maintain its doctrine that the \textit{mens rea} of depraved mind murder is recklessness pure and simple while at the same time recognizing the existence of mitigating circumstances. Of course, since the court has stated that the only difference between the external elements of the two crimes lies in the greater degree of risk implied in the adjective "grave" in the murder section versus the adjective "substantial" required for manslaughter, it would require the court to broaden the scope of relevant circumstances. The facts which could establish provocation of the actor are usually different from the facts which establish the degree of risk created by the actor's violent reaction to the provocation. But such a minor fine-tuning of its ratio decidendi would be a small price to pay for maintaining the chief point insisted on by the court: the lack of any difference in the \textit{mentes reae} of the two offenses.

This attempt to "objectify" the mitigating element also maintains continuity with the common law background to the extent that the common law did not allow heat of passion in a purely sub-
jective sense as mitigation. Indeed, the law books are full of cases evaluating the objective facts giving rise to heat of passion according to a “reasonable person” standard.\footnote{See LaFave \& Scott, supra note 34, at 654-58; R. Perkins \& R. Boyce, supra note 32, at 85-88; Ashworth, The Doctrine of Provocation, 35 Cambridge L. J. 292, 298-99 (1976); Note, Manslaughter and the Adequacy of Provocation: The Reasonableness of the Reasonable Man, 106 U. Pa. L. Rev. 1021, 1022 (1958). For a thorough historical survey suggesting that the objective limitations on heat of passion were corruptions of a simple subjective standard in early common law, see Singer, supra note 75, at 280-83.}

As Michael and Wechsler wrote in their landmark study:

Other things being equal, the greater the provocation, . . . the more ground there is for attributing the intensity of the actor’s passions and his lack of self-control on the homicidal occasion to the extraordinary character of the situation in which he was placed rather than to any extraordinary deficiency in his own character. While it is true, it is also beside the point, that most men do not kill on even the gravest provocation; the point is that the more strongly they would be moved to kill by circumstances of the sort which provoked the actor to the homicidal act, and the more difficulty they would experience in resisting the impulse to which he yielded, the less does his succumbing serve to differentiate his character from theirs.\footnote{Michael \& Wechsler, A Rationale of the Law of Homicide II, 37 Colum. L. Rev. 1261, 1281 (1937).}

When all is said and done, however, there remains what, to me, is an insuperable obstacle to any attempt to explain mitigation in purely objective, circumstantial terms. At bottom, the basis of the mitigation is “extreme emotional disturbance,” or as a previous generation would have said, “heat of passion.” It is simply not possible to exclude from consideration the actual subjective mental and emotional condition of the actor. Certainly, the common law did not exclude such inquiry. Even where the provoking circumstances were sufficient to make the hypothetical average person lose self-control, if the testimony showed that the defendant, being made of sterner stuff, killed in cold blood, he was guilty of murder.\footnote{LaFave \& Scott, supra note 34, at 660-61; R. Perkins \& R. Boyce, supra note 32, at 98.} Alternatively, if an actor, having been reasonably roused into a heat of passion, “cooled off” sooner than the average man and killed in cold blood, he was guilty of murder.\footnote{LaFave \& Scott, supra note 34, at 662-63; R. Perkins \& R. Boyce, supra note 32, at 101.}

Bearing in mind that there is no express statutory affirmative
defense of extreme emotional disturbance for depraved mind murder, this mitigating factor either must be implied in the definition of the crime itself or else be disallowed altogether. If extreme emotional disturbance necessarily entails inquiry into the defendant’s subjective mental and emotional condition, how is the court to reconcile its precedents which identify the *mens rea* of depraved mind murder with that of reckless manslaughter—as to which all admit that extreme emotional disturbance is irrelevant?

The third possible path to reconcile the court’s holdings with the demands of rational penal policy and historical continuity involves a distinction between mental states that *establish* culpability and those that *diminish* it. Register’s holding that depraved mind murder does not require proof of recklessness *plus* some aggravating mental element does not preclude a holding that would admit proof of some subjective condition that *subtracts* from the culpability of recklessness. Note the court’s statement in *Roe*: “Evidence of the actor’s subjective mental state, however, is *not pertinent* to a determination of the additional element required for depraved indifference murder: whether the objective circumstances bearing on the nature of a defendant’s reckless conduct are such that the conduct creates a very substantial risk of death.”122 This can be read as eliminating the relevance of the actor’s state of mind for all purposes, or, more appropriately, as limited to its irrelevance as an aggravating element.

A further distinction worth noting is that between an individual’s mental state and his emotional state. The four standardized definitions of “culpable mental states” are just that: states of cognition and volition—knowing, thinking, and choosing. The Register line of cases only establishes that recklessness as a culpable “mental state” is sufficient to establish guilt for murder. These holdings have no bearing whatever on the distinct question of whether a particular emotional state may mitigate the degree of blame that would attach to a particular mental state in the absence of such emotion.

The suggested interpretation would restore some vitality to the statutory language “a depraved indifference to human life,” which otherwise seems to be read out of the murder statute. Extreme emotional disturbance for which there is a reasonable expla-

nation or excuse does not negate ordinary recklessness. The one can logically and realistically coexist with the other. But if the recklessness occurs in the kind of grave risk circumstances that would otherwise elevate the offense to murder, then the existence of a condition of extreme emotional disturbance (subjective) reasonably explained or excused (objective) can mitigate the actor's culpability to reckless manslaughter. In sum, recklessness, however grave the risk, which is the product of passion under great stress, is by definition not depraved indifference to human life.

VI. Conclusion

Next to the basic policy that punishment should fall only on the guilty and not the innocent, the most fundamental policy of any system of graded punishments is that even the guilty should not be punished beyond their deserts. Respect for the law could not be maintained otherwise. A corollary of the last point is that an offender's deserts are inextricably connected with his subjective state as much as with the harmful consequences he caused or the circumstances in which he acted. Free will, choice, blameworthiness, and accountability are the stuff of what our forebears called mens rea.

There is no doubt that as an historical matter there emerged from the early attribution of strict liability for harmful acts a core concept of mens rea in criminal law: actus non facit reum nisi mens sit rea. As Blackstone said: "An unwarrantable act without a vicious will is no crime at all." This premise developed primarily in the context of claims of justification, excuse, and mitigation.

As the common law of crimes came to be superseded largely by statutory codes with the mental element and external elements more or less precisely defined for each crime, the notion of a common core of mens rea was pushed into the background. Some scholars argued that the idea of mens rea itself was superfluous and that analysis need focus only on the mentes reae of specific crimes. The proliferation of statutory offenses malum prohibitum intensified this trend away from maintaining a consensus on

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123 4 W. BLACKSTONE, supra note 67, at 21.
the common core of mens rea.

I am also convinced that one pernicious byproduct of the Mullaney-Patterson-Kohl line of cases is that by insisting that the burden of proof can be shifted to the defendant only on elements extrinsic to the definition of the crime, we have generated a reverse effect of reading important elements out of the crime in order that they may be upheld as affirmative defenses. Of course, a man who is insane can "intend" a consequence. But if his insanity renders him irresponsible and morally and legally unworthy of blame, has he acted with "mens rea"? And if the burden of proving that issue may validly be placed on the defendant under Mullaney and Kohl, has mens rea been pushed out of the definition of crimes such as murder?

I am not arguing against shifting the burden of proof as such; I would like to bypass that controversy in this discussion. What troubles me is the legal reasoning used by the courts to justify such a shift. Even where burden of proof is not an issue, I am afraid that judges will have taught themselves to think of the "guilty mind" as something extrinsic to crime and punishment. Murder is the gravest felony known to our law. People were once put to death in New York for committing it, and may be again some day. Even where the murder statute speaks of a depraved indifference to human life, the New York Court of Appeals holds that the mental culpability is no different than that for reckless manslaughter. The notion of mens rea as the "vicious will" corresponding to the gravity of the crime has become invisible. Or, at least, it has lost its identity. While the court acknowledges that murder with depraved indifference is more blameworthy than reckless manslaughter, it accounts for the difference by purely external circumstances.

I have argued that such reasoning distorts the legislative intent in the depraved mind murder statute, ignores two hundred years of legal history, and provides the jury with ambiguous and confusing instructions.

Even if these criticisms are unavailing and current doctrine remains unchanged, it is unnecessary to extend the doctrine to exclude extreme emotional disturbance as a mitigating factor in a depraved mind murder case, as some lower courts have done. None of the New York Court of Appeals' holdings require such a result and

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125 Patterson, 432 U.S. at 210; Mullaney, 421 U.S. at 704; Kohl, 72 N.Y.2d at 197, 527 N.E.2d at 1185, 532 N.Y.S.2d at 48.
every consideration of historical continuity and moral proportion-
ality supports the contrary result. If the concept of depraved indif-
ference to human life means anything at all, it excludes by neces-
sity an actor whose reckless violence was the product of intense
passion provoked by sources that reasonably account for his emo-
tional state.

As the statute presently reads (depraved indifference) the bur-
den of proof rests with the People. If the legislature wishes as a
matter of policy to make mitigation an affirmative defense, as in
intentional murder, I see no constitutional obstacle to doing so,
provided that the definition of the crime is rewritten to eliminate
the common-law concept of depraved indifference and replace it
with a purely factual description of the mental state along the lines
of the Model Penal Code.129

129 See supra note 93 and accompanying text.