Maine Law Review

Volume 40 | Number 2 Article 13

June 1988

Maine's Unintentional Murder Statute: Depraved Indifference on Trial

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MAINE'S UNINTENTIONAL MURDER STATUTE: DEPRAVED INDIFFERENCE ON TRIAL

I. INTRODUCTION

Perhaps nowhere in the law is the demand for reason and justice more compelling than in the penal law,[1] and nowhere in the penal law is the need for fairness greater than in the law defining murder.[2] The notion of fairness in Anglo-American criminal law is embodied in the concept of mens rea.[3] For over three hundred years, the basic

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1. Professor Henry Wechsler, the American Law Institute's Reporter for the Model Penal Code, aptly described the unique nature of penal law:

> Whatever views one holds about the penal law, no one will question its importance in society. This is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. By the same token, penal law governs the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy. If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its toils.

Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1098 (1952).

2. Society has an undoubted, paramount interest in protecting the lives of individuals. Under Maine law, as under the law of other states, murder is considered the most serious of all criminal offenses. For this reason, one accused of murder faces the most severe sanctions meted out by the criminal justice system. *See* ME. REV. STAT. ANN. tit. 17-A, § 1251 (1983 & Supp. 1987-1988) (Punishment for murder is life imprisonment or incarceration "for any term of years that is not less than 25."). The stakes for both the individual and the community are at their highest in this area of the penal law.

3. Sir James Stephen cautioned that mens rea has no particular meaning outside the context of the crime of which it is part:

> "*[M]ens rea*" means no more than that the definition of all . . . crimes contains not only an outward and visible element, but a mental element, varying according to the different nature of different crimes. . . . [T]he only means at arriving at a full comprehension of the expression "*mens rea*" is by a detailed examination of the definitions of particular crimes, and therefore the expression itself is unmeaning.

2 J. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 95 (1883), *quoted in* Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 1026 n.202 (1932). For practical purposes, however, the term "mens rea," which literally means "a guilty mind," BLACK'S LAW DICTIONARY 889 (5th ed. 1979), is used throughout this Comment, unless expressly noted to the contrary, to refer to the subjective culpable state of mind required for the conviction of any crime.

Mens rea is a malleable concept, and the connotation of the words in the context of the crime of murder has changed during the course of history "in order to enable courts to visit with a severe penalty killers who, in the public opinion of the day, ought not to be let off with [a] slight punishment." Sayre, *supra*, at 998. See *infra* notes 18-67 and accompanying text for a discussion of the evolution of mens rea as an element of the crime of murder.

tenet of penal law has been that "*actus non facit reum, nisi mens sit rea.*"[4] A mens rea element serves to define a crime in positive terms and also provides the basis for defenses that negate the subjective culpability element.[5] Mens rea, in other words, is a "shorthand statement[] for a cluster of concepts having to do with states of mind *or* their absence."[6] This cluster of concepts is present, of course, in the law of homicide. Several legal scholars have found in the history of homicide law "the emergence of the mental element as a factor of prime importance, the gradual freeing from criminal responsibility of those who killed without guilty intent, and the separation of different kinds of homicide into more and less serious offenses dependent upon the psychical element."[7] To put the point figuratively, mens rea is the backbone of the criminal law, without which the body of the law, including homicide law, collapses.

As part of the 1977 recodification of Maine criminal law, the Maine Legislature enacted a depraved indifference murder statute. Although the Legislature has amended the original statute, the substance of the provision remains intact. The Maine Criminal Code provides: "A person is guilty of murder if . . . [h]e engages in conduct which manifests depraved indifference to the value of human life and which in fact causes the death of another human being . . . ."[8] The Legislature defined the crime in vague terms, and the Maine

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4. *See* E. COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND *6, *107 (referring to elements of the crimes of treason and larceny). *See generally* Sayre, *supra* note 3, at 974-75. In English, the principle means: "An act does not make [the doer of it] guilty, unless the mind be guilty; that is, unless the intention be criminal. The intent and the act must both concur to constitute the crime." BLACK'S LAW DICTIONARY 34 (5th ed. 1979). The same notion is present in the Maine Criminal Code. ME. REV. STAT. ANN. tit. 17-A, § 34 (1983). *See also* MODEL PENAL CODE § 2.02 (1985).

5. Drafters of modern criminal codes apply what Herbert Packer calls the "positive approach" to mens rea:

> [T]he positive approach[] attempts to identify particular states of mind and to attribute them to each of the material elements constituting the definition of particular criminal offenses. This positive approach has been carried to a high degree of analytic rigor in the American Law Institute's Model Penal Code, which identifies four grades of mental elements—purpose, knowledge, recklessness, and negligence. It then attributes these four elements to three material elements—the actor's physical conduct, the surrounding circumstances, and the result of the conduct. In this analytic framework, what we might ordinarily think of as "defenses" . . . are included as material elements of the offense that must be accompanied by an appropriate mental element.

H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 105 (1968). The writers of the Maine Criminal Code also took the positive approach, and this Comment thus stays within the bounds established by this analytic framework. For a description of the "negative approach" to mens rea, see *infra* note 88.

6. H. PACKER, *supra* note 5, at 104.

7. Sayre, *supra* note 3, at 995. *See also infra* notes 18-67 and accompanying text.

8. ME. REV. STAT. ANN. tit. 17-A, § 201(B) (1983) (enacted by P.L. 1977, ch. 510, § 38). For a survey of the statutory history of murder law in Maine, see *infra* notes 20-

Supreme Judicial Court subsequently ruled that the crime of depraved indifference murder contains no subjective culpable state of mind requirement.[9] Where a jury determines that an actor's conduct was outrageous, revolting, brutal, or shocking and created a high degree of risk of death to the deceased victim, it may conclude without more that the defendant committed murder. The statute does not require the factfinder to infer from the actor's behavior that he acted with any particular subjective state of mind.

This Comment reviews the common law antecedents to depraved indifference murder and notes that common law history afforded ample reason for the Law Court to conclude that a subjective culpable state of mind is part of the definition of the crime.[10] Moreover, an analysis of Maine's murder law prior to the 1970's reveals that Maine precedent did not mandate the court's interpretation of the depraved indifference murder statute.[11] Placing the unintentional murder statute in historical context reveals the complexities of homicide law that account for, but do not justify, the Law Court's construction of the statute.[12]

A murder statute that lacks a subjective culpable state of mind requirement is questionable not only because it conflicts with the evolution of homicide law and currently prevailing authority. This Comment contends that an objective definition of murder is also unjust in principle and this injustice manifests itself when the statute is applied in practice to criminal defendants. This Comment examines carefully the depraved indifference murder statute in relation to other provisions of the Maine Criminal Code. It argues that removing the concept of mens rea from the meaning of murder produces at least three deleterious consequences: first, exculpatory defenses are unavailable to a person accused of unintentional murder;[13] second, depraved indifference murder subsumes the intentional or knowing category of murder to the extent that the provisions proscribe the same conduct and thus tend to reduce murder to purely objective terms;[14] third, an objective definition of murder derogates from the purposes of the penal sanction.[15]

Following a discussion of the shortcomings of the depraved indifference murder statute, this Comment argues that the Legislature should amend the statute to include a subjective culpable state of mind requirement. This argument raises the question of what state

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21 & 101.

9. *See infra* text accompanying notes 95-109.
10. *See infra* text accompanying notes 18-67.
11. *See infra* notes 68-93 and accompanying text.
12. *See infra* notes 94-112 and accompanying text.
13. *See infra* text accompanying notes 115-42.
14. *See infra* text accompanying notes 143-65.
15. *See infra* text accompanying notes 193-225.

of mind requirement is proper for depraved indifference murder. Several state jurisdictions have enacted murder statutes that are analogous to Maine's depraved indifference statute.[16] This Comment surveys the law of these jurisdictions to find alternative definitions of unintentional murder. None offers an entirely satisfactory answer. The relevant law of some jurisdictions nonetheless provides a starting point for redefining depraved indifference murder. Building on this foundation, this Comment recommends that the Legislature incorporate into the definition of depraved indifference murder a mental element of recklessness. The definition of the crime should also include an enumeration of narrow and specific aggravating circumstances that serve to distinguish depraved indifference murder from reckless manslaughter.[17] This recommendation is consistent with historical precedent and would bring depraved indifference murder within the principles already contained in the Maine Criminal Code.

II. AN HISTORICAL OVERVIEW

Maine's unintentional murder statute[18] is ultimately founded on old English common law. Depraved indifference murder is a lineal decendent of malice aforethought. Malice aforethought was the early

16. *See infra* note 227.

17. *See infra* text accompanying notes 280-302.

18. ME. REV. STAT. ANN. tit. 17-A, § 201(1)(B) (1983 & Supp. 1987-1988). The Maine murder statute in its entirety provides:

§ 201. **Murder.**

1. A person is guilty of murder if:

A. He intentionally or knowingly causes the death of another human being;

B. He engages in conduct which manifests depraved indifference to the value of human life and which in fact causes the death of another human being; or

C. He intentionally or knowingly causes another human being to commit suicide by the use of force, duress or deception.

1-A. For purposes of subsection 1, paragraph B, when the crime of depraved indifference is charged, the crime of criminally negligent manslaughter shall be deemed to be charged.

2. The sentence for murder shall be as authorized in chapter 51.

3. It is an affirmative defense to a prosecution under subsection 1, paragraph A, that the actor causes the death while under the influence of extreme anger or extreme fear brought about by adequate provocation.

4. For purposes of subsection 3, provocation is adequate if:

A. It is not induced by the actor; and

B. It is reasonable for the actor to react to the provocation with extreme anger or extreme fear, provided that evidence demonstrating only that the actor has a tendency towards extreme anger or extreme fear shall not be sufficient, in and of itself, to establish the reasonableness of his reaction.

5. Nothing contained in subsection 3 may constitute a defense to a prosecution for, or preclude conviction of, manslaughter or any other crime.

Id. § 201.

common law element that withdrew certain homicides from the monarch's authority to pardon and that denied the killer the benefit of his clergy. Malice aforethought branched into express and implied malice during the middle of the sixteenth century. Briefly stated, express malice evolved to mean an unlawful homicide committed with an intentional state of mind. Implied malice aforethought originated as a presumption of premeditation, but evolved into a subjective culpable state of mind, i.e., an element of depraved heart murder that the factfinder inferred from the circumstances of the killing. Insofar as Maine's current depraved indifference murder statute lacks a subjective culpable state of mind requirement, the statute is inconsistent with its historical Anglo-American development.

Lord Coke defined murder as an "unlawful[] kill[ing] within any county of the realm . . . under the king's peace, with malice forethought, either expressed by the party, or implied by the law."[19] In 1841, Maine defined murder as the "unlawful[] kill[ing of] any human being, with malice aforethought, either express or implied."[20] The substance of this statute continued as the law of murder in Maine until the 1975 recodification of the criminal law.[21] Maine

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19. E. COKE, *supra* note 4, at *47.

20. ME. REV. STAT. tit. 12, ch. 154, § 1 (1841).

The early murder statutes in Maine provided for two degrees of murder:

> Whoever shall commit murder with *express* malice aforethought, or in perpetrating or attempting to perpetrate any crime, punishable with death, or imprisonment in the state prison for life, or for an unlimited term of years, shall be deemed guilty of murder of the *first degree*, and shall be punished with death.

Id. § 2 (emphasis added). "Whoever shall commit murder, otherwise than is set forth in the preceding section, shall be deemed guilty of murder in the *second degree*, and shall be punished by imprisonment for life in the state prison." *Id.* § 3 (emphasis added).

Sections two and three, read in conjuction with section one, provided that a killing with express malice aforethought was murder in the first degree, and a killing with implied malice aforethought was murder in the second degree. *See* State v. Verrill, 54 Me. 408, 415-16 (1867); State v. Knight, 43 Me. 11, 35 (1857); State v. Conley, 39 Me. 78, 87-91 (1854); State v. Waters, 39 Me. 54, 68 (1854); State v. Smith, 32 Me. 369, 373-74 (1851). One is compelled to infer that a higher level of blameworthiness attached to a killing with express malice aforethought than to a killing with implied malice aforethought. The fifth revision of the Maine statutes eliminated the degrees of murder for the purpose of disposing with the death penalty; a killing committed with either express or implied malice aforethought was punishable by life imprisonment. ME. REV. STAT. ch. 119, § 1 (1903). The definition of murder in Maine under the 1964 revision of the statutes was the "unlawful[] kill[ing of] a human being with malice aforethought, either express or implied . . . ." ME. REV. STAT. ANN. tit. 17, § 2651 (1964).

21. In 1975 the Legislature enacted title 17-A of the Maine Criminal Code. P.L. 1975, ch. 499 (effective March 1, 1976) (amended 1977). Sections 201-206 set forth six degrees of homicide. Section 202 provided: "A person is guilty of criminal homicide in the 2nd degree if he causes the death of another intending to cause such death, or

courts ruled, prior to recodification, that depraved heart murder, the lineal forbearer of depraved indifference murder,[22] fell within the elusive concept of "implied malice aforethought"[23] and encompassed those killings rooted in "a heart void of human kindness, depraved and fatally bent on mischief."[24] Depraved indifference murder, therefore, is a vestige of the common law notion "implied malice aforethought," and an historical analysis should trace the evolution of this concept.

Malice aforethought was the element that, at early English common law, distinguished murder from manslaughter.[25] Parliament removed from the king the power to pardon[26] and from the accused his right to the benefit of the clergy[27] in cases of homicide commit-

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knowing that death will almost certainly result from his conduct." *Id.* § 1. The Legislature, in section 201, defined criminal homicide in the first degree as second degree homicide which the actor committed under explicit, aggravating circumstances. *Id.* § 1. Prior to the effective date of chapter 499, the homicide provisions of the criminal code were altered slightly in P.L. 1975, ch. 740, §§ 37-42.

Maine's current murder statute, *see supra* note 18, took form in 1977 and was patterned after the Model Penal Code definition of murder. P.L. 1977, ch. 510, § 38 (effective October 24, 1977); MODEL PENAL CODE § 210.2 (1962).

22. Sir James Stephen defined murder as an "unlawful homicide with malice aforethought," malice aforethought meaning, *inter alia*, the state of mind equivalent to "*knowledge* that the act which causes death will probably cause the death of, or grievous bodily harm to, some person . . . although such knowledge is accompanied by *indifference* whether death or grievous bodily harm is caused . . . ." J. STEPHEN, A DIGEST OF THE CRIMINAL LAW 182 (5th ed. 1894) (emphasis added). He intended by this definition to clarify the content of implied malice as expressed in colorful words such as a "heart regardless of social duty and deliberately bent on mischief." 3 J. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 76 (1883) [hereinafter J. STEPHEN, HISTORY]. *See id.* at 55-56. *See generally* MODEL PENAL CODE § 210.2 comment at 15, 25, 27 (1980); W. LAFAVE & A. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 541-42 (1972).

23. *See* State v. Duguay, 158 Me. 61, 75-77, 178 A.2d 129, 136-37 (1962); State v. Turmel, 148 Me. 1, 6-7, 88 A.2d 367, 369-70 (1952); State v. Merry, 136 Me. 243, 248, 8 A.2d 143, 146 (1939); State v. Knight, 43 Me. 11, 34 (1854); State v. Smith, 32 Me. 369, 373-74 (1851). *Cf.* Commonwealth v. Fox, 73 Mass. 585, 587-88 (1856); Commonwealth v. York, 50 Mass. 93, 101-102 (1845).

24. State v. Smith, 32 Me. at 374.

25. Kaye, *The Early History of Murder and Manslaughter (Pt. 1)*, 83 L.Q. REV. 365, 366-70 (1967). The notion of malice aforethought existed prior to its function as the distinguishing characteristic between murder and manslaughter. In the statute of 1389, during the thirteenth year in the reign of King Richard II, "malice prepensed" denoted the "whole of culpable homicide, leaving therefore no residuary category capable of being identified with what later came to be called Manslaughter." *Id.* at 369. *See also* Perkins, *A Re-Examination of Malice Aforethought*, 43 YALE L.J. 537, 543-44 (1934).

26. 13 Rich. 2, ch. 1, § 4 (1389) ("[I]f [the deceased] were murdered or slain by Await, Assault, or Malice prepensed, the Charter [of Pardon] shall be disallowed . . . .").

27. A criminal entitled to benefit of clergy was effectively protected from capital punishment. 3 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 296-99 (1923). Benefit of the clergy originally extended only to members of the clergy, who were tried before

ted with malice aforethought.[28] The punishment for murder was death.[29] A killing without malice aforethought was manslaughter and the punishment was branding the criminal's thumb and ordering forfeiture of his personal goods.[30] Parliament never defined "malice aforethought," but left to the courts and to commentators the task of giving content to the words in light of particular circumstances.

William Staunford[31] was one of the first legal writers to incorporate malice aforethought into the definition of murder. In the mid-1500's, he wrote:

> For at this day, one is able to define murder in a manner other than as by Bracton and Britton, for if anyone of *malice aforethought* kills another feloniously, without regard to whether he kills openly or secretly, or whether [his victim] is English or foreign, it is murder so long as [his victim] lives in the realm under

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ecclesiastical courts. The privilege expanded, however, to cover persons who could read. 1 J. STEPHEN, HISTORY, *supra* note 22, at 461. This expansion was an effort by the courts to mitigate the harsh penalties imposed by early law. Perkins, *supra* note 25, at 542. Such mitigation produced disparate results, however, since severity of punishment bore little relation to the atrocity of the crime but was a function of literacy. Parliament was obliged to bridle the principle of benefit of clergy in order more justly to separate crimes that resulted in capital punishment from those that did not. *See generally* 1 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 424-40 (1895).

28. 1 Edw. 6, ch. 12, § 10 (1547) ("[N]o Person or Persons . . . attainted or convicted of Murder of Malice prepensed . . . shall have and enjoy the Privilege and Benefit of his or their Clergy . . . ."); 23 Hen. 8, ch. 1, § 3 (1531) ("[N]o Person nor Persons, which hereafter shall happen to be found guilty . . . for any wilful Murder of Malice Prepensed . . . shall from henceforth be admitted to the Benefit of his or their Clergy, but utterly be excluded thereof . . . ."); 12 Hen. 7, ch. 7 (1496) ("[I]f any Lay Person hereafter prepensedly murder their Lord, Master, or Sovereign immediate, that they hereafter not be admitted to their Clergy . . . ."). *See generally* 4 W. BLACKSTONE, COMMENTARIES 201-202 (London 1783 & photo. reprint 1978); 1 E. EAST, THE PLEAS OF THE CROWN 215-16 (London 1803); M. FOSTER, A REPORT OF SOME PROCEEDINGS . . . FOR THE TRIAL OF REBELS 257 (2d ed. London 1776); 1 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 466-70 (London 1736 & photo. reprint 1971); 1 W. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 184 (7th ed. London 1795); 3 J. STEPHEN, HISTORY, *supra* note 22, at 43-46.

29. That is, a killing with malice aforethought stood on the same footing as all previous felonious homicides and was punishable by death. *See* 2 F. POLLOCK & F. MAITLAND, *supra* note 27, at 459-61; 3 J. STEPHEN, HISTORY, *supra* note 22, at 44.

30. Sayre, *supra* note 3, at 996-97; 1 J. STEPHEN, HISTORY, *supra* note 22, at 462-63.

31. William Staunford was born in 1509 at Hadley in Middlesex. He received his classical education at Oxford and pursued his legal studies at Gray's Inn, where he was appointed to the bar in 1536. Staunford served as Attorney-General under Edward VI, and was raised to the bench in 1554, shortly after the accession of Mary. He retained his seat in the Common Pleas until his death in 1558. Staunford is noted primarily for encouraging the first publication of Glanville's *Tractatus de Legibut et Consuetudinibus Angliae*, and for authoring *Treatise on the Pleas of the Crown* and *Exposition of the King's Prerogative*. E. FOSS, THE JUDGES OF ENGLAND 630 (1870).

the protection of the king.[32]

Staunford did not go so far as to give substance to the terminology, but only contrasted murder with a killing upon "chance medley"[33] and with voluntary homicide upon a sudden quarrel.[34] English law historian Sir James Stephen deduced that during the time of Staunford, in the middle of the sixteenth century, "malice prepense," i.e., malice aforethought, connoted nothing more than premeditation.[35] Killings with malice aforethought did not include killings in which the actor, without premeditation, knowingly or purposefully[36] caused the death of another person. An intentional

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32. The text accompanying this note is the Commentator's translation of the following:

> Per que a cest iour, home peut diffiner murder in autre manner que Bracton e Britton fierent .s. quant ascun de *malice prepensee*, tua auter felonisment nient ciant regarde le quel il luy tua apertement ou secretement, ou le quel il soit anglois, ou auter home quiconque, issint que il vivast in le realme subs le protection le roy.

W. STAUNFORD, LES PLEES DEL CORON 18b (London 1557 & photo. reprint 1979) (emphasis added).

33. "Chance medley" was an ambiguous concept during the early and middle sixteenth century. Staunford used the words to describe an accidental homicide that occurred during an act of violence. *See* Kaye, *The Early History of Murder and Manslaughter (pt. 2)*, 83 L.Q. REV. 569, 584 (1967). Another interpretation of "chance medley" was an intentional killing upon a "sudden encounter." *Id.* at 584-85. Kaye suggests that the latter construction became accepted by most authorities concurrently with their interpretation of "malice aforethought" as "premeditation." *Id.*

34. *Id.* at 584.

35. 3 J. STEPHEN, HISTORY, *supra* note 22, at 47. *Accord* Kaye, *supra* note 33, at 572-73, 581-82.

36. This Comment explains the development of mens rea in the law of homicide in modern terms of legal parlance. Unless otherwise provided, the culpable states of mind "purposely," "knowingly," "recklessly," and "negligently" refer to the definitions of these terms in the Model Penal Code.

> **Section 2.02. General Requirements of Culpability.**
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> . . . .
>
> (2) *Kinds of Culpability Defined.*
>
> (a) *Purposely.*
>
> A person acts purposely with respect to a material element of an offense when:
>
> (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
>
> (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.
>
> (b) *Knowingly.*
>
> A person acts knowingly with respect to a material element of an 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

homicide without premeditation, therefore, was a clergyable and pardonable[37] offense.[38]

"Malice aforethought," as construed during the middle of the sixteenth century, thus referred only to a premeditated intent to kill another person.[39] This interpretation did not long survive, however, for English criminal law soon evolved to encompass, within the crime of murder, intentional and knowing killings without premeditation. William Lambard,[40] writing in the late sixteenth century, explained that murder expanded to include intentional killings without premeditation as the scope of "malice aforethought" widened. Lambard noted that the judiciary broadened the concept of "malice aforethought" by finding that the law would impute "malice," or

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that it is practically certain that his conduct will cause such a result.

(c) *Recklessly.*

A person acts recklessly with respect to a material element of an offense 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.

(d) *Negligently.*

A person acts negligently with respect to a material element of an offense when he should be aware of 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 the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

MODEL PENAL CODE § 2.02(2) (1985). "Intentionally" is the Maine Criminal Code analogue of "purposely." ME. REV. STAT. ANN. tit. 17-A, § 35 (1983).

37. *See supra* notes 26-28.

38. The consequence of construing "malice aforethought" in the vernacular was to limit application of the mandatory death penalty to those cases in which there was evidence of premeditation. Without proof of premeditation, an intentional and knowing killing was outside the definition of murder and within both the Crown's power to pardon and the benefit of the clergy.

39. *See supra* text accompanying notes 31-35.

40. William Lambard was born in London in 1536. He entered Lincoln's Inn in 1556, two years prior to the ascension of Queen Elizabeth I. There is no indication that he received a classical education prior to studying law at Lincoln's Inn. Lambard was called to the bar in 1567, and one year later he published his first book, *Archaionomia*, a collection and translation of Anglo-Saxon manuscripts. Two years later, in 1570, he completed his manuscript, *A Preambulation of Kent*, which was first printed in 1576. Lambard was appointed to the Commission of Peace in 1580 and, in 1581, he published *Eirenarcha* (*Of the Office of the Justice of the Peace*). These scholarly publications and his devotion to Queen Elizabeth I brought Lambard various positions of responsibilty and honor. He became a Master of Chancery in 1591 and in the same year published *Archeion* (*A Discourse Upon the High Courts of Justice in England*). Lambard died in East Greenwich in 1601. W. DUNKEL, WILLIAM LAMBARDE, ELIZABETHAN JURIST 1536-1601 (1965).

premeditation, to the actor when there was no evidence thereof, but merely evidence of a lesser culpable state of mind.[41] Although the law presumed premeditation, the basis of the presumption was a lower level culpable state of mind.[42] The legal construction of "implied malice" did not preclude the necessity of proving some subjective culpable state of mind in one accused of murder.

"Malice aforethought" subsequently divided into the separate, yet not clearly distinct, concepts of "express malice aforethought" and "implied malice aforethought." In the early seventeenth century, Lord Coke explicitly and authoritatively wrote that murder was an unlawful killing with either express or implied malice aforethought.[43] He reasoned that malice referred to a settled purpose or *intent* and that the law would imply malice in certain cases.[44] Coke's

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41. Lambard wrote:

> Many times the law doth by the sequel judge of that malice which lurked within the party, and doth accordingly make imputation of it. And therefore if one draw his weapon and therewith kill another that standeth by him, the law judgeth it to have proceeded from former malice, meditated within his own mind, however it be kept secret from the sight of other men. . . . [T]he law presupposeth that he carrieth that malicious mind with him that he will achieve his purpose though it be with the death of him against whom it is directed.

3 J. STEPHEN, HISTORY, *supra* note 22, at 50 (quoting W. LAMBARD, EIRENARCHA 205 (n.p., n.d.)).

Lambard created a new class of homicide that fell under the definition of murder by relieving the prosecution of the burden of proving premeditation. He did not explicity say that "malice aforethought" so construed brings an intentional killing without premeditation within the definition of murder. Rather, he indicated that the law will presume premeditation when there is no evidence thereof. Nonetheless, he effectively bridged the mens rea gap that previously had existed between manslaughter and a premeditated killing, because an intentional killing was the only type of homicide in which premeditation properly could be presumed. An intentional homicide, in essence, became a residual category of murder as Lambard removed from murder the time element of premeditation. *See id.* at 50-51.

42. See *infra* notes 51 & 78 for a discussion of the distinction between a legal presumption and a factual inference.

43. *See supra* text accompanying note 19.

44. Lord Coke was unequivocal when he defined murder, but unfortunately was not so unambiguous when he attempted to convey intelligibly the content of that definition. Coke construed express malice aforethought in general terms: "Malice prepensed is, when one compasseth to kill, wound, or beat another, and doth it *sedato animo*[,i.e., with settled purpose or intent]. This is said in law to be [express] malice forethought, prepensed, *malitia praecogitata*." E. COKE, *supra* note 4, at *51.

Coke stated that there are three cases where the law will imply malice. The first case is "in respect of the manner of the deed. As if one killeth another without any provocation on the part of him, that is slain, the law implieth malice . . . ." *Id.* at *52. An actor certainly can kill another with settled purpose, an element of *express* malice aforethought, without any provocation, a component of *implied* malice aforethought. Coke's definition of a killing upon express malice aforethought thus is not clearly distinct from his first case of implied malice aforethought.

Coke's other two cases of implied malice aforethought do not elucidate the content of implied malice and fail to distinguish it from express malice aforethought. Malice

cases of implied malice, however, were presumptions of intent masquerading as inferences of factual intent.[45] The seventeenth century jurist Matthew Hale[46] perceived this fiction and exposed it. He adopted verbatim Coke's cases of implied malice,[47] but indicated that they were instances where the law *presumed* malice within the actor.[48] Hale also stressed the notion of provocation, a term that Coke mentioned in his first case of implied malice aforethought, i.e., that malice would be "implied" where one unlawfully killed another person without provocation. Hale regarded "without provocation" as a negative that was pregnant with the inverse rule that where one unlawfully kills another *with* provocation the law will *not* imply malice.[49]

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is implied "[i]n respect of the person slain. As if a magistrate or known officer, or any other, that hath lawfull warrant, and in doing, or offering to doe his office, or to execute his warrant, is slain, this is murder, by malice implied by law . . . ." *Id.* This example of implied malice overlaps Coke's definition of express malice aforethought, since one purposely can kill a "magistrate or known officer." Who is slain does not reveal the actor's state of mind. Coke believed that malice also was implied "[i]n respect of the person killing. If A assault B to rob him and in resisting A killeth B this is murder by malice implied, albeit he never saw or knew him before." *Id.* This case likewise fails to show the substantive difference between express and implied malice, because *A* could have killed *B* in *sedato animo.*

45. See *infra* notes 51 & 78 for a discussion of the distinction between presumptions of law and factual inferences.

Stephen contends that when Coke equated malice with *sedato animo,* he assigned an unnatural meaning to the word, "a word which naturally means ill-will in general, and refers not to the intention . . . ." 3 J. STEPHEN, HISTORY, *supra* note 22, at 55. Thus, "having defined express malice in an unnatural sense, [Coke] used the word in its natural sense as soon as he came to speak of implied malice." *Id.* Stephen severely criticized Coke on this point and attributed to him the subsequent confusion and ambiguity for which the concepts express and implied malice aforethought became notorious.

This Commentator accepts Stephen's contention that Coke misconstrued the distinction between express and implied malice as conceived by Lambard. That Coke was speaking of ill-will or premeditation in fact in his three cases of implied malice, however, is far from clear. A less strained reading is that having defined malice as an unlawful killing in *sedato animo,* Coke construed implied malice as a presumption in law of *sedato animo,* i.e., intent. *See* Perkins, *supra* note 25, at 547.

46. Matthew Hale was born at Alderley in 1609. He attended Oxford but received no degree. He nevertheless entered Lincoln's Inn and was appointed to the bar in 1636. Hale became a judge of the Common Pleas in 1654, soon after Cromwell had ascended to power. Hale presided in the Exchequer for nearly eleven years and in 1671 became Chief Justice of the King's Bench. He died 5 years thereafter. E. FOSS, *supra* note 31, at 319-22.

47. 1 M. HALE, *supra* note 28, at 451. See *supra* note 44 for those cases in which Coke believed malice should be implied.

48. "Such a malice therefore, that makes the killing of a man to be murder, is of two kinds, 1. Malice in fact, or 2. Malice in law, or *ex praesumptione legis.*" 1 M. HALE, *supra* note 28, at 451. "Malice in fact is a deliberate intention of doing some corporal harm to the person of another." *Id.*

49. Hale wrote: "Murder and manslaughter differ not in the kind or nature of the offense, but only in the degree, the former being the killing of a man of malice pre-

One might reasonably doubt that Hale's recognition of the presumption of intent and the correlative principle of adequate provocation relates directly to depraved heart murder, the common law precursor of depraved indifference murder.[50] Indeed, a "presumption of malice absent adequate provocation" is a legal concept that is essentially different from depraved heart or depraved indifference murder.[51] The former concept is a presumption bearing on the severity of punishment once there has been a determination of guilt,[52] whereas the latter constitutes a separate and distinct category of murder. The distinction between these principles exists notwithstanding that both concepts share a common origin in implied malice aforethought.

Implied malice did not clearly evolve from a "presumption of malice" to include "depraved heart murder" until the mid-eighteenth century, when the English jurist Michael Foster[53] coined the phrase that would stand as the hallmark of depraved heart murder. Foster wrote, "Malice in this instance meaneth, that the fact hath been attended with such circumstances as are the ordinary symptoms of a

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pense, the latter upon a sudden provocation and falling out." *Id.* at 449. He seized on this principle and set for himself the task of solving the problem of "What is such a provocation, as will take off the presumption of malice in him, that kills another." *Id.* at 455.

50. *See supra* note 22.

51. Rollin Perkins explained:

> During [the] metamorphosis [of implied malice] from a mere inference of fact to a presumption of law and finally to its frank recognition as *apsychical fact* distinct from 'express' malice, no one of these meanings was, unfortunately, entirely lost, and at the present time the term is tainted with all three.

Perkins, *supra* note 25, at 549 (emphasis added).

A presumption of law is distinct from an inference of fact. "A presumption . . . is . . . a rule of law laid down by the judge and attaching to one evidentiary fact certain *procedural consequences* as to the duty of production of other evidence by the opponent." 9 J. WIGMORE, WIGMORE ON EVIDENCE § 2491(1) (1981). Perkins believed that implied malice properly involved a true presumption only insofar as it disburdened the prosecution of proving "the non-existence of every conceivable set of circumstances which might be sufficient to constitute either innocent homicide or guilt of manslaughter only." Perkins, *supra* note 25, at 550-51. Thus, an actor charged with murder would have the burden of going forward with evidence that showed exculpating or mitigating circumstances.

Perkins emphasized that express or implied "malice aforethought [are] a *matter of mind*, however convenient it may be to speak in terms of the absence of circumstances of justification, excuse or mitigation." *Id.* at 567 (emphasis added). Perkins advocated disposing of the terms "expressed" and "implied" and focused on defining "malice aforethought" in a manner that embodied both concepts. *Id.* at 568-69.

52. *See infra* text accompanying notes 84-93.

53. Michael Foster was born in 1689. He entered Exeter College, Oxford, in 1705 and was appointed to the bar in 1713 at the Middle Temple. Foster became a judge of the King's Bench in 1745. He died in 1763. E. Foss, *supra* note 31, at 278-79.

wicked, depraved, malignant spirit."[54] Cases of implied malice "turn upon [a] single point, that the [killing] hath been attended with such circumstances as carry in them the plain indications of an heart regardless of social duty and fatally bent upon mischief."[55] Examples in nineteenth and early twentieth century American cases of conduct evincing a "heart regardless of social duty and fatally bent on mischief" include shooting at a moving automobile,[56] into a crowd,[57] an occupied house,[58] or at the caboose of a moving train.[59] Other examples include driving a car at a high speed along a busy street,[60] throwing a heavy beer glass at a person carrying a lighted oil lamp,[61] and playing Russian roulette.[62] The actor in each case was convicted of murder notwithstanding that he lacked an intent to kill.[63]

Although depraved heart murder developed without a requirement of an intent to kill, the crime did have a mens rea element. Chief Justice Shaw in *Commonwealth v. York*[64] cited numerous instances of murder by implied malice, and concluded that implied

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54. M. FOSTER, *supra* note 28, at 256. Foster also made reference to what the law did not mean by malice aforethought: "When the law maketh use of the term *[m]alice aforethought* as descriptive of the crime of murder, it is not to be understood in that narrow restrained sense, to which the modern use of the word *Malice* is apt to lead one, *a principle of malevolence to particulars . . . .*" *Id.*

55. *Id.* at 257.

56. Wiley v. State, 19 Ariz. 346, 170 P. 869 (1918); Hill v. Commonwealth, 239 Ky. 646, 40 S.W.2d 261 (1931).

57. Durham v. State, 177 Ga. 744, 171 S.E. 265 (1933).

58. People v. Jernatowski, 238 N.Y. 188, 144 N.E. 497 (1924).

59. Banks v. State, 85 Tex. Crim. 165, 211 S.W. 217 (Tex. Crim. App. 1919).

60. State v. Trott, 190 N.C. 674, 130 S.E. 627 (1925).

61. Mayes v. People, 106 Ill. 306 (1883).

62. Commonwealth v. Malone, 354 Pa. 180, 47 A.2d 445 (1946). For a general discussion of this case, those cases cited in notes 57-62 and similar cases, see MODEL PENAL CODE § 210.2 comment 4 (1980); W. LAFAVE & A. SCOTT, JR., *supra* note 22, at 541-43; Perkins, *supra* note 25, at 556.

63. *Express* malice, not implied malice, evolved to mean a homicide committed with a knowing or purposeful, i.e., intentional, state of mind. Perkins, *supra* note 25, at 548-49. "When a man attacks another with a dangerous weapon without any provocation; that is express malice from the nature of the act, which is cruel. The definition of malice implied is where it is not express in the nature of the act . . . ." Regina v. Mawgridge, 84 Eng. Rep. 1107, 1112 (1708). "[E]vidence [] of [express malice] must arise from external circumstances discovering that inward intention, as lying in wait, menacings antecedent, former grudges, deliberate compassings, and the like, which are various according to [a] variety of circumstances . . . ." 1 M. HALE, *supra* note 28, at 451. Express malice is found in "such acts as shew a direct and deliberate intent to kill another, as poisoning, stabbing, and such like, [which] are so clearly murder, that I know not any questions relating thereto worth explaining." 1 W. HAWKINS, *supra* note 28, at 189. Later legal commentators added little, if anything, to this explanation of express malice. *See generally* 4 W. BLACKSTONE, *supra* note 28, at 198-99; 1 E. EAST, *supra* note 28, at 214-15; 3 W. RUSSEL, RUSSEL ON CRIMES 1-4 (6th ed. 1896). For Coke's definition of express malice, see *supra* note 44.

64. 50 Mass. (9 Met.) 93 (1845).

malice involved a subjective element of recklessness or wantonness that the fact finder inferred from the circumstances:

> All these . . . are cases where death ensues from acts done *recklessly and wantonly*, under circumstances of inhumanity and cruelty, indicating a heart devoid of social duty, and fatally bent on mischief. . . . [W]hether such homicide be murder or manslaughter must depend upon the degree of carelessness, cruelty or malignity, presented by the evidence, depending upon the particular facts and circumstances, the malice must be an *inference of fact* from these circumstances . . . .[65]

Prominent legal authorities agree that a "depraved heart" murder historically denoted a subjective culpable state of mind[66] that was distinct from intention yet no less blameworthy.[67] Maine's current depraved indifference murder statute, insofar as it does not contain a mens rea component, thus departs from the history of homicide law.

III. UNINTENTIONAL MURDER IN MAINE: FROM DEPRAVED HEART MURDER TO DEPRAVED INDIFFERENCE MURDER

No murder statute in Maine facially included unintentional killings within the definition of murder until the Legislature recodified the criminal law in 1977.[68] Judicial construction of pre-1977 murder statutes brought unintentional homicides under the "implied mal-

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65. *Id.* at 102 (emphasis added).

66. A subjective culpable state of mind requires the actor to be aware that his conduct is life-threatening. Pollock deduced that "[t]he distinction [between murder and manslaughter] which seemed most reasonable consisted in the consciousness that the act done was one which would be likely to cause death. No one . . . could commit murder without that consciousness." Regina v. Vamplew, 176 Eng. Rep. 234, 234 (1862) (footnote omitted). Stephen is perhaps the authority who is most well-known for advocating the principle that the actor must subjectively be aware of the danger that his conduct poses. *See supra* note 22. Perkins concurs with a subjective awareness requirement and labels the psychical element a "man-endangering-state-of-mind." Perkins, *supra* note 25, at 557. *See also* R. PERKINS & R. BOYCE, CRIMINAL LAW 73 (3d ed. 1982) ("wanton and wilful disregard of an unreasonable human risk"). J.W. Cecil Turner supported the requirement of a subjective standard. Turner, *The Mental Elements in Crimes at Common Law*, 6 CAMBRIDGE L.J. 31, 39-40, 53 (1936).

Justice O.W. Holmes expressed views antithetical to Stephen's on this point. Holmes believed that only an objective analysis of the actor's conduct was required to find criminal liability. The actor's "failure or inability to predict [consequences was] immaterial, if, under the circumstances known to him, the court or jury, as the case might be, thought them obvious." Commonwealth v. Pierce, 138 Mass. 165, 178 (1884) (Holmes, J). *See also* Commonwealth v. Chance, 174 Mass. 245, 252, 54 N.E. 551, 554 (1899) (Holmes, C.J.); O. HOLMES, THE COMMON LAW 53-57 (1923). For a criticism of Holmes's position, see H. HART, PUNISHMENT AND RESPONSIBILITY 242-44 (1968).

67. "As far as wickedness goes it is difficult to suggest any distinction worth taking between an intention to inflict bodily injury, and reckless indifference whether it is inflicted or not." 3 J. STEPHEN, *supra* note 22, at 56.

68. *See supra* notes 18 & 101.

ice" concept contained in the old murder statutes.[69] The Law Court's interpretation of implied malice in murder cases prior to 1977 thus bears upon the meaning of Maine's current unintentional murder statute.[70] Early Law Court decisions that construed implied malice aforethought did less to define the concept than to demonstrate its elusiveness. Ambiguous language in these decisions fosters confusion about what function the term implied malice served in the law of murder. What were the bench and bar to make of explanations that "[m]alice is *implied* by law from any deliberate, cruel act, committed by one person against another"[71] or that "*[i]mplied malice* is an inference of law upon the facts found by a jury"?[72]

This vague phraseology suggests no fewer than four rational interpretations of implied malice: (1) a factual inference of an intent to kill; (2) a presumption in law of an intent to kill; (3) a culpable state of mind distinct from, yet no less blameworthy than, an intent to kill; and (4) a term of art expressing the public policy that certain homicides should have the highest degree of blameworthiness attributed to them for the purposes of severity of punishment. The difference among these interpretations of implied malice prior to 1977 reflects more the changing nature of the law, described in the second section of this Comment, than any misperceptions of a single true meaning.[73]

Implied malice might seem to refer most naturally to a factual inference of a specific intent to kill. Law Court opinions often juxtaposed the terms "implied" and "express" malice, and the contrast between the two discloses part of what implied malice was not. "Express malice exist[ed] where one with . . . formed design . . . kill[ed] another; which formed design [was] evidenced by external circumstances discovering that inward intention . . . ."[74] The factfinder could thus infer express malice from the circumstances.[75] This left

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69. *E.g.*, State v. Turmel, 148 Me. 1, 6-7, 88 A.2d 367, 369 (1952) ("Malice aforethought does not necessarily mean that there must be specific intent to kill . . . ."); State v. Merry, 136 Me. 243, 248, 8 A.2d 143, 146 (1939) ("[Malice] is implied when there is no showing of actual intent to kill . . . .").

70. The Law Court has stated that its construction of depraved indifference is based upon the common law definition of depraved heart murder, a concept derived from implied malice aforethought. *See, e.g.*, State v. Crocker, 435 A.2d 58, 64-65 (Me. 1981).

71. State v. Neal, 37 Me. 468, 470 (1854) (emphasis added).

72. State v. Knight, 43 Me. 11, 35 (1857) (emphasis added).

73. *See supra* text accompanying notes 18-67.

74. State v. Knight, 43 Me. at 34-35. *See also* State v. Merry, 136 Me. 243, 248, 8 A.2d 143, 146 (1939); State v. Neal, 37 Me. at 469-70. Express malice retained the meaning that Matthew Hale had assigned to it as early as 1736. *See supra* note 63.

75. The term "formed design," which the court used to define express malice, might be read to refer to premeditation or deliberation rather than intention. This is an unlikely interpretation, however, since even where a murder statute explicitly required premeditation or deliberation,

implied malice to fill a role bearing no relation to what its name at least superficially suggested, since *express* malice meant that the actor's conduct *implied* intent.

A second plausible interpretation of implied malice is a legal presumption of an intentional killing. Formulations such as "implied by law" or "inference of law"[76] or "the law . . . will conclusively infer malice"[77] are inaccurate insofar as they entangle legal presumptions with factual inferences.[78] One can safely deduce, however, that the court meant a presumption of law, since the court already had equated inferences of fact, i.e., factual intent, with express malice aforethought. A presumption describes "a judicially recognized relationship between one fact or groups of fact[, i.e., basic fact,] and another fact or group[, i.e., presumed fact]. . . . When the basic fact is established, the existence of the presumed fact must be assumed . . . ."[79] The basic fact, once established, that gave rise to the presumption of intent to kill was a heart regardless of social duty and fatally bent on mischief.[80] There are, of course, constitutional impli-

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judicial development of the American law of homicide [interpreted these two terms] . . . to exclude the two elements which the words normally signify: a determination to kill reached (1) calmly and (2) some appreciable time prior to the homicide. The elimination of these elements leaves . . . nothing precise as the crucial state of mind but intention to kill.

Wechsler & Michael, *A Rationale of the Law of Homicide (Pt. 1)*, 37 COLUM. L. REV. 701, 707-708 (1937) (footnotes omitted).

76. *See supra* notes 71-72.

77. State v. Lawrence, 57 Me. 574, 584 (1870).

78. The Law Court has explained the difference between a presumption and an inference:

> A presumption is a conclusion which a rule of law directs shall be made from proof of certain facts but an inference is a deduction which reason and logic dictates shall be made from a fact situation. An inference is a deduction as to the existence of a fact which human experience teaches us can reasonably and logically be drawn from proof of other facts.

Manchester v. Dugan, 247 A.2d 827, 829 (Me. 1968). *See also* R. FIELD & P. MURRAY, MAINE EVIDENCE 33 (1976); 1 J. WEINSTEIN & M. BERGER, EVIDENCE ¶ 300[01] (1986).

79. Morgan, *Foreword* to MODEL CODE OF EVIDENCE at 52 (1942).

80. State v. Duguay, 158 Me. 61, 80, 178 A.2d 129, 138-39 (1962) (Malice is implied from " 'that general malignancy and disregard of human life which proceed from a heart void of social duty, and fatally bent on mischief.' " (citation omitted)); State v. Turmel, 148 Me. 1, 7, 88 A.2d 367, 369-70 (1952) ("The jury was fully justified in their verdict of murder [since they] were fully justified in believing that this murder 'proceeded from an evil disposition or a mind and heart regardless of social duty and fatally bent on mischief.' " (citation omitted)); State v. Merry, 136 Me. 243, 248, 8 A.2d 143, 146 (1939) ("[Malice] is implied when there is no showing of actual intent to kill, but death is caused by acts which the law regards as manifesting such an abandoned state of mind as to be equivalent to a purpose to murder."); State v. Smith, 32 Me. 369, 373-74 (1851) ("[T]hough there be no proof of previous design or ill-will or unkind feelings[,] . . . the law allows the malice to be implied; that is, it allows the inference of a heart void of human kindness, depraved and fatally bent on mischief."); Commonwealth v. Fox, 73 Mass. (7 Gray) 585, 587-88 (1856) ("[T]he law implies malice, where the circumstances of the homicide are such as to show that the

cations in construing implied malice as a presumption of law.[81] Maine's current depraved indifference murder statute does not, however, embody a presumption in law of a culpable state of mind.

A third possible way to construe implied malice involves a variation of the second theory. One can reasonably understand the words "a depraved heart fatally bent on mischief" to reflect the actor's state of mind, which is no less culpable than an intent to kill.[82] That is, where the factfinder could infer from the evidence that the killing proceeded from a depraved heart, a subjective culpable state of mind, there was no need for the law to presume intent. No Maine decision clearly supports this proposition, although other jurisdictions have embraced this theory.[83]

Finally, the basic notion of malice, whether express or implied, can be seen as an expression of the public policy that certain homicides should receive the most severe punishment. This sense of implied malice is actually a remnant of Matthew Hale's principle of the presumption of malice absent adequate provocation.[84] It pervades pre-1977 Law Court decisions construing the law of murder.[85] For example, the Maine Supreme Judicial Court, sitting as the Law

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act proceeded from an evil disposition, or a mind and heart regardless of social duty and fatally bent on mischief."). *See generally* R. PERKINS & R. BOYCE, *supra* note 66, at 76-77.

Michael Foster originated the words "a heart regardless of social duty and fatally bent on mischief." M. FOSTER, *supra* note 28, at 257.

81. The fifth amendment due process requirement, which is applied to the states through the fourteenth amendment, precludes trial courts from instructing juries that the law presumes intent from an act. "Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury. . . . [T]he trial court may not [instruct] that the law raises a presumption of intent from an act." Morissette v. United States, 342 U.S. 246, 274 (1952). The state must prove beyond a reasonable doubt every element of the crime charged. *In re* Winship, 397 U.S. 358, 364 (1970).

The *Morissette* Court read an intentional state of mind requirement into a federal larceny statute, basing its interpretation partly on how state courts of last resort construe "larceny-type offenses." Morissette v. United States, 342 U.S. at 256. For further discussion of *Morissette*, see *infra* notes 213-14 and accompanying text.

82. "There is little distinction, except in degree, between a positive will to do wrong and an indifference whether wrong is done or not. . . . Every act of gross carelessness, even in the performance of what is lawful, and, a fortiori, of what is not lawful, and every negligent omission of a legal duty, whereby death ensues, is indictable either as murder or manslaughter."

State v. Pond, 125 Me. 453, 456, 134 A. 572, 573 (1926) (quoting 1 BISHOP, BISHOP ON CRIMINAL LAW §§ 313-314 (6th ed. 1877). *See supra* note 67.

83. *See supra* text accompanying notes 55-66.

84. *See supra* text accompanying notes 46-52.

85. *See* State v. Park, 159 Me. 328, 331-32, 193 A.2d 1, 3 (1963); State v. Duguay, 158 Me. 61, 74-76, 178 A.2d 129, 136 (1962); State v. Arsenault, 152 Me. 121, 126, 124 A.2d 741, 743 (1956); State v. Turmel, 148 Me. 1, 6-7, 88 A.2d 367, 369 (1952); State v. Lawrence, 57 Me. 574, 583-84 (1870); State v. Knight, 43 Me. 11, 35 (1857); State v. Neal, 37 Me. 468, 470 (1854).

Court, expounded on this view of implied malice in *State v. Rollins*.[86] The *Rollins* court explained that a presumption of malice at common law "signified a unitary legal principle reflecting two subsidiary aspects."[87] First, malice referred to the proof required for a conclusion that the homicide was unlawful and thus criminal.[88] Second, malice functioned in the sense described by Hale,[89] as a presumption that the most severe criminal sanction would attend an unlawful homicide unless the actor established that the killing occurred in the heat of passion upon sudden and adequate provocation.

> [O]nce there was evidence validly adequate to authorize a conclusion beyond a reasonable doubt that the circumstances in which defendant had killed another human being rendered the homicide unlawful and thus a crime (felonious homicide), as to the further question of the severity of the punishment to be imposed, the law would treat a homicide, *once* adequately shown to be an *unlawful* killing, as criminal conduct meriting the most severe punishment unless specific factors relevant to the palliation of punishment were adduced.[90]

Malice, as bearing on the severity of punishment, was presumed only after the state had introduced evidence sufficient to permit a juror to conclude beyond a reasonable doubt that the actor had intentionally killed the victim.[91] In other words, malice in this context

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86. 295 A.2d 914 (Me. 1972).

87. *Id.* at 918.

88. *Id.* at 918-19. The burden fell on the defendant to justify, mitigate, or excuse his actions after the state had shown an unlawful killing. Current learning would call this a negative approach to mens rea.

> [T]he negative approach, views the definition of criminal offenses as . . . "defeasible": a man who kills another is guilty of murder, *unless* he did not kill intentionally or recklessly, or *unless* he believed that his life was in danger . . . . In this analysis, the mental element is perceived as relating exclusively to matters of justification, excuse, or mitigation.

H. PACKER, *supra* note 5, at 106.

There was disagreement among early judges whether permitting a showing of a killing, without more, to constitute adequate proof of a felonious homicide was consistent with the the common law notion that the prosecutor must prove every element of criminality beyond a reasonable doubt. State v. Rollins, 295 A.2d at 919 (citing Commonwealth v. York, 50 Mass. (9 Met.) 93 (1845)).

89. *See supra* text accompanying notes 46-52.

90. State v. Rollins, 295 A.2d at 919. Justice Wernick emphasized that criminality and severity of punishment are distinct concepts. *Id.*

91. The court stated:

> That "malice is presumed" from an *intentional* killing is thus, basically, only a summarizing characterization of the proposition that the law demands that the *intentional* killing of one human being by another must bear the heaviest penalty unless extenuated by other circumstances deemed by a wise public policy relevant to the severity of penalty.

Id. at 920 (emphasis added). The Law Court was considering "the nature and effect of the presumption of malice which arises once the State has proved beyond a reason-

did not designate any subjective state of mind or other element of criminality.[92] Rather, it was a "fictional, metaphysical term of art" that was "extinguished" where the defendant proved that he had acted in the heat of passion on sudden provocation, a factor that mitigated blameworthiness yet did not negate any element of the crime.[93]

Implied malice, however, was not solely a "fictional, metaphysical term of art" that implemented the policy that the most severe criminal sanction should apply in cases of felonious homicide. Depraved heart murder, a discrete category of murder, also derived from implied malice aforethought.[94] Although the former sense of implied malice did not signify a culpable state of mind, the latter sense did denote a mens rea element distinct from, but no less blameworthy than, intent. Law Court decisions that explored the meaning of implied malice focused on adequate provocation, but ignored that depraved heart murder also derived from implied malice aforethought.

Justice Wernick, while contending in a concurrence in *State v. Lafferty*[95] that malice was not an element of intentional murder, argued that heat of passion upon sudden and adequate provocation extinguished malice even where a defendant is accused of depraved heart murder: "Manifestly, here, 'malice aforethought' cannot be identified with 'premeditation' since, by hypothesis, there is lacking a subjective intention to have death result."[96] The concurrence further noted, however, that an unintentional murder required no subjective state of mind at all.[97] This explanation is dictum, and Justice

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able doubt that the defendant committed a voluntary and intentional homicide, not justifiable or excusable." State v. Wilbur, 278 A.2d 139, 144 (Me. 1971), *rev'd sub nom.* Wilbur v. Mullaney, 473 F.2d 943 (1st Cir. 1973), *aff'd*, 421 U.S. 684 (1975).

92. State v. Lafferty, 309 A.2d 647, 669-70 (Me. 1973) (Wernick, J., concurring); State v. Rollins, 295 A.2d at 919; State v. Wilbur, 278 A.2d at 145-46.

The First Circuit rejected the Law Court's assertion that murder and manslaughter were but different degrees of "a single underlying criminal entity, 'felonious homicide,' " State v. Rollins, 295 A.2d at 918, and concluded that "[t]he presumption is employed not simply to assist the state in its factual proof, but to shift the burden of proof onto the defendant," which is a denigration of *In re Winship*. Wilbur v. Mullaney, 473 F.2d at 943. The Supreme Court affirmed the decision of the First Circuit and held "that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." Mullaney v. Wilbur, 421 U.S. 684, 704 (1975).

93. State v. Lafferty, 309 A.2d at 671 (Wernick, J., concurring). Notwithstanding that the prosecution had proven every element of murder beyond a reasonable doubt, the actor could reduce the severity of his punishment by showing that he had acted under heat of passion brought about by adequate provocation, because "the law [made] a concession to a frailty attributable to the average human being." *Id.*

94. *See supra* text accompanying notes 53-67 and cases cited in notes 23 & 80.

95. 309 A.2d 647 (Me. 1973).

96. *Id.* at 672 (Wernick, J., concurring).

97. A depraved heart murder has occurred where "death is caused by conduct

Wernick cited no authority for his assertion. The statement, in fact, contradicts the historical development of homicide law. *State v. Lafferty*, nonetheless, stands as the authority upon which the Law Court relies for the proposition that there is no subjective state of mind element in the crime of depraved indifference murder.[98]

The 1964 version of Maine's murder statute[99] was in force when the Law Court decided *State v. Lafferty*. Depraved indifference murder was added to the Criminal Code as part of the 1977 recodification.[100] The Legislature did not initially attempt to define "depraved indifference."[101] As part of the 1977 recodification, however,

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which *objectively* evaluated is characterized by a high death producing potential. Here, it is such *objective* tendency of the conduct, nothing else appearing, which renders the homicide, first, a criminal homicide and, second, punishable as 'murder.' " *Id.* at 671 (Wernick, J., concurring) (emphasis added). Furthermore, "[t]he language that the 'reckless' or 'brutal' conduct manifests 'a heart void of social duty, and fatally bent on mischief' is a metaphorical, [sic] description of the objective tendency of the conduct and should not be thought, mistakenly, to import the existence of an actual subjective state of mind." *Id.* at 672 n.5.

Neither the *Lafferty* plurality opinion nor Justice Wernick's concurrence exposes the dual function of implied malice as a term of art applying public policy and as an element of unintentional murder. Had the Law Court explored the distinct functions of implied malice, it might have defended the constitutionality of Maine's murder statute without characterizing unintentional murder as consisting of purely objective elements. Justice Wernick might have asserted that the murder statute, *see supra* note 20, embodied two subjective states of mind, intent and recklessness, within the terms express malice and implied malice, respectively. After the state showed that the defendant had killed another person with either of these states of mind, malice would undertake its second function as a term of art permitting the defendant to palliate the blameworthiness of his actions by showing that he had acted in the heat of passion upon adequate provocation. Express malice would be the term of art that allowed the heat of passion defense to reduce an intentional killing to manslaughter. Implied malice would be the term of art that allowed the heat of passion defense to reduce an unintentional yet reckless killing to manslaughter.

98. *See infra* note 104. State v. Ellis, 325 A.2d 772 (Me. 1974), decided a year after *Lafferty*, adopted in dictum the *Lafferty* definition of unintentional murder:

> The "reckless disregard for the lives or safety of others" which can be an element of manslaughter is quite different in quality objectively from that reckless conduct which can be an element of "murder." "Reckless conduct" which, when viewed objectively is considered in law to have the equivalent effect of a subjective intention to kill, is traditionally described as "reckless and wanton and willful" conduct. Although it necessarily involves neither a subjective intention to kill *nor a subjective awareness of the serious danger to which others are exposed*, it is regarded in law as such a serious disregard of the obligation to exercise reasonable care so as not to unreasonably endanger the lives and safety of others as to be tantamount to a subjective intention to kill, and deserving of the same punishment.

Id. at 776 n.2 (emphasis added and citation deleted).

99. *See supra* note 20.

100. *See* P.L. 1977, ch. 510, § 38.

101. The relevant portion of the 1977 recodification is in force today and provides: "A person is guilty of murder if[] [h]e engages in conduct which manifests a depraved indifference to the value of human life and which in fact causes the death of another

the Legislature also repealed the homicide statute enacted two years earlier that had set forth six degrees of criminal homicide. The new statute returned to the murder-manslaughter classification previously in effect in Maine.[102] The Law Court interpreted this return as signalling legislative approval of Justice Wernick's definition of depraved heart murder in *Lafferty*.[103] The court continues to construe

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human being . . . ." P.L. 1977, ch. 510, § 38. *Compare id. with* ME. REV. STAT. ANN. tit. 17-A, § 201(1)(B) (1983).

The Legislature attempted to define depraved indifference in a 1983 amendment to the murder statute:

> 1-A. For purposes of subsection 1, paragraph B, a person engages in conduct which manifests a depraved indifference to the value of human life when:
>
> A. Either he knows that there is a very high degree of risk that his conduct will cause death or serious bodily injury, or a reasonable and prudent person in his situtation would know of that risk; and
>
> B. His conduct, when viewed in light of the totality of the circumstances, reflects such an indifference to the value of human life that it would be generally regarded by a reasonable and prudent person as depraved.
>
> As used in paragraph B, "totality of the circumstances" means the nature and purpose of the actor's conduct, the circumstances known to the actor and the circumstances which would have been apparent to a reasonable and prudent person in the actor's situation. "Depraved" means outrageous, revolting, savage, brutal or shocking, readily demonstrating an almost total lack of concern or appreciation for the value of human life.

P.L. 1983, ch. 450, § 2 (repealed 1985). Current subsection 1-A, *see supra* note 18, replaced this attempt at definition. P.L. 1985, ch. 416.

Former subsection 1-A hinted at a subjective element in two respects. First, in paragraph A, the actor's awareness of a high degree of risk was an alternative to the mere requirement that a reasonable person would have been aware of the risk. Second, the subsection defined the term "depraved" as a set of circumstances indicating a lack of concern for human life. The focus was on the actor's lack of concern or appreciation, and an absence of concern or appreciation implies awareness of the risk and a conscious disregard therefor.

102. *See supra* note 21.

103. "In enacting the depraved indifference murder statute as part of its return to the earlier classification of homicides, the legislature among other things reinstated the objective standard of culpability that governed the pre-Code offense of 'implied malice' murder." State v. Crocker, 435 A.2d 58, 64 (Me. 1981) (citation omitted). "[T]he legislature used language taken directly from pre-Code case law to define [depraved indifference] murder and thereby reflected a legislative judgment that an objective standard of evaluation is to be applied." State v. Woodbury, 403 A.2d 1166, 1173 (Me. 1979).

The *Crocker* court cites the Maine Legislative Record as supporting its conclusion that the Legislature intended to "reinstate[] the objective standard of culpability that governed the pre-Code offense of 'implied malice' murder." State v. Crocker, 435 A.2d at 64. The record, however, reflects that the return to pre-Code categories of homicide was prompted by the fact that "the number of degrees of homicide was creating confusion on the part of the public and that the judges and prosecutors were uncomfortable with the various distinctions [between the degrees of murder] . . . ." 2 Legis. Rec. 2257 (1977) (statement of Rep. Spencer). The Judiciary Committee believed that the

depraved indifference murder as not having a subjective culpable state of mind element.[104] A verdict of guilty against one charged

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earlier law "designation of murder, felony murder and manslaughter was one that people understood better and were more comfortable with." *Id.* There is no suggestion in the Legislative Record that the new enactment, a completely new statutory version of murder law, was precisely to duplicate the common law definitions of murder. Indeed, one primary purpose of recodification is to eradicate the shortcomings of the prior law. The Law Court, to the extent that it held that the recodification was merely an embodiment of old common law, thwarted this purpose and injected into the new murder statute all the problems that attended the common law definitions of murder.

104. *See* State v. Joy, 452 A.2d 408, 411 (Me. 1982) (The objective standard of depraved indifference murder is "conduct manifesting a high tendency to cause death" which is " 'so heinous in the eyes of the law as to constitute murder.' " (quoting State v. Woodbury, 403 A.2d at 1173)); State v. Crocker, 435 A.2d at 64 (A verdict of guilty of depraved indifference murder is proper where the jury finds "that the accused had engaged in objectively 'reckless' or 'brutal' conduct causing a death . . . ." The Law Court further characterized the conduct as "objectively manifesting a high death-producing potential."); State v. Flick, 425 A.2d 167, 173 (Me. 1981) (The Law Court upheld the presiding judge's instructions that " 'it is not necessary to prove that the defendant . . . in fact himself had a depraved indifference to the value of human life . . . .' "); State v. Lagasse, 410 A.2d 537, 540 (Me. 1980) (The depraved indifference murder statute "deal[s] with those few instances in which, although the defendant did not act intentionally or knowingly, his conduct, objectively viewed, created such a high tendency to produce death that the law attributes to him the highest degree of blameworthiness."); State v. Goodall, 407 A.2d 268 (Me. 1979) (The Law Court held that aggravated assault, simple assault, and reckless conduct are not lesser included offenses of depraved indifference murder, since they, unlike depraved indifference, require the state to prove the actor's subjective state of mind as an element of the crime.); State v. Woodbury, 403 A.2d 1166, 1171 (Me. 1979) (The Law Court upheld the presiding judge's instructions that " '[i]t is not necessary that the proof or the evidence show a depraved indifference in fact in the accused, it is sufficient that the conduct of the accused manifests or shows a state of mind which is generally considered by mankind to be depraved.' "); State v. Lewisohn, 379 A.2d 1192, 1207-1208 (Me. 1977) (The Law Court held that the presiding judge's instuctions "satisfied the concept[] that reckless conduct which, when viewed objectively would be considered in law to have the equivalent effect of a subjective intention to kill, although neither involving necessarily such a subjective intention to kill nor a subjective awareness of the serious danger to which others are exposed . . . ."). *See also* State v. Michaud, 513 A.2d 842 (Me. 1986).

It is not so plain that early Maine case law supports the notion that the actor need not be aware of the risk of death or serious bodily injury which his conduct creates. Although Justice Wernick had not cited authority for the objective standard proposition in his *Lafferty* concurrence, the Law Court, in *State v. Woodbury*, bottomed the assertion on *State v. Merry*, which stated, "[Malice] is implied when there is no showing of actual intent to kill, but death is caused by acts which the law regards as manifesting such an abandoned state of mind as to be equivalent to a purpose to murder." State v. Merry, 136 Me. 243, 248, 8 A.2d 143, 146 (1939). *See* State v. Woodbury, 403 A.2d at 1172 (The *Woodbury* court cited to State v. Park, 159 Me. 328, 332, 193 A.2d 1, 3 (1963), but the passage taken from *State v. Park* was first written in *State v. Merry*.). The *Woodbury* court reasoned that the phrase "which the law regards" implied that it was irrelevant whether the actor regarded the conduct as manifesting an abandoned state of mind. State v. Woodbury, 403 A.2d at 1172.

This is a strained reading of *State v. Merry*. First, it is unlikely that anyone would

with depraved indifference murder is proper in Maine where a reasonable person finds that the actor's conduct manifests such a high tendency to cause death,[105] and is so "heinous"[106] or "brutal"[107] that it "shows a state of mind which is generally considered by mankind to be depraved."[108] The law regards such conduct as "tantamount to a subjective intent to kill" for purposes of punishment.[109]

The Law Court's interpretation of depraved indifference is inconsistent not only with the common law of murder, but also with the pertinent provisions of the Model Penal Code. Maine's depraved in-

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contend that the prosecution should be compelled to prove that the actor himself regarded his conduct as manifesting an abandoned state of mind. The appropriate issue is whether the actor must be aware of the risk which he created, not whether he is aware that he is aware of the risk. The language of *State v. Woodbury*, rather than rationally supporting the objective standard of depraved indifference murder, seems to do no more than to preclude the absurdity of requiring a state of mind with respect to having a state of mind. Second, a more natural reading of the quoted *State v. Merry* passage is that the law presumed an abandoned state of mind, an element of the crime of unintentional murder, from certain basic facts. *See supra* notes 76-81 and accompanying text. This is how some older authorities construed depraved heart murder. *See* MODEL PENAL CODE § 210.2 comment at 15 (1980). All recent Law Court decisions that endorse the objective standard of depraved indifference murder go no further for authority than the shaky interpretation of *State v. Merry*, and rely principally on the *Lafferty* concurrence and subsequent opinions based thereon. *See* State v. Michaud, 513 A.2d at 846-47; State v. White, 460 A.2d 1017, 1019-20 (Me. 1983); State v. Joy, 452 A.2d at 411; State v. Crocker, 435 A.2d at 62-67; State v. Lagasse, 410 A.2d at 540; State v. Lewisohn, 379 A.2d at 1209; State v. Ellis, 325 A.2d 772, 776 n.2 (Me. 1974).

105. *See* State v. Joy, 452 A.2d at 411; State v. Lagasse, 410 A.2d at 540; State v. Woodbury, 403 A.2d at 1173. The same notion is expressed as "high-death producing potential," *see* State v. Crocker, 435 A.2d at 64, or some high degree of "reckless[ness]," *see id*; State v. Ellis, 325 A.2d at 776 n.2; State v. Lafferty, 309 A.2d at 672 & n.5 (Wernick, J., concurring), or "a very high degree of risk" of death or bodily injury. *See* State v. Michaud, 513 A.2d at 846 (quoting State v. Crocker, 435 A.2d at 63); State v. Flick, 425 A.2d at 173.

106. *See* State v. Michaud, 513 A.2d at 846 (quoting State v. Crocker, 435 A.2d at 63); State v. Joy, 452 A.2d at 411 (quoting State v. Woodbury, 403 A.2d at 1173); State v. Flick, 425 A.2d at 173; State v. Woodbury, 403 A.2d at 1173.

107. State v. Crocker, 435 A.2d at 64 (quoting State v. Lafferty, 309 A.2d at 671, 672 n.5). The court also used the words "outrageous," "revolting," and "shocking" to describe conduct that might constitute depraved indifference murder. *Id.* at 65. The *Crocker* court further explained: "The accused must consciously have engaged in conduct that he should have known would create a 'very high degree' of risk of death or serious bodily injury and 'it must also under the circumstances [have been] unjustifiable for him to take the risk.' " *Id.* at 63 (quoting W. LAFAVE & A. SCOTT, JR., *supra* note 22, at 542). LaFave and Scott do discuss the issue of whether the actor must be aware of the risk that he creates. The Law Court, however, neglects to point out that LaFave and Scott's conclusion is that the better approach is that the actor must be cognizant of the risk of death that he causes.

108. State v. Woodbury, 403 A.2d at 1171. *See also* State v. Crocker, 435 A.2d at 64 (" 'heart void of social duty, and fatally bent on mischief' ") (quoting State v. Lafferty, 309 A.2d at 672 n.5 (Wernick, J., concurring)); State v. Flick, 425 A.2d at 173.

109. State v. Lewisohn, 379 A.2d 1192, 1208 (Me. 1977).

difference murder statute is based upon the Model Penal Code formulation of unintentional murder.[110] Section 210.2 of the Model Penal Code states: "[C]riminal homicide constitutes murder when . . . it is committed recklessly under circumstances manifesting extreme indifference to the value of human life."[111] The drafters of the Model Penal Code commented under this section that "the actor must *perceive and consciously disregard* the risk of death of another before the conclusion of recklessness can be drawn. This result is consistent with the general conception of the Model Code that serious felony sanctions should be grounded securely in the subjective culpability of the actor."[112] One can reasonably infer that the Legislature, in following the Model Penal Code pattern, intended to adopt the drafters' position on culpable state of mind. The Law Court apparently never considered this possibility. In any case, the consequence is that Maine's unintentional murder statute has no subjective culpable state of mind element.

IV. The Depraved Indifference Murder Statute in the Context of Maine's Criminal Code

Under Maine's law of unintentional murder, a jury may find a defendant guilty of murder if the jury finds the defendant's conduct outrageous, revolting, shocking, or brutal and that it manifests a high degree of risk of death to the victim. The factfinder need not infer from the actor's brutal or outrageous behavior that he acted with any particular subjective state of mind. This definition of depraved indifference murder is contrary to the Anglo-American development of unintentional homicide.[113] Not only does the absence of any mens rea element depart from the historical development of unintentional murder, but the practical application of the depraved indifference murder statute in criminal trials also fosters gross injustice.[114]

A. A Lack of Adequate Defenses.

A charge of depraved indifference murder can effectively block a defendant's statutory path to reckless manslaughter. Simple and af-

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110. *Compare* Model Penal Code § 210.2(1)(b) (1980) *with* Me. Rev. Stat. Ann. tit. 17-A, § 201(1)(B) (1983).

111. Model Penal Code § 210.2(1)(b) (1980).

112. *Id.* § 210.2 comment, at 28 (emphasis added). *But see* Moreland, *A Re-Examination of the Law of Homicide In 1971: The Model Penal Code*, 59 Ky. L.J. 788, 795 (1971), *cited in* Model Penal Code § 210.2 comment, at 27 n.63 (1980).

113. Sayre, *supra* note 3, at 914-1000.

114. The ultimate practical effect of theory on the interests of the criminal defendant is the surest measure of the relevance of theory to justice. *See generally* Wechsler, *The Challenge of Model Penal Code*, 65 Harv. L. Rev. 1097, 1097-98 (1952), *quoted supra* note 1.

firmative defenses[115] that function to create a reasonable doubt that the criminal defendant entertained a subjective culpable state of mind are inapplicable where mens rea is not an element of the crime. A depraved indifference murder defendant, therefore, cannot employ defenses of feeblemindedness,[116] intoxication,[117] or mental abnormality[118] to reduce the indictment for murder to a conviction of reckless manslaughter. Furthermore, the Maine Legislature has removed the free-standing[119] "adequate provocation" defense from depraved indifference murder defendants.[120]

Feeblemindedness is not specifically mentioned as a defense in the Maine Criminal Code. Section 36 of the Code provides, however, that "[e]vidence of ignorance or mistake as to a matter of fact or law may raise a reasonable doubt as to the existence of a required culpable state of mind."[121] A person accused of intentional murder may introduce evidence that he mistakenly believed that, for example, the gun was not loaded in order to raise a reasonable doubt that he intended to kill the victim; or a feebleminded person might properly submit evidence that he simply was incapable of forming the requisite culpable state of mind.[122] Such evidence is irrelevant and thus inadmissible,[123] however, where the defendant is tried for depraved indifference murder.

Section 38 of the Maine Criminal Code permits a criminal defendant to offer "[e]vidence of an abnormal condition of the mind [to] raise a reasonable doubt as to the existence of a required culpable

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115. A defendant relying on a simple defense "assume[s] the *burden of going forward with the evidence* of such nature and quality as to raise the issue of [the defense] and justify a reasonable doubt of guilt if upon the whole evidence the factfinder entertains such a doubt." State v. Millett, 273 A.2d 504, 507 (Me. 1971) (emphasis in original) (discussing the issue of burden of proof when the defendant asserts the justification of self-defense). In other words, "the defense has the production burden and the prosecution has the persuasion burden." H. PACKER, *supra* note 5, at 139. Once the defendant has raised a reasonable doubt on the issue, "the State must disprove [the defense] beyond a reasonable doubt." ME. REV. STAT. ANN. tit. 17-A, § 101(1) (1983). This rule is applied "to all cases where there is a claim of justification for the criminal conduct." *Id.* § 101 comment. Where a defendant relies on an affirmative defense, however, the defendant must prove the elements of the defense by a preponderance of the evidence. *Id.* § 101(2).

116. *See infra* text accompanying notes 121-23.

117. *See infra* text accompanying notes 129-34.

118. *See infra* text accompanying notes 124-28.

119. "Free-standing" expresses the idea that the extreme anger or extreme fear upon adequate provocation defense is neither a justification nor an exculpatory defense. Adequate provocation, instead, is merely a mitigating circumstance that otherwise reduces the blameworthiness of the actor's conduct.

120. *See infra* text accompanying notes 135-37.

121. ME. REV. STAT. ANN. tit. 17-A, § 36(1) (1983).

122. *See generally* W. LAFAVE & A. SCOTT, JR., *supra* note 22, at 544-45.

123. *See* M.R. EVID. 402.

state of mind."[124] The Law Court, in *State v. Burnham*,[125] explained that evidence is admissible under the abnormal condition of mind defense only so long as the evidence shows to some degree that "the mental disease or defect, rather than causing the formation of a culpable state of mind, destroys the defendant's capacity to form the [culpable state of mind] required for the crime."[126] Evidence of a defendant's incapacity to form a culpable state of mind is irrelevant and inadmissible[127] where the crime charged does not require that the state prove any subjective state of mind in the accused.[128]

The Maine Criminal Code is silent on the defense of involuntary intoxication. Notwithstanding the absence of a statutory basis for the defense, the Law Court held in *State v. Rice*[129] that "involuntary intoxication will exonerate as to all crimes and not merely those which involve specific intent as an essential element."[130] Furthermore, involuntary intoxication is not an affirmative defense, but is a defense that requires the state to disprove beyond a reasonable doubt the involuntary intoxication or "a causative relation between it and [the] defendant's conduct" once either party has introduced evidence generating the issue.[131] The *Rice* court, however, analogized involuntary intoxication to the defense of mental abnormality.[132] The comparison implies that the involuntary intoxication defense is inapplicable where the crime charged does not have a subjective culpable state of mind element.[133] A depraved indifference murder defendant may not, therefore, avail himself of the involuntary intoxi-

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124. ME. REV. STAT. ANN. tit. 17-A, § 38 (1983).

125. 406 A.2d 889 (Me. 1979).

126. *Id.* at 894.

127. *See* M.R. EVID. 402.

128. *See* State v. Burnham, 406 A.2d at 894, 896.

129. 379 A.2d 140 (Me. 1977).

130. *Id.* at 145 n.4.

131. *Id.* at 145. Although *State v. Rice* was a pre-Code case in that the alleged criminal conduct occurred in 1975, the Legislature has refrained from overturning the involuntary intoxication defense and its attendant rule of burden of proof. For a discussion of the distinction between simple and affirmative defenses, see *supra* note 115.

132. State v. Rice, 379 A.2d at 146.

133. *See supra* notes 124-28. The Model Penal Code expressly recognizes the defense of involuntary intoxication: "Intoxication that . . . is not self-induced . . . is an affirmative defense if by reason of such intoxication the actor at the time of his conduct lacks substantial capacity either to appreciate its criminality (wrongfulness) or to conform his conduct to the requirements of the law." MODEL PENAL CODE § 2.08(4) (1985). The Model Penal Code's formulation of the defense is more akin to Maine's insanity defense than the defense of mental abnormality. *Compare id. with* ME. REV. STAT. ANN. tit. 17-A, § 38 (1983) *and id.* § 39 (Supp. 1987-1988). Under the Model Penal Code's definition of involuntary intoxication, therefore, the defense might be available to a defendant who is accused of a crime, such as depraved indifference murder, that contains no subjective culpable state of mind requirement. *Cf. infra* text accompanying notes 138-42.

cation defense.[134]

Section 201(3) of the Criminal Code allows an "actor [who] causes the death [of another person] while under the influence of extreme anger or extreme fear brought about by adequate provocation"[135] to reduce a charge of *intentional or knowing* murder to manslaughter.[136] That the adequate provocation affirmative defense is unavailable to a depraved indifference murder defendant is a necessary implication of the statute. The Law Court, indeed, has emphatically stated: "Adequate provocation is *not* an affirmative defense, and has no application, to depraved indifference murder . . . ."[137]

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134. Although the Criminal Code is silent regarding the defense of involuntary intoxication, the Code expressly allows an accused to rely on the defense of self-induced intoxication. The pertinent portion of the Maine Criminal Code provides:

§ 37. **Intoxication.**

1. Except as provided in subsection 2, evidence of intoxication may raise a reasonable doubt as to the existence of a required culpable state of mind.

2. When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he not been intoxicated, such unawareness is immaterial.

ME. REV. STAT. ANN. tit. 17-A, § 37 (1983). *See also* MODEL PENAL CODE § 2.08 (1985). Self-induced intoxication is a defense where it negates an intentional or knowing state of mind, *see* State v. Franklin, 463 A.2d 749, 755 (Me. 1983), but is unavailable where recklessness is the requisite level of culpability. *See* State v. Barrett, 408 A.2d 1273, 1276 (Me. 1979). Self-induced intoxication, therefore, might be an inapplicable defense even if proof of depraved indifference required evidence that the actor was aware of and consciously disregarded a risk that he created.

135. ME. REV. STAT. ANN. tit. 17-A, § 201(3) (1983 & Supp. 1987-1988).

136. *Id.* § 203 (emphasis added). The statute provides in pertinent part:

§ 203. **Manslaughter**

1. A person is guilty of manslaughter if he

. . . .

B. Intentionally or knowingly causes the death of another human being under circumstances which do not constitute murder because he causes the death while under the influence of extreme anger or extreme fear brought about by adequate provocation. Adequate provocation has the same meaning as in section 201, subsection 4. The fact that he causes the death while under the influence of extreme anger or extreme fear brought about by adequate provocation constitutes a mitigating circumstance reducing murder to manslaughter and need not be proved in any prosecution initiated under this subsection.

Id. § 203(1)(B).

137. State v. Michaud, 513 A.2d 842, 852 (Me. 1986) (emphasis by the court). The trial justice in *State v. Michaud* instructed the jury that

[t]he third fact necessary for a conviction under the depraved indifference charge again is the State must prove beyond a reasonable doubt that at the time of the death, the Defendant either was not under the influence of extreme anger, or that if he were under such influence, it was not brought about by adequate provocation . . . .

Id. at 852. The Law Court ruled that the adequate provocation defense is inapplicable to the crime of depraved indifference murder. *Id.*

Although a depraved indifference murder defendant may employ the insanity defense[138] when the evidence is sufficient, application of the defense to a crime that has no subjective culpable state of mind element creates confusion. Maine's current insanity defense focuses on the actor's cognitive capacity to realize the nature of his act and his ability to distinguish between right and wrong. This theory of the insanity defense derives from the *M'Naghten* rule.[139] The

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Removing the adequate provocation defense from depraved indifference murder defendants while leaving the defense intact for intentional or knowing murderers might lead to absurd and arbitrary results. Imagine, for example, a situation wherein a person unsuspectingly finds his spouse practicing adultery and immediately becomes so enraged that he shoots and kills his spouse's adulterous partner. An actor who is accused of knowing or intentional murder in this case properly may submit evidence that he was under extreme anger brought about by adequate provocation and, thereby, reduce the crime to manslaughter. Where the state elects to charge the defendant solely with depraved indifference murder—see *infra* text accompanying notes 140-50 for examples of cases where the prosecution charges both kinds of murder—the result is quite different. An actor who is accused of depraved indifference murder for an unlawful killing under such circumstances *cannot* rely on the adequate provocation affirmative defense to reduce the crime to manslaughter.

There appears no convincing rationale for the proposition that adequate provocation should be a mitigating circumstance in cases of intentional or knowing murder but not in cases of depraved indifference murder. One might contend that a question of extreme anger or extreme fear is inapposite where there is no subjective culpable state of mind requirement for the crime charged. This is a specious argument. The defense of heat of passion upon sudden provocation, the common law analogue of extreme anger or extreme fear, applied both to intentional murder and depraved heart murder. *See* State v. Lafferty, 309 A.2d 647, 671-72 (Me. 1973) (Wernick, J., concurring) ("If, however, this objectively 'reckless' or 'brutal' conduct is caused by heat of passion upon sudden, adequate provocation, the homicide remains criminal but becomes punishable as 'manslaughter' . . . . "). The current extreme anger or extreme fear defense also does not negate a culpable state of mind but is a "mitigating circumstance," *see* ME. REV. STAT. ANN. tit. 17-A, § 203(1)(B) (1983 & Supp. 1987-1988), which palliates the blameworthiness of the actor's conduct. The absence of a state of mind requirement in the definition of a crime, therefore, should not bar use of the defense.

138. The Maine Criminal Code provides the following insanity defense:

§ 39. **Insanity**

1. A defendant is not criminally responsible if, at the time of the criminal conduct, as a result of mental disease or defect, he lacked substantial capacity to appreciate the wrongfulness of his conduct. The defendant shall have the burden of proving, by a preponderance of the evidence, that he lacks criminal responsibility as described in this subsection.

2. As used in this section, "mental disease or defect" means only those severely abnormal mental conditions that grossly and demonstrably impair a person's perception or understanding of reality. An abnormality manifested only by repeated criminal conduct or excessive use of alcohol, drugs or similar substances, in and of itself, does not constitute a mental disease or defect.

ME. REV. STAT. ANN. tit. 17-A, § 39 (Supp. 1987-1988).

139. Lord Chief Justice Tindal laid down the rule in Daniel M'Naghten's Case, 10 C. & F. 200, 8 Eng. Rep. 718 (1843), that the insanity defense is grounded in the cognitive capacity of the actor. The *M'Naghten* test presumed every man

M'Naghten test excused from criminal responsibility a criminal defendant whose mental delusions prevented him from "know[ing] that he was doing a wrong or wicked act."[140] The insanity defense does not negate the culpability element of a crime, and thus the defense is applicable even where the crime charged contains no mens rea element. The concepts denoted by the phrases "culpable state of mind" and "knowledge that an act is wrongful," however, are difficult to parse. Where a jury is not required to find that the actor was *aware* of the risk of death that he produced, the jury likely will be puzzled by the question whether the actor "lacked substantial capacity to appreciate the wrongfulness of his conduct."[141] Application

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> to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved . . . ; and that to establish a defence on the ground of insanity, it must be cleary proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act knew the difference between right and wrong . . . .

Id. at 210, 8 Eng. Rep. at 722.

140. *Id.* at 202, 8 Eng. Rep. at 719. The Model Penal Code cogently expresses this notion and the rationale therefor:

> As far as its principle extends, the M'Naghten rule is right. Those who are irresponsible under the test are plainly beyond the reach of the restraining influence of the law, and their condemnation would be both futile and unjust. A deranged person who believes he is squeezing lemons when he chokes his wife, or who kills in supposed self-defense on the basis of a delusion that another is attempting to kill him, is plainly beyond the deterrent influence of the law . . . .

MODEL PENAL CODE § 4.01 comment at 166 (1985).

141. ME. REV. STAT. ANN. tit. 17-A, § 39 (1983 & Supp. 1987-1988). Maine's insanity statute formerly contained a "volitional prong" in addition to a "cognitive prong." 1986 Me. Legis. Serv. 796, § 5 (repealed the volitional prong). The prior insanity defense permitted a defendant to invoke the defense "if, at the time of the criminal conduct, as a result of mental disease or defect, he either *lacked substantial capacity to conform his conduct to the requirements of the law*[, i.e., volitional prong], or lacked substantial capacity to appreciate the wrongfulness of his conduct[, i.e., cognitive prong]." *Id.* (emphasis added). The Maine Legislature originally adopted both the volitional prong and the cognitive prong upon American Law Insititute recommendations. *Compare id. with* MODEL PENAL CODE § 4.01 (1985).

The volitional prong is a modified version of the rule promulgated in Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954). *See* MODEL PENAL CODE § 4.01 comment, at 173 (1985). A criminal defendant is not criminally responsible under the *Durham* rule "if his unlawful act was the product of mental disease or defect." Durham v. United States, 214 F.2d at 874-75 (citation omitted). The District of Columbia Circuit reasoned in *Durham* that the cognitive right-wrong test was unsatisfactory, since "(a) it does not take sufficient account of psychic realities and scientific knowledge, and (b) it is based upon one symptom and so cannot validly be applied in all circumstances." *Id.* at 874. The *Durham* test and its contemporary theory, the volitional prong, allow a defendant to prove that he is not criminally responsible, notwithstanding that he knew his act was wrongful, where a mental disease destroyed his

of the insanity defense in a depraved indifference murder case would be less confusing and more effective if there were a subjective mens rea component of the crime.[142]

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capacity to refrain from the unlawful act.

A criminal defendant who is accused of committing depraved indifference murder could more easily use the volitional prong of the insanity defense than the cognitive prong of the insanity defense. The depraved indifference murder statute merely requires that the prosecution establish that the defendant engaged in brutal conduct or conduct posing a high degree of risk of death and that the defendant thereby caused the death of another person. There is no inquiry into the actor's state of mind. *See* cases cited *supra* note 104. Where the defendant, however, could prove by a preponderance of the evidence that a mental disease or defect overrode his capacity to restrain himself from engaging in the brutal or high-risk conduct, he would establish his criminal irresponsibility. The cognitive prong, in contrast, is conceptually difficult to apply to depraved indifference murder. In applying the cognitive prong, the factfinder must determine whether *vel non* a mental disease or defect precluded the defendant's awareness that his conduct was wrongful. This inquiry might seem odd in the context of depraved indifference murder, since the defendant's subjective state of mind is irrelevant for purposes of convicting him of the crime.

142. There is a possiblity that a person accused of depraved indifference murder also can offer evidence of mental disease or defect to the extent that it is relevant to the issue of voluntary conduct. "A person commits a crime only if he engages in voluntary conduct." ME. REV. STAT. ANN. tit. 17-A, § 31(1) (1983). The Legislature left open the definition of voluntary, but the Law Court added substantive meaning to the term in State v. Mishne, 427 A.2d 450 (Me. 1981). The *Mishne* court noted "that section [31] does not describe a culpable state of mind which must be proven in addition to the state of mind, defined in section [35], required by the law defining the crime." *Id.* at 457. The court further ruled that

> section [31] does not create a defense of duress, which is treated separately [in the criminal code] . . . . Nor is it necessary to rely on section [31] when evidence may be introduced to negate a culpable state of mind because of mental disease or defect . . . or intoxication . . . . Section [31] could not have been intended to duplicate the provisions of these other sections.

Id. at 457-58. The court proceeded to adopt the Model Penal Code definition of voluntary conduct or, more accurately, the meaning of lack of voluntariness. *Id.* at 458.

Voluntariness does not connote conduct that is the product of "a reflex or convulsion," "hypnotic suggestion" or "otherwise is not a product of the effort or determination of the actor or a bodily movement during unconsciousness or sleep." MODEL PENAL CODE § 2.01(2) (1985). "There is sufficient difference between ordinary human activity and a reflex or convulsion to make it desirable that they be distinguished for purposes of criminal responsibility by a term like 'voluntary.' " *Id.* § 2.01 comment, at 215 (1985).

There is no rational distinction between unconsciousness that is inconsistent with voluntary conduct and lack of awareness that is caused by a mental disease or defect. *Id.* § 2.01 comment, at 216, 219. That is, absence of self-awareness is tantamount to unconsciousness for the purpose of determining the voluntariness of the actor's conduct. Evidence of mental disease or defect should be admissible, therefore, to show the absence of voluntariness. Moreover, "[t]he burden is on the state to prove that the defendant was not acting in an unconscious, involuntary way." State v. Mishne, 427 A.2d at 458.

B. *The Transformation of Murder into a Purely Objective Crime.*

The depraved indifference murder statute embodies a legislative policy decision that murder convictions sometimes are warranted even where the prosecution cannot prove that a killing was intentionally or knowingly committed. Depraved indifference, in other words, functions as a statutory safety-net that protects a prosecutor's murder charge from falling to a manslaughter conviction. The task of the legislature and judiciary is to weave a mesh that catches only the cases that do not properly fit into the manslaughter category. The depraved indifference safety-net, however, threatens to function more like a catchall. Under the current construction of the statute, depraved indifference can conceivably subsume other classifications of unlawful homicide[143] and reduce murder to a strictly objective crime, a crime without a subjective state of mind component.

Depraved indifference murder can subsume other classifications of homicide because many killings that are intentional or knowing also fit the elements of depraved indifference. After all, intentional or knowing murders frequently result from conduct that creates a high degree of risk of death. Intentional or knowing murders are also usually, if not always, outrageous, heinous, revolting, brutal, and shocking. They can hardly appear otherwise to a community that places a premium on human life. Thus, the breadth of the language defining depraved indifference helps turn the statute into a catchall. Furthermore, the system encourages prosecutors to charge depraved indifference murder even where the killing can properly be characterized as knowing and intentional. The lack of adequate defenses to depraved indifference murder makes it easier to obtain a conviction under that statute.

A survey of recent Law Court decisions suggests that, to some extent, depraved indifference murder has subsumed knowing and intentional homicide. Both intentional or knowing and depraved indifference murder have been charged *and* jury instructions given on both crimes where a husband shot his wife in the shoulder with a handgun after an altercation;[144] where a prison inmate punched an-

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143. This is not to say that depraved indifference murder is a lesser included offense of an intentional or knowing murder. *Cf.* State v. Goodall, 407 A.2d 268 (Me. 1979).

144. State v. Lewisohn, 379 A.2d 1192, 1196 (Me. 1977). Although the killing in this case occurred prior to enactment of the depraved indifference statute, the trial justice charged the jury with the same language which later was adopted to define depraved indifference murder. *Compare id.* at 1207 *with supra* text accompanying notes 105-108. Defense counsel contended that "the presiding Justice failed to articulate with sufficient clarity the distinction between the elements of [depraved indifference] murder and those of involuntary manslaughter," but did not object on the grounds that the facts did not warrant application of the law of depraved indifference murder. State v. Lewisohn, 379 A.2d at 1207.

other prisoner and then struck him three times on the back of the head with a two-by-four with such force that the lumber snapped into two pieces on the final blow;[145] where an estranged husband stabbed his wife several times, inflicting "four stab wounds in the neck and one in the chest area [and] one through the heart";[146] where a father severely beat and starved his five-year old stepson;[147] where a man ignited a fire at two o'clock in the morning outside the door of a woman's second-floor apartment "because he was mad at her";[148] where the defendant violently shook a two-month-old infant on at least three different occasions and caused bone fractures, including "arm and leg fractures, rib fractures and . . . fractures at the joints of the long bones . . .";[149] and where the defendant, after threatening to kill his live-in girlfriend, fired two shotgun blasts through the front door of the house where she was babysitting and caused the death of a nine-year-old boy.[150]

The subsuming of intentional and knowing murder by depraved indifference can also occur subtlely. For example, prosecutors have charged an accused with both intentional or knowing murder and depraved indifference murder *in the same count* of the indictment.[151] Where both charges are contained within the same count, and the jury returns a guilty verdict, there is no assurance that the jury reached a unanimous decision regarding either charge.[152] The form of the indictment invites jurors to combine the guilty votes for

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145. State v. Woodbury, 403 A.2d 1166, 1168 (Me. 1979). The defendant argued on appeal that the trial court's instruction on depraved indifference was erroneous in that they did not require the jury to find that the defendant was "personally indifferent to the value of human life." *Id.* at 1171. The Law Court rejected this challenge. *Id.* at 1171-73.

146. State v. Flick, 425 A.2d 167, 169 (Me. 1981). The Law Court did not accept the defendant's contention that the depraved indifference provision of the murder statute should be construed to contain a subjective culpable state of mind requirement.

147. State v. Crocker, 435 A.2d 58, 62 (Me. 1981).

148. State v. Joy, 452 A.2d 408, 409-10 (Me. 1982). The defendant was mistaken in believing that the person with whom he was angry was inside the apartment. *Id.* There were, however, two men inside the apartment. *Id.* One man awoke and escaped through a window, but the other never awoke and was found dead. *Id.*

149. State v. White, 460 A.2d 1017, 1019 (Me. 1983).

150. State v. Michaud, 513 A.2d 842, 844-45 (Me. 1986).

151. *See* State v. Hickey, 459 A.2d 573, 575 (Me. 1983); State v. Joy, 452 A.2d 408, 410 (Me. 1982); State v. Crocker, 435 A.2d 58, 62 (Me. 1981); State v. Flick, 425 A.2d 167, 168 (Me. 1981). The defendant in each case failed to object to the form of the indictment.

152. The Maine Rules of Criminal Procedure require the jury verdict in a criminal case to be unanimous. M.R. CRIM. P. 31(a). The Supreme Court has held, however, that the sixth amendment does not require jury unanimity for guilty verdicts in noncapital cases. Apodaca v. Oregon, 406 U.S. 404 (1972) (state constitutional provision permitting ten members of twelve-member jury to render guilty verdict is not violative of the sixth amendment).

both categories of murder in order to achieve a unanimous verdict.[153] Moreover, including two alternative charges in one count creates problems on appeal. An appellate court will not know which category of murder formed the basis of the verdict when asked to review the record to determine if the evidence is sufficient to support a murder conviction.[154] Perhaps the most important consideration, however, is that the prosecution can elect to indict an accused for only depraved indifference murder where it is proper to charge both types of murder.[155] This strategy removes exculpatory defenses from the defendant and blocks his path to reckless manslaughter as a lesser included offense.[156]

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153. One might argue that a guilty verdict where the indictment presents two charges in one count is a unanimous verdict with respect to both charges. Support for this proposition might be drawn from the case where a jury returns a general verdict on an indictment that contains several counts. *See, e.g.*, State v. Tibbetts, 86 Me. 189, 190, 29 A. 979, 979 (1893) ("A general verdict of guilty on several counts is a verdict on all, and therefore on each . . . ."). The analogy, however, is unpersuasive, since an indictment alternatively charging two or more offenses in one count is unlike an indictment that charges two or more offenses in separate counts. The Law Court has recognized that, in the former case, "the reviewing court cannot determine whether both alternatives or only one formed the basis of the jury verdict." State v. Joy, 452 A.2d at 411 n.4. The *Joy* court did not recognize the possiblity of a unanimous verdict based on a combination of votes for one form of murder and votes for the other.

154. *See* State v. Joy, 452 A.2d at 411 n.4. The *Joy* court was not pressed on the issue, since it found that the evidence was sufficient to support convictions of both types of murder. *Id.* at 411-12. The Law Court has suggested that charging depraved indifference murder and intentional or knowing murder in separate counts is the "better practice," but noted that the burden is on the defendant to object to the form of the indictment. State v. Hickey, 459 A.2d at 579 n.4. *See generally* M.R. CRIM. P. 8(a). The defendant in State v. Crocker, 435 A.2d 58 (Me. 1981), did not contend that the evidence was insufficient to support a conviction, but challenged the constitutionality of the statute. *See infra* notes 166-70 and accompanying text. The one-count indictment compelled the defendant to try to persuade the court that he was convicted of depraved indifference murder in order to set up his contention that the statute was unconstitutional. State v. Crocker, 435 A.2d at 62 n.2. The court did not have to question the basis of the verdict, however, because it found the statute constitutionally sound. *Id.* at 62-67. In sum, *State v. Crocker* and *State v. Joy* did not force the court to confront the one-count-indictment dilemma, and there is no indication of how the court would handle the issue were it to arise.

155. The Law Court has not been presented yet with a case where the state charged the defendant solely with depraved indifference murder and the defendant challenged his conviction only on sufficiency of evidence grounds. One might use this observation to support the position that prosecutors do not overuse or abuse the depraved indifference statute. The observation, however, is no answer to the charge that the potential for abuse remains. *See infra* text accompanying notes 157-65. Furthermore, that the Law Court has not heard a case where a defendant has faced only a depraved indifference charge suggests another conclusion. Namely, this situation indicates that depraved indifference does not proscribe any *particular* class of offenses, but merely functions as a fail-safe device for obtaining murder convictions. The regularity with which prosecutors charge intentional or knowing murder and depraved indifference murder in tandem supports this proposition.

156. *See supra* text accompanying notes 115-42.

The Law Court, in *State v. Lagasse*,[157] recognized and addressed potential prosecutorial abuse of the depraved indifference murder statute. The homicide victim in this case witnessed the defendant Lagasse assault a young woman, and a brief altercation between the victim and Lagasse erupted into a fight.[158] Lagasse believed that the victim was wielding a knife and drew a jackknife himself. The two wrestled. Lagasse grabbed the decedent in a headlock and punched him in the chest with the hand in which he held the jackknife. The force of the blow closed the blade of the knife on Lagasse's hand and injured his fingers. The pain of the cut caused the defendant to release his hold on the victim and the victim collapsed to the ground. The defendant, in the course of punching the victim, had fatally stabbed the decedent in the chest.

The state charged Lagasse with intentional or knowing murder and, in the alternative, with depraved indifference murder.[159] The trial justice read the depraved indifference charge to the jury at the commencement of the trial, but found that the evidence did not warrant an instruction on the charge.[160] The Law Court rejected the defendant's argument on appeal that disclosing the depraved indifference charge to the jury constituted highly prejudicial error. The court felt obliged, however,

> to utter a word of caution to prosecutors[:] . . . [T]he prosecutor should be fully informed[, by the time the trial begins,] as to all of the circumstances surrounding the particular homicide and should carefully evaluate his evidence to determine whether in fairness to the defendant the charge of depraved indifference murder ought to be dismissed before the trial commences. The statute recognizing the crime of depraved indifference murder is not a catchall enacted to make it easier to secure convictions. The purpose of the statute is to deal with those *few instances in which, although the defendant did not act intentionally or knowingly*, his conduct, objectively viewed, created such a high tendency to produce death that the law attributes to him the highest degree of blameworthiness. . . . In fulfilling their ethical responsibility, prosecutors must recognize that depraved indifference murder constitutes a *narrow and limited exception* to the fundamental principle of our Criminal Code that a person may not be proven guilty of a crime without proof that he possessed [a] culpable state[] of mind.[161]

It is apparent that this resort to admonishing prosecutors to apply the statute only in narrow and limited circumstances has been unsuccessful.[162] The burden to restrict application of depraved indif-

157. 410 A.2d 537 (Me. 1980).
158. *Id.* at 539.
159. *Id.*
160. *Id.* at 540.
161. *Id.* (emphasis added; footnote and citations omitted).
162. For a sampling of cases decided after *State v. Lagasse* in which the prosecu-

ference to those few instances in which it is proper thus falls on defense counsel.

The burden of compelling the state to elect to proceed with one form of murder or the other is generally too heavy for a defendant to carry. The defense counsel in one post-*State v. Lagasse* case sought to require the prosecutor to opt either for a charge of intentional or knowing murder or for a charge of depraved indifference murder.[163] The Law Court held, however, that the cautionary words of *State v. Lagasse* were not meant to force a prosecutor to choose between categories of murder. The "true legacy" of the *Lagasse* caveat is no more than a pronouncement that prosecutors have an ethical duty to "pursue only charges supported by the evidence."[164] *State v. Lagasse*, therefore, did not alter Maine law governing election of charges. The defendant must show, in order to compel election of charges, that "the potential prejudice to the defendant or adverse effect on the jury . . . rise[s] above that usually inherent in the circumstances of a substantial criminal prosecution."[165] The *State v. Lagasse* caution to prosecutors acknowledges the catchall characteristic of depraved indifference murder, but certainly does not cure the defect.

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tion utilized the depraved indifference murder statute even where evidence was sufficient to enable a jury to convict the defendant of an intentional or knowing murder, see *supra* notes 146-50 and accompanying text.

163. *See* State v. Hickey, 459 A.2d 573 (Me. 1983). The prosecutor in *State v. Hickey* charged the defendant with both intentional or knowing murder and depraved indifference murder, and the grand jury indicted the defendant on each alternative. *Id.* at 575. Nine months after the grand jury indicted the defendant, defense counsel moved the trial justice to compel the state to elect to charge the defendant with either intentional or knowing murder or depraved indifference murder. *Id.* at 577. The trial court, following a hearing on the issue, granted the motion to compel election and subsequently denied the state's motion for reconsideration of the order. The state appealed the denial of reconsideration. *Id.* at 577-78.

164. *Id.* at 582. The ethical duty to which the Law Court referred is described in the Maine Code of Professional Responsibility. The Maine Bar Rules provide: "A lawyer shall not institute or cause to be instituted criminal charges when he knows, or it is obvious, that the charges are not supported by probable cause." M. BAR R. 3.7(i)(1). This Rule, *a fortiori*, does not restrain prosecutors from charging depraved indifference murder where the evidence is found sufficient to require instructions on the charge. *See supra* text accompanying notes 144-50. Bar rules obviously cannot serve to correct a flawed statute.

165. State v. Hickey, 459 A.2d at 579. This standard is extremely difficult to meet.

> It is usual to charge a felony in different ways and in several counts, with a view to meet the evidence, as it may turn out on the trial; and if the different counts are inserted in good faith, for the purpose of meeting a single charge, the Court *will not ever* compel the prosecutor to elect.

State v. Flye, 26 Me. 312, 316 (1846) (emphasis added), *cited in* State v. Hickey, 459 A.2d at 579. *See also* State v. Hood, 51 Me. 363, 364 (1864). The defendant must establish, in essence, bad faith on the part of the prosecutor.

C. *Problems of a Constitutional Dimension.*

The Law Court has also addressed whether the depraved indifference murder statute is unconstitutional as a denial of equal protection,[166] or for vagueness.[167] Depraved indifference murder defendants persistently have argued that the lack of any rational basis for distinguishing between criminally negligent manslaughter and depraved indifference murder,[168]in conjunction with a significant disparity in criminal sanctions,[169] denies equal protection.[170] A conviction of depraved indifference murder, the argument goes, is arbitrary in that it subjects a defendant to a more severe penalty for engaging in unlawful conduct proscribed by the lesser offense of criminally negligent homicide. The Law Court has been equally per-

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166. *See* State v. Michaud, 513 A.2d 842, 847-48 (Me. 1986); State v. White, 460 A.2d 1017, 1019-20 (Me. 1983); State v. Crocker, 435 A.2d 58, 63-67 (Me. 1981). Only the defendant in *State v. White* raised the question of arbitrariness at trial and, thereby, properly preserved the issue for appeal. M.R. CRIM. P. 52(b). The Law Court limited its scope of review in *State v. Michaud* and *State v. Crocker* to examining the decisions only "for obvious errors affecting substantial rights," *see, e.g.*, State v. Willoughby, 507 A.2d 1060, 1069 (Me. 1986), although the issue was purportedly of constitutional dimensions.

167. State v. Michaud, 513 A.2d at 846-47; State v. White, 460 A.2d at 1020; State v. Crocker, 435 A.2d at 62-63; State v. Flick, 425 A.2d 167, 173-74 (Me. 1981). Only the defendant in *State v. White* properly preserved the issue of vagueness for appeal by raising the question at trial. *See* M.R. CRIM. P. 52(b).

In the *Michaud* case, the defendant also assailed the constitutionality of the depraved indifference murder statute on the grounds that the crime lacks a subjective culpable state of mind requirement. State v. Michaud, 513 A.2d at 846. The Law Court stated that the argument "lack[ed] merit and require[d] no discussion." *Id.* at 848. One might think, at first blush, that a murder statute that is void of a culpable state of mind element is contrary to the due process standards that the Supreme Court established in *In re* Winship, 397 U.S. 358 (1970) and upheld in Mullaney v. Wilbur, 421 U.S. 684 (1975) and Patterson v. New York, 432 U.S. 197 (1977). These cases, however, speak only of the procedure to which a state must adhere when implementing its substantive criminal law. "[W]here a state has chosen to retain the traditional distinction between murder and manslaughter, . . . the burden of persuasion must remain on the prosecution with respect to the distinguishing factor . . . ." Patterson v. New York, 432 U.S. at 228 (Powell, J., dissenting). The dispute among the justices in *Patterson v. New York* aptly demonstrates the blurred distinction between substantive and procedural law but, nonetheless, confirms that "nothing in *Mullaney* or *Winship* precludes a state from abolishing the distinction between murder and manslaughter and treating all unjustifiable homicide as murder." *Id.*

168. *See* ME. REV. STAT. ANN. tit. 17-A, §§ 35(4), 203(1)(A) (1983). For the analogous Model Penal Code definition of criminal negligence, see *supra* note 36.

169. "A person convicted of murder shall be sentenced to the State prison for life or for any term of years that is not less than 25." ME. REV. STAT. ANN. tit. 17-A, § 1251 (Supp. 1987-1988). Manslaughter is a class A offense unless "it occurs as a result of reckless or criminally negligent operation of a motor vehicle," in which case it is a class B crime. *Id.* § 203(3). A class A offense is punishable by imprisonment for "a definite period not to exceed 20 years," *id.* § 1252(2)(A) (1983), and a class B crime carries a ten-year maximum period of imprisonment. *Id.* § 1252(2)(B).

170. U.S. CONST. amend. XIV, § 1.

sistent in rejecting this contention by distinguishing the degree of risk of death generated by criminally negligent conduct and the degree of risk of death produced by depravedly indifferent conduct.[171] It seems fair to conclude, however, that the difference in degree does keep depraved indifference murder within the limits of the Constitution.[172]

That the statute is safe from a constitutional assault founded on the equal protection clause, however, does refute the argument that a slight difference in degree of risk[173] is an unprincipled substitute for the traditional subjective mens rea distinction between murder and criminally negligent manslaughter. Moreover, the Law Court has felt compelled to explain repeatedly the distinction not only between the degrees of risk but also between a reckless state of mind[174] and the objective recklessness that constitutes depraved indifference.[175] A distinction susceptible to misinterpretation by jurists and

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171. The Law Court expounded on the differences in degree of risk in State v. Crocker, 435 A.2d 58 (Me. 1981):

> At the lower end of the scale [of the standard of conduct] is mere ordinary [civil] neligence consisting of no more than a failure to exercise due care. A person whose merely negligent conduct results in death of another will in Maine be subject at most to liability for tort damages. At the point next higher on the scale, conduct that creates a "'high degree' of risk (something more than 'unreasonable' risk)," and which constitutes a "gross deviation from the standard of conduct that a reasonable and prudent person would observe in the same situation," will serve as the basis for manslaughter liability; but "it will not do for murder." At the upper end of the scale, the actor's conduct, even though also both civilly and criminally negligent, objectively manifests savagery or brutality, reflecting "'a very high degree' of risk" that death will result. At that final point, the "degree of danger attending" the death-producing act is reckoned in law to be "very great . . . ." The legislature has determined that upon findings of death-producing conduct objectively manifesting savagery or brutality, a factfinder would be justified in concluding that there had occurred a killing of the highest degree of blameworthiness and accordingly punishable by the severest penalties provided for by law.

Id. at 66-67 (citations omitted). *See also* State v. Michaud, 513 A.2d at 848; State v. White, 460 A.2d at 1020.

172. O.W. Holmes opined, "I have heard it suggested that the difference is one of degree. I am the last man in the world to quarrel with a distinction simply because it is one of degree. Most distinctions, in my opinion, are of that sort, and are none the worse for it." Haddock v. Haddock, 201 U.S. 562, 631 (1906) (Holmes, J., dissenting), *quoted in* W. LAFAVE & A. SCOTT, JR., *supra* note 22, at 542 n.3.

173. *See supra* note 171.

174. *See* ME. REV. STAT. ANN. tit. 17-A, § 35(3) (1983); MODEL PENAL CODE § 2.02(2)(c) (1985). For the text of this section of the Model Penal Code, see *supra* note 36.

175. *See* State v. White, 460 A.2d 1017, 1019 (Me. 1983); State v. Joy, 452 A.2d 408, 411 (Me. 1982); State v. Crocker, 435 A.2d at 64 n.4; State v. Woodbury, 403 A.2d 1166, 1172 n.9 (Me. 1979); State v. Ellis, 325 A.2d 772, 776 n.2 (Me. 1974); State v. Lafferty, 309 A.2d 647, 672 n.5 (Me. 1973) (Wernick, J., concurring).

The Law Court asserted in *State v. Woodbury* that *before enactment of the Crimi-*

attorneys is apt to be misunderstood and misapplied by jurors.[176]

The Maine Law Court also addressed the issue of whether the depraved indifference murder statute is void for vagueness.[177] A crimi-

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nal Code the court "recognized that the 'reckless disregard for the lives and safety of others,' which constituted an element of manslaughter, was not to be equated with 'reckless conduct,' which constituted an element of murder[,]" since the former requires a subjective awareness of a risk while the latter " *'involves neither a subjective intention to kill nor a subjective awareness of the serious danger to which others are exposed.'* " State v. Woodbury, 403 A.2d at 1172 n.9. (quoting State v. Lafferty, 309 A.2d at 672 n.5 (Wernick, J., concurring)) (emphasis by *Woodbury* court). The import of the distinction is apparent in State v. Goodall, 407 A.2d 268 (Me. 1979). Defendant Goodall was charged with depraved indifference murder for the brutal beating death of his victim. *Id.* at 272-73. Goodall's counsel requested the trial justice to instruct the jury on the lesser offenses of manslaughter, aggravated assault, assault, and reckless conduct. *Id.* at 279. The trial justice instructed the jury on the law of criminally negligent manslaughter, but refused Goodall's request to instruct the jury on the other offenses on the grounds that they were not lesser included offenses of depraved indifference murder. *Id.* The Law Court held that the trial justice properly refused Goodall's requested instructions:

> [W]hereas the inquiry in a prosecution for "depraved indifference" murder is . . . an *objective* one and requires no evidence whatever of the defendant's *subjective* state of mind, the [offenses of aggravated assault, assault and reckless conduct] *do* require an affirmative showing by the State of the defendant's subjective state of mind. Accordingly, those other offenses are not lesser included offenses of "depraved indifference" murder . . . .

Id. at 280 (emphasis by the court).

There is case law in Maine that runs counter to the Law Court's conclusion that the word "recklessness," as used prior to the Criminal Code, connoted no more than objectively viewed conduct in the case of implied malice and referred to a subjective state of mind in the case of reckless manslaughter. The Law Court ruled in State v. Verrill, 54 Me. 408 (1867) that a murder indictment that did not indicate whether the defendant was accused of first degree murder (i.e., a killing with "express malice aforethought") or second degree murder (i.e., a killing with "implied malice aforethought"), but merely accused the defendant of killing with "malice aforethought," was sufficient to sustain a conviction of murder in the first degree. *Id.* at 416. The court reasoned that

> [t]here is still but one crime of murder, as at the common law, although by the provisions of the statute there are two degrees of that crime, liable to different punishments. . . . The words, "malice aforethought" would ordinarily be understood to express the same idea as "express malice;" *and include cases of implied malice . . . as the greater includes the less.*

Id. at 415 (emphasis added). The term "recklessness" as used to define implied malice, therefore, necessarily referred to a subjective state of mind to the extent that it was a lesser included offense of express malice murder.

176. The Law Court shrugs off the troubling fact that "depraved indifference" is an ambiguous term which is elusive of description.

> We are aware that the "depraved indifference to the value of human life" which the State must prove under section 201(1)(B) is often referred to by trial courts as a "state of mind." Whether or not that short-hand characterization is inapt or possibly confusing, we reiterate [that] . . . the particular *element* of the State's proof that is the subject of this discussion is *not* a "culpable mental state" as that term is used in the criminal code.

State v. Goodall, 407 A.2d at 280 n.18.

177. *See supra* note 167.

nal statute violates the constitutional right to due process[178] where the statutory provisions are so vague that they "fail[] to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute."[179] The court has held that the statute is not void for vagueness since

> [it] gives fair notice that it is intended to proscribe conduct resulting in death that . . . a reasonable and prudent person in [the defendant's] situation would have known would [1] cause a very high degree of risk of death or serious bodily injury, and, [2] when viewed in the totality of the circumstances, reflects a depraved indifference to the value of human life.[180]

This reasoning fails to recognize, however, that a person of ordinary intelligence has no notice of what conduct reflects a depraved indifference to human life. One response to this criticism is that the Law Court previously had eliminated any ambiguity by interpreting depraved indifference to mean conduct that is heinous, outrageous, revolting, brutal, or shocking.[181] This response, however, fails to account for the fact that the definitional language is no less vague than the term it defines. The issue becomes, then, whether such a broad and vague *construction* of the depraved indifference murder statute violates the fourteenth amendment of the Constitution.

The Law Court's construction of depraved indifference is similar to the provision of the Georgia Criminal Code which provides that murder[182] is punishable by death where the offense "was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim . . . ."[183] The Supreme Court held that this statutory provision is facially constitutional in *Gregg v. Georgia*.[184] The Court warned, however, that its constitutionality depended upon a sufficiently limited interpretation and application of the statute in individual cases.[185] The issue arose in *Godfrey v. Georgia*[186] whether the "Geor-

178. U.S. CONST. amend. XIV, § 1.

179. United States v. Harriss, 347 U.S. 612, 617 (1953), *quoted in* State v. Parker, 372 A.2d 570, 573 (Me. 1977). The *Harriss* Court explained, "The underlying principle is that no man shall be held criminally reponsible for conduct which he could not reasonably understand to be proscribed." United States v. Harriss, 347 U.S. at 617.

180. State v. Michaud, 513 A.2d 842, 847 (Me. 1986). *See also* State v. White, 460 A.2d 1017, 1020 (Me. 1983); State v. Crocker, 435 A.2d 58, 62-63 (Me. 1981); State v. Flick, 425 A.2d 167, 173-74 (Me. 1981).

181. *See supra* notes 106-107 and accompanying text.

182. GA. CODE ANN. § 16-5-1 (1984).

183. *Id.* § 17-10-30(7). The Court's discussion concerning the vagueness of Georgia's death-penalty statute is pertinent to an analysis of Maine's depraved indifference murder statute, even though less vagueness might be tolerated in the former context than in the latter.

184. 428 U.S. 153, 196-207, *reh'g denied*, 429 U.S. 875 (1976).

185. The petitioner in *Gregg v. Georgia* asserted that section 17-10-30(7) (formerly GA. CODE ANN. § 27-2534.1(b)(7) (1978)) was vague to the point that the death

gia Supreme Court ha[d] adopted such a broad and vague construction of the . . . aggravating circumstance as to violate [the federal Constitution]."[187] The two murders for which Godfrey was convicted were attended neither by torture nor aggravated battery,[188] and the jury reported that the aggravating circumstance on which the death penalty rested "was 'that the offense of murder was outrageously or wantonly vile, horrible and inhuman.' "[189]

The Court held that the trial court's instructions on the aggravating circumstance, a mere reading of the statutory section, did not narrow sufficiently the meaning of the aggravating circumstance since "[a] person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' "[190] The vague phrases "outrageously or wantonly vile, horrible or inhuman," "depravity of mind" and "torture" must be rooted in objectively ascertainable criteria in order to withstand constitutional scrutiny.[191] The words used to characterize conduct

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penalty was applicable to any murder offense. Gregg v. Georgia, 428 U.S. at 201. The Court responded, "It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction." *Id.*

186. 446 U.S. 420 (1980).

187. *Id.* at 423.

188. *Id.* at 426.

189. *Id.*

190. *Id.* at 428-29.

191. The Supreme Court embraced the Georgia Supreme Court's elaborations of section 17-10-30(7) of the Georgia Code in Harris v. State, 237 Ga. 718, 230 S.E.2d 1 (1976) and Blake v. State, 239 Ga. 292, 236 S.E.2d 637 (1977). Godfrey v. Georgia, 446 U.S. at 431. The Georgia court, in those two cases, construed the vague terminology in section 17-10-30(7) (formerly codified in GA. CODE ANN. § 27-2534.1(b)(7) (1978)) to be limited by the more objective standards of that provision.

> The *Harris* and *Blake* opinions suggest that the Georgia Supreme Court had by 1977 reached three separate but consistent conclusions respecting the § [17-10-30(7)] aggravating circumstance. The first was that the evidence that the offense was "outrageously or wantonly vile, horrible or inhuman" had to demonstrate "torture, depravity of mind, or an aggravated battery to the victim." The second was that the phrase "depravity of mind," comprehended only the kind of mental state that led the murderer to torture or to commit an aggravated battery before killing his victim. The third . . . was that the word, "torture," must be construed *in pari materia* with "aggravated battery" so as to require evidence of serious physical abuse of the victim *before* death.

Id. (emphasis added and footnotes omitted). This construction of the statute places emphasis on the "aggravated battery" requirement, which is in no wise vague. Section 16-5-24(a) of the Georgia Code states, "A person commits the offense of aggravated battery when he maliciously causes bodily harm to another by depriving him of a member of his body, by rendering a member of his body useless, or by seriously disfiguring his body or a member thereof." This definition governs the meaning of the term "aggravated battery" as used in section 17-10-30(7). *See* Holton v. State, 243 Ga. 312, 317 n.1, 253 S.E.2d 736, 740 n.1 (1979), *cited in* Godfrey v. Georgia, 446 U.S.

that reflects a depraved indifference to human life—heinous, outrageous, revolting, brutal, and shocking—are without any determinable referents that might serve to hold the depraved indifference murder statute within constitutional bounds.[192]

D. Derogation of the Purpose of the Criminal Sanction.

Two dominant schools of thought, utilitarianism and retributivism, justify criminal punishment on opposing grounds.[193] Jeremy Bentham's utilitarian theory postulates that "[n]ature has placed man under the empire of *pleasure* and of *pain*" and posits that "[w]e owe to them all our ideas; we refer to them all our judgments, and all the determinations of our life."[194] Society can govern individual behavior only by affecting feelings of pleasure or pain.[195] Penal sanctions prevent man from engaging in criminal conduct by promising that the pain attending such conduct will outweigh potential pleasure resulting therefrom.[196] Deterrence, both specific and general, is the foundation of the utilitarian view.[197] Moral blameworthi-

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at 432 n.13.

192. One can argue that the vague statutory language of Maine's depraved indifference statute is linked to narrow, objectively ascertainable criteria in that the conduct must pose a high degree of risk of death to another person. *See supra* note 105. It is not altogether clear whether both heinousness *and* a high tendency to cause death are required elements of depraved indifference murder, or whether each is an alternate of the other. No doubt lingers, notwithstanding this ambiguity, that the actor's conduct must create a high risk of death. *See supra* note 171.

This fact leads to two conclusions. First, where brutality of the act is a distinct element of the offense, it must have an objective referent other than the risk of death criteria. The elements otherwise would be one in the same. An example of an objective referent distinct from the risk of death is aggravated battery inflicted against the victim before death. *See supra* note 191. Second, where heinousness and risk of death are each alteratives to the other, the words denote the same concept. To refute this conclusion is to deny that the actor's conduct must produce a high degree of risk of death. Construing heinous conduct to mean an act that creates a high degree of risk of death, however, contorts the English language and does nothing but foster confusion. In sum, the vague construction of depraved indifference either should refer to some objective criteria other than a high risk of death or should not be used at all.

193. Justice Holmes referred also to the purposes of vengeance, O. HOLMES, *supra* note 66, at 40-42, and reform, or rehabilitation. *Id.* at 41, 42.

194. J. BENTHAM, THE THEORY OF LEGISLATION 1 (1975).

195. *Id.* at 16-18. *See generally* J. MURPHY & J. COLEMAN, THE PHILOSPHY OF LAW 123-25 (1984).

196. *See generally* H. PACKER, *supra* note 5, at 11 (1968).

197. *Id.* at 39. Packer describes special deterrence as "after-the-fact inhibition of the person being punished" and general deterrence as "inhibition in advance by threat or example." *Id.* Justice Holmes expressed the deterrent principle of utilitarianism in an imaginary conversation between himself and a condemned criminal:

> If I were having a philosophical talk with a man I was going to have hanged (or electrocuted) I should say, I don't doubt that your act was inevitable for you but to make it more avoidable by others we propose to sacrifice you to the common good. You may regard yourself as a soldier dying for your country if you like. But the law must keep its promises.

ness plays a small part, if any at all.[198] The notion of morality, in contrast, is fundamental to the retributive theory.[199] The retributive theory views man not as a hedonistic individual guided solely by sensations of pleasure and pain, but as a "responsible moral agent."[200] Justice inheres in punishing a responsible moral agent for his wrongdoing.[201] The reason for punishment under this theory is simply that a criminal should suffer his ill-deserts.[202]

Neither the utilitarian principle of deterrence nor the retributive notion of morality can serve as the sole basis for the penal sanction. On the one hand, absolute utilitarianism ignores "the moral ambigu-

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HOLMES-LASKI LETTERS 806 (M. Howe ed. 1953).

198. Justice Holmes explained that the criminal law should not be primarily concerned with the actor's moral blameworthiness.

> [W]hen we are dealing with that part of the law which aims more directly than any other at establishing standards of conduct, we should expect there more than elsewhere to find that the tests of liability are *external*, and independent of the degree of evil in the particular person's motives or intentions. The conclusion follows directly from the nature of the standards to which conformity is required.

O. HOLMES, *supra* note 66, at 50 (emphasis added). Holmes, however, found utilitarian underpinnings to the notion of blameworthiness in that "conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear." *Id.*

199. Retributivism is rooted in Kantian philosophy. Kant wrote:

> Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for society, but instead it must in all cases be imposed on a person solely on the ground that he has committed a crime; for a human being can never be confused with the objects of the law of things.

I. KANT, METAPHYSICAL ELEMENTS OF JUSTICE 99 (trans. John Ladd 1965), *quoted in* J. MURPHY & J. COLEMAN, *supra* note 195, at 125-26.

200. H. PACKER, *supra* note 5, at 9.

201. Justice Holmes denounced the "mystic bond between wrong and punishment" as nothing more than "vengeance in disguise." O. HOLMES, *supra* note 66, at 42, 45. Retribution is tantamount to revenge, because

> [the] feeling of fitness [of suffering for misdeeds] is absolute and unconditional only in the case of our neighbors. . . . [A]ny one who has satisfied himself that an act of his was wrong, and that he will never do it again, would [not] feel the least need or propriety . . . of his being made to suffer for what he had done . . . .

Id. at 45.

Holmes's criticism of Kantian retributivism on this point is not well-founded, since he attributes to the theory a personal nature which simply is not present.

> The demand for punishment as retribution . . . grows out of respect for the law (not simply oneself), the demand that attacks against the law (not simply against oneself) be taken seriously, and the belief that the only morally acceptable way to deal with such attacks is in terms of a theory based on *justice* or respect for *rights* (and not utility) as a primary value.

J. MURPHY & J. COLEMAN, *supra* note 195, at 126.

202. Sir James Stephen metaphorically explained that "the sentence of the law is to the moral sentiment of the public in relation to any offence what a seal is to hot wax." 2 J. STEPHEN, *supra* note 22, at 81.

ity of punishment. . . . And for that reason, limits need to be placed on the adoption of the utilitarian stance . . . ."[203] On the other hand, pure Kantian retributivism "expresses . . . nothing more than dogma, unverifiable and on its face implausible."[204] Herbert Packer

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203. H. PACKER, *supra* note 5, at 63. At least two points show that the aim of the criminal law cannot rest on a pure deterrence theory. First, Benthams's assumption that an individual rationally balances the benefits and costs prior to engaging in criminal activity does not bear the weight of reality. "The Benthamite model may well be a[n] . . . accurate representation of the acquisitive criminal: the burglar, the embezzler, the con man[,]" but the model is inapposite to "the perpetrator of the crime of passion." *Id.* at 41. Even where an actor does rationally contemplate the countervailing pleasures and pains attending his conduct, he might decide that the chance of conviction is sufficiently slim to justify taking the risk. Moreover, "[t]he fact of recidivism may throw some doubt on the efficacy of special deterrence . . . ." *Id.* at 39 (emphasis deleted).

The second point is a classic Kantian criticism of utilitarianism, that is, the principle of utility denigrates the concepts of justice and morality. A utilitarian conceives of individual rights as mere tools for promoting the public welfare, as means to an end. Personal rights extend only so far as they are consistent with general happiness. Utilitarianism must admit, therefore, that condemnation of an innocent person is justified so long as deterrence values are served thereby. A rebuttle to this troubling possibility is that widespread punishment of innocent persons disserves utility, since unpredictability in punishment ultimately will undermine the effectiveness of general deterrence. That is, where an individual is just as likely to be punished for innocent activity as for criminal behavior, the rationale for refraining from anti-social conduct is vitiated. The constraints which utility itself imposes on application of the penal sanction for purposes of deterrence, however, are insufficient. Selective, rather than extensive, punishment of innocent men, which does not undercut the deterrence, is within the limits set by the principle of utility. Kantianism, by contrast, holds rights out as ends in themselves. There exists, therefore, the potential for conflict between rights and utility, but personal dignity remains inviolable even where the general welfare is not served thereby. *See generally* J. MURPHY & J. COLEMAN, *supra* note 195, at 74-86. Deterrence based upon principles of utility, according to Kantianism, wrongly disregards and potentially subverts fundamental individual rights.

204. H. PACKER, *supra* note 5, at 38-39. Retributivism likewise has flaws which suggest that retribution alone cannot function as the basis for the criminal sanction. Primarily, it is difficult to find any state interest in castigating an actor solely because some notion of morality commands that he suffer for his sins. State interest in deterring crime for the protection of its citizens, in contrast, is evident. Herbert Packer explains the distinction in this manner:

> The retributive view is essentially backward-looking; it regards the offense committed by the criminal as crucial, and adjusts the punishment to it. The utilitarian view is forward-looking; it assesses punishment in terms of its propensity to modify the future behavior of the criminal and . . . of others who might be tempted to commit crimes.

Id. at 11. Scholars have struggled to show that the force of penal law should be brought to bear on individuals for reasons of retribution. One theory is that the expression "just deserts" is short-hand for the concept that retributive punishment negates "one citizen's taking an unfair advantage of the majority of his fellow citizens. It is in this sense that the criminal deserves to be punished." J. MURPHY & J. COLEMAN, *supra* note 195, at 130. A state's interest in punishment, under this theory of retribution, still is far more attenuated than under the theory of deterrence. For Justice Holmes's criticism of retribution, see *supra* note 201.

and other legal scholars draw the best features from each philosophy and apply them in a complementary manner. The result is a more workable and just theory of criminal law.[205] Packer relies primarily on principles of deterrence and adopts the retributive position for "what it denies rather than what it affirms."[206] That is, *moral blameworthiness* is the "limiting doctrine[] of the criminal law."[207] Blameworthiness connotes culpability, "those aspects of human conduct . . . that serve, or ought to serve, as exemption from criminal punishment. These include, as is conventionally recognized, states of mind."[208]

Prevailing authority views subjective culpability as a necessary condition to punishment for serious crimes.[209] Justice Jackson, writ-

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205. Packer rests his argument on the premise that the purpose of criminal law is to strike a balance between individual autonomy and a safe environment in which human autonomy can thrive.

> Law, including the criminal law, must in a free society be judged ultimately on the basis of its success in promoting human autonomy and the capacity for individual human growth and development. The prevention of crime is an essential aspect of the environmental protection required if autonomy is to flourish. It is, however, a negative aspect and one which, pursued with single-minded zeal, may end up creating an environment in which all are safe but none is free.

H. PACKER, *supra* note 5, at 65. Packer's thesis is that this balance is best achieved by regarding the prevention of crime as "a necessary but not a sufficient condition for punishment" and by considering the concept of culpability or blameworthiness likewise as "a necessary but not a sufficient condition of punishment." *Id.* at 62. *Accord* J. MURPHY & J. COLEMAN, *supra* note 195, at 125-38.

206. H. PACKER, *supra* note 5, at 39.

207. *Id.* at 64. Packer's approach is thus fundamentally utilitarian, in that it transforms what Kant considered to be the basis of punishment into a limitation on punishment imposed for prevention's sake. Packer parts company with traditional utilitarians in the comprehension of deterrence. He views deterrence more broadly "as a complex psychological phenomenon meant primarily to create and reinforce the conscious morality and unconscious habitual controls of the law-abiding . . . . Punishment of the morally innocent does not reinforce one's sense as a law-abider, but rather undermines it." *Id.* at 65. Ascribing objective definitions to criminal offenses "ignores the distinctive nature of the penal law," "den[ies] all moral force to the proscriptions of the criminal law and generate[s] in individuals a sense of gross injustice." Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1435 (1968).

208. H. PACKER, *supra* note 5, at 64.

209. *See* MODEL PENAL CODE § 2.02, comment 1, at 229 (1985); H. PACKER, *supra* note 5, at 68; Wechsler, *supra* note 207, at 1435. *See generally* H. HART, *Intention and Punishment*, in PUNISHMENT AND RESPONSIBILITY (1968). The Model Penal Code includes negligence in the enumerated states of mind, *see supra* note 36, notwithstanding the objective nature of criminal negligence. The Model Code justifies criminal liability for inadvertent risk creation on the grounds that such potential liability "supplie[s] . . . an additional motive to take care before acting . . . . To some extent, at least, this motive may promote awareness and thus be effective as a measure of control." MODEL PENAL CODE § 2.02, comment 4, at 243 (1985). The Code commentary notes, however, that negligence "should properly not generally be deemed sufficient in the definition of specific crimes and it should often be differentiated from

ing for the majority in *Morissette v. United States*,[210] provided a powerful rationale for this principle. The United States indicted Morissette "on the charge that he 'did unlawfully, wilfully and knowingly steal and convert' " property of the United States government.[211] The trial judge refused to admit evidence offered to disprove that Morissette had acted with a criminal intent. The court, at the close of evidence, instructed the jury that " '[t]he question on intent is whether or not he intended to take the property. He says he did. Therefore, if you believe either [him or the prosecutor's evidence], he is guilty.' "[212] Morissette was convicted, and the Sixth Circuit affirmed the guilty verdict.[213]

The Supreme Court reversed the conviction and held "that mere omission from [the federal statute] of any mention of intent will not be construed as eliminating that element from the crimes denounced."[214] Justice Jackson reasoned:

> The contention that an injury can amount to a crime only when inflicted by [a subjective culpable state of mind] is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good

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conduct involving higher culpability for the purposes of sentence." *Id.* at 243-44 (footnote omitted). The commentary was *not* suggesting that only the degrees of risk created by an actor should be differentiated for the purpose of distinguishing murder from manslaughter. The differentiation to which the Model Code refers is between "subjective culpability" and "objective culpability," or negligence. The Model Code adamantly states, "[S]erious felony sanctions should be grounded securely in the subjective culpability of the actor. To the extent that inadvertent risk creation, or negligence, should be recognized as a form of criminal homicide, that question should be faced separately from the offense of murder . . . ." MODEL PENAL CODE § 210.2, comment 4, at 28 (1980). The Law Court, notwithstanding generally accepted authority, has distinguished depraved indifference murder from criminally negligent manslaughter based upon the degree of risk created by the actor with no regard to the actor's awareness of the risk. *See supra* notes 104 & 171. For a discussion of the impropriety of employing any objective standard as the basis for imposition of the criminal sanction, see Hall, *Negligent Behavior Should Be Excluded From Penal Liability*, 63 COLUM. L. REV. 632 (1963).

210. 342 U.S. 246 (1952). Petitioner Morissette, while hunting on land owned by the United States and used as a practice bombing range, came across heaps of old, spent bomb casings. Morissette believed that the government had abandoned the casings and he salvaged three tons of the material to sell as scrap metal. *Id.* at 247-48.

211. *Id.* at 248. The United States alleged that the petitioner had violated a federal criminal law, which states: "Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another [any property] of value of the United States . . . [is criminally liable]." 18 U.S.C. § 641 (1982).

212. Morissette v. United States, 342 U.S. at 249. Defense counsel objected to the court's instructions, contending that 18 U.S.C. § 641 required the prosecution to prove that Morissette acted with a criminal intent. The trial judge overruled the objection on the grounds that his felonious intent was " 'presumed by his own act.' " *Id.*

213. Morissette v. United States, 187 F.2d 427 (6th Cir. 1951).

214. Morissette v. United States, 342 U.S. at 263.

> and evil. *A relationship between some mental element and punishment for a harmful act . . .* has afforded the rational basis for a . . . substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.[215]

The Maine Supreme Judicial Court has expressed on more than one occasion that the public policy underlying the objective nature of depraved indifference murder is that such conduct has "attributed to [it] the highest degree of blameworthiness for purposes of severity of punishment."[216] The law of depraved indifference murder, in essence, denounces the relationship between a subjective mental element and punishment and imputes moral culpability to the actor based upon his conduct alone.[217]

Where a court merely attributes the highest degree of blameworthiness to the actor for purposes of punishment, as in the case of depraved indifference murder, the relationship between actual, subjective culpability and punishment is severed.[218] The notion that the

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215. *Id.* at 250-51 (emphasis added and footnotes deleted).

216. State v. Lafferty, 309 A.2d 647, 672 (Me. 1973) (Wernick, J., concurring) (emphasis deleted). *See also* State v. Lagasse, 410 A.2d 537, 540 (Me. 1980); State v. Woodbury, 403 A.2d 1166, 1173 (Me. 1979); State v. Lewisohn, 379 A.2d 1192, 1208 (Me. 1977).

217. There is some difficulty with the distinction between attributing blameworthiness to the actor for purposes of punishment and imputing one of the enumerated states of mind, *see supra* note 36, to the defendant for purposes of establishing guilt. A presumption of a culpable state of mind violates the fourteenth amendment due process mandate that a state must prove beyond a reasonable doubt every element of a criminal offense. *See, e.g.*, Sandstrom v. Montana, 442 U.S. 510, 522 (1979) (instructing a jury in a homicide case that " '[t]he law presumes that a person intends the necessary and natural consequences of his voluntary acts[]' " constitutes either a burden-shifting or conclusive presumption that violates the Constitution). One is hard-pressed to find substantial difference between "blameworthiness for purposes of punishment" and the culpable states of mind listed in section 35 of the Maine Criminal Code. ME. REV. STAT. ANN. tit. 17-A, § 35 (1983). That is, one can argue that under the depraved indifference murder statute the law presumes blameworthiness, i.e., a subjective culpable state of mind in the accused, albeit for reasons of severity of punishment rather than for purposes of establishing guilt. Whether a certain concept functions as an element of criminality or as an element relevant to punishment after criminality has been established, however, can be a matter of debate which reaches constitutional dimensions. *See, e.g.*, Mullaney v. Wilbur, 421 U.S. 684 (1974) (The United States Supreme Court disagreed with the Law Court's assertion that "malice," as used in Maine's former murder statute, was solely a factor relevant to punishment and was not an element of the offense.). For a brief discussion of *Mullaney v. Wilbur*, see *supra* notes 92 & 167.

218. Note that in Morissette v. United States, 342 U.S. 246 (1952), the Supreme Court construed the relevant federal statute to require that the prosecution prove an intentional state of mind as an element of the offense. *See supra* text accompanying note 214. The Law Court has determined, in contrast, that the definition of depraved indifference murder is void of a subjective culpable state of mind. The blameworthiness, or culpability, attributed to one convicted of depraved indifference murder, therefore, is a "presumption" that arises once guilt has been established, rather than a presumption bearing on the determination of guilt. The distinction, on the one

law regards conduct proscribed by the depraved indifference murder provision as "tantamount to a subjective intention to kill" for purposes of punishment[219] implicitly condones the substitution of public vengeance for deterrence as the rationale for the criminal sanction. The presumption of blameworthiness that is present in the law of depraved indifference murder thus derogates from the purpose of the penal sanction.[220]

There is no basis whatsoever for contending that an objectively defined crime serves specific deterrence values.[221] One might argue, however, that the objective nature of depraved indifference murder is not meant to condone vengeance, but instead is intended to promote general deterrence.[222] Assuming for the sake of argument that the purpose of the depraved indifference murder statute is general deterrence, the fact remains that any deterrent value gained thereby is not worth the price.[223] The heavy cost of defining murder without some subjective culpable state of mind is the denigration of moral

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hand, makes a world of difference to the state, since a presumption of blameworthiness *after* a determination of guilt is not violative of the due process clause of the fourteenth amendment. *See supra* note 167. The distinction, on the other hand, matters little to the criminal defendant, in the sense that the presumption of blameworthiness in either case results in the same degree of punishment. The holding of *Morissette v. United States* was not a constitutional ruling, but rather was based on the history and evolved fairness of the criminal law. Justice Jackson's words, therefore, are just as applicable to an analysis of the depraved indifference murder statute as to an interpretation of the federal statute at issue in *Morissette v. United States*.

219. State v. Lewisohn, 379 A.2d 1192, 1208 (Me. 1977).

220. Part Three of the Maine Criminal Code provides numerous purposes of punishment for criminal activity, the first of which is "[t]o prevent crime through the deterrent effect of sentences, the rehabilitation of convicted persons, and the restraint of convicted persons when required in the interest of public safety." ME. REV. STAT. ANN. tit. 17-A, § 1151 (1983 & Supp. 1987-1988). *Accord* MODEL PENAL CODE § 1.02(2)(a)-(b) (1985).

221. *See generally* H. HART, *Legal Responsibility and Excuses*, in PUNISHMENT AND RESPONSIBILITY (1968). Specific deterrence focuses on an individual actor's state of mind and seeks to dissuade him from choosing to violate the law. The law is not concerned with the thoughts which an actor entertained before or during the commission of an act where he is accused of depraved indifference murder. Whether the actor was aware *vel non* of the risks which he created is immaterial to the issue of criminal liability. Specific deterrence cannot function when the law does not require the actor to be cognizant of the nature of his conduct.

222. General deterrence, unlike specific deterrence, does not focus on the individual actor, but rather on the effect of his punishment on his fellow citizens. Punishment of conduct which the actor performs without awareness of risk or absent a knowing disregard of a statute "is commonly justified not on the ground that the violators can be said to be individually blameworthy, but on the ground that the threat of punishment will help to teach people generally to be more careful." Hart, *The Aims of the Criminal Law*, 23 L. & CRIM. PROC. 401, 414 (1958). *See, e.g.*, United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558 (1971) (transporter of corrosive liquids not required to be aware of federal regulation requiring proper shipping papers in order to be convicted for a violation of 18 U.S.C. § 834 (repealed 1979)).

223. *See generally* H. HART, *supra* note 221, at 40-50.

blameworthiness, which, as Herbert Packer explains, is the limiting principle of the penal law.[224] A murder statute that defines the crime of murder in purely objective terms shows little respect for the fundamental "belief in freedom of the human will and [the] consequent ability and duty of the normal individual to choose between good and evil."[225]

V. REDEFINING DEPRAVED INDIFFERENCE MURDER

Fundamental principles of criminal law and the reasoning of preeminent authorities compel one to conclude that a proper definition of depraved indifference murder must include a subjective culpable state of mind element. This proposition presents the problems of determining what culpable state of mind should serve as an element of unintentional murder. The Model Penal Code provides in section 210.2: "[C]riminal homicide constitutes murder when . . . it is committed *recklessly* under circumstances manifesting extreme indifference to the value of human life."[226] Twenty-two states, including Maine, have engrafted into their criminal codes an explicit homicide provision that is analogous to section 210.2 of the Model Penal Code.[227] The drafters of the Model Code, however, failed to express

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224. One need not accept Herbert Packer's concept of the purpose of the criminal sanction in order to conclude that the degree of punishment for a criminal offense should depend on the actor's subjective state of mind. The severity of the criminal sanction imposed, under either the retributive or utilitarian theory of punishment, is properly based upon a mens rea hierarchy. On the one hand, the notion of retribution suggests that punishment should be graded in accordance with the level of repugnance that an actor has for another person's individual autonomy. One who intends to kill another person has more disrespect for individual autonomy than one who merely creates a situation which puts another's life at risk. This is so particularly when the actor is unaware of the risk he engenders. An actor who intends to kill is more morally blameworthy, or culpable, than an actor who unknowingly endangers the life of another. On the other hand, the utilitarian theory of deterrence must recognize that the conduct of an actor who possesses a subjective culpable state of mind in the performance of his act is generally more dangerous to society than an actor who does not entertain such a culpable state of mind. The state has a justifiably greater interest in imposing the harshest penal sanctions on those who pose the greatest threat to society. The criminal law, therefore, should reserve the most severe punishment for those who possess a subjective culpable state of mind in the performance of unlawful conduct, that is, those who are the most dangerous to their fellow citizens. See *supra* text accompanying notes 193-202 for a brief discussion of the retributive and utilitarian theories of punishment.

225. Morissette v. United States, 342 U.S. 246, 250 (1952).

226. MODEL PENAL CODE § 210.2(1)(b) (1980) (emphasis added).

227. The criminal codes of eight jurisdictions provide that a homicide resulting from recklessness that manifests extreme indifference to the value of human life constitutes murder or first degree murder: ALA. CODE § 13A-6-2(a)(2) (1982); COLO. REV. STAT. § 18-3-102(1)(d) (1986); KY. REV. STAT. ANN. § 507.020(1)(b) (Michie/Bobbs-Merrill 1985); ME. REV. STAT. ANN. tit. 17-A, § 201(1)(b) (1983 & Supp. 1986-1987); MISS. CODE ANN. § 97-3-19(b) (1973 & Supp. 1986); N.M. STAT. ANN. § 30-2-1(A)(3) (1984); N.D. CENT. CODE § 12.1-16-01(1)(b) (1985); WASH. REV. CODE ANN. §

clearly the proscriptions of this section.[228] States that have adopted substantially equivalent provisions, therefore, have developed various functional definitions of acts "committed recklessly under circumstances manifesting extreme indifference to the value of human life."[229] All but two states have integrated a heightened level of recklessness into the definition of extreme indifference homicide.[230] Moreover, some jurisdictions have opted to incorporate objective elements into the definition in order to circumscribe the scope of the offense. These objective elements include, for example, the number of persons endangered by the reckless act and the brutality of the killing.

Almost all state jurisdictions that have enacted a homicide provision analogous to section 210.2 of the Model Penal Code define "circumstances manifesting extreme indifference" in terms of the degree of risk of death created and realized by the actor.[231] This approach

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9A.32.030(1)(b) (1977).

Eleven state statutes define such homicide as murder in the second or third degree: ALASKA STAT. § 11.41.110(a)(2) (1983 & Supp. 1987); ARIZ. REV. STAT. ANN. § 13-1104(A)(3) (1978); ARK. STAT. ANN. § 5-10-103(a)(2) (1987); DEL. CODE ANN. tit. 11, § 635(1) (1979); FLA. STAT. ANN. § 782.04(2) (West 1976 & Supp. 1988); MINN. STAT. ANN. § 609.195 (West 1987 & Supp. 1988); N.H. REV. STAT. ANN. § 630:1-b(I)(b) (1986); N.Y. PENAL LAW § 125.25(2) (1987); OKLA. STAT. ANN. tit. 21, § 701.8.1 (1983); S.D. CODIFIED LAWS ANN. § 22-16-7 (1979 & Supp. 1987); WIS. STAT. ANN. § 940.02 (West 1982).

Finally, three states adopted section 210.2 of the Model Penal Code as a manslaughter statute: CONN. GEN. STAT. ANN. § 53a-55(a)(3) (West 1985); N.J. STAT. ANN. § 2C:11-4 (West 1982 & Supp. 1987-1988); OR. REV. STAT. § 163.118(1)(a) (1985).

228. *See infra* text accompanying notes 238-39.

229. MODEL PENAL CODE § 210.2(1)(b) (1980).

230. There apparently is only one state other than Maine that has interpreted a murder statute that is analogous to section 210.2 of the Model Penal Code, *supra* text accompanying note 226, to exclude a subjective culpable state of mind requirement. The Wisconsin Criminal Code provides: "Whoever causes the death of another human being under either of the following circumstances is guilty of a Class B felony: (1) By conduct imminently dangerous to another and evincing a depraved mind, regardless of human life . . . ." WIS. STAT. ANN. § 940.02 (West 1982). The Wisconsin Court of Appeals, an intermediate appellate court, held in State v. Bernal, 111 Wis. 2d 280, 330 N.W.2d 219 (Wis. Ct. App. 1983), that "[t]he existence of a particular state of mind is not an element of second-degree [depraved indifference] murder." *Id.* at 283, 330 N.W.2d at 221 (citing Wagner v. State, 76 Wis. 2d 30, 48, 250 N.W.2d 331, 341 (1977)).

231. Many state extreme or depraved indifference homicide statutes explicitly provide that the actor's conduct must pose a high degree of risk of death to another person. *See* ALA. CODE § 13A-6-2(a)(2) (1982); ARIZ. REV. STAT. ANN. § 13-1104(A)(3) (1978 & Supp. 1987); COLO. REV. STAT. § 18-3-102(1)(d) (1986); CONN. GEN. STAT. ANN. § 53a-55(a)(3) (West 1985); KY. REV. STAT. ANN. § 507.020(1)(b) (Michie/Bobbs-Merrill 1985); N.Y. PENAL LAW § 125.25(2) (1987); WASH. REV. CODE ANN. § 9A.32.030(1)(b) (1977).

Other state statutes express the same notion as an act "imminently dangerous" to another person. *See* FLA. STAT. ANN. § 782.04(2) (West 1976 & Supp. 1987); MINN. STAT. ANN. § 609.195 (West 1987 & Supp. 1988) ("perpetrating act eminently danger-

recognizes that there exist situations where the risk of death is not so substantial that the factfinder can infer knowledge[232] on the part of the actor, yet the chance of death is so significant that a conscious disregard thereof warrants punishment for murder rather than manslaughter. Such a definition of unintentional murder, which is based upon a heightened level of recklessness, is preferable to Maine's definition of depraved indifference murder[233] because the actor's subjective awareness and disregard of the risk constitutes the culpable state of mind element of the crime.[234] A depraved or extreme indifference murder defendant thus can utilize exculpatory defenses to reduce the grade of his offense.[235]

The difficulty with the elevated degree of recklessness approach is that it blurs the distinction between the "knowing" and the "reckless" culpable states of mind. A person commits a "knowing" murder when "he is aware that it is practically certain that his conduct will cause [the death of another person]."[236] A person recklessly causes the death of another person, in contrast, when he is aware of and "consciously disregards a substantial and unjustifiable risk that [the death] will result from his conduct."[237] The line between knowl-

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ous"); N.M. STAT. ANN. § 30-2-1(A)(3) (1984) ("any act greatly dangerous"); OKLA. STAT. ANN. tit. 21, § 701.8 (1983); S.D. CODIFIED LAWS ANN. § 22-16-7 (1979 & Supp. 1987); WIS. STAT. ANN. § 940.02 (West 1982).

Some state judiciaries read a risk requirement into depraved or extreme indifference homicide statutes. *See, e.g.*, Stiegele v. State, 714 P.2d 356, 360 (Alaska Ct. App. 1986) (defendant drove pickup truck in such a manner that he knew that "he was substantially certain to cause his passengers' deaths."). The Alaska extreme indifference murder statute does not expressly require a high risk of death. *See* ALASKA STAT. § 11.41.110(a)(2) (1983 & Supp. 1987).

232. That is, the jury is not able to find that the actor was aware that his conduct was "practically certain" to cause death. *See supra* note 36.

233. *See supra* note 18.

234. *See, e.g.*, State v. Walton, 133 Ariz. 282, 291, 650 P.2d 1264, 1273 (Ariz. Ct. App. 1982) (an extreme indifference creating a grave risk of death to another person is a more culpable mental state than the conscious disregard of a substantial and unjustifiable risk); State v. Omar-Muhammad, 102 N.M. 274, 278, 694 P.2d 922, 926 (1985) (depraved mind murder requires proof that the defendant had subjective knowledge of the risk involved in his actions); People v. France, 57 A.D.2d 432, 434, 394 N.Y.S.2d 891, 893 (1977) (conviction of depraved mind murder requires that the act be perpetrated with a full consciousness of the probable consequences); CONN. GEN. STAT. ANN. § 53a-55(a)(3) comment (West 1985) (Extreme indifference homicide "is aimed at reckless conduct coupled with 'an extreme indifference to human life,' which causes death. Thus, this is one step further towards culpability than the reckless conduct of second degree manslaughter.").

235. *See* cases cited *supra* note 234.

236. MODEL PENAL CODE § 2.02(b)(ii) (1985) (definition of "knowingly"); *id.* § 210.2(1)(a) (1980) (definition of murder). *See also* ME. REV. STAT. ANN. tit. 17-A, § 35(2)(B) (1983) (definition of "knowingly"); *id.* § 201(1)(A) (definition of intentional or knowing murder).

237. MODEL PENAL CODE § 2.02(2)(c) (1985). *See also* ME. REV. STAT. ANN. tit. 17-A, § 35(3) (1983). Reckless homicide, under both the Maine Criminal Code and the

edge and recklessness lies at the point where a risk is so substantial that it constitutes a practical certainty. A definition of depraved or extreme indifference murder that focuses on the actor's awareness and disregard of a risk of this magnitude presupposes that there exists a category of risk that is more than "substantial," but less than a "practical[] certain[ty]." An actor who consciously disregards a risk of this particular degree entertains a culpable state of mind "in addition to those used generally throughout the [Model Penal Code]."[238] The drafters of the Model Penal Code conceded:

> Whether recklessness is so extreme that it demonstrates [an indifference similar to that attending a purposeful or knowing homicide] is not a question . . . that can be further clarified. It must be left directly to the trier of fact under instructions which make it clear 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.[239]

There is a reasonable doubt, however, whether a jury will fare any better than the drafters of the Model Penal Code in discerning such subtle differences in degree. A more workable definition of depraved indifference murder would incorporate one of the four state of mind requirements used generally in the criminal code.

Moreover, some jurisdictions perceive no rational distinction between a knowing culpable state of mind and an awareness and disregard of a grave risk of death. In *People v. Marcy*,[240] the appellant appealed against his conviction of extreme indifference murder on the grounds that the conviction violated the equal protection guarantees of both the United States and the Colorado Constitutions.[241] The appellant argued that the crime of extreme indifference murder is not rationally distinguishable from the crime of knowing murder.[242] The Supreme Court of Colorado examined the proscriptions

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Model Penal Code, constitutes manslaughter. MODEL PENAL CODE § 210.3(1)(a) (1980); ME. REV. STAT. ANN. tit. 17-A, § 203(1)(A) (1983).

238. MODEL PENAL CODE § 210.2 comment, at 22 n.37 (1980). See *supra* note 36 for the definitions of the culpable states of mind that are employed in the Model Penal Code.

239. MODEL PENAL CODE § 210.2 comment, at 22 (1980).

240. 628 P.2d 69 (Colo. 1981) (en banc).

241. *Id.* at 71. In *People v. Marcy*, the appellate court stated that the jury could have inferred from the evidence that the defendant, who was in a depressed and intoxicated condition, shot his wife with a revolver. The defendant confessed that he shot his wife, but claimed that he did not intend to fire the gun. *Id.* at 72 & n.2. The defendant was indicted "with two alternative subsections of the first degree murder statute: . . . murder after deliberation, and . . . murder by extreme indifference." *Id.* The presiding judge instructed the jury on both kinds of first degree murder and "the lesser included offenses of second degree [knowing] murder, manslaughter and criminally negligent homicide." *Id.* The jury convicted the defendant of first degree murder by extreme indifference. *Id.*

242. *Id.* at 73. At the time the Supreme Court of Colorado decided *People v.*

of the statutes and reasoned that the difference between conduct that is practically certain to cause the death of another and conduct creating a grave risk of death to another "is so imperceptible as to vitiate its meaningful application in an adjudicative proceeding."[243] The court further reasoned that an awareness and disregard of a grave risk is substantively equivalent to a knowing culpable state of mind. Thus, the court held "that the statutory prohibition of extreme indifference murder . . . violates equal protection of the laws because it cannot reasonably be distinguished from the lesser offense of second degree [knowing] murder . . . ."[244] The rationale of

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Marcy, Colorado's extreme indifference murder statute provided: "[A] person commits the crime of murder in the first degree if[] '[u]nder circumstances manifesting extreme indifference to the value of human life, he knowingly engages in conduct which creates a grave risk of death to a person other than himself, and thereby causes the death of another.' " *Id.* at 75 (quoting COLO. REV. STAT. § 18-3-102(1)(d) (1973)). The state's second degree murder statute provided in part: "A person commits the crime of murder in the second degree if '[h]e causes the death of a person knowingly, but not after deliberation.' " *Id.* (quoting COLO. REV. STAT. § 18-3-103(1)(a) (1973)). " 'A person acts "knowingly" . . . , with respect to a result of his conduct . . . when he is aware that his conduct is practically certain to cause that result.' " *Id.* at 78 (quoting COLO. REV. STAT. § 18-5-501(6) (1978)).

243. *Id.* at 79.

244. *Id.* at 80 (citation omitted). The court rested its decision upon article II, section 25 of the Colorado Constitution, not the federal Constitution. *Id.* 71, 80.

Note that the Colorado extreme indifference murder statute requires, *inter alia*, that the actor "*knowingly* engage[] in conduct which creates a grave risk of death." (emphasis added). *See supra* note 242. The court, however, did not rule that there was no rational distinction between extreme indifference murder and knowing murder solely because the term "knowingly" was included in the definition of extreme indifference murder. The court instead reasoned that "acting under circumstances manifesting extreme indifference to the value of human life must mean acting with the awareness that one's actions are practically certain to cause the death of another . . . the very same culpability required for [knowing] murder in the second degree under the existing statutory scheme." People v. Marcy, 628 P.2d at 80. The court merely added: "Moreover, any heightened awareness and disregard of a fatal risk connoted by the 'extreme indifference' terminology . . . is already implicit in the *other* statutory component of the offense: 'he *knowingly* engages in conduct which creates a grave risk of death . . . .' " *Id.* (emphasis added). Thus the court most likely would have reached the same result even if the term "knowingly" were not part of the definition of extreme indifference murder.

The appellant in *People v. Marcy* attacked the constitutional validity of Colorado's extreme indifference murder statute on the grounds that punishment for extreme indifference murder was more severe than punishment for knowing murder, although both murder statutes proscribed the same conduct. *Id.* at 73. In Maine, the same range of sentences applies both to knowing murder and to depraved indifference murder. *See* ME. REV. STAT. ANN. tit. 17-A, §§ 201, 1251 (1983 & Supp. 1987-1988). Disparity in punishment, therefore, would not be a basis for an equal protection argument against the validity of the depraved indifference murder statute even if the provision contained a culpability element that was indistinct from the "knowingly" element of knowing murder. The absence of a constitutional argument, however, does not support the proposition that the two murder provisions should proscribe the same conduct. There is no point to a depraved indifference murder provision that

the Supreme Court of Colorado militates against defining depraved indifference murder in terms of an elevated degree of recklessness.[245]

A few states, in addition to including heightened recklessness as a culpable state of mind requirement of depraved indifference homicide, have made the applicability of the statute contingent upon the number of persons against whom the actor's conduct is directed. The Washington Court of Appeals, for instance, held in *State v. Berge*[246] that a defendant cannot be charged and tried pursuant to the state's extreme indifference murder statute[247] where his "attack [is] *specifically* directed at a particular victim."[248] While he was suffering from "a toxic paranoid psychosis," defendant Berge discharged thirty rounds of rifle ammunition "into and around [his sleeping] victim."[249] The state charged Berge with extreme indifference murder. The trial judge gave instructions thereon, and the jury convicted him. The appellate court reversed the conviction and remanded for a new trial on the grounds that the evidence did not support a conviction of extreme indifference murder.[250] The appellate court construed the statute in the context of precedent law and found that the words "manifesting an extreme indifference to human life" refer to

> " 'general recklessness, and are not pertinent to describe cruelty to an individual. The act by which death is effected must *evince* a disregard to human life. Now, a brutal assault upon an individual may evince animosity and hate towards that person, and a cruel and revengeful disposition, but it could not properly be said to be evidence of a recklessness and disregard of human life

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does no more than what already is accomplished by the knowing murder provision.

245. Colorado is not the only state that takes this position. The lack of distinction between (1) an awareness and disregard of a grave risk of death and (2) a practical certainty that death will result prompted the Hawaii Legislature to exclude extreme indifference homicide from its penal code. The commentary to section 707-701 of the Hawaii Penal Code provides:

> An actor whose indifference to human life amounts to "practical certainty" of causing death will be held to have caused death knowingly under the Code's formulation of murder; but where the actor's conduct is characterized by a "cruel, wicked, and depraved indifference," without more, these character traits ought to be taken into account at the time of disposition.

HAW. REV. STAT. § 707-701 commentary (1985).

246. 25 Wash. App. 433, 607 P.2d 1247 (1980).

247. The Washington Criminal Code provides: "A person is guilty of murder in the first degree when . . . [u]nder circumstances manifesting an extreme indifference to human life, he engages in conduct which creates a grave risk of death to any person, and thereby causes the death of a person . . . ." WASH. REV. CODE ANN. § 9A.32.030(1)(b) (1977).

248. State v. Berge, 25 Wash. App. at 437, 607 P.2d at 1250 (emphasis in the original).

249. *Id.* at 434-35, 607 P.2d at 1248.

250. *Id.* at 436, 437, 607 P.2d at 1249, 1250.

generally.' "[251]

The Court of Criminal Appeals of Alabama interpreted that state's extreme indifference murder statute[252] in *Northington v. State*[253] and reached the same conclusion as the Washington court. The Alabama court held that the defendant could not be convicted of extreme indifference murder because "the defendant's acts and omissions were specifically directed at a particular victim and no other."[254] Washington and Alabama share this approach with other jurisdictions.[255]

A delimitation of the extreme or depraved indifference homicide statute that is based upon the number of persons imperiled by the actor's reckless conduct produces some salutary results. First, this objective element is a discrete requirement that is not a substitute for the mens rea element of the crime.[256] An extreme indifference murder defendant, therefore, can use exculpatory defenses to reduce an indictment for murder to a conviction of a crime with a lesser

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251. *Id.* at 436-37, 607 P.2d at 1249 (quoting State v. Mitchell, 29 Wash. 2d 468, 477, 188 P.2d 88, 93 (1947) (quoting Darry v. People, 10 N.Y. 120, 156 (1854))) (emphasis provided by the *Darry* court).

252. A person commits the crime of murder under Alabama law when, "[u]nder circumstances manifesting extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to a person other than himself, and thereby causes the death of another person . . . ." ALA. CODE § 13A-6-2(a)(2) (1982).

253. 413 So. 2d 1169 (Ala. Crim. App. 1981), *cert. quashed*, 413 So. 2d 1172 (Ala. 1982).

254. *Id.* at 1171.

255. *See, e.g.*, State v. Carlson, 328 N.W.2d 690, 694 (Minn. 1982) (quoting State v. Wahlberg, 296 N.W.2d 408, 417 (Minn. 1980)) (The depraved mind statute requires that " 'the act must be committed without a special design upon the particular person or persons with whose murder the accused is charged.' "); State v. Sena, 99 N.M. 272, 274, 657 P.2d 128, 130 (1983) (quoting State v. DeSantos, 89 N.M. 458, 461, 553 P.2d 1265, 1268 (1976)) ("[T]he depraved mind theory 'has been limited to reckless acts in disregard of human life in general as opposed to the deliberate intention to kill one particular person.' . . . Sena committed an act 'greatly dangerous to the *lives* of others' which falls within the depraved mind theory.") (emphasis added).

256. The New Mexico Supreme Court has limited the applicability of New Mexico's depraved mind murder statute, N.M. STAT. ANN. § 30-2-1(A)(3) (1984), to acts that are not directed at any particular individual. *See supra* note 255. The court also has ruled that the statute requires the state to prove that the defendant entertained a subjective culpable state of mind. The trial court in State v. IBN Omar-Muhammad, 102 N.M. 274, 694 P.2d 922 (1985) instructed the jury that one element of depraved mind murder is that "[t]he defendant should have known that his act was greatly dangerous to the lives of others . . . ." *Id.* at 277, 694 P.2d at 925 (emphasis deleted). The New Mexico Supreme Court held on the defendant's appeal that "[t]his instruction was an incorrect statement of the law because it sets out an objective standard of knowledge of the risk as the requisite knowledge for the crime of first-degree depraved mind murder. The requisite knowledge is a subjective one." *Id.*

This is the rule in other states that have precluded use of the depraved indifference provision when the defendant's act was directed at one particular person. *See, e.g.*, Weems v. State, 463 So. 2d 170, 172 (Ala. 1984) (extreme indifference murder statute requires that the defendant consciously disregard the risk of death).

subjective culpable state of mind requirement.[257] Second, this definition minimizes the degree to which the intentional or knowing murder statute and the extreme indifference murder statute proscribe the same conduct.[258] The state thus must often elect to proceed with a charge of either one crime or the other.[259] A compelled election precludes the prosecution from misusing extreme indifference as a safety net to save a murder conviction and ensures that extreme indifference will not subsume other classifications of unlawful homicide.[260] Third, an objective standard that is based on the number of individuals endangered by the defendant's recklessness is a workable rule. The foregoing factors indicate that the approach adopted by Washington, Alabama, and other states is preferable to that taken by Maine, but this is not to say that theirs is the most accurate definition of depraved indifference homicide.

An extreme indifference homicide statute, which is inapplicable where a defendant acts against a particular person, is not without shortcomings. Whether the actor's reckless conduct is directed towards a specific individual and no other is an overexclusive objective inquiry. The number of persons threatened by the actor's conduct does not always accurately distinguish those killings that should be treated as murder from those that should be treated as manslaughter. In the Oklahoma decision *Massie v. State*,[261] for example, a jury

257. *See* Weems v. State, 463 So. 2d at 172 (criminally negligent and reckless manslaughter are lesser included offenses of extreme indifference murder); IBN Omar-Muhammad, 102 N.M. at 278-79, 694 P.2d at 926-27 (vehicular homicide by reckless conduct is lesser included offense of depraved mind murder because the latter requires a more culpable state of mind than the former); State v. Berge, 25 Wash. App. 433, 438-39, 607 P.2d 1247, 1250-51 (1980) (intoxication is defense to extreme indifference murder). Compare these cases with *supra* text accompanying notes 115-42.

258. Maine's depraved indifference murder statute is vague to the degree that it sanctions much conduct that is proscribed by the intentional or knowing murder statute. *See supra* notes 144-50. If Maine were to limit the application of the depraved indifference murder statute to situations where the actor's conduct was not directed against any particular person or persons, the depraved indifference statute would be applicable to only two (i.e., State v. Joy, 452 A.2d 408 (Me. 1982); State v. Michaud, 513 A.2d 842 (Me. 1986)) of the seven cases discussed *supra* text accompanying notes 144-50.

259. *See, e.g.*, State v. Berge, 25 Wash. App. 433, 607 P.2d 1247 (1980) (defendant who fired thirty rifle shots in and around his sleeping victim cannot be charged with and tried for extreme indifference murder). *Compare id. with* cases cited *supra* notes 146-52. This does not mean, of course, that the prosecution always must elect between the two kinds of murder under this definition of extreme indifference murder. *See, e.g.*, Free v. State, 455 So. 2d 137 (Ala. Crim. App. 1984) (prosecution cannot be forced to elect between extreme indifference and intentional murder where defendant fired rifle at persons in passing vehicles).

260. See *supra* text accompanying notes 143-65 for a discussion of how Maine's depraved indifference murder statute tends to subsume other classifications of unlawful homicide.

261. 553 P.2d 186 (Okla. Crim. App. 1976).

convicted the defendant of depraved mind murder for the beating death of a four-year-old. The Oklahoma Court of Criminal Appeals reversed the conviction on the grounds that the depraved mind statute was limited to cases where the actor consciously jeopardized the lives of many persons and did not aim his conduct at anyone in particular.[262] Finding this result unacceptable, the Oklahoma Legislature revamped its unintentional murder statute to include conduct that is directed against and imperils only one person.[263]

The brutality or heinousness of an unlawful killing are objective circumstances that some states also incorporate, in conjunction with the mens rea requirement of heightened recklessness, as an element of extreme or depraved indifference homicide. In the New York case *People v. Osburn*,[264] for example, the defendant struck a nine-year-old girl in her abdomen with such force that she died from massive hemorraging of the liver and intestine.[265] The trial court, following a nonjury trial, acquitted the defendant of intentional murder, but found him guilty of second degree murder under New York's depraved indifference murder statute.[266] The Fourth Department of the Appellate Division agreed with the trial judge that the evidence supported a finding that the "defendant recklessly engaged in conduct which created a grave risk of death to the victim and caused her death."[267] The appellate division, however, modified the judgment to find the defendant guilty of manslaughter because the evidence did not show that the "defendant's conduct was so gross, so wicked, so extremely cruel, or so vicious or prolonged as to demonstrate a depraved killing."[268] The Supreme Court of New Hampshire

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262. *Id.* at 190-91.

263. OKLA. STAT. ANN. tit. 21, § 701.8 (1983). *See* Tucker v. State, 675 P.2d 459 (Okla. Crim. App. 1984). The *Tucker* court held that a depraved mind murder instruction was properly given under section 701.8, because the evidence at trial suggested that the five-month-old victim died as a result of beatings inflicted by the defendant. *Id.* at 460. *Compare id. with* Massie v. State, 553 P.2d at 190-91.

Note that the Oklahoma Legislature could have achieved the same effect via an alternate route. Rather than removing the requirement that the actor's conduct not be directed towards a specific person, the legislature could have enacted alternative aggravating circumstances, e.g., the age of the victim against whom the conduct was directed, which would have brought the actions of the defendant in *Massie v. State* within the proscriptions of the unintentional murder statute. *Cf. infra* text accompanying notes 290-302.

264. 124 A.D.2d 1048, 508 N.Y.S.2d 746 (1986), *appeal denied*, 69 N.Y.2d 831, 506 N.E.2d 549 (1987).

265. People v. Osborn, 124 A.D.2d at 1048-49, 508 N.Y.S.2d at 747.

266. *Id.* at 1049, 508 N.Y.S.2d at 747. A person is guilty of second degree murder under New York law when, "[u]nder circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person . . . ." N.Y. PENAL LAW § 125.25(2) (1987).

267. People v. Osburn, 124 A.D.2d at 1048, 508 N.Y.S.2d at 747.

268. *Id.* at 1049, 508 N.Y.S.2d at 747.

construed the phrase "under circumstances manifesting an extreme indifference to the value of human life"[269] similarly in *State v. Dow*.[270] In that case, the court affirmed an extreme indifference murder conviction since "[t]he evidence show[ed] not simply a killing, but a killing accomplished by a brutal beating and asphyxiation."[271]

A definitional approach that incorporates the cruel or vicious nature of the killer's conduct as an objective element of depraved or extreme indifference homicide is preferable to the Law Court's construction of Maine's depraved indifference murder statute. The former approach is better because the objective element is coupled with and does not displace the reckless culpable state of mind element of the crime.[272] There are, however, substantial flaws in a scheme that emphasizes the character of the defendant's acts. Requirements of heinousness, brutality, or viciousness are too vague to rationally distinguish murder from less culpable types of homicide.[273]

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269. N.H. REV. STAT. ANN. § 630:1-b(I)(b) (1986).

270. 126 N.H. 205, 489 A.2d 650 (1985). States other than New York and New Hampshire stress the callousness or brutality of the killer's conduct. *See, e.g.*, Tucker v. State, 675 P.2d 459, 460-61 (Okla. Crim. App. 1984) (defendant battered five-month-old infant over a two-day period); DEL. CODE ANN. tit 11, § 635 (1979). See *infra* text accompanying note 274 for language of title 11, section 635(1) of the Delaware Code Annotated.

271. *Id.* at 206, 489 A.2d at 651. The defendant in *State v. Dow* hit his victim with a log and "inflicted a series of bruises, lacerations and broken bones on her face, neck and shoulders. He also filled her mouth and throat with pine needles and leaves, and he then pushed these materials down her throat with a stick, blocking her airway and causing her death." *Id.*

272. *See, e.g.*, Eaton v. State, 394 A.2d 217, 220 & n.3 (Del. 1978) (reckless manslaughter is a lesser included offense of depraved mind murder); State v. Dow, 126 N.H. at 207, 489 A.2d at 652 (extreme indifference murder statute requires proof that the defendant acted with a reckless culpable state of mind as well as under circumstances manifesting extreme indifference); People v. Northrup, 83 A.D.2d 737, 738, 442 N.Y.S.2d 658, 660 (1981) (awareness and conscious disregard of risk is an essential element of depraved indifference murder). *Compare* these cases *with, e.g.*, State v. Goodall, 407 A.2d 268 (Me. 1979) (holding that aggravated assault, simple assault and reckless conduct are not lesser included offenses of depraved indifference murder, since they, unlike depraved indifference, require the state to prove a subjective culpable state of mind as an element of the offense).

273. *See supra* text accompanying notes 177-92. The vague language used to describe the objective circumstances of an extreme indifference murder invites prosecutors to indict an actor for both intentional or knowing and depraved indifference murder. *E.g.*, State v. Allison, 126 N.H. 111, 489 A.2d 620 (1985) (upholding over defendant's objections the prosecutor's right to proceed with charges of both intentional or knowing and extreme indifference murder). Depraved indifference murder thus subsumes intentional or knowing murder to the extent that homicides can be characterized as brutal. This subsumption tends to reduce the culpable state of mind element of all murder to a mere requirement of recklessness. In Conyers v. State, 396 A.2d 157 (Del. 1978), for example, the defendant was charged with and convicted of depraved indifference murder for shooting the victim through the heart at close range

These objective circumstances are expressed in language so vague that it might not bear constitutional scrutiny. Title 11, section 635 of the Delaware Code Annotated, for example, provides: "A person is guilty of murder in the second degree when . . . [h]e recklessly causes the death of another person under circumstances which manifest a cruel, wicked and depraved indifference to human life."[274] The appellant in *Waters v. State*[275] contended that the statutory provision was unconstitutionally vague and, in the alternative, that the trial court erred in failing to instruct the jury as to the meaning of the provision.[276] The Supreme Court of Delaware acknowledged that the wording of the statute was "constitutionally borderline," but found that it was within the bounds of due process.[277] The court held, however, that the trial judge committed a plain and reversible error when he charged the jury simply by reading section 635(1) without expounding on the connotations of "cruel, wicked and depraved indifference."[278] These words alone allow jurors to grade the defendant's crime guided primarily by their personal predilections.[279]

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with a twelve-gauge shotgun. *Id.* at 159. The court admitted into evidence vivid, color slides of the fatal wound inflicted by the shotgun blast. *Id.* at 160. One cannot quarrel with a murder conviction in such a case. One can validly object, however, on the point that all the prosecution had to prove was a reckless killing and its accompanying gore, rather than an intentional or knowing state of mind. For a discussion of the subsumption of intentional or knowing murder by depraved indifference murder in Maine, see *supra* text accompanying notes 143-65.

Consequently, two actors who kill with the same culpable state of mind might be convicted of different grades of homicide based on vague objective elements. For example, the appellate court in People v. Osburn, 124 A.D.2d 1048, 508 N.Y.S.2d 746 (1986), *appeal denied*, 69 N.Y.2d 831, 506 N.E.2d 549 (1987), held that a killer could not be convicted of depraved indifference murder for striking a nine-year-old girl with such force that she died from internal hemorraging, because his conduct was not sufficiently brutal. *Id.* at 1048-49, 508 N.Y.S.2d at 747. Would the outcome be otherwise if a defendant killed a five-week-old infant in the same manner? Perhaps yes, even assuming that the actors possessed the same culpable state of mind in each instance, because the act can be characterized as more heinous. *Compare id. with* State v. McGranahan, 415 A.2d 1298, 1300-1301 (R.I. 1980) (conviction of murder upheld where defendant hit five-week-old infant one time in order to stop it from crying, and the baby subsequently died). A preferable method of distinguishing between depraved or extreme indifference murder and manslaughter would be based on more narrowly defined objective circumstances.

274. DEL. CODE ANN. tit. 11, § 635(1) (1979).

275. 443 A.2d 500 (Del. 1982). The defendant in *Waters v. State* was indicted on a charge of intentional murder (first degree murder) for shooting his victim in the chest with a twelve-guage shotgun. The trial judge instructed the jury on the lesser included offenses of depraved indifference murder (second degree murder) and manslaughter. The jury convicted the defendant of depraved indifference murder. *Id.* at 502.

276. *Id.* at 501, 503.

277. *Id.* at 504-506.

278. *Id.* at 506.

279. Justice Marshall explained the deleterious consequences of vague criminal

Although the various approaches of other jurisdictions do not offer completely satisfactory definitions of depraved indifference murder, they provide a starting point for redefining Maine's unintentional murder statute. The foregoing survey of the murder law in states that have enacted a homicide law based upon section 210.2 of the Model Penal Code[280] reveals that a reckless state of mind is a threshold requirement of depraved or extreme indifference murder. In many jurisdictions, the mental element of the crime connotes a level of culpability that is more than reckless but less than intentional or purposeful. This mental state often is characterized as a "heightened awareness and disregard of a fatal risk"[281] and is tantamount to acting knowingly.[282] Such conduct currently is within the proscriptions of Maine's intentional or knowing murder statute.[283] This Comment recommends, therefore, that the Legislature incorporate recklessness,[284] rather than heightened recklessness, into the definition of depraved indifference murder.[285]

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statutes in Grayned v. City of Rockford, 408 U.S. 104 (1972):

> [I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Id. at 108-109.

280. *See supra* note 227.

281. *See, e.g.*, People v. Marcy, 628 P.2d 69, 79 (Colo. 1981).

282. *See supra* text accompanying notes 240-45.

283. ME. REV. STAT. ANN. tit. 17-A, § 201(1)(A) (1983). See *supra* note 18 for the text of section 201(1)(A).

284. See *supra* note 36 for the definition of "recklessly."

285. Perhaps it is possible to characterize the mens rea constituent of the crime in more creative words that better reflect the mental state of actual indifference to the life of another. This Commentator, however, feels constrained to proffer a definition that is formed from the concepts existing in the Criminal Code. Jurisdictions that attempt to describe an "indifferent" state of mind lapse into loose language that is no less vague than that engendered by Michael Foster over two hundred years ago. *Compare, e.g.*, CAL. PENAL CODE § 188 (West Supp. 1987) (implied malice exists "when the circumstances attending the killing show abandoned and malignant heart"), *construed in* People v. Atkins, 53 Cal. App. 3d 348, 358-59, 125 Cal. Rptr. 855, 861-62 (1975) *with supra* text accompanying notes 54-55. Moreover, a definition that fits neatly into the context of the current Code will ensure practical application and predictable results. Finally, the definition must reasonably relate to other sections of the Criminal Code, including exculpatory defense provisions, in order to avoid jury confusion.

One student has attempted to clarify the mens rea component of depraved indifference murder and has proposed the following definition:

> Extreme indifference can be discovered by asking the finder of fact whether the actor would have committed the act *had he known* it would cause a death. This question goes to the very core of the meaning of indifference. It discovers the "abandoned and malignant heart" and willingness to kill that should define unintended murder. If the answer to the question is yes, the defendant placed virtually no value on human life and merits punishment

Under this Comment's proposal, there is no distinction between depraved indifference murder and reckless manslaughter based upon discreteness in culpability. In Maine, "[a] person is guilty of manslaughter if he . . . [r]ecklessly . . . causes the death of another human being."[286] Although crimes are generally graded according to the established hierarchy of culpable states of mind,[287] objective circumstances often serve as guidelines for determining the classification of criminal offenses. Many jurisdictions circumscribe depraved or extreme indifference homicide by incorporating objective elements into the definition of the crime. These elements include the number of persons imperiled by the reckless act and the atrocity of the homicide.[288] "The net effect is to change manslaughter to murder when aggravated circumstances are present."[289] States that have integrated objective elements into the meaning of depraved indifference homicide, however, have failed to delimit properly the proscriptive reach of the offense.

Objective requirements of heinousness, brutality, viciousness, and callousness are too vague to rationally distinguish depraved indifference murder from either manslaughter or intentional or knowing murder.[290] External factors cannot adequately separate killings that are murder from those that are manslaughter unless such circumstances are delineated and described in definite terms. No state has enumerated specific circumstances that serve to qualify a reckless homicide as depraved or extreme indifference murder. Classifying killings by their objective circumstances, however, has precedent in statutes that prohibit other offenses against the person. In Maine, for example, assault is classified as a class D crime[291] and aggravated

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for murder.

Note, *Defining Unintended Murder*, 85 COLUM. L. REV. 786, 807 (1985) (emphasis by notator).

The primary fault of this proposal is that it requires the factfinder to speculate to an extreme degree. The jury is asked to assume that the actor was aware that death was practically certain to result and to determine whether this knowledge would have affected the actor's conduct. A response to this hypothetical question is not an inference of fact; it is mere guesswork. A jury that is allowed to convict a defendant of murder based upon such speculation is apt to be guided by personal biases and predilections. Furthermore, it is uncertain how the definition will function in the context of other criminal code provisions. Will the factfinder be required to assume that the actor had knowledge, for example, even when the actor was intoxicated or even if the actor is feebleminded? Finally, the notator's suggested definition might create problems on review in cases where a defendant challenges his conviction on the sufficiency of the evidence. There undoubtedly is difficulty in determining whether evidence supports a response to a purely hypothetical question.

286. ME. REV. STAT. ANN. tit. 17-A, § 203(1)(A) (1983).

287. *See* W. LAFAVE & A. SCOTT, JR., *supra* note 22, at 191-93; *supra* note 36.

288. *See supra* text accompanying notes 246-79.

289. HAW. REV. STAT. § 707-701 commentary (1985).

290. *See supra* text accompanying notes 177-92.

291. ME. REV. STAT. ANN. tit. 17-A, § 207 (1983 & Supp. 1987-1988).

assault is classified as a class B crime.[292] The culpability requirements are the same in both crimes, but aggravating factors distinguish one offense from the other.[293] Aggravating circumstances include the seriousness of the resulting injury, the manner in which the injury is inflicted, and the age of the victim.[294]

This Comment recommends that the Legislature amend Maine's depraved indifference murder statute to include both a reckless culpable state of mind element and an enumeration of specific and unambiguous aggravating circumstances that reasonably distinguish between reckless manslaughter and reckless murder. There is no doubt that selecting appropriate objective factors to distinguish unintentional murder from manslaughter is a formidable task. By the same token, however, the burden is not insuperable. The Legislature should determine what circumstances, which when consciously disregarded by the actor, justly separate killings that are murder from killings that are manslaughter.[295] Such factors might include, for example, the age of the victim,[296] the kind of weapon, if any, that

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292. *Id.* § 208 (1983).

293. *Compare id.* § 207 (1983 & Supp. 1987-1988) *with id.* § 208 (1983).

294. *Id.* §§ 207(2), 208 (A)-(C). The aggravating factors that distinguish assault from aggravated assault are far less vague than terms such as heinous, brutal and vicious. A particularly apt example is section 208(C) of the Maine Criminal Code, which provides that a person with the requisite culpable state of mind commits an aggravated assault when he causes "[b]odily injury to another under circumstances manifesting extreme indifference to the value of human life." The section continues, "Such circumstances include, but are not limited to, the number, location or nature of the injuries, the manner or method inflicted, or the observable physical condition of the victim." *Id.* § 208(C). Although vagueness still is present in this language, these terms are far less vague than words such as "heinous." States that base the distinction between unintended murder and manslaughter on the heinousness of the killing, however, do not attempt to eliminate the vagueness of the language even to this degree.

295. For reasons explained above, *see supra* note 285, the mens rea element of depraved indifference murder should be founded on principles currently existing in the Maine Criminal Code. Moreover, a mens rea element characterized as an actual indifference to human life is not amenable to simple definition or application. This Comment recommends, therefore, that a reckless state of mind is the most appropriate culpable state of mind requirement for depraved indifference murder. *See supra* notes 280-85 and accompanying text. In formulating the list of aggravating circumstances that serve to distinguish unintentional murder from manslaughter, however, the Legislature should be guided by a definite purpose: to delineate certain factors, which when accompanied by a conscious disregard therefor, reflect an actual indifference to human life on the part of the actor. This focus permits the Legislature to find what would be the proscriptive reach of a murder statute that incorporates an actual indifference state of mind, but obviates the difficulty, or perhaps impossibility, of defining unambiguously the mental state of actual indifference.

296. *Cf.* ME. REV. STAT. ANN. tit. 17-A, § 207(2) (Supp. 1987-1988). Subsection two provides: "Assault is a Class D crime, except in instances of bodily injury to another who has not attained his 6th birthday, provided that the actor has attained his 18th birthday, in which case, it is a Class C crime." *Id.* Juries in jurisdictions that incorporate the brutality or heinousness of the killing into the definition of unintentional

caused the death of the victim,[297] and the number of persons endangered or killed as a result of the actor's conduct.[298] Each of the enumerated aggravating elements should serve as an alternate for the others. In addition to the presence of one of the specified aggravating circumstances, a conviction of depraved indifference murder would require that the actor recklessly[299] engage in voluntary conduct[300] that causes[301] the death of another human being. The proposed reckless state of mind requirement of depraved indifference murder should apply to all the specified elements of the crime, including the aggravating factors.[302]

VI. CONCLUSION

The absence of a subjective culpable state of mind element in Maine's depraved indifference murder statute represents a radical departure from the historical development of homicide law. Depraved heart murder was the common law precursor of depraved indifference murder, and depraved heart murder was rooted in the notion of implied malice aforethought. According to prominent authority, depraved heart murder connoted a culpable state of mind that was distinct from intention, but was no less blameworthy. Implied malice aforethought, however, was a shorthand expression for a bundle of concepts. One such concept, in addition to depraved heart murder, was a presumption of malice absent adequate provocation—a presumption bearing on the severity of punishment, not on the determination of guilt or innocence. In some cases, therefore,

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murder appear to base the degree of brutality in part on the age of the victim. *See supra* discussion in note 273. The jury, however, is free either to take the age of the victim into account or to disregard the age of the victim. If the Legislature reasons that the age of the person killed should be an aggravating factor that elevates manslaughter to murder, the Legislature should explicitly include that factor as one of the group of alternate elements of depraved indifference murder. A jury needs more guidance than that afforded by a word as vague as "brutal." Furthermore, the defendant is entitled to assurance that jurors will not visit their personal biases on the defendant through such vague terminology. *See supra* note 279.

297. *Cf.* ME. REV. STAT. ANN. tit. 17-A, § 208(1)(B) (1983) (use of dangerous weapon is one aggravating factor that distinguishes assault from aggravated assault).

298. *See supra* text accompanying notes 246-63. The number of persons endangered or killed as a result of the actor's conduct is not a factor that is adequate by itself to differentiate between unintentional murder and reckless manslaughter. *See supra* text accompanying notes 261-63. As one of several aggravating circumstances, however, the factor is not "overexclusive" and can therefore serve to separate murder from manslaughter. The three aggravating factors suggested in the text are not meant, of course, to constitute a complete list of possible aggravating circumstances.

299. ME. REV. STAT. ANN. tit. 17-A, § 35(3) (1983). *See also supra* note 36.

300. ME. REV. STAT. ANN. tit. 17-A, § 31 (1983) (formerly § 51), *construed in* State v. Mishne, 427 A.2d 450, 457-58 (Me. 1981). For a brief discussion of *State v. Mishne*, see *supra* note 142.

301. ME. REV. STAT. ANN. tit. 17-A, § 33 (1983).

302. *See id.* § 34(2).

malice referred to a culpable state of mind, while in other cases it did not. Confusion undoubtedly inheres in the expression "implied malice aforethought." That the Maine Supreme Judicial Court construed the depraved indifference murder statute in the context of this chaos accounts for, yet does not justify, the court's conclusion that depraved indifference murder is void of a subjective culpable state of mind requirement.

The Law Court's interpretation of the depraved indifference murder statute also is unwarranted because the statute is based upon the Model Penal Code formulation of unintentional murder, which provides that extreme recklessness, a subjective culpable state of mind requirement, is an element of the offense.[303] One can reasonably conclude that the Legislature, in following the Model Penal Code pattern, meant to abandon the conceptual problems of the common law's depraved heart murder and to incorporate into the crime such a mens rea component.

Moreover, the lack of a subjective culpable state of mind requirement constitutes a deviation from the principles that underlie Maine's Criminal Code. The mens rea concept pervades the Criminal Code,[304] and the presence of a murder statute that is void of a mens rea requirement in this context produces harsh, even arbitrary, results. A depraved indifference murder defendant is not able to use exculpatory defenses to reduce the grade of his offense. The deprivation of adequate defenses encourages prosecutors to rely upon depraved indifference to secure murder convictions, and the vagueness of depraved indifference in turn enhances the opportunity to exploit the absence of exculpatory defenses.

The net effect of the nonexistence of subjective culpability in depraved indifference murder, in conjuction with the vague construction of the statute, is the reduction of the general crime of murder to a strictly objective crime. An apt example of the subsumption of intentional or knowing murder by depraved indifference murder is provided in *State v. Michaud*.[305] In *State v. Michaud*, appellant Michaud, after threatening to kill his live-in girlfriend, fired two shotgun blasts through the front door of the house where she was babysitting and caused the death of a nine-year-old boy.[306] The state charged Michaud in a two-count indictment with both knowing murder and depraved indifference murder. On the first count, which charged Michaud with knowing murder, the jury convicted him of reckless manslaughter. On the second count, which charged Michaud with depraved indifference murder, the jury found him

303. MODEL PENAL CODE § 210.2 comment, at 22 (1980).
304. *See* ME. REV. STAT. ANN. tit. 17-A, § 34 (1983).
305. 513 A.2d 842 (Me. 1986).
306. *Id.* at 844-45.

guilty as charged.[307]

Defense counsel's theory in the case plainly was that the appellant's culpable state of mind did not rise to the level required for a conviction of knowing murder. Indeed, the jury accepted this theory. *State v. Michaud* demonstrates, however, that the depraved indifference murder statute removes from the jury the option of finding, in agreement with the defendant's theory, that the killing constituted reckless manslaughter, but not murder. This result is attributable to the anomalous nature of depraved indifference murder; the statute does not conform to the principles of the Maine Criminal Code. In the *Michaud* case, the charge of depraved indifference murder actually nullified the defense counsel's theory of the case, a theory perfectly consistent with the principles embodied in the Criminal Code.[308]

Perhaps the circumstances of *State v. Michaud* are of a case that falls within a proper definition of depraved indifference murder.[309] Even if the killing in the *Michaud* case is a paradigm of depraved indifference, however, there is nonetheless no reason to deny the jury the opportunity to conclude that the killing amounted only to reckless manslaughter.[310] Reckless manslaughter, in other words, should be a lesser included offense of depraved indifference murder.[311] This Comment has argued that a conviction of depraved indifference murder should require that the actor recklessly engaged in voluntary conduct, which includes one or more explicitly and narrowly defined aggravating circumstances, that caused the death of another human being. Under the suggested definition of unintentional murder, in contrast to Maine's current definition of the crime, the theory of reckless manslaughter is available to one who is accused of depraved indifference murder. Cases that properly fit into the murder category of homicide will be caught in the mesh of the recommended provision, but cases of reckless manslaughter will not be snared. The offered definition eliminates problems of vagueness and realizes the purposes of the penal sanction. A depraved indifference murder statute that contains a subjective culpability element conforms both to the evolution of homicide law and to the present scheme of the Criminal Code.

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307. *Id.* at 846.

308. To argue simply that the Legislature has the prerogative to define depraved indifference murder in this manner is merely to evade the issues raised in this Comment.

309. *See* cases cited *supra* notes 56-59.

310. ME. REV. STAT. ANN. tit. 17-A, § 203 (1983 & Supp. 1987-1988).

311. *See id.* § 13-A (1983) (definition of included offenses).