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**PEOPLE V. DUBARRY – AN EXPLORATION INTO THE
COMPLEXITIES OF CHARGING A DEFENDANT WITH BOTH
INTENTIONAL MURDER AND DEPRAVED INDIFFERENCE
MURDER**

*Arielle Montoro**

**COURT OF APPEALS OF NEW YORK
PEOPLE V. DUBARRY¹
(DECIDED APRIL 7, 2015)**

I. INTRODUCTION

In the recent New York Court of Appeals case, *People v. Dubarry*, the court attempted to resolve an issue that was disputed among the Appellate Division Departments for many years.² Specifically, the court considered whether the trier of fact could convict a defendant for both intentional murder premised on the transferred intent theory and depraved indifference murder when the trial court submitted such charges in the conjunctive.³ The Court of Appeals previously rendered decisions on this same issue, but its ambiguous and fact-specific opinions led to differing interpretations and the Appellate Division split.⁴ The New York Court of Appeals

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¹ 31 N.E.3d 86 (N.Y. 2015).

² See discussion *infra* Section V.

³ *Dubarry*, 31 N.E.3d at 93.

⁴ For example, the Second Department held that the trier of fact could convict the defendant of both depraved indifference and intentional murder, while the Third Department held that the jury could not convict a defendant of both intentional and depraved indifference

attempted to resolve this issue in *Dubarry* when it held that the jury cannot convict a defendant of both depraved indifference and intentional murder for a single murder.⁵

This note will provide an analytical review of *Dubarry* and further discuss how the Court of Appeals did not, in the long run, resolve the split among the Appellate Division Departments in New York. Specifically, this note argues that the court should charge a defendant with multiple murder charges alternatively. However, if the counts are non-murder counts, then it is possible for the court to charge the defendant with such charges conjunctively. In Part II, this note will provide an overview of the *Dubarry* decision, including the relevant facts and the court's discussion. Part III will examine the transferred intent theory in detail. In Part IV, this note will analyze the previous New York Court of Appeals cases, specifically *People v. Gallagher*⁶ and *People v. Trappier*,⁷ which discussed a similar issue that was set forth in *Dubarry*. Part V will then examine the split among the Departments of the Appellate Division—specifically, the cases that discussed the issue presented in *Dubarry*, as well as the similarities and differences among the Appellate Division rulings. Also in Part V, this note will explore the impact of the *Dubarry* decision on the prior Appellate Division cases. In Part VI, this note will consider the background for charging defendants with depraved indifference murder in New York. Lastly, Part VII will analyze *Dubarry*'s impact on future cases.

II. DISCUSSION OF DUBARRY

The facts in *Dubarry* were in dispute at the time of trial. The State and the Defendant each presented its version of the story and the following sections will present both versions. Additionally, the procedural history and the court's analysis and holding are examined below.

murder. See *People v. Douglas*, 901 N.Y.S.2d 57 (App. Div. 2d Dep't 2010); *People v. Molina*, 914 N.Y.S.2d 331 (App. Div. 3d Dep't 2010).

⁵ *Dubarry*, 31 N.E.3d at 95.

⁶ 508 N.E.2d 909 (N.Y. 1987).

⁷ 660 N.E.2d 1131 (N.Y. 1995).

A. State's Version of the Facts

The State alleged that Herburtho Benjamin (“Codefendant”) and ten other men were in Brooklyn, New York, and approached a residential building while searching for someone who assaulted one of them.⁸ The men proceeded inside the lobby where they saw Darius Dubarry (“Defendant”), a member of a religious group known as the Lek Leh Israelites,⁹ who had just finished his Sabbath services.¹⁰ Once the Defendant walked past the group of men outside the building one of the men stated, “That’s him.”¹¹ Some of the men testified that they saw the Defendant and the Codefendant “pull out guns and shoot at one another.”¹² The State also obtained video footage from the building’s surveillance camera, which showed the shootout and the Defendant “extending his arm to fire a gun before he reentered the building.”¹³ The forensic evidence further established that the Defendant fired the bullet that killed the victim “who was uninvolved in the events and innocently standing a few buildings away from the shooting.”¹⁴

Not long after the shooting, the Defendant left the crime scene, and about a week later, investigators found the Defendant in a hotel in the State of Georgia under an assumed name.¹⁵ The investigators obtained statements from the Defendant in which he explained that directly prior to the shooting, he was leaving his religious services.¹⁶ He stated that he saw the men in the lobby follow him outside the building where the Codefendant pointed a gun at him.¹⁷ The Defendant said he “heard a click, and then a shot[.]”

⁸ *Dubarry*, 31 N.E.3d at 89.

⁹ This group is more commonly known as the “Black Israelites.” See Glenn Blain, *State Court of Appeals Overturns Murder Conviction for Man Involved in Brooklyn Nurse’s Death from Gun Battle*, N.Y. DAILY NEWS (Apr. 8, 2015, 12:30 AM), <http://www.nydailynews.com/news/politics/court-appeals-overturns-murder-conviction-gun-battle-article-1.2177113>.

¹⁰ *Dubarry*, 31 N.E.3d at 89.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* The innocent victim was a thirty-five-year-old nurse and a mother of a nine-year old son. See Veronika Belenkaya, Tina Moore, & Bill Hutchinson, *Son Grieves Over Death of Mother*, N.Y. DAILY NEWS (Dec. 18, 2007, 2:26 AM), <http://www.nydailynews.com/news/crime/son-grieves-death-mother-article-1.274873>.

¹⁵ *Dubarry*, 31 N.E.3d at 89.

¹⁶ *Id.*

¹⁷ *Id.*

which caused him to shoot back and run into the building.¹⁸ The State also obtained eyewitness testimony from one of the residents who lived in the building who stated he saw the Defendant fire first at the Codefendant.¹⁹

B. Defendant's Version of the Facts

At trial, the Defendant testified that the Codefendant was the initial shooter and “shot . . . for no apparent reason.”²⁰ The Defendant testified that he had a gun in his possession because he was keeping it from a member of his congregation.²¹ According to the Defendant, this member showed the Defendant a gun and said he had to handle a situation.²² The Defendant told him to “chill out,” took the weapon, and said he would dispose of it later.²³

The Defendant then saw the men in the lobby and thought he recognized one of them as a resident of the building.²⁴ The Defendant explained he was smoking a cigarette in front of the building when the ten men accompanying the Codefendant went outside.²⁵ The Defendant turned to enter the building and heard someone say, “Move. Move. Move.”²⁶ He turned again and saw the Codefendant “pointing a gun at him.”²⁷ The Defendant alleged that he did not know who the Codefendant was, and that he “froze when he saw the gun.”²⁸ The Defendant stated the Codefendant “pulled the trigger twice, but the gun failed to fire,” and when the Codefendant fired again, the Defendant fired multiple shots back.²⁹ The Defendant claimed he never handled a gun previously and did not know where

¹⁸ *Id.*

¹⁹ *Id.* at 89-90. The witness testified during the grand jury proceeding, but not at trial. *Dubarry*, 31 N.E.3d at 89-90. This witness testified that he saw the Defendant fire the first shot at the Codefendant. *Id.* The witness, however, refused to testify at trial because of his belief that the Defendant was behind alleged threats made against the witness's family. *Id.* Following a hearing to determine whether the Defendant was responsible for such threats, the court held that the Defendant was not responsible for them. *Id.*

²⁰ *Id.*

²¹ *Dubarry*, 31 N.E.3d at 90.

²² *Id.*

²³ *Id.* at 91.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Dubarry*, 31 N.E.3d at 91.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

he placed the gun after the shooting.³⁰ He stated he returned to his apartment, and two days later, went to Georgia out of fear.³¹ He believed all the men were gang members, and fleeing to Georgia would allow enough time for his family to find an attorney.³² Additionally, he alleged that the police coerced him to make false statements.³³

C. Procedural Background

At the pre-charge conference, and while discussing the verdict sheet, the trial court noted that intentional murder and depraved indifference murder were separate and distinct crimes; thus, the jury would consider both charges together.³⁴ Defense counsel argued that there was insufficient evidence to establish depraved indifference murder because the Defendant participated in mutual combat with the Codefendant.³⁵

Nevertheless, the court submitted both charges to the jury in the conjunctive, among other charges, with the intentional murder charge submitted on a transferred intent theory.³⁶ The court

³⁰ *Id.*

³¹ *Dubarry*, 31 N.E.3d at 91.

³² *Id.*

³³ *Id.*

³⁴ *Id.* While the physical act required for both intentional murder and depraved indifference murder is the same, the requisite mental state differs. *See* N.Y. PENAL LAW § 125.25(1) (McKinney 2016). Both types of murder require the physical act of killing another person. *Id.* at 125.25(2). However, while intentional murder requires the defendant to possess a mental state of intent to kill the victim, depraved indifference requires the defendant to recklessly engage in conduct that creates a grave risk of death and such death occurs because of the conduct. *Id.* Depraved indifference is its own culpable mental state and exists when a defendant possesses “an utter disregard for the value of human life—a willingness to act not because one intends harm, but because one simply does not care whether grievous harm results or not.” *People v. Feingold*, 852 N.E.2d 1163, 1168 (N.Y. 2006) (quoting *People v. Suarez*, 844 N.E.2d 721, 730 (N.Y. 2005) (internal quotations omitted)).

³⁵ *Dubarry*, 31 N.E.3d at 91. Mutual combat is defined as “[a] consensual fight on equal terms — arising from a moment of passion but not in self-defense — between two persons armed with deadly weapons.” *Mutual Combat*, BLACK’S LAW DICTIONARY (10th ed. 2014). The mutual combat aspect is relevant because if two defendants acted in mutual combat with each other, the court would reduce the murder charge to voluntary manslaughter, which is a lesser crime than murder. *Id.*

³⁶ *Dubarry*, 31 N.E.3d at 91. Depraved indifference is defined in the New York Penal Law: “A person is guilty of murder in the second degree [under depraved indifference] 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

instructed the jury to consider the depraved indifference murder charge, and irrespective of its determination on that count, to next consider whether the defendant committed intentional murder.³⁷ Thus, the court left open the possibility that the jury could convict the Defendant of two forms of murder, each of which requires a different mental state for the same single act of murder.

Subsequently, the jury convicted the Defendant of multiple charges, including intentional and depraved indifference murder.³⁸ The Defendant appealed, and the Appellate Division, Second Department, affirmed.³⁹ The Second Department stated that, while the murder convictions were each based on different states of mind with regard to the different victims, there was “more than one potential victim[,]” which allowed the Defendant’s murder convictions to stand.⁴⁰ Soon after, a New York Court of Appeals judge granted the Defendant leave to appeal.⁴¹

On appeal to the Court of Appeals, the Defendant claimed that the trial court violated his constitutionally protected due process rights when it submitted the depraved indifference murder charge and the intentional murder charge based on a transferred intent theory conjunctively to the jury.⁴² The Defendant argued that “where the actual and intended victims are different,” a conviction of both intentional murder and depraved indifference murder “subjects him to multiple criminal liability for a single homicide.”⁴³

The State asserted that each murder count required different culpable mental states; thus, the court should affirm the convictions.⁴⁴ In support of its argument, the State explained that a conviction of intentional murder required the State to prove the Defendant’s intent

thereby causes the death of another person” N.Y. PENAL LAW § 125.25(2) (McKinney 2016) (emphasis added). By contrast, a person is guilty of murder in the second degree under New York Penal Law when “he *intends* to cause the death of someone, and he causes the death of such person or third person under transferred intent.” *Id.* at § 125.25(1) (emphasis added). The transferred intent theory, therefore, allows the defendant to be criminally liable for his or her actions, even though the intended victim was not the person harmed. *Id.*

³⁷ *Dubarry*, 31 N.E.3d at 91.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 92.

⁴² *Dubarry*, 31 N.E.3d at 92.

⁴³ *Id.*

⁴⁴ *Id.*

to cause the death of the intended victim (here, the Codefendant) beyond a reasonable doubt.⁴⁵ In contrast, the conviction of depraved indifference murder required proof beyond a reasonable doubt of the Defendant's recklessness by creating a grave risk of death to the actual victim "under circumstances evincing a depraved indifference to human life, resulting in the victim's death."⁴⁶

D. Court of Appeals Discussion in *Dubarry*

The New York Court of Appeals, reversing the Second Department's decision, held that it was improper for the court to submit the intentional murder and depraved indifference murder charges in the conjunctive, and therefore, the jury could not convict the Defendant of both depraved indifference and intentional murder.⁴⁷ The court agreed with the Defendant and determined that "on the facts of this case," the State could not employ the theory of transferred intent to convict the Defendant twice for the killing of the same victim.⁴⁸

The Court of Appeals in *Dubarry* began its analysis by examining *People v. Gallagher* in which the court held that "in single homicide cases, intentional and depraved indifference murder counts must be submitted to the jury in the alternative."⁴⁹ The *Gallagher* court explained that an act is either intended or not intended by its actors; it cannot be both.⁵⁰ The *Dubarry* court further discussed the transferred intent theory, explaining that a defendant can be responsible for the death of a person even if it was not the person the defendant *intended* to kill.⁵¹ The *Dubarry* court established that the holding in *Gallagher* equally applies when the State proceeds on a transferred intent theory.⁵² The court in *Dubarry* stated:

Whether based on the defendant's conscious objective towards the intended victim, or on a transferred intent theory directed at a different, and actual, victim, [the]

⁴⁵ *Id.* at 94.

⁴⁶ *Id.*

⁴⁷ *Dubarry*, 31 N.E.3d at 95.

⁴⁸ *Id.* at 92.

⁴⁹ *Id.*; see *Gallagher*, 508 N.E.2d 909.

⁵⁰ *Dubarry*, 31 N.E.3d at 92 (quoting *Gallagher*, 508 N.E.2d at 910).

⁵¹ *Dubarry*, 31 N.E.3d at 93.

⁵² *Id.* at 94.

defendant's conviction depends on a jury finding that [the] defendant harbored the requisite intentional mental state. [The d]efendant cannot then also be guilty of the same murder premised on a depraved state of mind.⁵³

The court explained that whether the Defendant acted with intent to kill one victim or whether he acted with the intent, on the transferred intent theory, to kill a different victim had no effect on whether the jury could convict the defendant of both depraved indifference murder and intentional murder.⁵⁴ In either case, the court stated the answer to such question was still no.⁵⁵

The Court of Appeals in *Dubarry* acknowledged that the State had two alternative means by which it could establish the Defendant's state of mind: (1) by proving transferred intent or (2) by proving depraved indifference to human life.⁵⁶ Further, the *Dubarry* court explained that the Defendant's state of mind was for the jury to determine.⁵⁷ However, the court stated that because recklessness is a culpable mens rea, different from the intentional murder mens rea, allowing both murder charges prevents the jury from determining the defendant's state of mind at the time the act was committed.⁵⁸

In *Dubarry*, the State unsuccessfully argued that *Gallagher* did not apply because two outcomes could result to two different individuals—the actual and intended victims—and urged the court to rely on *People v. Trappier*.⁵⁹ In *Trappier*, the Court of Appeals upheld a defendant's conviction of attempted first-degree assault and first-degree reckless endangerment when the defendant fired multiple shots towards his intended victim.⁶⁰ The *Trappier* court noted the defendant may have intended to cause serious physical injury, while also recklessly creating a grave risk that a more serious result, like death, could occur from his act.⁶¹ The court in *Trappier* held that

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Dubarry*, 31 N.E.3d at 93.

⁵⁷ *Id.* at 94.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 94-95.

⁶¹ *Dubarry*, 31 N.E.3d at 94-95 (quoting *Trappier*, 660 N.E.2d at 1133).

“the separate mens rea of intent and recklessness are not mutually exclusive when applied to different outcomes.”⁶²

The *Dubarry* court distinguished the facts before it from those in *Trappier*, holding that while two different states of mind accompanied the murder counts, only one outcome resulted: the victim’s death.⁶³ The Court of Appeals explained that the transferred intent theory has two components:⁶⁴ First, “to establish an intentional conscious objective to cause the death of another[,]” and second, to establish that the “shooting resulted in death.”⁶⁵ Therefore, the *Dubarry* court emphasized that under the transferred intent theory, it was crucial for the State to establish the intent to kill, and a resulting death which means that “the identity of the victim was irrelevant.”⁶⁶ The court ultimately concluded that the State focused too much on the identity of the intended victim, and not on the requisite mental state.⁶⁷ Therefore, the State “ignore[d] the essence of intentional murder based on transferred intent.”⁶⁸

Thus, the *Dubarry* court ruled that *Gallagher* was the controlling precedent and explained that the Defendant could only be guilty of depraved indifference murder or intentional murder with the transferred intent theory.⁶⁹ While the Court of Appeals held that *Gallagher* controlled, the court did not overrule *Trappier*, in which the court held that it could charge the defendant with both an intentional assault charge and a reckless assault charge in the conjunctive.⁷⁰ Therefore, *Trappier* still remains good law today. However, it may be challenging for the Appellate Divisions to determine which rule of law applies because *Gallagher* and *Trappier* present different circumstances. If there are two murder charges with different mens rea, should the court automatically charge those

⁶² *Dubarry*, 31 N.E.3d at 95 (quoting *Trappier*, 660 N.E.2d at 1132) (internal quotations omitted).

⁶³ *Dubarry*, 31 N.E.3d at 95.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* While the court stated the State focused too much on the identity of the victim, the court did not give any guidance on what would have been appropriate. *Dubarry*, 31 N.E.3d at 95.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Trappier*, 660 N.E.2d at 1132.

counts alternatively? The answer is difficult to determine because of the lack of guidance by the Court of Appeals in *Dubarry*.

III. TRANSFERRED INTENT THEORY

An examination of the transferred intent theory is crucial to understand the court's reasoning in *Dubarry*. Transferred intent is not applicable to increase criminal liability—that is, the defendant cannot be charged with transferred intent for the sole purpose of including additional criminal charges.⁷¹ In New York, “when the resulting death is of a third person who was not the defendant’s intended” target (the “intended victim”), the defendant can still be responsible for the unintended victim’s death (the “actual victim”) “as if the intended victim were killed.”⁷² The defendant’s intent to kill the intended victim will transfer to the actual victim, in turn establishing the intent element of intentional murder.⁷³ To successfully prove intentional murder, the State must show that the defendant, “[w]ith intent to cause the death of another person, . . . cause[d] the death of such person or of a third person”⁷⁴ The actual victim’s identity is irrelevant, as long as “the requisite intent to kill is” sufficiently alleged and established, “and the death of” such person results.⁷⁵

The doctrine of transferred criminal intent exists to ensure the defendant “will be prosecuted for the crime he or she intended to commit even when, because of bad aim or some other ‘lucky mistake,’ the intended target was not the actual victim.”⁷⁶ While transferred intent may be useful to convict a defendant of a crime, the theory is permissible only when, “without the doctrine, the defendant could not be convicted of the crime at issue because the mental and physical elements do not concur as to either the intended or actual victim.”⁷⁷ Rather, the doctrine is meant to hold the defendant accountable for a crime he or she has committed when all the

⁷¹ *People v. Fernandez*, 673 N.E.2d 910, 913 (N.Y. 1996).

⁷² *Fernandez*, 673 N.E.2d at 913.

⁷³ *Id.*

⁷⁴ N.Y. PENAL LAW § 125.25(1) (McKinney 2016).

⁷⁵ 35 N.Y. JUR. 2d *Transferred Intent* § 504, LexisNexis (database updated July 2016).

⁷⁶ *Fernandez*, 673 N.E.2d at 913 (citing *People v. Birreuta*, 208 Cal. Rptr. 635, 639 (Cal. Ct. App. 1984)).

⁷⁷ *Fernandez*, 673 N.E.2d at 913 (citing *Ford v. State*, 625 A.2d 984, 998 (Md. 1993)).

elements of that crime have been met, absent the intended victim's death (i.e., when the actual victim died instead).⁷⁸

IV. PRIOR COURT OF APPEALS CASES ON THE ISSUE OF CHARGING INTENTIONAL AND DEPRAVED INDIFFERENCE MURDER

While *Gallagher* and *Trappier* both discussed the issue of whether a court can submit both an intentional murder and depraved indifference murder charge to the jury, these decisions did not provide a definitive direction to the Departments of the Appellate Division.⁷⁹ Subsequently, the Departments adopted inconsistent interpretations, which will be discussed further in Part V.

In 1987, the Court of Appeals in *Gallagher* held that the court can only charge the defendant with intentional murder and depraved indifference murder in the alternative.⁸⁰ However, in *Trappier*, decided in 1995, the court held that it could charge the jury with both an intentional charge and a reckless charge in the conjunctive.⁸¹ The Court of Appeals in *Dubarry* may have distinguished *Trappier* because it was not a homicide case, but an assault case, and thus, each charge had a distinct outcome as compared to the other.⁸² Nevertheless, the Appellate Division Departments never made such a distinction. This section will discuss cases in which the Court of Appeals considered whether the court could charge a defendant with both intentional murder and depraved indifference murder.

A. *People v. Gallagher*

People v. Gallagher was the leading precedent the Court of Appeals cited in *Dubarry*.⁸³ In *Gallagher*, the court explained that it is up to the jury, not the court, to decide the defendant's mental state; therefore, the court should submit the charges in the alternative to

⁷⁸ *Fernandez*, 673 N.E.2d at 913.

⁷⁹ See *Gallagher*, 508 N.E.2d at 909; *Trappier*, 660 N.E.2d at 1131.

⁸⁰ *Gallagher*, 508 N.E.2d at 910.

⁸¹ *Trappier*, 660 N.E.2d at 1133.

⁸² *Dubarry*, 31 N.E.3d at 95.

⁸³ *Id.* at 94. *Dubarry* adopted similar reasoning, as well as the same conclusion: that the court cannot submit intentional murder and depraved indifference charges in the conjunctive. *Id.* at 95.

enable the jury to properly determine the defendant's mental state at the time of the crime.⁸⁴

In *Gallagher*, the court held that the jury could not convict the accused of both intentional murder and depraved indifference murder simultaneously; rather, the jury may convict him of one or the other.⁸⁵ The defendant was a veteran New York City Police Officer, who consumed large amounts of alcohol after an all-night celebration on St. Patrick's Day.⁸⁶ That night, the defendant shot and killed a fellow police officer, similar to how the victim was shot and killed in *Dubarry*.⁸⁷ The defendant was charged with two different counts of murder in the second degree.⁸⁸ The trial judge advised defense counsel that, in conjunction with the indictments of intentional murder and depraved mind murder, he also submitted additional charges for the jury to consider.⁸⁹ Specifically, these charges were manslaughter in the first degree, as a lesser-included offense of intentional murder, and manslaughter in the second degree, as a lesser-included offense of depraved mind murder.⁹⁰ Defense counsel opposed the additional charges, arguing that this would allow the jury to return two guilty verdicts for the same act with different requisite mental states, and therefore, the court should submit the charges in the alternative.⁹¹ The judge overruled defense counsel's request, and the jury returned a guilty verdict for both intentional murder and manslaughter in the second degree, the former requiring an intentional state of mind, and the latter requiring a reckless state of

⁸⁴ *Gallagher*, 508 N.E.2d at 910.

⁸⁵ *Id.* at 909. Prior to 1998, depraved indifference murder was previously called depraved mind murder. The elements of the crime remained the same; it was simply a name change. See *Dubarry*, 31 N.E.3d at 92 n.2.

⁸⁶ *Gallagher*, 508 N.E.2d at 909.

⁸⁷ *Id.*

⁸⁸ *Id.* at 909-10.

⁸⁹ *Id.* at 910.

⁹⁰ *Id.* A lesser-included offense is a crime that contains similar "elements of a more serious crime and" is therefore committed when someone is accused of committing the more serious crime. *Lesser-Included Offense*, BLACK'S LAW DICTIONARY (10th ed. 2014). A lesser-included offense is regarded as "the same offense as the greater offense." *Id.* Thus, a conviction or acquittal of either offense prevents a trial for the other offense. *Id.*

⁹¹ *Gallagher*, 508 N.E.2d at 910.

mind.⁹² The Appellate Division, Second Department upheld the trial court's decision and an appeal ensued.⁹³

The New York Court of Appeals in *Gallagher* held that a defendant who intentionally shoots someone acts “with the conscious objective of bringing about that result”⁹⁴ That same defendant cannot act with a conscious disregard that “a substantial and unjustifiable risk that such a result will occur.”⁹⁵ The Court of Appeals focused on the fact that the act (shooting) and the result (death of the victim) were the same for both crimes.⁹⁶ In other words, the jury cannot convict the defendant of both intentional murder and depraved indifference murder because this would result in two murder convictions for one murder.⁹⁷

The Court of Appeals in *Gallagher* further explained that the Criminal Procedure Law provides that, if a defendant is indicted on two counts that conflict with one another, the court must submit at least one of those charges.⁹⁸ However, the statute further provides that if the court decides to charge the two inconsistent counts, it must charge them in the alternative, which means the jury cannot find the defendant guilty on both counts.⁹⁹ The *Gallagher* court emphasized that it was the jury's responsibility to decide if the defendant possessed either mental state at the time of the event in question.¹⁰⁰ The court further explained that this rationale applies to lesser-included offenses as well.¹⁰¹ The *Gallagher* court held that the defendant could not possess “more than one of the mental states on the kaleidoscope of culpable mental states”¹⁰² The court noted that because there was only one act (shooting), and one result (death), two convictions for one act could not be valid.¹⁰³

⁹² *Id.*; see N.Y. PENAL LAW § 125.15(1) (McKinney 2016) (stating “[a] person is guilty of manslaughter in the second degree when: [h]e recklessly causes the death of another person”).

⁹³ *Gallagher*, 508 N.E.2d at 910.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ N.Y. CRIM. PROC. LAW § 300.40(5) (McKinney 2016).

⁹⁹ *Id.*

¹⁰⁰ *Gallagher*, 508 N.E.2d at 910.

¹⁰¹ *Id.* at 911.

¹⁰² *Id.*

¹⁰³ *Id.*

Gallagher is consistent with the *Dubarry* holding in that the defendant cannot be convicted of both intentional murder and depraved indifference,¹⁰⁴ and the Court of Appeals in *Dubarry* simply reaffirmed its prior reasoning from *Gallagher*.

B. *People v. Trappier*

A number of years later, in *Trappier*, the Court of Appeals held that the jury could convict a defendant for both attempted assault in the first degree (an intentional assault charge) and reckless endangerment (a reckless assault charge).¹⁰⁵ In this case, a dispute arose between the defendant and a security guard.¹⁰⁶ When the defendant chucked a bottle in the lobby of an apartment building, the security guard told the defendant to leave, to which the defendant responded, "I'll be back."¹⁰⁷ The defendant later returned and fired three shots in the direction of the security guard.¹⁰⁸ One bullet hit the security guard in the leg, and the other went right past his ears.¹⁰⁹ The State charged the defendant with attempted assault and reckless endangerment, among other charges.¹¹⁰

The trial court in *Trappier* instructed the jury on attempted first-degree assault, which required proof beyond a reasonable doubt that the defendant *intended* "to cause serious physical injury" to the security guard.¹¹¹ On the other hand, reckless endangerment required the State to prove beyond a reasonable doubt that the defendant "*recklessly* created a grave risk of death to . . . [the security guard] under circumstances evincing a depraved indifference to human life."¹¹² Further, the court emphasized that someone "recklessly creates a grave risk of death to another person when he is aware of and consciously disregards a substantial and unjustifiable risk that a grave risk of death will result."¹¹³

¹⁰⁴ *Id.*

¹⁰⁵ *Trappier*, 660 N.E.2d at 1132.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Trappier*, 660 N.E.2d at 1132.

¹¹¹ *Id.*

¹¹² *Id.* at 1133 (emphasis added).

¹¹³ *Id.*

The defendant in *Trappier* was convicted on both reckless endangerment and attempted assault counts.¹¹⁴ Defense counsel argued to the judge that the jury's conviction meant that the defendant possessed both reckless and intentional mental states at the time of the alleged act, and such conviction was mistaken because the defendant could not have acted both intentionally and recklessly in regard to the same action.¹¹⁵ The judge rejected defense counsel's theory that the states of mind were contradictory.¹¹⁶ However, the Appellate Division, First Department reversed the trial court's decision, stating that the counts were legally inconsistent with each other.¹¹⁷ The case was further appealed to the New York Court of Appeals.¹¹⁸

The Court of Appeals in *Trappier* stated that the court must examine whether the essential elements of each charge submitted contradict each other.¹¹⁹ The court further explored the relevance and impact of *Gallagher*, which was decided eight years before *Trappier*.¹²⁰

When applying the *Gallagher* reasoning to *Trappier*, the Court of Appeals acknowledged that the act (the shooting) was the same for the reckless endangerment count and the attempted assault count,¹²¹ but the similarities between *Gallagher* and *Trappier* ended there. The *Trappier* court concluded that the attempted assault and reckless endangerment counts each required two different results.¹²² The court reasoned that a defendant may intend one result to occur (serious physical injury), while “recklessly creating a grave risk that a different, more-serious result—death” occurs from such action.¹²³ The *Trappier* court explained that the defendant may have fired his weapon at the security guard harboring the intent to cause only serious physical injury.¹²⁴ The court stated that the defendant, in firing his weapon, “simultaneously consciously disregarded a

¹¹⁴ *Id.*

¹¹⁵ *Trappier*, 660 N.E.2d at 1133.

¹¹⁶ *Id.*

¹¹⁷ *Id.*; see *People v. Trappier*, 616 N.Y.S.2d 739 (App. Div. 1st Dep't 1994).

¹¹⁸ *Trappier*, 660 N.E.2d at 1133.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Trappier*, 660 N.E.2d at 1133.

¹²⁴ *Id.* at 1133-34.

substantial and unjustifiable risk that, by so doing, he would create a grave risk of a more severe outcome,” the security guard’s death.¹²⁵ Ultimately, the New York Court of Appeals in *Trappier* reversed the First Department decision and held that a court can charge a defendant with both reckless and intentional charges when the defendant’s act produces two distinct results.¹²⁶

The Court of Appeals in *Dubarry* correctly distinguished its facts from those in *Trappier*. *Trappier* did not involve a homicide, but first-degree assault and reckless endangerment.¹²⁷ Therefore, the statutes required different mens rea and actus reus for attempted assault and reckless endangerment charges; the former mens rea requiring intent to cause serious physical injury and the latter requiring reckless creation of a grave risk of death.¹²⁸ Even though the defendant may intend to cause serious physical injury and not death, intent to inflict injury can still cause a more serious risk of death.¹²⁹ In *Dubarry*, by contrast, the depraved indifference and intentional murder charges both required the end result of death.¹³⁰ The Court of Appeals in *Dubarry* clarified that *Gallagher* and *Trappier* involved different situations; however, the court did not adequately differentiate these two cases.

V. APPELLATE DIVISION SPLIT

In *Gallagher* and *Trappier*, the Court of Appeals discussed whether the court may charge a defendant with both intentional murder and depraved indifference murder.¹³¹ The court reached seemingly different conclusions, which resulted in a split among the four Departments of the Appellate Division.¹³² The First, Second, and Fourth Departments all concluded that a court may charge a defendant with both an intentional murder charge and a depraved indifference murder charge, while the Third Department concluded that a court can only charge a defendant with such crimes in the

¹²⁵ *Id.* at 1134.

¹²⁶ *Id.* at 1132.

¹²⁷ *Id.*

¹²⁸ *Trappier*, 660 N.E.2d at 1132-33.

¹²⁹ *Id.*

¹³⁰ *Dubarry*, 31 N.E.3d at 94.

¹³¹ See *Trappier*, 660 N.E.2d at 1132; *Gallagher*, 508 N.E.2d at 909.

¹³² See discussion *infra* Section V.A.

alternative.¹³³ Thus, a jury could convict different defendants committing the same crimes in the same state and under similar facts with one or two murder charges, depending upon the Department in which the case fell.

A. Appellate Division Departments that Charged Intentional Murder and Depraved Indifference Murder in the Conjunctive

The First, Second, and Fourth Departments all held that a jury may convict a defendant of both a depraved indifference charge and intentional murder charge.¹³⁴ The relevant decisions from each of these Departments are discussed below.

1. Appellate Division, First Department

The consensus in the First Department was that the court can charge intentional murder and depraved indifference together.¹³⁵ However, the First Department did not elaborate beyond stating the holding.

a. People v. Page

In *People v. Page*,¹³⁶ the First Department affirmed a defendant's convictions of both intentional murder under a transferred intent theory and depraved indifference murder.¹³⁷ The defendant argued that the First Department should reverse these counts because they were not submitted to the jury as alternatives.¹³⁸ The court reasoned that because more than one potential victim was present at the time of the shooting, the jury could convict the defendant of both murder counts.¹³⁹ Because it was possible the defendant possessed a different state of mind with respect to each

¹³³ *Id.*

¹³⁴ See discussion *infra* Section V. A.1-4.

¹³⁵ See *People v. Page*, 880 N.Y.S.2d 287 (App. Div. 1st Dep't 2009); *People v. Monserate*, 682 N.Y.S.2d 25 (App. Div. 1st Dep't 1998).

¹³⁶ *Page*, 880 N.Y.S.2d 287. The defendant in *Page* was convicted of two counts of murder in the second degree, among other charges. *Id.* at 288. The court did not develop the facts any further.

¹³⁷ *Id.* at 289.

¹³⁸ *Id.*

¹³⁹ *Id.*

individual victim, the court affirmed the defendant's conviction on both murder charges.¹⁴⁰

b. *People v. Monserate*

In *People v. Monserate*,¹⁴¹ the First Department affirmed that there was sufficient evidence to convict the defendant of intentional murder under the theory of transferred intent and depraved indifference murder.¹⁴² The First Department held that the trial court properly submitted the charges in the conjunctive rather than the alternative because "more than one mens rea could have existed simultaneously under the circumstances."¹⁴³ The court explained that the defendant acted intentionally with regard to his intended victim and caused the death of the actual victim, which satisfied the mens rea element of intentional murder under the doctrine of transferred intent.¹⁴⁴ The First Department decided the defendant also acted with depraved indifference in regard to the general public, including the actual victim.¹⁴⁵ For these reasons, the First Department affirmed the trial court's decision.¹⁴⁶

2. *Appellate Division, Second Department*

The Second Department held that the trial court could submit to the jury a charge requiring an intentional mens rea and a charge requiring a reckless mens rea in the conjunctive.¹⁴⁷ In *People v. Douglas*,¹⁴⁸ the court reasoned that it could charge a defendant with reckless assault and intentional assault in the conjunctive because the defendant could act recklessly with respect to one victim while also acting intentionally with respect to another victim.¹⁴⁹

¹⁴⁰ *Page*, 880 N.Y.S.2d at 289.

¹⁴¹ 682 N.Y.S.2d 25 (App. Div. 1st Dep't 1998). The defendant in *Monserate* was convicted of two counts of murder in the second degree, among other charges. *Id.* at 26. The court did not develop the facts any further.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Monserate*, 682 N.Y.S.2d at 26.

¹⁴⁶ *Id.*

¹⁴⁷ *See Douglas*, 901 N.Y.S.2d 57.

¹⁴⁸ 901 N.Y.S.2d 57 (App. Div. 2d Dep't 2010).

¹⁴⁹ *Id.* at 61.

In *Douglas*, a van with tinted windows double-parked in a traffic lane in Brooklyn, New York on September 26, 2003.¹⁵⁰ A family (the Williamses) was in the van sitting with the passenger side door open.¹⁵¹ The defendant started to back his vehicle into a parking spot next to the van when he rolled over a glass bottle and hit Ms. Williams with the flying glass from that bottle.¹⁵² Ms. Williams's son and brother confronted the defendant to ask for an apology.¹⁵³ The defendant stepped out of his car, proceeded back in the vehicle, turned the car around, and parked across the street from the van.¹⁵⁴ He then exited his vehicle and ran across the street carrying a gun.¹⁵⁵ The defendant fired his gun at the Williamses' vehicle.¹⁵⁶ "The [defendant] pointed the gun through an open window and fired two more shots"¹⁵⁷ A police officer arrived, and a police chase ensued, leading the police to catch the defendant.¹⁵⁸

The prosecution charged the defendant with two counts of assault in the first degree.¹⁵⁹ The first count alleged that the defendant "*intended* to cause serious physical injury" to the victim with a deadly weapon.¹⁶⁰ The second count alleged that the defendant "*recklessly* engaged in conduct that created a grave risk of death to" the victim.¹⁶¹ The jury convicted the defendant of depraved indifference reckless assault, but he later appealed, stating that he only acted intentionally towards Ms. Williams and her son.¹⁶² The defendant further argued that while the evidence could support a conviction of intentional assault under the transferred intent theory, it could not support a conviction of reckless assault.¹⁶³

The *Douglas* court stated, "[w]hether a criminal act is intentional or reckless depends upon the relationship between the perpetrator's objective in committing the act and the result the act

¹⁵⁰ *Id.* at 59.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Douglas*, 901 N.Y.S.2d at 59.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Douglas*, 901 N.Y.S.2d at 59.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Douglas*, 901 N.Y.S.2d at 59.

produces.”¹⁶⁴ The court stated that “[o]rdinarily a defendant cannot be guilty of both the intentional and reckless *assault of the same individual* because a defendant cannot intend to cause serious physical injury to a person and at the same time consciously disregard a risk that he or she will succeed in doing so.”¹⁶⁵ The *Douglas* court noted that if the defendant harmed the intended victim, created a grave risk to the intended victim’s life, was aware of such risk but disregarded it, and ultimately caused serious physical injury to the actual victim, that act constituted reckless assault.¹⁶⁶ In other words, the defendant may act with intent directed at one person, while acting recklessly with respect to a different person.¹⁶⁷ The court found that the defendant acted with specific intent to kill or injure his intended victims, *and* he “created a substantial, unjustifiable, and grave risk of death,” not only to the victim but also to the other occupants of the car.¹⁶⁸ The court concluded that the evidence would have supported a conviction of intentional assault under the transferred intent theory and sufficiently supported a conviction of depraved indifference reckless assault.¹⁶⁹

3. *Appellate Division, Fourth Department*

The Fourth Department has likewise held that the court may charge a defendant with intentional murder and depraved indifference in the conjunctive, rather than in the alternative, adopting the same reasoning as the First and Second Departments.

In *People v. Henderson*,¹⁷⁰ the defendant appealed his murder convictions, alleging the State improperly charged him with both intentional murder and depraved indifference murder.¹⁷¹ The court held that the defendant “intend[ing] to murder one victim when he drove a vehicle into a crowd did not preclude a finding that he acted with depraved indifference with respect to the three other victims

¹⁶⁴ *Id.* at 60 (quoting *People v. Atkinson*, 799 N.Y.S.2d 125, 129 (App. Div. 2d Dep’t 2005) (internal quotations omitted)).

¹⁶⁵ *Douglas*, 901 N.Y.S.2d at 60 (emphasis added).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 61.

¹⁶⁹ *Id.*

¹⁷⁰ 911 N.Y.S.2d 521 (App. Div. 4th Dep’t 2010).

¹⁷¹ *Id.* at 522.

...¹⁷² The court agreed with the First Department’s decision in *Page*, reasoning that because there was “more than one potential victim,” the defendant could possess different mental states with respect to each victim.¹⁷³ Therefore, the jury could indeed convict the defendant of both depraved indifference and intentional murder.¹⁷⁴

B. Appellate Division, Third Department: The Only Department that Charged Intentional Murder and Depraved Indifference Murder in the Alternative

The Third Department is the only Department of the New York Appellate Division that held that in most cases, a court must submit an intentional murder and depraved indifference murder charge *exclusively* in the alternative.¹⁷⁵ The court determined that the jury’s role is to decide which mens rea the defendant possessed at the time of the crime.¹⁷⁶ Therefore, the jury cannot find that the defendant acted both intentionally and recklessly with respect to the same result.

The Third Department in *People v. Molina*¹⁷⁷ held that the trial court could submit an intentional murder charge and a depraved indifference charge only in the alternative.¹⁷⁸ In *Molina*, the defendant and two other people, Ross and Knox, were at a nightclub in Elmira in July 2008.¹⁷⁹ A dispute erupted between Ross and an additional group of men from South Carolina.¹⁸⁰ Both groups went to an apartment complex where they met up with additional groups outside of the complex.¹⁸¹ One man saw the defendant pull out a gun and started to shoot.¹⁸² One bullet penetrated the apartment complex

¹⁷² *Id.*

¹⁷³ *Id.* at 523.

¹⁷⁴ *Id.*

¹⁷⁵ *See Molina*, 914 N.Y.S.2d 331.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 336.

¹⁷⁹ *Id.* at 334.

¹⁸⁰ *Molina*, 914 N.Y.S.2d at 334.

¹⁸¹ *Id.* at 335.

¹⁸² *Id.*

and struck Maurice Davis in the head while he was in his apartment, ultimately causing his death.¹⁸³

The State charged the defendant with two counts of murder in the second degree, and he was convicted of manslaughter in the first degree¹⁸⁴ and depraved indifference murder.¹⁸⁵ The defendant appealed to the Third Department, arguing that the trial court erred by not submitting the charges in the alternative.¹⁸⁶ Agreeing with the defendant, the court reasoned that “[t]win-count indictments . . . charging both intentional homicide and depraved indifference murder . . . should be rare[, with t]win-count submissions to a jury, even rarer.”¹⁸⁷ The court stated that when the State presents both murder counts to the court, the trial court “should presume that the defendant’s . . . [acts] fall[] only within one category of murder”¹⁸⁸

The *Molina* court held that while the defendant intended to kill at least one of the men from South Carolina, he accidentally killed Davis.¹⁸⁹ The court explained that as a result, the defendant could be convicted of either intentional murder under the theory of transferred intent or depraved indifference murder by shooting into an occupied apartment building; however, the defendant may *not* be found guilty of both.¹⁹⁰ Concluding otherwise, the court noted, would:

take[] the issue of determining [the] defendant’s mens rea out of the hands of the jury, and invite[] the jury to simultaneously convict [the] defendant of killing Davis both intentionally and with a depraved mind, when it should have been instructed that it could find defendant guilty of *either* intentional murder *or* depraved indifference murder¹⁹¹

¹⁸³ *Id.*

¹⁸⁴ Manslaughter in the first degree is a lesser-included offense of intentional murder and thus also requires intent, while depraved indifference is not premised on the mens rea of intent. *See* N.Y. PENAL LAW § 125.25 (McKinney 2016).

¹⁸⁵ *Molina*, 914 N.Y.S.2d at 335.

¹⁸⁶ *Id.* at 336.

¹⁸⁷ *Id.* at 335 (quoting *Suarez*, 844 N.E.2d at 731 (internal quotations omitted)).

¹⁸⁸ *Molina*, 914 N.Y.S.2d at 335.

¹⁸⁹ *Id.* at 336.

¹⁹⁰ *Id.* at 335.

¹⁹¹ *Id.*

For these reasons, the court disagreed with the other three departments and held that the court could not submit the depraved indifference and intentional murder charges to the jury together.¹⁹²

C. The Effect of *Dubarry* on Prior First, Second, and Fourth Department Cases

The *Dubarry* court did not satisfactorily resolve the split among the Departments. As discussed above, the First, Second, and Fourth Departments of the Appellate Division all held that a court may submit intentional murder and depraved indifference murder charges together for a single murder. This rule conflicts with the Court of Appeals' recent decision in *Dubarry*, rendering most cases that were decided in conflict with *Dubarry* no longer good law if the defendant's action in the case resulted in a single murder. Thus, for the future, it is questionable what attorneys at the Appellate Division level will argue. For homicide charges, *Dubarry* seems clear: one victim and one murder results in the State's charging two different murder charges in the alternative. However, if the case is not a homicide and is instead an assault, analogous to *Trappier*, then it seems that as long as the actus reus was different (meaning two distinct results could occur), then the State may charge the defendant with the two different assault charges in the conjunctive. However, this concept is problematic, especially when every case and set of facts are different. Essentially, the State will take the *Trappier* side, and the defense will take the *Gallagher/Dubarry* approach. It is challenging to take a cookie cutter approach, making it difficult not only for the Appellate Divisions to apply the law but also for the Court of Appeals.

VI. THE INCONSISTENCY WHICH LED TO "TWIN-COUNT INDICTMENTS" IN THE NEW YORK COURT OF APPEALS

Scholars and professionals, including judges, predicted that an issue would arise if courts allowed the State to charge defendants with both depraved indifference and intentional murder.¹⁹³ It is likely

¹⁹² *Id.* at 336.

¹⁹³ See Sweet v. Bennett, 353 F.3d 135, 143-48 (2d Cir. 2003) (Walker, J., concurring); 1 N.Y. LAW OF DOM. VIO. *Murder in the Second Degree, Depraved Indifference Murder* §

that poor drafting of the statute by the New York Legislature contributed to this problem.¹⁹⁴ The statutory elements of intentional murder are self-explanatory: a defendant must intend to cause a person's death, and that death must occur.¹⁹⁵ On the other hand, depraved indifference was not clearly defined in the statute, and was left up to the New York courts to decide.¹⁹⁶ This section will discuss the different interpretations of depraved indifference murder, along with the profound effect of these varying interpretations on the criminal justice system.

In New York, a person is guilty of depraved indifference murder when, "under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person."¹⁹⁷ From the 1880s to the 1980s, the New York Court of Appeals agreed that depraved indifference was a mental state distinct from the mental state of recklessness, even though recklessness was included in the definition of "depraved indifference."¹⁹⁸

However, in *People v. Register*,¹⁹⁹ the New York Court of Appeals held that depraved indifference was *not* a separate culpable mental state.²⁰⁰ The Court of Appeals stated that depraved indifference does not refer to either the actus reus or mens rea.²⁰¹ The *Register* court stated that when the court previously held that depraved indifference murder was not a culpable mental state, it "objectively define[d] the circumstances which must exist to elevate a homicide from manslaughter to murder."²⁰²

In *People v. Sanchez*,²⁰³ the Court of Appeals applied the *Register* test, which resulted in a dissent by Judge Rosenblatt that

2:77, Westlaw (3d ed. database updated Nov. 2016) [hereinafter *Murder in the Second Degree*].

¹⁹⁴ *Bennett*, 353 F.3d at 144-45 (Walker, J., concurring).

¹⁹⁵ N.Y. PENAL LAW § 125.25(1) (McKinney 2016).

¹⁹⁶ See *Feingold*, 852 N.E.2d at 1164-65.

¹⁹⁷ N.Y. PENAL LAW § 125.25(2) (McKinney 2016).

¹⁹⁸ See *People v. Poplis*, 281 N.E.2d 167 (N.Y. 1972); *People v. Jernatowski*, 144 N.E. 497 (N.Y. 1924); *Darry v. People*, 10 N.Y. 120 (1854) (holding that recklessness and depraved indifference were distinct mental states).

¹⁹⁹ 457 N.E.2d 704 (N.Y. 1983).

²⁰⁰ *Id.* at 708.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ 777 N.E.2d 204 (N.Y. 2002).

heavily criticized this test.²⁰⁴ He stated, “In concluding that depraved indifference murder has a mens rea of ordinary recklessness, the [c]ourt in *Register* essentially took the ‘depraved’ out of depraved indifference, so that depraved indifference murder is virtually indistinguishable from reckless manslaughter.”²⁰⁵ Judge Rosenblatt argued that the broad definition of depraved indifference would lead courts to charge juries with both intentional murder and depraved indifference murder, leading depraved indifference murder to lose its true meaning.²⁰⁶ Later cases such as *People v. Gonzalez*²⁰⁷ carved out exceptions to the *Register* rule when differentiating between intentional and depraved indifference murder.²⁰⁸ In *Gonzalez*, the court held that when a defendant *purposefully* intends to kill someone, depraved indifference is not present.²⁰⁹ Thus, the Court of Appeals attempted to draw a line between conduct that evinced a depraved indifference to human life and conduct that was intentional.²¹⁰

Eventually, the Court of Appeals in *People v. Feingold*²¹¹ expressly overruled *Register* and decided that depraved indifference murder was a culpable mental state and was not an objective set of circumstances.²¹² The court explained that “depraved indifference is best understood as an utter disregard for the value of human life – a willingness to act not because one intends harm, but because one simply doesn’t care whether grievous harm results or not.”²¹³ With *Feingold* overruling *Register*, critics were hopeful that courts charging both murder counts would be a thing of the past.²¹⁴ Unfortunately, that is not true as demonstrated by this note.

Throughout the *Register* period, judges reasoned that prosecutors were receiving an unfair advantage over defendants because they could attempt to obtain two convictions rather than

²⁰⁴ *Id.* at 218 (Rosenblatt, J., dissenting).

²⁰⁵ *Id.* at 227 (Rosenblatt, J., dissenting).

²⁰⁶ *Id.* at 232-33 (Rosenblatt, J., dissenting).

²⁰⁷ 807 N.E.2d 273 (N.Y. 2004).

²⁰⁸ *Id.* at 275-76.

²⁰⁹ *Id.* at 276-77.

²¹⁰ *Id.*

²¹¹ 852 N.E.2d 1163 (N.Y. 2006).

²¹² *Id.* at 1169.

²¹³ *Id.* at 1168 (internal quotations omitted).

²¹⁴ See *Murder in the Second Degree*, *supra* note 193.

one.²¹⁵ Judge Bellacosa in his dissent in *People v. Roe*²¹⁶ correctly predicted that an increased number of prosecutors would charge a defendant with both depraved indifference and intentional murder.²¹⁷ Additionally, Judge Rosenblatt dissented from *Sanchez* expressing similar concerns:

[D]epraved indifference murder counts have become routine escorts to intentional murder counts

. . . .

[T]he charge of depraved indifference murder, intended to be a rare indictment for a rare breed of criminal, has undeniably become a tactical weapon of choice that distorts the Penal Law and skews the process of indictment, trial and plea²¹⁸

Judge Rosenblatt expressed concerns he and many other judges had in cases prior to *Feingold*. While the majority in *Feingold* was probably hopeful for a change, as evidenced by *Dubarry*, defendants are still wrongfully charged with both intentional and depraved indifference murder.

VII. THE IMPLICATIONS OF DUBARRY

The Court of Appeals in *Dubarry* attempted to resolve the split among the Appellate Division Departments on the issue of whether a court can charge a defendant with both intentional murder and depraved indifference murder for the same killing. Prior to *Dubarry*, the First, Second, and Fourth Departments all agreed that the court could submit a murder charge requiring an intentional mens rea and a murder charge requiring a depraved indifference mens rea in the conjunctive.²¹⁹ However, the Third Department disagreed, instead finding that courts can only submit these charges in the alternative.²²⁰ As the Third Department explained in *Molina*, a defendant cannot kill with both an intentional and a depraved indifference state of mind.²²¹

²¹⁵ *Id.*

²¹⁶ 542 N.E.2d 610 (N.Y. 1989).

²¹⁷ *Roe*, 542 N.E.2d at 619 (Bellacosa, J., dissenting).

²¹⁸ *Sanchez*, 777 N.E.2d at 224 (Rosenblatt, J., dissenting).

²¹⁹ See discussion *supra* Section V.

²²⁰ *Molina*, 914 N.Y.S.2d at 336.

²²¹ *Id.* at 336.

The Court of Appeals in *Dubarry* agreed with the Third Department: the defendant can only possess either an intentional or a depraved indifference state of mind, but not both.²²² The *Dubarry* court emphasized that submitting the charges in the conjunctive deprives the jury of its role in determining the defendant's state of mind at the time the murder or act was committed.²²³

The *Dubarry* holding is consistent with the dissents in *Sanchez* and *Roe*.²²⁴ However, *Dubarry*, *Sanchez*, and *Roe* all involved murder charges.²²⁵ Would it make a difference if the charges were assault charges? The answer is likely yes, according to the Court of Appeals in *Trappier*, which held that the court can charge a defendant with both attempted assault and reckless endangerment.²²⁶ The *Trappier* court examined the mens rea and actus reus of the charges and concluded that each charge required a different result.²²⁷ In such a case, the defendant could intend to cause serious physical injury, while also recklessly causing a grave risk of death to another person.²²⁸ The *Dubarry* court came to the right decision and *Trappier* should not be overruled; however, the *Dubarry* court should have explained further how it came to its decision.

Judges have pointed out that New York Court of Appeals cases wrongly focus on the act of the crime.²²⁹ However, it is hard to distinguish the results in a murder case from each other – can a defendant intend to kill someone while also recklessly causing his death?

The fact-specific nature of the cases makes it extremely challenging to create a definite rule. However, even in *Dubarry*, the Court of Appeals did not seem to resolve the Appellate Division split. *Dubarry* is just another decision specifically ruling on the facts of the case. Defense counsel cannot guarantee to his client that a judge will not charge him with both intentional murder and depraved

²²² *Dubarry*, 31 N.E.3d at 95.

²²³ *Id.*

²²⁴ See *supra* notes 217-18 and accompanying text.

²²⁵ See *Dubarry*, 31 N.E.3d at 89; *Roe*, 542 N.E.2d at 610; *Sanchez*, 777 N.E.2d at 204.

²²⁶ *Trappier*, 660 N.E.2d at 1132.

²²⁷ *Id.* at 1132-34 (stating that reckless endangerment required the defendant to recklessly create a grave risk of death to another person under circumstances evincing a depraved indifference to human life, while attempted assault required the defendant to intend serious injury).

²²⁸ *Id.*

²²⁹ See *Bennett*, 353 F.3d at 143-48 (Walker, J., concurring).

indifference murder because it depends on how fact-specific the case is and what precedent the judge applies that day. While the *Dubarry* court rightfully held that, on the facts of that case, a trial court cannot charge a defendant with both intentional and depraved indifference murder, the *Dubarry* court did not resolve the split among the Appellate Divisions and did not make it easier to resolve future cases before the Court of Appeals. The Court of Appeals should have explained the rationale for its holding and furnished an in-depth analysis as to the significance of the differences between *Gallagher* and *Trappier*. This would have provided meaningful guidance not only to the Departments of the Appellate Division, but also to the trial courts.