

Notes

REALITY CHECK: HOW PRACTICAL CIRCUMSTANCES AFFECT THE INTERPRETATION OF DEPRAVED INDIFFERENCE MURDER

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ABSTRACT

This Note examines the treatment of depraved indifference murder across the thirty-six states that include the concept in their criminal codes. The Note identifies the broad range of practical circumstances that shape the development of depraved indifference murder statutes, and argues that it is not possible to develop a single interpretation that will function effectively across all jurisdictions. Finally, this Note identifies the three most important practical circumstances that affect the development of depraved indifference murder statutes.

INTRODUCTION

Depraved indifference murder is an anomaly in the field of criminal law. Although criminal codes generally place a premium on clarity to inform potential defendants of the types of conduct that will be subject to punishment, many depraved indifference murder statutes include such vague concepts as “depraved heart”¹ or

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1. Alan C. Michaels, Note, *Defining Unintended Murder*, 85 COLUM. L. REV. 786, 787 (1985) (citing WILLIAM BLACKSTONE, 4 COMMENTARIES *199).

“extreme indifference to the value of human life.”² Some states provide a more structured definition of depraved indifference that focuses on the defendant’s subjective state of mind³ or the degree of risk created by the defendant’s conduct,⁴ but these interpretations vary widely by jurisdiction.

In February 2003, fifty-two-year-old administrative law judge Larry Feingold disabled the pilot lights of his oven, turned on the gas, ingested tranquilizers, and fell asleep in an attempt to commit suicide.⁵ During this attempt, a spark from the refrigerator ignited the gas, triggering an explosion that blew out the walls of his apartment.⁶ Feingold was charged with first-degree reckless endangerment,⁷ which, in New York, requires that the defendant “evin[c]e a depraved indifference to human life.”⁸ Although this was a reckless endangerment case, the Court of Appeals of New York seized the opportunity to address the state’s interpretation of “depraved indifference” as applied to its depraved indifference murder statute.⁹ The opinion culminated a line of cases altering the state’s interpretation of depraved indifference murder from an objective to a subjective approach.¹⁰ This opinion, however, reveals only two of the many approaches to depraved indifference murder. Unlike New York, Colorado interprets its depraved indifference murder statute according to the number of lives endangered by the defendant’s actions,¹¹ whereas Utah evaluates depraved indifference murder based on the risk of death created by the defendant’s conduct.¹²

This Note provides a framework for states to adopt a definition of depraved indifference murder that effectively corresponds with the practical realities of their jurisdictions. To create this framework, this Note examines the approaches taken by the thirty-six states that

2. MODEL PENAL CODE § 210.2(1)(b) (Proposed Official Draft 1962).

3. *See infra* Part II.E.

4. *See infra* Part II.B–C.

5. *People v. Feingold*, 852 N.E.2d 1163, 1164 (N.Y. 2006).

6. *Id.*

7. *Id.*

8. N.Y. PENAL LAW § 120.25 (McKinney 2004).

9. *Feingold*, 852 N.E.2d at 1164 (“To begin with, there is no dispute that the term ‘depraved indifference’ has the same meaning in both the depraved indifference murder statute and the reckless endangerment statute.”).

10. *See infra* Part III.B.

11. *See infra* Part III.C.

12. *See infra* Part III.D.

include the concept of depraved indifference in their criminal codes. Unlike other investigations, which have been largely theoretical in nature, this Note sheds light on the practical realities that shape a state's interpretation of depraved indifference murder. It summarizes the different approaches to depraved indifference murder across the country and identifies the practical reasons behind each state's selection of a particular interpretation and the consequences of that choice. Given the diversity of practical circumstances that lead to the selection of a particular mode of interpretation, it is not possible to provide an "ideal" analysis of depraved indifference that works in every jurisdiction. But by closely evaluating the reasons for adhering to a particular interpretive methodology and the consequences that stem from this choice, states can follow the approach that best fits their individual circumstances. This Note identifies the three most important practical factors that a state must consider when selecting an interpretive approach.

Part I examines the foundations of the depraved indifference murder concept and highlights influential commentary on the subject. Part II provides a summary of the methodologies that are followed in all thirty-six states that recognize the depraved indifference concept and demonstrates the practical consequences that result from each particular interpretive choice. Part III illustrates how previous analyses of depraved indifference murder fail to evaluate the practical realities leading to a state's choice of an interpretive methodology. This Part demonstrates that practical realities play a major role in a state's selection of its approach to depraved indifference murder by examining the formation of the interpretive scheme toward depraved indifference murder in five states. Part IV analyzes the results in Parts II and III and provides recommendations on how states can best utilize this information to select an interpretive approach to depraved indifference murder that corresponds with their unique practical circumstances.

I. BACKGROUND

At common law, murder included the killing of a human being by another human being with malice aforethought.¹³ The concept of "malice aforethought" developed during the Enlightenment, when

13. See RICHARD J. BONNIE ET AL., *CRIMINAL LAW* 772 (2d ed. 2004) ("[M]urder came to include all homicides committed with 'malice aforethought' . . .").

criminal conduct was evaluated on reason rather than the religious concept of sin.¹⁴ Malice constituted “any evil design in general; the dictate of a wicked, depraved, and malignant heart . . . ,”¹⁵ a disdain for social relations and for the political order.¹⁶

The concept of malice aforethought was divided into “express” and “implied” malice. As a result, the common law definition of unintentional murder encompassed two types of killings: those that were not premeditated or deliberate but were done as the result of an intentional act¹⁷ and those that were based on a level of recklessness displaying a “depraved heart.”¹⁸ According to Professor V.F. Nourse, “The murder of a depraved heart developed, at least in part, as a killing that was unprompted by an aggressor or provocateur; there was no relation, societal or legal, that prompted the murder.”¹⁹ In its early development, depraved heart murder, like much of the common law, was based on morality, aiming to punish those offenders who committed acts so reckless that they violated all social and political norms.²⁰

In 1962, the law of murder changed drastically with the development of the Model Penal Code (MPC).²¹ The Model Penal Code abandoned the “malice aforethought” and “depraved heart” language of common law murder,²² instead defining the offense along the four culpability levels of section 2.02: “purposely,” “knowingly,”

14. V.F. Nourse, *Hearts and Minds: Understanding the New Culpability*, 6 BUFF. CRIM. L. REV. 361, 372 (2002).

15. Michaels, *supra* note 1, at 787 (quoting *Commonwealth v. Malone*, 47 A.2d 445, 447 (Pa. 1946)).

16. Nourse, *supra* note 14, at 375.

17. Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. CAL. L. REV. 953, 1003 (1998) (“What we would now call intent to kill, purpose or knowledge in the language of the Model Penal Code, became known as ‘actual’ or ‘express’ malice, which was the basis for one type of murder.”).

18. *Id.* (“Some killings that were not purposeful or knowing, however, were added to the murder category under the rubric of ‘implied’ malice, including a category of ‘depraved heart’ murders, and were treated the same as knowing killings.” (citation omitted)).

19. Nourse, *supra* note 14, at 376.

20. *See id.* (“One spoke of an abandoned heart in such a context precisely because ‘no person, unless of an abandoned heart, would be guilty of such an act upon a slight or no apparent cause.’” (quoting BLACKSTONE, *supra* note 1, at *200)).

21. *See BONNIE*, *supra* note 13, app. A, at A-1 (“[T]he [American Law] Institute published the Model Penal Code in 1962.”).

22. Nourse, *supra* note 14, at 371 (“Modern drafters rejected the idea of a ‘depraved heart’ because they saw this phrase as a sentimental, ambiguous, holdover of an ancient common law.”).

“recklessly,” and “negligently.”²³ The MPC defines “extreme indifference” murder as a homicide that “is committed recklessly under circumstances manifesting extreme indifference to the value of human life.”²⁴ The commentary to section 210.2(1)(b) of the Model Penal Code indicates that the drafters intended extreme indifference murder to define a homicide that falls short of the mens rea required for “knowingly,”²⁵ but is more severe than manslaughter.²⁶ Despite this description, the drafters did not provide a definition for the phrase “extreme indifference to the value of human life.”²⁷ Instead, they opted to leave that determination to the trier of fact, instructing that “recklessness that can fairly be assimilated to purpose or knowledge should be treated as murder and that less extreme recklessness should be punished as manslaughter.”²⁸ This construction has produced a great deal of criticism because the drafters’ explanation of extreme indifference seems no clearer than the common law concept of a depraved heart.²⁹ As a result, states are left to make their own determinations of the meaning of extreme indifference, producing a wide variety of interpretations of the depraved murder concept.³⁰

23. MODEL PENAL CODE § 210.1 (Proposed Official Draft 1962).

24. *Id.* § 210.2(1)(b). As defined in section 2.02,

[a] person acts recklessly . . . when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.

Id. § 2.02(2)(c).

25. According to Model Penal Code section 2.02,

[a] person acts knowingly with respect to a material element of the offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

Id. § 2.02.

26. *Id.* § 210.3(1) (including recklessly committed criminal homicide in the definition of manslaughter).

27. *Id.* § 210.2(1)(b).

28. O’Brien v. State, 45 P.3d 225, 231 (Wyo. 2002) (quoting MODEL PENAL CODE § 210.2(1)(b) cmt. 4 (Proposed Official Draft 1962)).

29. Michaels, *supra* note 1, at 789 (“It is hard to see how these words by themselves provide more definite guidance than the common law’s ‘depraved and malignant heart . . .’”).

30. *See id.* at 801 (“Despite widespread adoption of the Model Penal Code, and its mens rea framework for most offenses, this framework has not been widely used to define unintended murder.”).

In 1985, Alan Michaels, later a professor of criminal law at Ohio State University and author of numerous articles on the subject of criminal mens rea, provided a degree of clarity by classifying the divergent state approaches into four categories: objective circumstances, degree of risk, multiple victim, and mens rea.³¹ According to Michaels, the objective circumstances approach “uses the offender’s physical conduct to distinguish murder from manslaughter. Under this analysis, the jury focuses on the objective circumstances surrounding the crime, not the actor’s attitude towards his victim’s life.”³² Michaels points out that this approach has a number of advantages, namely that it is relatively easy for the jury to understand, it has precedent in other areas of the law, and it produces reasonable results.³³ Yet, by allowing the jury to rely on its sense of what is objectively reasonable when making a determination, the jury “may be led to decide by instinct, or worse, prejudice.”³⁴ Considering that this approach does not provide adequate “guidelines for appellate control,”³⁵ this drawback gains even more significance. The objective standard is also inconsistent with general homicide principles, which rely on mental states to differentiate various grades of murder.³⁶

Departing slightly from the objective circumstances approach, the degree of risk methodology “limits extreme indifference murder to cases in which the actor’s deed created a particularly significant chance of causing a death.”³⁷ Like the objective scheme, the degree of risk approach is easy to comprehend.³⁸ Simplicity may not compensate for its underinclusiveness, however, as it fails to cover situations that appear to demonstrate a depraved indifference to life, such as a game of Russian roulette in which there is less than a 50 percent chance that a bullet will discharge.³⁹ Professor Nourse strongly disapproves of this approach, arguing that although “focusing on ‘risk’ for depraved heart murder seems like a neutral, more precise, calculus . . . it

31. *Id.* at 790–94.

32. *Id.* at 790 (citation omitted).

33. *Id.* at 793.

34. *Id.* at 794–95.

35. *Id.* at 795.

36. *Id.* at 794.

37. *Id.* at 791 (citation omitted).

38. *See id.* at 797 (“Risk is a straightforward concept easily expressed in mathematical terms.”).

39. *Id.* at 798.

quickly becomes a rationalization for our judgments, not a means to them.”⁴⁰

Professor Nourse prefers to interpret depraved indifference murder according to what Michaels calls a multiple victim approach.⁴¹ “Under a multiple victim analysis, a defendant is guilty of unintended murder only if his reckless act endangers more than one individual.”⁴² Michaels indicates that, again, the advantage of this approach lies in its simplicity. Limiting depraved indifference murder to situations endangering more than one person’s life creates a bright-line rule that prevents prosecutors and juries from convicting a defendant of depraved indifference murder for a crime that appeared to intentionally target a particular victim.⁴³ This clarity comes, however, with the cost of underinclusiveness.⁴⁴

Michaels’ last category of interpretive approaches to depraved indifference murder is *mens rea*. “Th[e] ‘mens rea’ approach stresses that the characterization of an unintended killing as murder depends on the actor’s mental state. The offender who does not care if his victim lives or dies receives the murder sanction.”⁴⁵ This approach is the only one of the four that focuses on the individual defendant’s *actual* indifference to human life. It is also the methodology that most closely resembles the grading scheme in other areas of homicide law, which are differentiated by referring to the actor’s actual mental state.⁴⁶ This approach suffers from similar drawbacks as the common law “depraved heart” interpretation, however, because it does not provide any guidance on evaluating a defendant’s mental state. In the absence of a definition of “extreme indifference to the value of

40. Nourse, *supra* note 14, at 386.

41. *Id.* at 386 (“Th[e] focus on the individual must be false or at least incomplete; we don’t live in bubbles or on islands. People commit crimes against others; and it is the relation between the ‘other’ and the ‘defendant’ that informs most of our judgments about the relative blameworthiness of the parties.”).

42. Michaels, *supra* note 1, at 792.

43. *Id.* at 799 (“The seductiveness of the multiple victim approach lies in the clear limits it places on which homicides can be treated as murder, and the protection these limits afford against abuses of the doctrine at the hands of courts, prosecutors, and juries.” (citation omitted)).

44. *See id.* at 799 (“By restricting unintended murder to cases where many people are threatened, this approach denies that an unintended killing can ever be as bad as murder if it threatens only one or two individuals.”).

45. *Id.* at 792.

46. *Id.* at 800.

human life” in the Model Penal Code,⁴⁷ a mens rea approach must provide standards by which to evaluate a defendant’s subjective state of mind to avoid a constitutional vagueness challenge.⁴⁸

Of these methodologies, Michaels argues that the mens rea approach is optimal because it accords with the utilitarian⁴⁹ and retributive⁵⁰ theories of criminal law. Yet, he also recommends an alternative theory that, he argues, would address the problems inherent in the mens rea approach. His suggestion involves a counterfactual inquiry into “whether the actor would have committed the act *had he known* it would cause a death.”⁵¹ Michaels argues that this standard would combine focusing on the actor’s state of mind with the ease of interpretation that makes the objective circumstances, degree of risk, and multiple victim approaches desirable schemes of interpretation.⁵²

Although Michaels provides a useful classification system for the variety of methodologies used among the states, he ignores many of the practical realities that shape a state’s interpretation of depraved indifference murder. Through the use of a largely theoretical analysis, Michaels recommends a counterfactual inquiry that he claims is free of the conceptual shortcomings that detract from the other interpretive methodologies.⁵³ This Note, however, demonstrates that no single approach can work across all jurisdictions because of the different practical realities among the states. The practical realities of each state—combined with Michaels’ theoretical considerations—provide a framework for states to choose an interpretive

47. See *supra* note 27 and accompanying text.

48. See Michaels, *supra* note 1, at 800 (“Without a standard more specific or concrete than ‘extreme indifference to human life’ to guide the jury, the approach suffers from the vagueness and potential for confusion that plague the objective circumstances approach.”).

49. *Id.* at 803 (“Reckless actors are in turn more dangerous than ‘negligent’ actors, who take unjustified risks in ignorance. Utility therefore justifies harsher sanctions for intentional than for reckless killings, and harsher sanctions for reckless killings than for negligent ones.”).

50. *Id.* at 804 (“An individual who intends to kill a person shows a more fundamental disrespect for that person’s autonomy than someone who, in pursuit of some other goal, is merely willing to create a chance of killing a person. . . . A reckless killer, in turn, displays a greater lack of respect, and hence commits a greater wrong, than the actor negligently unaware that he is putting life at risk.”).

51. *Id.* at 807.

52. See *id.* at 807–08 (“In a sense, the suggested mens rea analysis adopts parts of the other approaches to unintended murder.”).

53. See *id.* at 808 (“By sharply defining a criterion for unintended murder, this approach successfully resolves classic problem cases where other approaches fail.”).

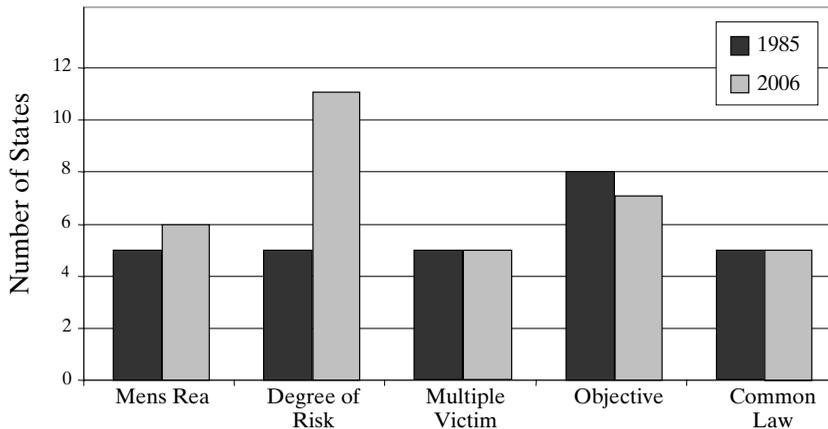
methodology that best fits the unique circumstances of their jurisdictions.

II. SUMMARY OF STATE INTERPRETATIONS OF DEPRAVED INDIFFERENCE MURDER

The broad range of approaches to depraved indifference murder that has developed reinforces the conclusion that no single interpretation can be adequately implemented across all jurisdictions. This Part furthers this point by illustrating the practical consequences that result from a state's choice of interpretive methodology. An examination of these consequences provides a useful framework for each state to consider when selecting a definition of depraved indifference murder that corresponds with its practical realities.

A comparison of the approaches taken by various states between 1985 and 2006 leads to the results summarized in Figure 1.⁵⁴

Figure 1. Depraved Murder Approaches in 1985 and 2006



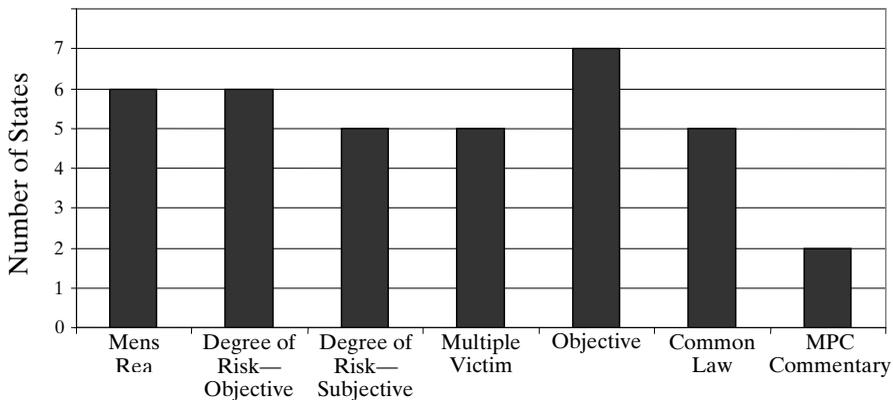
Evaluating the different state approaches according to Michaels' classification scheme indicates that there has been a noticeable shift toward the degree of risk methodology, a slight increase in the mens rea approach, and a slight decline in the objective circumstances approach. The significant increase in the number of states relying on a

54. The 1985 chart is based on the division of approaches summarized by Michaels, *supra* note 1, at 792 nn.23, 27, 30 & 32, 801 nn.87 & 90. Additionally, the "common law" category contains those states that have a depraved indifference murder statute, but interpret it based on the "depraved heart" language of the common law.

degree of risk methodology is likely the result of a shift toward an approach that measures the degree of risk according to defendants' subjective knowledge that their actions create a grave risk of death.⁵⁵

To evaluate this shift in a more comprehensive manner, this Part examines the approaches taken by the thirty-six states that apply the concept of depraved indifference. This classification of interpretations is divided into seven groups, rather than the four used by Michaels. The additional categories include states that continue to interpret their depraved indifference murder statute in accordance with the "depraved heart" and "malice aforethought" language of the common law, as well as those that have adopted the language of the Model Penal Code commentary to section 210.2(1)(b).⁵⁶ Also, the degree of risk approach is subdivided into two categories to differentiate those states that view the risk created by defendants' conduct objectively, and those that require defendants to have been subjectively aware of the risk of death created by their conduct. With the exception of the states that follow the Model Penal Code commentary, the additional classification indicates that the approaches are split relatively evenly among the thirty-six states, as indicated in Figure 2.

Figure 2. Depraved Murder Approaches in 2006



In addition to summarizing the number of states that adhere to each approach, this Part analyzes the consequences of following a

55. See *infra* Part II.C.

56. See *supra* notes 24–28 and accompanying text.

particular interpretive methodology. For example, a state may interpret its depraved indifference murder statute to address a particular problem, only to find that this choice of methodology is producing unwanted consequences that render the interpretive scheme less desirable.⁵⁷ Knowledge of these potential consequences, however, assists a state in choosing the optimal interpretive approach for its jurisdiction.

A. *Objective Circumstances*

Seven of the thirty-six states take an objective circumstances approach to depraved indifference murder.⁵⁸ Four of these seven states use an objective circumstances interpretation in cases involving intoxication.⁵⁹ Thus, whether or not these states adopted objective circumstances approaches for the purpose of minimizing the use of intoxication defenses, these leading cases reveal that the objective circumstances approach is particularly effective in preventing individuals from avoiding conviction through this defense. By objectively evaluating a defendant's extreme indifference to life and

57. See, e.g., *infra* Part III.B.

58. The states that follow an objective circumstances approach are Florida, New Hampshire, Oregon, Rhode Island, South Dakota, Virginia, and Wisconsin. See *Duckett v. State*, 686 So. 2d 662, 663 (Fla. Dist. Ct. App. 1996) (“An act is one ‘imminently dangerous to another and evincing a depraved mind regardless of human life’ as follows: (1) a person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury to another, and . . . (3) is of such a nature that the act itself indicates an indifference to human life.” (quoting FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES 66)); *State v. Cunningham*, 880 P.2d 431, 439 n.13 (Or. 1994) (“It is not the ‘circumstances’ that manifest extreme indifference but rather it is the conduct of a defendant that manifests his or her extreme indifference.” (quoting *State v. Boone*, 661 P.2d 917, 919 n.8 (Or. 1983))); *State v. Mattatall*, 603 A.2d 1098, 1108 (R.I. 1992) (“Thus, the nature of the killing alone demonstrates recklessness of consequence and a wanton disregard for the sanctity of human life”); *State v. Laible*, 594 N.W.2d 328, 333 (S.D. 1999) (“The trial court correctly instructed that ‘whether conduct is imminently dangerous to others and evincing a depraved mind regardless of human life is to be determined from the conduct itself and the circumstances of its commission.’”); *West v. Commonwealth*, 597 S.E.2d 274, 281 (Va. Ct. App. 2004) (“[T]he Commonwealth presented evidence that ‘the conduct of the driver constitutes a great departure from that of a reasonable person . . . which creates a great risk of injury to others and where by the application of an objective standard the accused should have realized the risk created by his conduct.’” (quoting *Keech v. Commonwealth*, 386 S.E.2d 813, 817 (Va. Ct. App. 1989))); *State v. Jensen*, 613 N.W.2d 170, 174 (Wis. 2000) (“However it is proven, the element of utter disregard for human life is measured objectively, on the basis of what a reasonable person in the defendant’s position would have known.”). For a detailed discussion of New Hampshire’s use of the objective circumstances approach, see *infra* Part III.A.

59. *Duckett*, 686 So. 2d at 662; *State v. Dufield*, 549 A.2d 1205, 1205 (N.H. 1988), 549 A.2d at 1205; *Mattatall*, 603 A.2d at 1103; *West*, 597 S.E.2d at 278.

requiring a mens rea of only recklessness, these states preclude defendants from arguing that their intoxication prevented them from forming the requisite intent to kill.⁶⁰

Two of these seven states grade depraved indifference homicide as manslaughter rather than murder.⁶¹ This indicates a legislative judgment that the reduced mens rea requirement of recklessness for a depraved indifference killing should not be graded at the same level as a murder in which the defendant had a subjective intent to kill the victim. Finally, the depraved indifference statutes in four of the seven states adhering to the objective approach use common law “malice aforethought” language, as opposed to the four mental states outlined in the Model Penal Code.⁶² This result is in accordance with Professor Nourse’s claim that “[d]epraved heart murder is fundamentally about indifference to others. The depraved heart murderer is someone who *fails to do something that all of us do every day to those who are immediately before us . . .*.”⁶³ Thus, these four common law jurisdictions evaluate depraved heart murder by an objective standard, according to whether the reasonable person would view the defendant’s actions as displaying indifference to others.

B. Degree of Risk—Objective Standard

Six states adhere to a degree of risk approach and evaluate the degree of risk using an objective standard.⁶⁴ Of these six states, four

60. *Dufield*, 549 A.2d at 1207.

61. OR. REV. STAT. § 163.118(1) (2005); VA. CODE ANN. § 18.2-36.1(B) (2004).

62. *See Duckett*, 686 So. 2d at 663 (“The elements for second-degree murder . . . are as follows: ‘. . . (3) There was an unlawful killing of (victim) by an act imminently dangerous to another and evincing a depraved mind regardless of human life.’” (quoting FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES 66)); *Mattatall*, 603 A.2d at 1105 (“[P]roof of malice is a required element of second-degree murder.”); *Laible*, 594 N.W.2d at 332 (“Homicide is murder in the second degree when perpetrated by any act imminently dangerous to others and evincing a depraved mind, regardless of human life . . .” (quoting S.D. CODIFIED LAWS § 22-16-7 (2006))); *West*, 597 S.E.2d at 282 (“[A]ppellant’s actions constituted behavior so gross, wanton and culpable as to show a reckless disregard for human life.”).

63. Nourse, *supra* note 14, at 378.

64. The states that follow a degree of risk approach evaluated objectively are Arizona, Maine, Massachusetts, Michigan, New Jersey, and North Dakota. *See State v. Valenzuela*, 984 P.2d 12, 14 (Ariz. 1999) (en banc) (“Second-degree murder . . . results when, without premeditation, one ‘recklessly engages in conduct which creates a grave risk of death,’ under circumstances ‘manifesting [an] extreme indifference to human life . . .’” (alteration in original) (quoting ARIZ. REV. STAT. ANN. § 13-1104(A)(3) (2006))); *State v. Witham*, 876 A.2d 40, 42 (Me. 2005) (“In a prosecution for depraved indifference murder the State is not required to prove that the defendant was subjectively indifferent to the value of human life, but rather that

have applied this standard to cases involving intoxication,⁶⁵ indicating that this approach is also effective in preventing defendants from relying on an intoxication defense. Although the objective degree of risk approach may help to prevent intoxication defenses, it may classify murders demonstrating intent to kill as depraved indifference murder. This problem prompted the Court of Appeals of New York to change its interpretation of the state's depraved indifference murder statute in *People v. Feingold*.⁶⁶

Among the states that applied an objective degree of risk approach to depraved indifference homicide, one classified the offense as reckless endangerment,⁶⁷ one classified it as manslaughter,⁶⁸ and four characterized such a killing as murder.⁶⁹ Like the objective circumstances approach, these varied classifications are likely a result of the reduced mens rea requirement for depraved indifference under an objective degree of risk approach. In contrast to the objective circumstances approach, however, the majority of states that rely on an objective degree of risk methodology use Model Penal Code

his conduct, objectively viewed by a reasonable person, manifested a depraved indifference to the value of human life.” (quoting *State v. Dodd*, 503 A.2d 1302, 1305 (Me. 1986)); *Commonwealth v. Oliveira*, 840 N.E.2d 954, 959 (Mass. 2006) (“[M]alice, for purposes of this theory of murder, also includes an intent to do an act that in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would follow.”); *People v. Goecke*, 579 N.W.2d 868, 879 n.25 (Mich. 1998) (“Most depraved-heart murder cases do not require a determination of the issue of whether the defendant actually was aware of the risk entailed by his conduct”); *State v. Bakka*, 826 A.2d 604, 612–13 (N.J. 2003) (“The phrase under circumstances manifesting extreme indifference to human life does not focus on the defendant’s state of mind but rather on the circumstances under which you find he acted. If, in light of all of the evidence, you find that defendant’s conduct resulted in a probability as opposed to a mere possibility of death, then you may find that he acted under circumstances manifesting extreme indifference to human life.”); *State v. Hanson*, 256 N.W.2d 364, 369 (N.D. 1977) (“The statute is graded, then, according to the severity of the risk created.”).

65. *Valenzuela*, 984 P.2d at 13; *Oliveira*, 840 N.E.2d at 957; *Goecke*, 579 N.W.2d at 871; *Bakka*, 826 A.2d at 607–08.

66. *People v. Feingold*, 852 N.E.2d 1163 (N.Y. 2006); see *infra* notes 135–38 and accompanying text.

67. N.D. CENT. CODE § 12.1-17-03 (1997).

68. N.J. STAT. ANN. § 2C:11-4(a)(1) (West 2005).

69. ARIZ. REV. STAT. ANN. § 13-1104(A)(3) (2006); ME. REV. STAT. ANN. tit. 17-A, § 201(1)(B) (2006); MICH. COMP. LAWS ANN. § 750.317 (West 2006 & Supp. 2007); see *Commonwealth v. Chhim*, 851 N.E.2d 422, 430 (Mass. 2006) (noting that murder, as defined by Mass. Gen. Laws ch. 265, §1, is unlawful killing with malice; and that “[m]alice is . . . an intent to cause death, to cause grievous bodily harm, or to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would follow”).

language to define depraved indifference.⁷⁰ This result follows logically from the Model Penal Code's definition of depraved indifference, which refers to recklessness and to the risk created by the defendant's conduct.⁷¹

C. *Degree of Risk—Subjective Standard*

Five states follow a degree of risk approach, but evaluate the risk subjectively according to the defendant's state of mind.⁷² Although Michaels combined this approach with the objective degree of risk approach, significant differences between the two approaches—both in their interpretation of depraved indifference murder and the consequences that result from this interpretation—merit distinction. The five states following the subjective degree of risk approach assess the defendant's indifference to life based on the subjective awareness of the risk created by the defendant's conduct. Whereas the Utah Supreme Court and the Alaska legislature require that the defendant's awareness of the risk rise to the level of "knowledge,"⁷³ the other states following this approach simply state that the defendant must be "subjectively aware" of the risk.⁷⁴ Although it is unclear whether these states require awareness to rise to the level of knowledge or merely recklessness, they nevertheless interpret the risk

70. See sources cited *supra* notes 67–69. Arizona, Maine, New Jersey, and North Dakota use Model Penal Code language, whereas Massachusetts and Michigan rely on a common law description.

71. See *supra* note 24.

72. The states that follow a degree of risk approach evaluated subjectively are Alaska, Kentucky, Pennsylvania, Utah, and Vermont. See *State v. Johnson*, 720 P.2d 37, 39 n.6 (Alaska 1986) ("The state has since conceded the correctness of the court of appeals' holding that subjective awareness of the risk is required under AS 11.41.110(a)(2)."); *Brown v. Commonwealth*, 174 S.W.3d 421, 425 (Ky. 2005) ("[Wantonness] . . . presupposes an awareness of the creation of substantial homicidal risk, a risk too great to be deemed justifiable by any valid purpose that the actor's conduct serves." (alteration in original) (quoting KY. REV. STAT. ANN. § 507.020 (West 2006))); *Commonwealth v. Santos*, 876 A.2d 360, 364 (Pa. 2005) ("[O]ur courts have consistently held that malice is present under circumstances where a defendant did not have an intent to kill, but nevertheless displayed a conscious disregard for 'an unjustified and extremely high risk that his actions *might* cause death or serious bodily harm.'" (quoting *Commonwealth v. Young*, 431 A.2d 230, 232 (Pa. 1981))); *State v. Brunell*, 615 A.2d 127, 130–31 (Vt. 1992) ("The difference between the implied intent to kill ('depraved heart') required for second-degree murder, and the criminally negligent conduct for involuntary manslaughter, is the defendant's awareness of the risk and the degree of that risk."). For a detailed discussion of Utah's use of the degree of risk approach evaluated subjectively, see *infra* Part III.D.

73. ALASKA STAT. § 11.41.110(a)(2) (2006); see *infra* Part III.D.

74. See *supra* note 72.

of the defendants' conduct according to their state of mind, rather than an objective standard akin to a probability calculation.

Two interesting differences appear between the states that follow a subjective degree of risk approach and those that maintain an objective degree of risk approach. First, all five subjective degree of risk states grade the depraved indifference statute as murder, rather than manslaughter.⁷⁵ This indicates that states are more comfortable grading a depraved indifference killing as murder because there is a mens rea element to the offense. Second, only one of the five cases defining the states' subjective degree of risk approach involved intoxication.⁷⁶ The other four included unintentional killings such as an inadvertent shooting,⁷⁷ a car accident,⁷⁸ and a case involving a shaken baby.⁷⁹ Rather than preventing improper intoxication defenses, these subjective degree of risk cases involved unintentional killings with the focus on defendants' awareness of the risk of death created by their conduct. Like the objective degree of risk approach, more states following the subjective degree of risk approach use Model Penal Code language instead of common law language.⁸⁰ Given the MPC's definition of recklessness and emphasis on mens rea,⁸¹ this result is not surprising.

D. Multiple Victim

Five of the thirty-six states adhere to a multiple victim approach.⁸² In these states, a defendant's act demonstrates a depraved

75. ALASKA STAT. § 11.41.110(a)(2) (2006); KY. REV. STAT. ANN. § 507.020(1)(b) (West 2006); 18 PA. CONS. STAT. ANN. § 2502(c) (West Supp. 2007); UTAH CODE ANN. § 76-5-203(2)(c) (1998 & Supp. 2007); VT. STAT. ANN. tit. 13, § 2301 (1998).

76. *Johnson*, 720 P.2d at 37.

77. *Santos*, 876 A.2d at 361.

78. *Brown v. Commonwealth*, 174 S.W.3d 421, 423 (Ky. 2005).

79. *State v. Brunnell*, 615 A.2d 127, 128 (Vt. 1992).

80. *See* sources cited *supra* note 75. Alaska, Kentucky, and Utah use MPC language, while Pennsylvania and Vermont rely on the common law description of depraved heart murder.

81. MODEL PENAL CODE § 2.02 (Proposed Official Draft 1962).

82. The states that follow a multiple victim approach are Alabama, Colorado, Minnesota, New Mexico, and Washington. *See Ex parte Williams*, 838 So. 2d 1028, 1031 (Ala. 2002) (“‘Reckless murder’ or, as it is sometimes called, ‘universal malice murder’ . . . requires the prosecution to prove conduct that manifests an ‘extreme indifference to human life,’ any human life.” (quoting *Ex parte Simmons*, 649 So. 2d 1282, 1285 (Ala. 1994) (per curiam))); *State v. Hanson*, 176 N.W.2d 607, 614 (Minn. 1970) (“The offense as defined by Minn. St. 609.195 . . . excludes a situation where the animus of defendant is directed towards one person only.” (citation omitted)); *State v. Dunbar*, 817 P.2d 1360, 1361 (Wash. 1991) (“Under circumstances manifesting an extreme indifference to human life, he engages in conduct which

indifference to life only if it puts the lives of more than one person at risk.⁸³ A defendant's endangerment of more than one life, however, does not prevent a conviction for the depraved indifference murder of a particular victim. Two of the cases falling under this category of interpretation involved the prosecution of a defendant for an unintentional shooting. In these cases—one involving the death of an innocent bystander during a gunfight,⁸⁴ and the other resulting from an accidental shooting while the defendant was playing with a revolver⁸⁵—the defendant's conduct endangered more than one life, even though there was only one victim.

Despite the relatively equal distribution between Model Penal Code and common law language in these statutes, reliance on a multiple victim approach demonstrates a preference to adhere to the common law notion that “[o]ne who committed what we would today call the classic idea of a depraved heart murder . . . was an ‘enemy to all mankind,’ and thus guilty of malice.”⁸⁶ The multiple victim approach indicates that individuals are guilty of depraved heart murder when their conduct demonstrates indifference—not just to one life, but to human life in general—thus demonstrating what the Colorado Supreme Court described as “universal malice.”⁸⁷

Although a multiple victim approach may lead to a smaller number of convictions for depraved indifference murder,⁸⁸ the graded severity of the offense for those convicted under this approach was the harshest of all of the categories. All five states employing a multiple victim analysis graded depraved indifference killings as murder.⁸⁹ Three of these states—Colorado, Washington, and New

creates a grave risk of death to any person, and thereby causes the death of a person . . .” (quoting WASH. REV. CODE ANN. § 9A.32.030(1)(b) (West 2006))). For detailed discussions of Colorado and New Mexico's use of the multiple victims approaches, see *infra* Parts III.C and III.E.

83. See *supra* notes 41–44 and accompanying text.

84. *Ex parte Williams*, 838 So. 2d at 1029.

85. *State v. Reed*, 120 P.3d 447, 450–51 (N.M. 2005).

86. *Nourse*, see *supra* note 14, at 375 (quoting BLACKSTONE, *supra* note 1, at *200).

87. *People v. Jefferson*, 748 P.2d 1223, 1233 (Colo. 1988).

88. This is because conduct that endangers the life of only one person is excluded from the coverage of the statute. See *supra* notes 41–44 and accompanying text.

89. ALA. CODE § 13A-6-2(a)(2) (Supp. 2006); COLO. REV. STAT. § 18-3-102(1)(d) (2006); MINN. STAT. ANN. § 609.195(a) (West 2003); N.M. STAT. ANN. § 30-2-1(A)(3) (2004); WASH. REV. CODE ANN. § 9A.32.030(1)(b) (West 2000).

Mexico—classify the offense as first-degree murder.⁹⁰ This indicates these states' view that murders demonstrating “universal malice” on the part of the defendant are just as reprehensible as premeditated intentional murders.

E. Mens Rea

Six states interpret their depraved indifference murder statutes according to a mens rea approach, based on the defendant's actual indifference to human life.⁹¹ This interpretive scheme focuses on defendants' states of mind, rather than the objective circumstances surrounding their actions. This approach resembles the subjective degree of risk approach in emphasizing defendants' mental states. The two schemes differ, however, in that the mens rea approach focuses on the defendant's subjective indifference to life, whereas the subjective degree of risk approach focuses on defendants' subjective awareness of the risk created by their reckless conduct.

Four of the six states following a mens rea approach use Model Penal Code language in their depraved indifference murder statutes.⁹² Given the MPC's emphasis on mens rea and its implementation of default mental states for those statutes in which a mental state is not

90. COLO. REV. STAT. § 18-3-102(1)(d) (2006); N.M. STAT. ANN. § 30-2-1(A)(3) (2004); WASH. REV. CODE ANN. § 9A.32.030(1)(b) (West 2000).

91. The states that adhere to a mens rea approach are Arkansas, California, Connecticut, Delaware, Maryland, and New York. *See* McCoy v. State, 69 S.W.3d 430, 435 (Ark. 2002) (“[T]he phrase ‘under circumstances manifesting extreme indifference to the value of human life’ indicates that the attendant circumstances themselves must be such as to demonstrate the culpable mental state of the accused.” (quoting Martin v. State, 547 S.W.2d 81, 84 (Ark. 1977))); People v. Martinez, 74 P.3d 748, 755 (Cal. 2003) (“[M]alice is now deemed implied ‘when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.’” (quoting People v. Dellinger, 783 P.2d 200, 202 (Cal. 1989))); State v. McMahon, 778 A.2d 847, 854 (Conn. 2001) (“This court concluded that the mental state required for a violation of § 53a-55(a)(3) was clear. ‘Recklessness involves a subjective realization of a risk and a conscious decision to ignore that risk.’” (citation omitted) (quoting State v. Bunkley, 522 A.2d 795, 804 (Conn. 1987))); Bridges v. State, 706 A.2d 489, 491 (Del. 1998) (“Bridges cannot reasonably be heard to argue that he was prejudiced by the admission of evidence bearing on a *state of mind* reflective of ‘depraved indifference to human life.’” (emphasis added)); Alston v. State, 662 A.2d 247, 248 (Md. 1995) (“Should death to one of the innocent bystanders or homeowners ensue, each participating in the lethal encounter has exhibited the *mens rea* that qualifies him for depraved-heart murder.”). For a detailed discussion of New York's adoption of the mens rea approach, see *infra* Part III.B.

92. ARK. CODE ANN. § 5-10-103(a)(1) (2006); CONN. GEN. STAT. ANN. § 53a-55(a)(3) (West 2001); DEL. CODE ANN. tit. 11, § 635(1) (Supp. 2006); N.Y. PENAL LAW § 125.15(1) (McKinney 2004).

enumerated,⁹³ the mens rea category understandably includes more states with MPC language than any of the other six categories. As a result, states with depraved indifference statutes consisting of MPC language are likely to impose a mens rea standard for each element of the crime, including the requirement that the defendant's act display "extreme indifference to the value of human life."⁹⁴

Five of the six states in the mens rea category classify depraved indifference killings as murder rather than manslaughter.⁹⁵ Like the subjective degree of risk approach,⁹⁶ this grading scheme indicates that states are more inclined to penalize a depraved indifference killing as murder if the defendant was subjectively indifferent to the life of the victim.

Finally, none of the leading cases utilizing a mens rea approach involved a murder committed while the defendant was intoxicated. Instead, these cases addressed such issues as accidental shootings⁹⁷ and "shaken baby" deaths.⁹⁸ Although these cases examined the defendant's subjective mental state, enabling the court to analyze whether the defendant's state of mind rose to the level of depraved indifference, they did not address concerns regarding the use of voluntary intoxication defenses to avoid conviction for depraved indifference murder.

F. Common Law

Five states rely on the common law's "depraved heart" and "malice aforethought" language to interpret depraved indifference murder.⁹⁹ The approach taken by these states does not fit within any

93. MODEL PENAL CODE § 2.02(3) (Proposed Official Draft 1962).

94. *Id.* § 210.2(1)(b).

95. ARK. CODE ANN. § 5-10-103(a)(1) (2006); CAL. PENAL CODE § 187(a) (West 1999 & Supp. 2007); DEL. CODE ANN. tit. 11, § 635(1) (Supp. 2006); MD. CODE ANN., CRIM. LAW § 2-204(a) (LexisNexis 2002); N.Y. PENAL LAW § 125.25(2) (McKinney Supp. 2007).

96. *See supra* note 75 and accompanying text.

97. *Alston v. State*, 662 A.2d 247, 248 (Md. 1995).

98. *Bridges v. State*, 706 A.2d 489, 490 (Del. 1998).

99. The states that follow the language of the common law are Georgia, Mississippi, Nevada, North Carolina, and Oklahoma. *See Sheffield v. State*, 635 S.E.2d 776, 779 (Ga. 2006) ("[A] malice murder can be shown . . . by evidence that the defendant acted where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart." (quoting *Parker v. State*, 507 S.E.2d 744, 747 (Ga. 1998))); *Clark v. State*, 693 So. 2d 927, 930 (Miss. 1997) ("[I]n a 'depraved heart' murder, malice can be inferred from the circumstances if the actions involved a very high degree of carelessness evincing a reckless indifference to the danger of human life." (citing *Windham v. State*, 602 So.

of the preceding categories, as the courts in these cases did not indicate whether a “depraved heart” is established through subjective evidence of defendants’ mental state or objective evidence of the circumstances or risks created by their actions. Similar to the subjective degree of risk and multiple victim approaches, all five states in the common law category grade depraved indifference killings as murder rather than manslaughter.¹⁰⁰

The variety of factual circumstances among the cases in this category indicates the flexibility of the common law’s “abandoned and malignant heart” approach to depraved indifference murder. One case dealt with an automobile accident death resulting from the driver’s intoxication,¹⁰¹ whereas others addressed death by child abuse,¹⁰² a reckless shooting,¹⁰³ and strangulation.¹⁰⁴ This broad range of factual circumstances reflects how the common law approach effectively encompasses all aspects of depraved indifference murder rather than focusing on one particular problem, such as the use of intoxication defenses. With this broad coverage, however, comes the disadvantage that the common law “depraved heart” standard is often vague and difficult to define.

G. Model Penal Code Section 210.2(1)(b) and Commentary

The seventh and final category of approaches consists of two states that interpret depraved indifference according to the language

2d 798, 802 (Miss. 1992)); *Collman v. State*, 7 P.3d 426, 449 (Nev. 2000) (en banc) (“[M]alice shall be implied when no considerable provocation appears, or when all circumstances of the killing show an abandoned and malignant heart.” (quoting NEV. REV. STAT. ANN. § 200.020 (West 2006))); *State v. Miller*, 543 S.E.2d 201, 206 (N.C. 2001) (“Another kind of malice arises when an act which is inherently dangerous to human life is done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief” (emphasis omitted)); *Mooney v. State*, 990 P.2d 875, 886 (Okla. Crim. App. 1999) (“Second degree murder is defined as a homicide ‘perpetrated by an act imminently dangerous to another person and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of *any particular individual*’” (quoting *Willingham v. State*, 947 P.2d 1074, 1081 (Okla. Crim. App. 1997))).

100. GA. CODE ANN. § 16-5-1(a) (2007); MISS. CODE ANN. § 97-3-19(1)(b) (2006); NEV. REV. STAT. ANN. §§ 200.020, 200.010 (2006); N.C. GEN. STAT. ANN. § 14-17 (West Supp. 2006); OKLA. STAT. ANN. tit. 21, § 701.8(1) (West 2002).

101. *Miller*, 543 S.E.2d at 203–04.

102. *Collman*, 7 P.3d at 430–32.

103. *Clark*, 693 So. 2d at 929.

104. *Sheffield*, 635 S.E.2d at 777.

of Model Penal Code section 210.2(1)(b) and its commentary.¹⁰⁵ These states let the trier of fact determine whether the defendant's "recklessness rose to the level of 'extreme indifference to the value of human life.'"¹⁰⁶ Both cases dealt with an unprovoked beating—one resulting in death and a murder conviction,¹⁰⁷ and the other resulting in serious injury and a conviction for aggravated assault and battery.¹⁰⁸ Like the common law approach, the rationale used by both of these courts does not comport with any of the preceding categories because the MPC fails to provide a conclusive definition of "extreme indifference." Allowing the trier of fact to determine whether the defendant acted with extreme indifference has the advantage of providing the flexibility to cover a wide variety of factual circumstances, as seen with the common law methodology. Yet relying solely on the Model Penal Code and its commentary could lead to the development of an "I know it when I see it"¹⁰⁹ approach that is subject to the prejudices of the trier of fact.

III. REASONS FOR THE STATES' INTERPRETATIONS OF DEPRAVED INDIFFERENCE MURDER

Summarizing the variety of approaches to depraved indifference murder and the practical consequences that stem from these approaches provides a useful background to guide a state when selecting an interpretive methodology. For a state to adopt the most appropriate interpretive approach to depraved indifference murder, it must examine how these various approaches correspond to the unique circumstances of its particular jurisdiction. Examining the formulation of the depraved indifference murder statutes in New

105. The two states following the Model Penal Code commentary are Kansas and Wyoming. *See State v. Robinson*, 934 P.2d 38, 47 (Kan. 1997) ("[T]he legislature intended for the depraved heart murder statute to carry a higher degree of culpability than the reckless involuntary manslaughter statute, thereby making the two statutes distinguishable. This intent is further supported by the commentary to the Model Penal Code . . ."); *O'Brien v. State*, 45 P.3d 225, 231–32 (Wyo. 2002) ("By adopting the Model Penal Code's term, 'recklessly,' to justify a lesser punishment for assault and battery, the Wyoming Legislature plainly intended to distinguish between 'recklessly' and 'recklessly under circumstances manifesting extreme indifference to the value of human life' in the same manner as had the Model Penal Code.").

106. *O'Brien*, 45 P.3d at 232.

107. *Robinson*, 934 P.2d at 42.

108. *O'Brien*, 45 P.3d at 227–28.

109. The "I know it when I see it" approach comes from Justice Potter Stewart's famous standard for determining obscenity. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

Hampshire, New York, Colorado, Utah, and New Mexico reveals that the underlying reasons for a particular state's interpretation of its depraved indifference murder statute are not limited to an assessment of the theoretical advantages and disadvantages summarized by Michaels and Nourse.¹¹⁰

As indicated by then-New Hampshire Supreme Court Justice David Souter in *State v. Dufield*,¹¹¹ some states interpret their depraved indifference murder statutes on the basis of practical reality.¹¹² For example, New Hampshire and New York relied on an objective interpretation of their depraved indifference murder statutes out of concern that a subjective interpretation would open the door to voluntary intoxication defenses.¹¹³ Although this continues to be the approach in New Hampshire, New York has switched to a mens rea approach to rectify the problems that its objective degree of risk approach was causing with regard to double-count indictments.¹¹⁴

Legislative action also influences state interpretations of depraved indifference murder. The New Mexico legislature's decision to include two depraved indifference murder statutes in its criminal code resulted in the state supreme court's flexible interpretation.¹¹⁵ Colorado and Utah provide two more examples that illustrate the interplay of the legislature and the judiciary. In *People v. Jefferson*,¹¹⁶ the Colorado Supreme Court affirmed the constitutionality of a 1981 amendment to its depraved indifference murder statute, which inserted the element of "universal malice." And in *State v. Fontana*,¹¹⁷ the Utah Supreme Court had to infer a mens rea element as a result of legislative action that was motivated by reference to constitutional challenges made in Colorado.¹¹⁸ The following examples indicate that states do not select a method of interpretation based entirely on theoretical advantages and disadvantages; they also consider the practical realities of their jurisdictions.

110. See *supra* notes 31–48 and accompanying text.

111. *State v. Dufield*, 549 A.2d 1205 (N.H. 1988).

112. See *infra* notes 124–26 and accompanying text.

113. See *infra* notes 120–30 and accompanying text.

114. See *infra* notes 131–38 and accompanying text.

115. See *infra* Part III.E.

116. *People v. Jefferson*, 748 P.2d 1223 (Colo. 1988).

117. *State v. Fontana*, 680 P.2d 1042 (Utah 1984).

118. See *infra* Part III.C–D.

A. *New Hampshire*

New Hampshire's objective circumstances approach to depraved indifference murder is illustrated by Justice Souter's state supreme court opinion in *State v. Dufield*. Dufield brutally murdered his extremely intoxicated sister by stabbing her with a screwdriver and a pair of scissors.¹¹⁹ He appealed his conviction for reckless second-degree murder, arguing that his intoxication prevented him from being able to form the requisite mental state of "extreme indifference to the value of human life."¹²⁰ To address the defendant's voluntary intoxication defense, Justice Souter discussed the appropriate method for interpreting New Hampshire's reckless murder statute.¹²¹ He noted that if the statute required the defendant's subjective indifference to life, he might have a valid intoxication defense.¹²² If the defendant's "extreme indifference to the value of human life" was interpreted according to an objective approach, however, "any voluntary intoxication that might have blinded a defendant to the risks of such extremely deviant behavior would be as irrelevant as it would be to proof of the less culpable deviation required to establish mere recklessness."¹²³

Justice Souter opted for the objective approach as the result of "practical consequences . . . and the policy underlying the statutory treatment of disregarding risks of harm to others."¹²⁴ The practical consequences involved the difficulty of providing a clear instruction to the jury in a case involving a voluntary intoxication defense if reckless murder was interpreted by a subjective standard.¹²⁵ Justice Souter felt that jurors would not be able to follow such an instruction

119. *State v. Dufield*, 549 A.2d 1205, 1206 (N.H. 1988).

120. *Id.*

121. Section 630:1-b(I)(b) of the New Hampshire Revised Statutes requires that, for reckless second-degree murder, the death be caused "recklessly under circumstances manifesting an extreme indifference to the value of human life." N.H. REV. STAT. ANN. § 630:1-b(I)(b) (2007).

122. *Dufield*, 549 A.2d at 1206.

123. *Id.* at 1207.

124. *Id.*

125. *See id.* ("The judge would begin by explaining that a defendant is responsible for the consequences of creating a substantial and unjustifiable risk of death of which he is entirely unaware by reason of voluntary intoxication, but only to the extent that the disregard of that risk by a sober person, aware of the circumstances, would not have exceeded a gross deviation from the norm of law-abiding conduct. The judge would then have to charge that the jury should nevertheless consider evidence of voluntary intoxication in deciding whether the circumstances in which the defendant acted manifested a state of extreme indifference to the value of human life.").

as the distinction it draws “would seem irrational.”¹²⁶ He also opted for an objective interpretation as a result of his finding that “consistent policy” required that voluntary intoxication be precluded as a defense for *reckless* second-degree murder, because section 2.08 of the Model Penal Code excludes voluntary intoxication defenses for crimes involving a mens rea of recklessness.¹²⁷

B. New York

In *People v. Register*,¹²⁸ the New York State Court of Appeals adopted an objective degree of risk approach.¹²⁹ Like the New Hampshire Supreme Court in *Dufield*, the court of appeals took this approach to prevent the use of intoxication defenses to second-degree depraved indifference murder.¹³⁰ Though this interpretation solved New York’s intoxication defense problem, it created complications for the court of appeals over the next twenty-three years. First, the use of a degree of risk approach blurred the line between second-degree murder and manslaughter because of the vague distinction between the “grave risk of death”¹³¹ necessary for a murder conviction and the “substantial and unjustifiable risk of death”¹³² required for reckless manslaughter.¹³³ The court of appeals holding in *Register* also created the practical problem of prosecutorial ease in charging depraved indifference when the killing resulted from the defendant’s intent to kill rather than indifference to life. For example, although murder indictments fell 50 percent between 1989 and 2001, depraved indifference charges doubled, and double-count indictments rose from 14 percent to 56 percent.¹³⁴

126. *Id.*

127. *Id.*

128. *People v. Register*, 457 N.E.2d 704 (N.Y. 1983). The defendant in this case brought a loaded pistol to the bar where he and a friend were drinking, and he shot the victim following an argument. *Id.* at 705.

129. Abraham Abramovsky & Jonathan I. Edelman, *Depraved Indifference Prosecutions in New York: Time for Substantive and Procedural Clarification*, 55 SYRACUSE L. REV. 455, 466–67 (2005).

130. *See id.* (“Register claimed that his drunken state left him unable to engage in the wantonness and depravity necessary to sustain a murder charge.”).

131. N.Y. PENAL LAW § 125.25(2) (McKinney Supp. 2007).

132. *Id.* § 125.15(1).

133. *See* Abramovsky & Edelman, *supra* note 129, at 468 (“[A]n entirely objective construction of depraved indifference would eliminate the distinction between second degree manslaughter and depraved indifference murder.”).

134. *Id.* at 477.

The court of appeals attempted to remedy these problems in a line of cases culminating with *People v. Feingold*,¹³⁵ a reckless endangerment case in which the court explicitly overruled *Register* by adopting a mens rea approach to depraved indifference murder.¹³⁶ The court went on to state that “depraved indifference is best understood as an utter disregard for the value of human life—a willingness to act not because one intends harm, but because one simply doesn’t care whether harm results or not.”¹³⁷ As a result, the interpretation of New York’s depraved indifference murder statute shifted from an objective degree of risk analysis to a mens rea analysis. This change should eliminate the ability of prosecutors to charge a defendant for both intentional and depraved indifference murder, because the two offenses have mutually exclusive mental states that cannot be charged in the same indictment.¹³⁸

C. Colorado

Prior to 1972, Colorado’s depraved indifference first-degree murder statute reflected a codification of the common law.¹³⁹ The statute was amended in favor of Model Penal Code language, providing “[i]f ‘[u]nder circumstances manifesting extreme indifference to the value of human life,’ a person ‘*intentionally* engages in conduct which creates a grave risk of death . . . and thereby causes the death of another,’ that person committed first-degree murder.”¹⁴⁰ Following this amendment, the distinction between

135. While attempting to commit suicide by inhaling gas from his stove, the *Feingold* defendant caused an explosion that destroyed the walls of his apartment and damaged those of his neighbors. *People v. Feingold*, 852 N.E.2d 1163, 1164 (N.Y. 2006); see also *supra* note 5 and accompanying text.

136. *Feingold*, 852 N.E.2d at 1167 (“[D]epraved indifference to human life is a culpable mental state.”). The court addressed the depraved indifference murder statute in this case because section 120.25 of the New York Penal Law states that a person violates the reckless endangerment statute “when, under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of risk to another person.” *Id.* at 1164.

137. *Id.* at 1168 (quoting *People v. Suarez*, 844 N.E.2d 721, 730 (N.Y. 2005) (per curiam)).

138. *Id.* at 1166 (“[I]ndifference to the victim’s life . . . contrasts with the intent to take it.” (quoting *People v. Payne*, 819 N.E.2d 634, 635 (N.Y. 2004))).

139. See John C. Steele, Comment, *Extreme Indifference Murder: The Impact of People v. Marcy*, 54 U. COLO. L. REV. 83, 87 (1982) (“A 1963 statute defined murder as ‘the unlawful killing of a human being with malice aforethought, either express or implied.’” (quoting COLO. REV. STAT. § 40-2-1 (1963))).

140. *Id.* at 88 (emphasis and first alteration added) (quoting COLO. REV. STAT. § 18-3-102(1)(d) (1973)).

first- and second-degree murder¹⁴¹ was that the intent required for first-degree murder was a form of “aggravated recklessness”¹⁴² that reflected a “universal malice.”¹⁴³

Five years later, the Colorado legislature removed “intentionally” from both the first- and second-degree murder statutes in favor of “knowingly.”¹⁴⁴ This change caused the Colorado Supreme Court to invalidate the depraved indifference murder statute in *People v. Marcy*.¹⁴⁵ In that case, the defendant brought an equal protection claim, alleging that the first- and second-degree murder statutes were indistinguishable.¹⁴⁶ Because the Colorado Supreme Court could no longer distinguish the two statutes on the basis of the “universal malice” that made first-degree murder a general intent crime,¹⁴⁷ it struck the first-degree murder statute down on equal protection grounds.¹⁴⁸

Following this decision, the Colorado legislature in 1981 amended the depraved indifference murder statute to read:

A person commits the crime of murder in the first degree if . . . [u]nder circumstances evidencing an attitude of *universal malice* manifesting extreme indifference to the value of human life *generally*, he knowingly engages in conduct which creates a grave risk of death to a person, or persons, other than himself, and thereby causes the death of another.¹⁴⁹

141. COLO. REV. STAT. § 18-3-103(1)(a) (1973) (providing that a person commits second-degree murder if “[h]e causes the death of a person intentionally, but not after deliberation”).

142. Steele, *supra* note 139, at 89 (quoting Joseph R. Quinn, *Homicides under the Colorado Criminal Code*, 49 DENV. L.J. 137, 153 (1972)). Justice Quinn also authored the opinion in *People v. Marcy*, discussed *infra* note 145 and accompanying text.

143. Steele, *supra* note 139, at 89 (quoting Quinn, *supra* note 142, at 152).

144. *Id.* at 90. The amendment was the result of an effort to ensure that both first-degree depraved indifference murder and second-degree murder would be interpreted as general intent crimes, in order to avoid the use of an intoxication defense. *See id.* at 89–90 n.44 (“Since extreme-indifference murder involved ‘universal malice,’ not directed at any one person, Rep. Gorsuch and Chief Justice Moore felt it should be amended from ‘intentionally’ to ‘knowingly’ . . .”).

145. *People v. Marcy*, 628 P.2d 69 (Colo. 1981).

146. Steele, *supra* note 139, at 91.

147. *Id.* at 92 (“Prior to 1977, when the original language of the 1972 Criminal Code was still in effect, the Colorado Supreme Court had upheld extreme-indifference murder . . . rel[y]ing on the distinction between general and specific intent.”).

148. *See id.* at 94 (“Since the required mental states were equivalent and the ‘extreme indifference’ language possessed no ‘independent significance,’ the court could discover ‘no rational basis’ for distinguishing the two statutes.”).

149. *Id.* at 101 (quoting COLO. REV. STAT. § 18-3-102(1)(d) (Supp. 1982)) (emphasis added).

People v. Jefferson represented the first challenge to the multiple victim approach embodied in this amended statute. After documenting the history of amendments to Colorado's depraved indifference first-degree murder statute, the Colorado Supreme Court upheld the amendment. The court found that "[t]he 1981 amendment reaffirmed the element of cold-bloodedness, as represented by the phrase 'under circumstances *evidencing an attitude of universal malice* manifesting extreme indifference to the value of human life *generally*.'"¹⁵⁰ The court held that this distinction sufficiently overcame the equal protection challenge because first-degree depraved indifference murder relates to conduct "which is not directed against a particular person at all."¹⁵¹ Thus, after extensive amendments, again in an attempt to avoid voluntary intoxication defenses,¹⁵² Colorado explicitly codified the multiple victim approach to depraved indifference murder that had always been the basis of its distinction between first- and second-degree murder.

D. Utah

In 1973, Utah amended its depraved indifference murder statute from a codification of the common law to language that mirrored the Model Penal Code section 210.2(1)(b).¹⁵³ In 1979 the Utah legislature sought to create a clear distinction between its depraved indifference murder and reckless manslaughter statutes by deleting the word "recklessly" from its depraved indifference murder statute.¹⁵⁴ The amendment was a reaction to a 1974 Colorado Supreme Court decision¹⁵⁵ that upheld Colorado's depraved murder statute against a constitutional challenge asserting there was no distinction between the mental state required for first- and second-degree murder.¹⁵⁶

150. *People v. Jefferson*, 748 P.2d 1223, 1231 (Colo. 1988) (quoting COLO. REV. STAT. § 18-3-102(1)(d) (Supp. 1982)).

151. *Id.* at 1233.

152. Steele, *supra* note 139, at 89–90 n.44 ("[S]econd-degree murder was a specific-intent crime and thus vulnerable to a defense of intoxication.").

153. *Recent Developments in Utah Law*, 1985 UTAH L. REV. 131, 152 (1985).

154. *Id.* at 153.

155. *People ex rel. Russel v. Dist. Court*, 521 P.2d 1254 (Colo. 1974).

156. *Recent Developments in Utah Law*, *supra* note 153, at 153 n.151 ("[D]espite the favorable ruling, the Utah Association of Prosecutors asked the legislature to delete 'recklessly' from the Utah statute, fearing that the Utah Supreme Court might declare Utah's statute unconstitutional for similar reasons.").

Because this amendment did not replace “recklessly” with another mens rea element, the Utah Supreme Court in *State v. Fontana* held that its depraved indifference statute no longer referred to a subjective mental state and that the court would need to imply one.¹⁵⁷ As a result of its decision in *State v. Bindrup*,¹⁵⁸ the court rejected “recklessly.”¹⁵⁹ It also feared that a mental state of “intentionally” would lead to “the second degree murder conviction of a person who intentionally engages ‘in conduct that in fact create[s] a grave risk of death to another, even without proof that the actor [knows] of the risk.’”¹⁶⁰ As a result, the Utah Supreme Court settled on a mens rea of “knowingly.”¹⁶¹

In *State v. Standiford*,¹⁶² the Utah Supreme Court upheld its decision in *Fontana*, finding that “to be convicted [of depraved indifference murder], a defendant must know the nature of his conduct, must know the circumstances that give rise to the risk of death, and must know that the risk constitutes a grave risk of death.”¹⁶³ In addition to this mens rea requirement, the Utah Supreme Court held that the term “depraved indifference to human life” should be interpreted according to an objective standard.¹⁶⁴ In other words, to be convicted of depraved indifference murder under Utah’s subjective degree of risk approach, defendants must act knowingly in creating a grave risk of death, and their conduct, when viewed objectively, must evince a depraved indifference to human life.¹⁶⁵

157. *Id.* at 154.

158. *State v. Bindrup*, 655 P.2d 674 (Utah 1982).

159. *Id.* at 676 (“The 1979 amendment of the statute in question makes it clear that reckless conduct is not sufficient to prove the offense of murder in the second degree.”).

160. *Recent Developments in Utah Law*, *supra* note 153, at 154 n.162 (alteration in original) (quoting *State v. Fontana*, 680 P.2d 1042, 1046 (Utah 1984)).

161. *Id.* at 154 (“In the context of depraved indifference murder, the court held that the burden is met if the prosecution shows that the defendant ‘acted with knowledge that his conduct created a grave risk of death to another.’” (quoting *Fontana*, 680 P.2d at 1046)).

162. *State v. Standiford*, 769 P.2d 254 (Utah 1988).

163. *Id.* at 263.

164. *Id.* at 261 (“The term ‘depraved indifference to human life’ does not refer to the mens rea, or subjective culpable mental state, of depraved murder, but rather to an objective reasonable person standard as to the value of human life.” (citation omitted)).

165. *See id.* at 264 (“In sum, the jury should be instructed that to convict of depraved murder it must find (1) that the defendant acted knowingly (2) in creating a grave risk of death, (3) that the defendant knew the risk of death was grave, (4) which means a highly likely probability of death, and (5) that the conduct evidenced an utter callousness and indifference toward human life.”).

E. *New Mexico*

The New Mexico Supreme Court's opinion in *State v. Reed*¹⁶⁶ differs from the other opinions discussed¹⁶⁷ in that it permits review of the multiple victim approach contained in its first-degree depraved indifference murder statute by either an objective or subjective standard. The court held:

[A] person guilty of depraved mind murder may not intend the specific result of death, but is equally culpable because that person intentionally commits 'an act imminently dangerous to others' or does so 'with the subjective knowledge that the act creates a very high degree of risk to the lives of others, indicating a depraved mind regardless of human life.'¹⁶⁸

This alternative interpretation results from the similar language used in New Mexico's first- and second-degree murder statutes. First-degree depraved murder requires that the defendant's act is "greatly dangerous to lives of others," whereas the second-degree murder statute prohibits acts that create "a strong probability of death or great bodily harm . . ." ¹⁶⁹ As seen in New York following *Register*, the difference between "greatly dangerous" and "a strong probability" is difficult to distinguish, and the New Mexico Supreme Court had to differentiate these two statutes.¹⁷⁰

IV. ANALYSIS AND RECOMMENDATIONS

This summary illustrates the rich complexity of the depraved indifference murder concept. As evidenced by the five states discussed in Part III, the wide variety of practical realities that influence states' interpretations of depraved indifference murder makes it virtually impossible to assign a single definition that effectively meets the needs of all thirty-six states that recognize the

166. *State v. Reed*, 120 P.3d 447 (N.M. 2005).

167. *See supra* Part III.A–D.

168. *Reed*, 120 P.3d at 455 (quoting *State v. Brown*, 931 P.2d 69, 75 (1996)).

169. Leo M. Romero, Note, *Unintentional Homicides Caused by Risk-Creating Conduct: Problems in Distinguishing Between Depraved Mind Murder, Second Degree Murder, Involuntary Manslaughter, and Noncriminal Homicide in New Mexico*, 20 N.M. L. REV. 55, 61 (1990) (quoting N.M. STAT. ANN. § 30-2-1(A)(3), (B) (1984)).

170. *See id.* ("The courts' attempts to distinguish between depraved mind murder and second degree murder have used the number of persons exposed to the risk and a subjective-objective knowledge distinction.").

depraved indifference concept. Further, the consequences arising from such an interpretive decision demonstrate the need for individual jurisdictions to base their choices on their particular circumstances. For example, both New York and New Hampshire initially decided to interpret their depraved indifference murder statute objectively.¹⁷¹ Although New Hampshire continues to adhere to the objective circumstances approach, New York switched to a mens rea approach because of the drastic increase in double-count indictments charged by prosecutors across the state.

Despite previous attempts to provide a comprehensive, effective definition of depraved indifference for the entire United States, the concept of depraved indifference does not lend itself to such an exact designation. Although a theoretically consistent interpretation is possible, differences in practical realities among the states prevent such a uniform classification. This Note does not attempt to design one “correct” approach to depraved indifference murder. Instead, the examples throughout this Note identify important practical considerations and provide a framework for interpreting the practical reasons and consequences that shape a state’s interpretive approach to depraved indifference murder. A close examination of these examples reveals three practical considerations that are particularly important in shaping the way a state interprets its depraved indifference murder statute.

First, when selecting an interpretive methodology, a state must identify the factual scenario that its depraved indifference murder statute targets. For example, states concerned with the use of voluntary intoxication defenses to avoid depraved indifference murder convictions should adopt an objective approach to depraved indifference murder.¹⁷² States that are more concerned with punishing unintentional killings as murder, however, should adopt an approach that focuses on the defendant’s subjective mental state, such as the mens rea or subjective degree of risk approach.¹⁷³ New York’s experience with its depraved indifference murder statute¹⁷⁴ indicates the importance of these factual issues. States selecting an interpretive methodology must consider the potential costs created by targeting a particular factual scenario. If these costs outweigh the benefits of

171. *See supra* Part III.A–B.

172. *See supra* Part II.A–B.

173. *See supra* Part II.C and E.

174. *See supra* Part III.B.

preventing the targeted factual scenario, then the state should opt for an alternative interpretation. New York initially desired to interpret its depraved indifference statute to protect against intoxication defenses, but the costs associated with this interpretation, in the form of double-count indictments, became excessive. To rectify this problem, New York adopted the mens rea approach.

Second, the felony grading of depraved indifference murder can influence a state's choice of interpretive approach. States that grade depraved indifference homicide as manslaughter should follow an objective circumstances approach because the mens rea requirement of recklessness is significantly lower than that necessary for a murder conviction.¹⁷⁵ This is the approach adopted in Oregon and Virginia.¹⁷⁶ States grading depraved indifference homicide as murder, however, should adopt an interpretive approach that considers defendants' state of mind, such as the mens rea or subjective degree of risk approach.¹⁷⁷ States opting to classify depraved indifference homicide as first-degree murder, such as Colorado, should choose to follow a multiple victim approach in order to ensure that defendants convicted of depraved indifference murder demonstrate "universal malice."¹⁷⁸ Additionally, the experiences of Colorado and Utah illustrate that states following an interpretive approach that involves the defendant's subjective mental state must distinguish the mens rea required for depraved indifference murder from other degrees of murder.¹⁷⁹

Finally, a state's use of Model Penal Code or common law language in its statute influences its choice of interpretive methodology. For example, states using MPC language in their depraved indifference murder statutes tend to opt for either of the degree of risk approaches, given the MPC reference to recklessness in its definition of depraved indifference.¹⁸⁰ The mens rea approach would also be appropriate, given the MPC's enhanced focus on the defendant's mental state.¹⁸¹ States using common law "malice aforethought" language should follow the objective circumstances

175. See *supra* note 61 and accompanying text.

176. OR. REV. STAT. § 163.118(1)(a) (2005); VA. CODE ANN. § 18.2-36.1(B) (2004).

177. See *supra* Part II.C and E.

178. See *supra* Part III.C and part II.D.

179. See *supra* Part III.C–D.

180. See *supra* note 24 and accompanying text.

181. See *supra* note 22–23 and accompanying text.

approach. This interpretive approach accords with the common law definition of depraved indifference murder as an unintentional killing that contravenes societal norms.¹⁸² States wishing to adopt a more flexible approach to depraved indifference murder that provides the courts with a large amount of discretion should define depraved indifference murder according to the “depraved heart” language of the common law or the Model Penal Code commentary.¹⁸³

These practical considerations are not intended to supplant the theoretical issues identified by Michaels. Instead, they serve as additional factors to shape a state’s choice of interpretive methodology. After a state has decided which theoretical approach to depraved indifference murder it prefers, it should then consider the unique practical realities of its jurisdiction. Considering the three factors outlined in this Part will ensure that a state’s interpretive approach is well suited to the realities of its jurisdiction, thus enabling its depraved indifference murder statute to operate effectively.

CONCLUSION

To aid states in future efforts to interpret their depraved indifference murder statutes, this Note provides a framework by which states can make a more informed decision regarding their definitions of depraved indifference murder. When coupled with the theoretical considerations highlighted by Alan Michaels, this Note’s examination of the reasons behind each state’s choice of interpretive approach, as well as the consequences that result from such schemes, enables states to select a definition of depraved indifference murder that best fits their unique practical realities. For example, Larry Feingold’s suicide attempt¹⁸⁴ provided the New York Court of Appeals with the opportunity to change the interpretation of the state’s depraved indifference murder statute and correct the problems associated with double-count indictments.¹⁸⁵ Yet had the court of appeals been aware of the practical considerations highlighted in this Note when it made its decision in *People v. Register*, perhaps this correction would not have been necessary. If the court was aware of

182. See *supra* notes 19–20 and accompanying text.

183. See *supra* Part II.F–G.

184. *People v. Feingold*, 852 N.E.2d 1163, 1164 (N.Y. 2006).

185. See *supra* Part III.B.

the costs associated with an objective interpretive approach, it might have opted for the mens rea approach back in 1983 instead of 2006.