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COMMENTS

DEPRAVED MIND MURDER AND INTOXICATION: SOME SOBERING THOUGHTS ON *PEOPLE v. REGISTER*

INTRODUCTION

In New York and other jurisdictions following the Model Penal Code, those who intentionally kill¹ others and those who kill with recklessness under circumstances evincing a depraved indifference to the value of human life² face the same possible sentences.³ In New York, they are jointly classified under the heading of second degree murder.

However, if one intentionally kills while voluntarily intoxicated, he may submit evidence of intoxication to negate his apparent intent.⁴

1. N.Y. PENAL LAW § 125.25(1) (McKinney 1975) [hereinafter cited as PENAL LAW]. The statute provides: "A person is guilty of murder in the second degree when: 1. With intent to cause the death of another person, he causes the death of such person or of a third person. . . ." *Id.*

2. PENAL LAW § 125.25(2) provides: "A person is guilty of murder in the second degree when: 2. 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. . . ." *Id.*

3. Murder in the second degree is a class A-I felony. PENAL LAW § 125.25 (McKinney Pam. 1984). Pursuant to PENAL LAW § 70.00(2)(a) and (3)(a), a person convicted of a class A-I felony is subject to a minimum term of imprisonment of not less than fifteen years nor more than twenty-five years. The maximum term of imprisonment shall be life imprisonment.

4. PENAL LAW § 15.25 provides: "Intoxication is not, as such, a defense to a criminal charge; but in any prosecution for an offense, evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negative an element of the crime charged." *Id.* Evidence of voluntary intoxication may be introduced to negate the element of intent as provided by PENAL LAW § 125.25(1). See *People v. Koerber*, 244 N.Y. 147, 155 N.E. 79 (1926). See *infra* notes 58, 59 and accompanying text.

The successful introduction of evidence of voluntary intoxication as a mitigating factor to a charge of intentional murder will result in the reduction of the charge to manslaughter in the first degree. *Koerber*, 244 N.Y. at 151, 155 N.E. at 81 (discussing *People v. Leonardi*, 143 N.Y. 360, 38 N.E. 372 (1894)). Manslaughter in the first degree is a class B felony, PENAL LAW § 125.20(2), and carries a maximum term of imprisonment of not more than twenty-five years. The minimum term of imprisonment may not exceed one-third of the maximum. The court has discretion in determining the minimum based on the nature and circumstances of the

This is not the case with one accused of depraved mind murder in New York, as held in the case of *People v. Register*.⁵

This Comment assesses the reasoning of the majority and dissenting opinions in *Register*, considers the history of depraved mind homicide in New York, and addresses the related basic policy issues. It concludes with the explanation of a proposed framework that could provide for a more policy-sensitive treatment of such crimes, either as a tool for judicial decision-making or for refining the New York Penal Law with respect to this offense.

*Two Hypotheticals*⁶

Hypothetical No. 1: Four third-year law students, Dan, Ken, Neil and Steve, shared a summer house in the town of Centerport, Suffolk, County, New York, during the Fall 1984 semester. They had just completed the last of their final exams and their thoughts on that fateful December afternoon had turned from textbooks and outlines to bottles of bourbon.

They sat around the kitchen table drinking shots from the bottle. When the 750 ml. bottle was finished, Steve recalled that he had seen more liquor in a basement cabinet among the abandoned belongings of the summertime lessees. He decided that it would be safer to “borrow” a bottle than to drive to a liquor store and risk being pulled over by the police. He figured he had to be well over the .10% blood alcohol level that statutorily constitutes driving while in-

crime, and the history and character of the defendant, PENAL LAW § 70.00(3)(b). Judge Jasen notes the paradoxical problem created by *Register*:

Under the majority's rule . . . a person who possessed only a reckless state of mind when he caused the death of another could be convicted of depraved mind murder . . . and sentenced to a term of 15 years to life imprisonment simply because objective circumstances surrounding the killing presented a “grave risk” of death even though the actor, due to intoxication, was unaware of those circumstances and could not appreciate the risks. The majority would also hold that another person who is fully aware of a “substantial and unjustifiable risk” and consciously disregards that risk can only be found guilty of manslaughter in the second degree and sentenced to as little as one and one-half years in jail . . . While there may be a technical distinction between a “grave” risk and a “substantial” one, the only real difference is about 15 years in prison.

60 N.Y.2d at 284-85, 457 N.E.2d at 712, 469 N.Y.S.2d at 606-07 (citing Gegan, *A Case of Depraved Mind Murder*, 49 ST. JOHN'S L. REV. 417, 442 (1974) [hereinafter cited as Gegan]).

5. 60 N.Y.2d 270, 457 N.E.2d 704, 469 N.Y.S.2d 599 (1983), *cert. denied*, 104 S. Ct. 2159 (1984).

6. The facts of the first hypothetical are based on the case of *Commonwealth v. Malone*, 354 Pa. 180, 47 A.2d 445 (1946) where two unintoxicated youths engaged in a game of “Russian poker.”

toxicated in New York.⁷ Each of them had consumed approximately one-quarter of the previous bottle of bourbon.

When he located the bottle, he found next to it a .38 caliber revolver. He opened the revolver's cylinder and found one live round. He took the bottle and the pistol, and stumbled upstairs to the kitchen.

"Look what I found!" said Steve. His housemates' eyes widened as they took in first, the fresh bottle of Jack Bourbon, then the revolver. All of them were intoxicated.⁸

"Is it loaded?" asked Neil.

"Yeah, its got one round in the cylinder," said Steve.

"Wanna play 'Russian poker?' " asked Dan.

"What's that?" asked Ken.

"It's a game where you take turns holding the gun up to the other guy's head and pulling the trigger."

"Like 'Russian roulette?' " asked Steve.

"Yeah," said Dan, "but the turns are taken much faster."

"Sounds good to me."

"Me, too."

"I'm in."

Steve took his place at the table. They continued to pass the bottle as the game commenced. Ken spun the cylinder, for effect, and put the revolver on the table.

"Who'll go first?" asked Neil.

"I will," said Ken. At that, he picked up the pistol, held it to Dan's head and pulled the trigger.

"Click," went the pistol. Ken spun the cylinder and handed it to Dan, who, in turn, pointed the barrel at Neil.

"Click." Neil pointed the pistol at Steve. Again, nothing happened. Neil spun the cylinder and handed it to Steve, who pointed it at Ken. When Steve pulled the trigger, the pistol discharged, killing Ken. The remaining three were shocked.

Hypothetical No. 2: Same facts as above, except that when it was Steve's turn to fire at Ken, Ken said to Steve, "By the way, I think you're a slob. You *never* clean your dishes."

7. N.Y. VEH. & TRAF. LAW § 1192(2) and (3) (McKinney Supp. 1984-1985).

8. Because the students were already drunk before they even thought to engage in the game, there are no problems with mitigation because of "bolstering." That is, drinking to work up the courage to perform a crime for which the defendant has already developed the specific intent. W. LAFAYE & A. SCOTT, JR., CRIMINAL LAW § 45 (1972) [hereinafter cited as LAFAYE & SCOTT].

Incensed by Ken's remark, Steve spun around wielding the revolver in his right hand. He pointed the gun at Ken, shouted "You're a dead man!" and pulled the trigger four times in rapid succession until the hammer found the fatal chamber, sending the deadly bullet through Ken's head.

Analysis: In hypothetical No. 1, Steve could be charged with and probably convicted of murder, whereby, "[u]nder circumstances evincing a depraved indifference to human life, he recklessly engage[d] in conduct which create[d] a grave risk of death to another person, and thereby cause[d] the death of another person."⁹ Under *Register*, evidence of his intoxication would be inadmissible to mitigate his crime.

In hypothetical No. 2, Steve could be charged with intentional murder, such that "[w]ith intent to cause the death of another person, he cause[d] the death of such a person or of a third person."¹⁰ However, convincing evidence of his intoxication may be admitted to negate the *mens rea* of intent, thus limiting any conviction to first degree manslaughter.¹¹ The irony of this was expressed by Judge Jasen, in his dissent:

It is . . . anomalous to say, as the majority does, that the Legislature intended that an individual who had no awareness of the seriousness of his conduct or the circumstances surrounding his actions due to intoxication and had no intent to kill should be punished as severely as the intentional killer.¹²

The Judge further noted that the practical effect of the *Register* decision may be even more perplexing: "The rule announced by the majority today effectively eviscerates the distinction between manslaughter in the second degree . . . and murder in the second degree . . . with respect to the accused's state of mind."¹³

I. THE CONTEXT OF *REGISTER*

Early in the morning of July 15, 1977, an intoxicated man, Bruce Register, produced a handgun during an argument in a bar and inexplicably fired three shots into the crowd around him, killing one patron and seriously wounding two others.¹⁴ Convicted of murder in

9. PENAL LAW § 125.25(2).

10. *Id.* § 125.25(1).

11. *See supra* note 4. *See also* PENAL LAW § 125.20.

12. 60 N.Y.2d at 286-87, 457 N.E.2d at 713, 469 N.Y.S.2d at 608 (Jasen, J., dissenting).

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

14. *Id.* at 273-74, 457 N.E.2d at 705, 469 N.Y.S.2d at 600.

the second degree under New York Penal Law section 125.25, subdivision 2, for recklessly causing the death of another person under circumstances evincing a depraved indifference to human life, Register argued to the Appellate Division, Fourth Department, that the trial court erred in refusing to charge the jury that evidence of voluntary intoxication could negate the element of depraved indifference, reducing the offense to manslaughter in the first degree. The appellate division unanimously rejected this contention.¹⁵

The Court of Appeals, in a 4 to 3 decision, with Judge Simons writing for the majority, affirmed the conviction, holding that the depraved indifference standard did not constitute a *mens rea* element, but merely a requirement concerning the factual setting that makes a homicide murder instead of manslaughter; that depraved mind murder is a crime involving recklessness plus aggravating circumstances.¹⁶ The majority opinion added that voluntary intoxication should be an aggravating rather than a mitigating factor.¹⁷ Furthermore, the majority noted that the Penal Law prohibits the introduction of evidence of intoxication to negate the *mens rea* of recklessness.¹⁸

The majority fashioned an analysis of the depraved mind murder subdivision which may be expressed as the sum of three elements: the voluntary act (*actus reus*),¹⁹ plus the culpable mental state (*mens rea*) of recklessness,²⁰ plus the "factual setting."²¹ This analy-

15. *People v. Register*, 90 A.D.2d 972, 973, 456 N.Y.S.2d 562, 564 (4th Dep't 1982). Even if we were to agree that "depraved indifference" is a state of mind to be judged subjectively, it is not such a state of mind that can be negated by intoxication. Indifference, unlike knowledge or intent, is a negative state of mind. It is defined as a lack of feeling for or against anything; unconcernedness; apathy." [sic] (Webster's New International Dictionary [2d ed.]) There is no requirement that a person be aware of, or have knowledge of, a situation to be indifferent to it. Intoxication cannot negate indifference; if anything, it can intensify it by inducing a lack of feeling, unconcernedness, and apathy.

Id.

16. 60 N.Y.2d at 278, 457 N.E.2d at 708, 469 N.Y.S.2d at 602-03.

17. *Id.* at 280-81, 457 N.E.2d at 709, 469 N.Y.S.2d at 604.

18. *Id.* at 278, 457 N.E.2d at 708, 469 N.Y.S.2d at 603. See PENAL LAW § 15.05(3). The definition of "recklessly" includes an express prohibition against the introduction of evidence of voluntary intoxication for the purpose of negating it. See *infra* note 20. See also *People v. Koerber*, 244 N.Y. 147, 155 N.E. 79 (1926); *People v. Leonardi*, 143 N.Y. 360, 38 N.E. 372 (1894).

19. PENAL LAW § 15.00(2) provides: "'Voluntary act' means a bodily movement performed consciously as a result of effort or determination. . . ." *Id.*

20. PENAL LAW § 15.05(3) provides:

A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The

sis is unique to depraved mind murder. While *actus reus* and *mens rea* are sufficient in determining the intentional form of murder, a third and necessary element for depraved mind murder is needed. This element is termed factual setting. Factual setting necessarily entails the fact finder looking back to the moment of criminality and objectively attributing the necessary mental state to the defendant. When the factual setting supports the necessary requirements, that is, “under circumstances evincing a depraved indifference to human life,” the *mens rea* of recklessness becomes “recklessness plus.”²² This last element elevates what is otherwise reckless manslaughter²³ to depraved mind murder.

Turning to the issue of the trial court’s refusal to charge the jury that it could consider evidence of intoxication to negate an element of the crime of depraved mind murder, the majority rejected the proposition outright. They stated that evidence of intoxication typically is used to negate the mental element of a crime. However, since the mental element required by the statute for depraved mind murder is “recklessly,” voluntary intoxication under New York Penal Law section 15.25 will not be a defense to recklessness.²⁴

Finally, the court declined to consider the element of “depraved indifference” as a culpable mental state *per se*, because it is not expressly listed as such by the statute in the way that recklessness is.²⁵

Judge Jasen, writing for the minority, proposed three rebuttal arguments. First, the New York Legislature, in drafting the depraved mind murder statute, purposely distinguished between reckless manslaughter and depraved mind murder, intending that depraved indif-

risk must be of such a nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto.

Id.

21. The court expressly stated:

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

60 N.Y.2d at 276, 457 N.E.2d at 706-07, 469 N.Y.S.2d at 601. *See generally* Annot., 25 A.L.R. 4th 311 (1983).

22. *See* *People v. Poplis*, 30 N.Y.2d 85, 281 N.E.2d 167, 330 N.Y.S.2d 365 (1972) (first formulation of “recklessness plus” under New York law).

23. PENAL LAW § 125.15(1) provides: “A person is guilty of manslaughter in the second degree when: 1. He recklessly causes the death of another person. . . .” *Id.*

24. 60 N.Y.2d at 275, 276, 457 N.E.2d at 706-07, 469 N.Y.S.2d at 601.

25. *Id.* at 278, 457 N.E.2d at 708, 469 N.Y.S.2d at 602-03.

ference plus recklessness would connote a *mens rea* more culpable than recklessness alone and nearly as culpable as intent.²⁶ Second, the majority rule fails to distinguish manslaughter in the second degree from murder in the second degree with respect to the defendant's state of mind.²⁷ Third, evidence of intoxication should have been admitted to negate this greater culpability and to mitigate the offense.²⁸

Judge Jasen contended that application of the majority's analysis could produce unfair results because whether a defendant would be convicted of murder or of manslaughter would turn upon the factual setting of the crime—circumstances out of his control or awareness.²⁹ This, he argued, is inconsistent with both the overall subjective scheme of the homicide statutes and the criminal law's jurisprudential goal of “punishing the vicious will.”³⁰

He argued that the majority ignored the statute's legislative history. Citing the depraved mind murder subdivision of the Revised Statutes of 1829,³¹ he stated that the requisite *mens rea* was “a depraved mind” and though the new statute was changed slightly, it was intended to be “substantially a restatement” of the former.³²

Judge Jasen's interpretation of the statute calls for subjective proportionality in grading the offense of the defendant. While intentional murder requires that the death of the victim be the conscious objective of the defendant,³³ Judge Jasen argues: “[A] person acts

26. *Id.* at 281-83, 457 N.E.2d at 709-11, 469 N.Y.S.2d at 604-05.

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

28. *Id.* at 281, 457 N.E.2d at 709, 469 N.Y.S.2d at 604.

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

30. *Id.* at 284, 457 N.E.2d at 711-12, 469 N.Y.S.2d at 606 (citing POUND, *Introduction to Sayre, CASES ON CRIMINAL LAW* at xxxvi (1927)). See also *Morisette v. United States*, 342 U.S. 246, 250-51 (1951).

31. 60 N.Y.2d at 281, 457 N.E.2d at 710, 469 N.Y.S.2d at 604. See N.Y. REV. STAT. pt. IV, ch. 1, tit. 1, § 5(2) (1829) [former PENAL LAW § 1044(2)] which provided in relevant part:

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

2. When perpetrated by any act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual.

Id.

32. 60 N.Y.2d at 281, 457 N.E.2d at 710, 469 N.Y.S.2d at 604-05 (citing TEMPORARY STATE COMM'N ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, Proposed N.Y. PENAL LAW § 339 (1964)). See also GILBERT CRIMINAL CODE AND PENAL LAW § 130.25, at 1C-63 (1967).

33. PENAL LAW § 15.05(1) provides: “A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct.” *Id.*

with depraved indifference . . . when he engages in conduct whereby he does not intend to kill but is so indifferent to the consequences, which he knows with substantial certainty will result in the death of another, as to be willing to kill.”³⁴

Under such a view, reckless homicide would rise to the level of *knowing* homicide. The factual setting should be irrelevant; it is enough that the defendant knows with substantial certainty the result of his act.³⁵ Since “knowingly”³⁶ is a culpable mental state subject to mitigation by convincing evidence of intoxication, the drunk defendant would not be found guilty of murder. This analysis, Judge Jasen argues, restores proportionality to the application of the statute.³⁷

Last, Judge Jasen characterizes the absence of “depraved indifference” from the list of culpable mental states in the Penal Law as irrelevant since the list was not intended to be all-inclusive.³⁸

II. REGISTER AND NEW YORK PRECEDENT UNDER THE REVISED STATUTES OF 1829

This section will trace the evolution of the depraved mind murder statute in New York case law and examine how the *Register* dissent, in seeking a solution to the difficulties of *Register*, may have misinterpreted it.

In construing the murder section of the Revised Statutes of 1829,³⁹ the Court of Appeals in *Darry v. People*⁴⁰ distinguished depraved mind murder from manslaughter. In *Darry*, a woman died after several days from repeated blows by her husband. At trial, the jury was charged that in order to find the defendant guilty of murder, they had to find that his act, absent provocation or heat of passion, was “imminently dangerous to the life of the deceased and evincing . . . a depraved mind, regardless of human life, although without any premeditated design to effect the death of the deceased.”⁴¹

34. 60 N.Y.2d at 285, 457 N.E.2d at 712, 469 N.Y.S.2d at 607.

35. *Id.* at 285-86, 457 N.E.2d at 712-13, 469 N.Y.S.2d at 607.

36. PENAL LAW § 15.05(2) provides: “A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such a nature or that such circumstance exists.” *Id.*

37. 60 N.Y.2d at 286, 457 N.E.2d at 713, 469 N.Y.S.2d at 607.

38. *Id.*, n.3.

39. N.Y. REV. STAT. pt. IV, ch. 1, tit. 1, § 5(2) (1829).

40. 10 N.Y. 120 (1854).

41. *Id.* The *Darry* court decided the question of whether the depraved mind murder subdivision of the Revised Statutes of 1829 was applicable to a defendant who created a risk of

There is no ambiguity in the *Darry* court's conclusion that the words, "a depraved mind, regardless of human life" describe a defendant's state of mind.⁴² No other distinction as to the defendant's *mens rea* existed under the statute.

In the later case of *People v. Jernatowski*,⁴³ there is also evidence that the existence of a *mens rea* more culpable than recklessness was required for depraved mind murder. There, a man fired into a house he knew was occupied. The court reasoned that when a person is "aware that there are human beings in a house [and] fires several shots into it, knowing that some one may be killed and with reckless indifference whether he is or not he ought not to be relieved from the natural consequences of his act . . ."⁴⁴

Judge Jasen illustrated his approach to knowing killing with this particular quotation. However, there are two problems with his position. First, in choosing to emphasize language that would be readily cognizable under the 1967 Penal Law definitions,⁴⁵ the dissent presumes the same meaning of the language in *Jernatowski*, a 1924 decision. However, even if the use of language in *Jernatowski* were interpreted under the current definitions, a second problem arises. Judge Jasen's emphasis on the use of the word "knowing" is misplaced since it speaks to the creation of the risk, not to certainty of the result.⁴⁶ To illustrate, he would say that a person who imbibes an alcoholic beverage *knows* with substantial certainty that he will become intoxicated and does so with a reckless indifference as to whether he becomes intoxicated or not. However, the proper reading is, a person who imbibes an alcoholic beverage *knows* with substantial certainty that he *may run the risk* of becoming intoxicated and does so with a reckless indifference as to whether he becomes intoxicated or not. These illustrations echo the language of *Jernatowski*.

In viewing these cases as precedent interpreting legislative intent, one may conclude that the legislature, by enacting the murder stat-

danger to many or to one. The court reversed Darry's conviction on the ground that he had created a danger to only one individual, his wife. The statute was changed by subsequent amendment. See 30 N.Y.2d 89; see also Gegan, *supra* note 4, at 436.

42. 10 N.Y. at 142.

43. 238 N.Y. 188, 144 N.E. 497 (1924).

44. *Id.* at 191, 144 N.E. at 498.

45. 60 N.Y.2d at 282, 457 N.E.2d at 710, 469 N.Y.S.2d at 605. Judge Jasen's analysis of knowing killing is apparently premised on the current statutory definitions of "knowingly." See PENAL LAW § 15.05(2).

46. Judge Jasen emphasized the term "knowing" in *Jernatowski*, 238 N.Y. at 191, 144 N.E. at 498. The definition of "knowingly" under PENAL LAW § 15.05(2) extends only to the awareness of particular conduct or circumstances. The statute does not extend to an awareness of the result.

ute, wanted to create a law to encompass a certain class of cases where a defendant's conduct posed a substantial and unjustifiable risk to many; an act not directed at a particular individual, but one that was undirected or general.⁴⁷ Its focus was on the scope of the harm threatened by the act, not the particular state of mind of the defendant. The *mens rea* classification of depraved mind murder served to segregate manslaughter from murder, the former being a newly defined offense.

Though the dissent in *Register* may not have made adequate use of these cases as evidence of the legislative history, the cases leading up to *Register*, disregarded them entirely, a point emphatically made by the dissent.

III. DECISIONS UNDER THE 1967 PENAL LAW

*People v. Poplis*⁴⁸ was the first case in which the Court of Appeals construed the new depraved mind murder subdivision. There, a man beat his infant stepdaughter and killed her. The facts were similar to those in *Darry*, but the court reached a different result and convicted the defendant of depraved mind murder, holding that in the new wording of the subdivision, "recklessly" is the prescribed *mens rea*.⁴⁹

However, the *Poplis* decision was myopic. While treating depraved mind murder as the separate category of "recklessness plus,"⁵⁰ the court was not clear as to where depraved mind murder fit. This has distinct significance in that if depraved indifference is a greater culpable mental state than mere recklessness, mitigating factors, such as voluntary intoxication, would be irrelevant to lower the degree of culpability. If, however, depraved mind murder is more closely aligned with intentional murder, mitigating factors can be utilized. The inability to adequately deal with this category termed

47. See generally *People v. Darry*, 10 N.Y. 120 (1854) (holding that defendant had to create a risk of harm to many to be convicted under the depraved mind murder subdivision).

48. 30 N.Y.2d 85, 281 N.E.2d 167, 330 N.Y.S.2d 365 (1972).

49. *Id.* at 88, 281 N.E.2d at 168, 330 N.Y.S.2d at 367. See also PENAL LAW § 125.25, commentary at 300 (McKinney 1975) ("Subdivision 2 defines the highest crime of *reckless* homicide which is very similar to a former Penal Law offense classified as first degree murder (§ 1044[2])." (emphasis in original)).

50. The *Poplis* court stated that "[t]he definition requires conduct with 'depraved indifference' to 'human life,' plus *recklessness*." 30 N.Y.2d at 88, 281 N.E.2d at 168, 330 N.Y.S.2d at 367 (emphasis added). The *Register* majority, in discussing *Poplis*, characterized the requisite *mens rea* "*recklessness plus* aggravating circumstances." 60 N.Y.2d at 278, 457 N.E. 708, 469 N.Y.S.2d at 603 (emphasis added). The objective aggravating circumstances were not deemed to be part of the *mens rea*. *Id.*

“recklessness plus” is only highlighted in a situation such as *Register*, where there exists a potential mitigating factor.

Poplis was criticized by Professor Gegan,⁵¹ whose article on the subject of depraved mind murder was cited in both of the *Register* opinions.⁵² Nevertheless, *Poplis* was the foundation for later decisions, including *Register*. The net effect of *Poplis* was to obfuscate the categorical distinction between murder and manslaughter, save for the court’s ambiguous reference to “conduct of a graver culpability . . . rather well understood at common law to involve something more serious than mere recklessness alone which has had an incidental tragic result.”⁵³

The central theme of this Comment, and indeed, the primary concern of the *Register* dissent, is the problem of how to grade the culpability of the intoxicated defendant, given *Poplis* and its progeny.

IV. BROADER ISSUES OF CULPABILITY AND PUNISHMENT

The role of intoxication must now be brought into perspective. At common law, any *mens rea* greater than recklessness could satisfy the threshold of murder by meeting the requirement of malice.⁵⁴ Intoxication was not a defense or excuse to a criminal charge, but served as an aggravating circumstance to heighten moral culpability.⁵⁵ In fact, drinking to excess was an independent culpable act.⁵⁶

51. Gegan, *supra* note 4, at 452.

52. 60 N.Y.2d at 274, 281, 457 N.E.2d at 706, 709-10, 469 N.Y.S.2d at 600, 605.

53. 30 N.Y.2d at 88, 281 N.E.2d at 168, 330 N.Y.S.2d at 366.

54. In *Darry v. People*, 10 N.Y. 120, 136-41 (1854), Judge Selden provided an extensive historical recitation of the background and origins of common law malice, and its relationship to legislative intent in the development of the Revised Statutes of 1829. *See generally* Gegan, *supra* note 4, at 427-32. Professor Gegan explained:

At common law, malice did not mean intent. Intent is a narrow term denoting a purposive means-end relation. Intent only requires that the actor seek a particular result. It does not deal with why he sought it or whether he was justified or provoked; nor does it deal with whether the actor ought to be held accountable for the result even though he did not intend it. The broader principle of *mens rea* sought to judge moral blameworthiness and the notion of malice exhibits this quality. Malice judges the actor’s character, not just his intent. Even in the simplest cases, where the facts bespoke an intent to injure, the inquiry into malice extended beyond intent.

Id. at 429. *See generally* LAFAYE & SCOTT, *supra* note 8, at § 67 (general discussion of malice aforethought); G. FLETCHER, *RETHINKING CRIMINAL LAW* § 4.4.1 (1978) (historical background of malice aforethought) [hereinafter cited as FLETCHER].

55. 60 N.Y.2d at 279-80, 457 N.E.2d at 709, 469 N.Y.S.2d at 604, (citing *People v. Koerber*, 244 N.Y. 147, 151-52, 155 N.E. 79, 81 (1926)) (“In a recent English case . . . [t]he learned lords agreed that at common law voluntary intoxication was regarded as an aggravation of the offense. . . .” (citations omitted)).

Later statutes divided classes of murder and manslaughter by *mens rea*. The statutory tendency, absent strong social policy to the contrary, was to scale punishment for homicide by individual culpability and blameworthiness.⁵⁷

At common law, the courts recognized that evidence of voluntary intoxication could be used to prove that a defendant could not have performed the act necessary to commit the crime.⁵⁸ Later, the New York legislature modified that rule by permitting the introduction of evidence of voluntary intoxication to demonstrate a defendant's motive or intent in committing an act.⁵⁹ Some common law courts began to permit evidence of voluntary intoxication to negate some types of *mens rea* which were called "specific intent," but not for others, which were termed "general intent."

Thus, in the post-*Darry* case of *People v. Koerber*,⁶⁰ the rule of mitigation for intoxication was stated:

When criminal intent in general is all that need be established the drunken defendant is treated as if he knew the consequence of his acts; but where a particular or specific intent must be established, if the jury find that the mind of the defendant was so obscured by drink that he was incapable of forming that intent, it may justify itself in the reduction of a charge.⁶¹

The rule in *Koerber* applies to premeditated murder, but in other settings, the distinction between general and specific intent provides less guidance.⁶² There are no cases that allow intoxication to mitigate depraved indifference.

56. 60 N.Y.2d at 280, 457 N.E.2d at 709, 469 N.Y.S.2d at 604.

57. See *infra* text accompanying notes 87-89.

58. The Comments to the Model Penal Code state:

When the element of the offense which the actor seeks to disprove involves his physical activity, no difficulty is perceived in according to intoxication its full probative significance, whatever that may be. A defendant may thus show that he was comatose and hence could not have struck a blow. . . .

MODEL PENAL CODE § 2.08 comment at 4 (Tent. Draft No. 9, 1959).

59. The Penal Law provides that intoxication may be introduced to "negative an element of the crime charged." PENAL LAW § 15.25. This wording of this section does not limit the "element" negated to the *mens rea* of a crime. *Id.*

60. 244 N.Y. 147, 155 N.E. 79 (1926) (intoxicated defendant's conviction of first degree murder during robbery reversed).

61. *Id.* at 152, 155 N.E. at 81. See FLETCHER, *supra* note 54, at 850.

62. In *People v. Hood*, 1 Cal. 3d 444, 462 P.2d 370, 82 Cal. Rptr. 618 (1969), Chief Justice Traynor acknowledged the great difficulty in applying the terms general and specific intent. However, the new "line" Traynor drew between general and specific intent only produced further confusion in the lower courts. S. KADISH, S. SCHULHOFER, & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES, CASES AND MATERIALS (4th ed. 1983), Notes at 806. The authors also note that other attempts have been made to simply gloss-over the problem of categorizing the mental state of the intoxicated defendant. "An English committee once proposed the crea-

Professor Fletcher describes two conflicting interests which the law must accommodate to apportion a defendant's liability for his act with his culpability in becoming intoxicated. The compromise is "between (1) the principle that if someone gets drunk, he is liable for the violent consequences, and (2) the principle that liability and punishment should be graded in proportion to actual culpability."⁶³

The current New York Penal Law closely parallels earlier drafts of the American Law Institute's Model Penal Code (MPC).⁶⁴ In the MPC, the drafters provided legislators with a structure consisting of four kinds of culpability and three material elements including "attendant circumstances."⁶⁵

Regarding the role of intoxication in this framework, the MPC drafters incorporated the rule of general and specific intents.⁶⁶ In their scheme, the line was drawn between "recklessness" and "knowledge," the former an example of general intent, the latter an example of specific intent. Therefore, if a crime necessitated knowledge or purpose as the requisite *mens rea* by statute, the intent was specific and that element could be negated by evidence of intoxication. Conversely, crimes involving recklessness or negligence were unassailable by such evidence. Adoption of the rule was extensively

tion of a new offense of dangerous intoxication when the prosecution for a dangerous crime fails for lack of intent due to intoxication." *Id.*

63. See FLETCHER, *supra* note 54, at 847.

64. See generally MODEL PENAL CODE (Tent. Draft No. 4, 1955), MODEL PENAL CODE (Tent. Draft No. 9, 1959). Tentative Drafts 4 and 9 address, *inter alia*, general principles of liability and specific offenses involving danger to the person, respectively.

65. The Comments to the Model Penal Code state:

The draft acknowledges four different kinds of culpability: purpose, knowledge, recklessness and negligence. It also recognizes that the material elements of offenses vary in that they may involve (1) the nature of the forbidden conduct or (2) the attendant circumstances or (3) the result of conduct. With respect to each of these three types of elements, the draft attempts to define each of the kinds of culpability that may arise. The resulting distinctions are, we think, both necessary and sufficient for the general purposes of penal legislation.

The purpose of articulating these distinctions in detail is, of course, to promote the clarity of definitions of specific crimes and to dispel the obscurity with which the culpability requirement is often treated when such concepts as "general criminal intent," "*mens rea*," "presumed intent," "malice," "wilfulness," "scienter" and the like must be employed. What Justice Jackson called "the variety, disparity and confusion" of judicial definitions of "the requisite but elusive mental element" in crime (*Morissette v. United States*, 342 U.S. 246, 252 [1952]) should, in so far as possible, be rationalized by the Code.

MODEL PENAL CODE § 2.02 comments at 124 (Tent. Draft No. 4, 1955).

66. MODEL PENAL CODE § 2.08 comments at 4-5 (Tent. Draft No. 9, 1959). The Code presents extensive varying views on the validity of the general versus specific intents approach. See generally *id.*, at 4-9.

debated by the MPC drafters⁶⁷ and remains the subject of criticism.⁶⁸ However, depraved mind murder presented a problem. The *mens rea* apparently was in some sense “more” than mere recklessness, yet what that “more” consisted of was difficult to specify.

The MPC approach to depraved mind murder requires the fact finder to determine the social utility⁶⁹ of the risk creating conduct.⁷⁰ Does the actor’s reckless conduct serve any valid purpose? If not, the fact finder will impute a “depraved indifference” to the defendant and convict him of murder, instead of manslaughter.⁷¹ As one can see, the MPC approach to depraved mind murder and the intoxicated defendant embraces Professor Fletcher’s first principle, but seems to ignore the second. While the MPC holds the intoxicated defendant liable for the consequences of his violent acts, it does not allow for mitigation due to intoxication, evidencing a failure to evenly apportion liability and actual culpability.

The first clear illustration of this in New York was in *People v. LeGrand*,⁷² involving an intoxicated defendant who killed his former

67. *Id.* As the Code acknowledges, one particular faction opposes any special rule for intoxication. Their argument is that the mental element of recklessness requires an awareness of the risk, and that this awareness could be negated by intoxication, as with intent and knowledge. This approach would dissolve the artificial distinction between general and specific intent. In further support of this position, the Code noted, the awareness requirement of recklessness is the “essence of its moral culpability.” *Id.* at 8. Thus, if the intoxicated defendant is incapable of this awareness of creating a risk greater than becoming intoxicated, then he should not be held as morally blameworthy for creating that greater risk.

This argument is countered by the strong policy that one who drinks and becomes intoxicated creates a potential danger to others. “The actor’s moral culpability lies in engaging in such conduct [viz., becoming intoxicated].” *Id.* at 9. In addition to this problem lies the ability to gauge the defendant’s “foresight . . . at the time when he imbibes.” *Id.* The Drafters rejected the former and adopted the rule of general and specific intent.

68. See FLETCHER, *supra* note 54, at 851.

69. See LAFAYE & SCOTT, *supra* note 8, at 542. The authors explain:

[T]he risk must not only be very high, as the defendant ought to realize in the light of what he knows; it must also under the circumstances be unjustifiable for him to take the risk. The motives for the defendant’s risky conduct thus become relevant; or to express the thought in another way, the social utility of his conduct is a factor to be considered. If he speeds through crowded streets, thereby endangering other motorists and pedestrians, in order to rush a passenger to the hospital for an emergency operation, he may not be guilty of murder if he unintentionally kills, though the same conduct done solely for the purpose of experiencing the thrill of fast driving may be enough for murder.

Id. See also MODEL PENAL CODE § 201.1 comments at 29 (Tent. Draft No. 9, 1959).

70. MODEL PENAL CODE § 201.2(1)(b) (Tent. Draft No. 9, 1959) provides in relevant part: “[C]riminal homicide constitutes murder when: (b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life.” *Id.*

71. See *supra* note 69.

72. 61 A.D.2d 815, 402 N.Y.S.2d 209 (2d Dep’t 1978), *cert. denied*, 439 U.S. 835 (1978). *LeGrand* is the first case in New York to address the issue of whether intoxication should

wife. In affirming the depraved mind murder conviction, the Appellate Division, Second Department, held that the only *mens rea* provided for by the statute was recklessness, an element that cannot be negated by intoxication.⁷³ Whatever the *Poplis* court's "plus" was, it was not deemed to be part of the mental element. The principle that liability should be graded in proportion to actual culpability was abandoned for this category of murder.

The reasoning of the *Register* majority flowed from *Poplis* and *LeGrand*. Analytically, their approach does not comport well with judicial tendencies or the legislative history, as shall be explained. The dissent in *Register* sensed this but did not successfully articulate an alternative solution.

Important issues remain unanswered under the current law: apart from their respective penalties, how is depraved mind murder to be distinguished from reckless manslaughter? How is the intoxicated defendant to be dealt with? Should there be a differentiation between the intoxicated defendant and the sober one, as with intentional murder? If so, how can the law be proportioned between the drunken defendant and the sober one? What analytical approach or test could be useful?

Though not addressing the question of the intoxicated defendant, Professor Gegan suggests three analytical variables to help distinguish depraved mind murder from manslaughter.⁷⁴ They are (1) the degree of risk, (2) the actor's state of mind, and (3) the objective quality of the act or surrounding circumstances.

The first variable considers "the degree of risk in killing someone," which requires distinguishing between "acts that create a 'risk' of death and acts that are virtually certain to cause death."⁷⁵ Moreover, to preserve both the legislature's intent and the necessary unities of time, place and causation, Gegan argues, the risk created must be "imminently dangerous" to the victim.⁷⁶ However, what would constitute "imminently dangerous" is still in question under current law because of the decision in *People v. Kibbe*.⁷⁷ There, defendants abducted an intoxicated man from a bar, robbed him, and left him on a highway, during a snow storm, a quarter-mile from

mitigate depraved mind murder, but progressed no further within the state than the appellate division. *Register* is the first case on the same issue to reach the Court of Appeals.

73. *Id.* at 815-16, 402 N.Y.S.2d at 211.

74. Gegan, *supra* note 4, at 441.

75. *Id.* at 442.

76. *Id.* at 443.

77. 35 N.Y.2d 407, 321 N.E.2d 773, 362 N.Y.S.2d 848 (1974).

help. The victim, incapacitated by alcohol yet conscious, was struck by a vehicle approximately one-half hour later and subsequently died. In finding that the risk was imminently dangerous to the victim, the *Kibbe* court, without explanation, expanded the scope of the temporal and causal elements.⁷⁸

The second variable Professor Gegan offers is “[s]ome psychic condition beyond awareness of risk that might constitute ‘depraved indifference to human life.’ ”⁷⁹ To judge a defendant’s subjective culpability, he notes, it is necessary to look at the degree of risk the defendant foresaw at the time of his act.

Under this second variable, two types of cases would be grouped under the rubric “depraved indifference to human life”: (1) where the actor subjectively knows his conduct is substantially certain to cause death.⁸⁰ In essence, this would bring knowing killing within the ambit of depraved mind murder; and (2) traditional cases of danger to many with a standard of less than substantial certainty. This would be conduct wholly devoid of justification, lacking any social utility.⁸¹

The problem Professor Gegan seeks to solve with this grouping of cases is to fill “a gap in the spectrum of mental states” between general and specific intents.⁸² While a knowing homicide under the first category may be mitigated by evidence of intoxication,⁸³ the second category cannot be mitigated because an analysis of conduct lacking in social utility calls for an objective determination. Still, the notion persists that there exists a gap in the spectrum of mental states.

The third suggested variable between depraved mind murder and reckless manslaughter is “[s]ome objective feature of the act or circumstances, beyond the fatal risk created, that might constitute ‘circumstances evincing a depraved indifference.’ ”⁸⁴ Professor Gegan suggests that the word “depraved” is a term of art which allows consideration of things collateral to a known or substantial risk of death. Recalling the facts of *Poplis*, he sees the factual setting enter into the choice of category: “[T]he prolonged cruelty, the helplessness of

78. Gegan, *supra* note 4, at 443.

79. *Id.* at 441.

80. *Id.* at 447.

81. *Id.*

82. *Id.*

83. Notably, there is no distinct category for “knowing” killing under New York law. *See* PENAL LAW § 125.25.

84. Gegan, *supra* note 4, at 441.

the [infant] victim, and the betrayal of duty on the part of one who should have been the infant's natural guardian and protector."⁸⁵

The *Register* court chose to focus on Professor Gegan's first variable, the degree of risk, and his third variable, the factual setting. The difficulty with this approach lies in its objective nature. Thus, a level of culpability may be ascribed to a defendant through purely objective criteria. A defendant may be wrongfully punished for circumstances out of his control or awareness. Is the rationale for punishment of this class of homicide social protection or punishment of the vicious will of the individual?⁸⁶ Under *Register*, punishment for depraved mind murder takes the form of social utility as opposed to punishment of the defendant's actual culpability.

Generally, social utility is countered by a modern enthusiasm for scaling punishment to subjective *mens rea* whenever possible. The exceptions to this trend developed in the face of strong and specific social utility considerations. For example, the crime of first degree murder in New York⁸⁷ was developed to discourage the killing of peace officers; the felony murder rule,⁸⁸ to discourage the commission of certain dangerous felonies or participation in them; or statutory rape,⁸⁹ to protect a class of citizen deemed incapable of con-

85. *Id.* at 452.

86. See generally FLETCHER, *supra* note 54, at § 6.8. Professor Fletcher is critical of a strict social utilitarian approach. Criticizing Justice Holmes, he notes:

Objective standards are identified as "social" rather than individual standards. If fault is found according to an objective standard, the implication is that the fault is "social" rather than individual. It follows that some injustice to the individual is inherent in the criminal law, for, as Holmes argued, the law "undoubtedly treat[s] the individual as the means to an end, and use[s] him as a tool to increase the general welfare at his own expense." Thus if the criminal law must be justified on this ground, there is nothing particularly disturbing about standards of strict liability, the felony-murder rule, and other devices that might be insensitive to the actual desert of the offender. All of these devices are like objective standards of liability, for they "sacrifice the individual to the general good." It follows from this account of the criminal law that the only sound rationale for punishment is social protection, not the distribution of punishment according to individual culpability.

Id. at 505 (quoting O.W. HOLMES, JR., THE COMMON LAW 46-48 (1881)).

87. PENAL LAW § 125.27(1). The first degree murder subdivision of the New York Penal Law applies to the intentional killing of a police officer, an employee of a state correctional institution, or under certain circumstances when a defendant is confined in a state correctional institution. *Id.* See *People v. Davis*, 43 N.Y.2d 17, 371 N.E.2d 456, 400 N.Y.S.2d 735 (1977), *cert. denied*, 435 U.S. 998 (1978), *cert. denied*, 438 U.S. 914 (1978) (holding first degree murder, PENAL LAW § 125.27, and the mandatory death penalty, PENAL LAW § 60.06, unconstitutional).

88. See PENAL LAW § 125.25(3).

89. See *id.* § 130.35(3).

WANTON DISREGARD		MENS REA
SUBJECTIVE ATTITUDES		
To Risk of Death	To Actual Death	
AFFIRMATIVE	AFFIRMATIVE	INTENT
AFFIRMATIVE	RECONCILED	WANTON DISREGARD
AFFIRMATIVE	UNRECONCILED	WANTON DISREGARD
RECONCILED	RECONCILED	WANTON DISREGARD
RECONCILED	UNRECONCILED	RECKLESSNESS
UNRECONCILED	UNRECONCILED	RECKLESSNESS
COGNITIVE ELEMENT		
Recklessness		
1. AWARE OF POSSIBLE DEATH		
2. AWARE OF POSSIBLE DEATH		
3. AWARE OF POSSIBLE DEATH		
4. AWARE OF POSSIBLE DEATH		
5. AWARE OF POSSIBLE DEATH		
6. AWARE OF POSSIBLE DEATH		

sending to sexual relations. However, when the courts are faced with a problem like depraved mind murder where there are no apparent specific social utility considerations, as in the examples above, there is no apparent reason for departing from parity between subjective *mens rea* and punishment.

V. AN APPROACH TO "RECKLESSNESS PLUS"—WANTON DISREGARD

How should depraved indifference be classified? Suggested here is an analytical approach that is somewhat more rigorous than those described above, yet arguably more appropriate.

The *Poplis* court's formulation of depraved indifference as "recklessness plus" is accurate, to be sure. However, by the time *Register* emerged, the factual setting had become the "plus"—the added element—one that bore no relation to subjective individual culpability, but which still served to elevate reckless manslaughter to murder. Yet this produced unfair results. It would appear that a return to a subjective criminality framework is indicated.

Restoration of the parity between *mens rea* and punishment may be achieved if, in addition to the cognitive element of "recklessness" (aware of a substantial risk of death), the subjective attitudes as to both the risk of death and the resulting harm were added (see chart). These subjective attitudes would be evaluated at the time of the act, as would the essential cognitive element. And, rather than equating depraved indifference with knowing killing as Judge Jasen and Professor Gegan have suggested, the gap in the spectrum of mental states could be bridged by the formulation of "wanton disregard" as a distinct classification. In this way, the *Koerber* rule for admission of evidence of intoxication as a mitigating factor would still apply.

Professors Perkins and Boyce⁹⁰ provide the springboard for the wanton disregard analysis. They contend that a wanton act is done intentionally and under circumstances that evince a wicked intent. It is not the same state of mind as actual intent but may be considered equivalent. In addition, Perkins and Boyce distinguish wantonness from recklessness with respect to state of mind and culpability. One who acts recklessly is aware of the risk but may hope to avoid the harm. One who acts wantonly, while he may not create a greater

90. R. PERKINS & R. BOYCE, CRIMINAL LAW (1982).

risk of harm may not be trying to avoid the harm and is indifferent to it. “Wanton conduct is reckless plus, so to speak.”⁹¹

VI. THE “THRILL-SEEKER” AND WANTON DISREGARD

The *Register* decision not only failed to resolve problems inherent in the Penal Law, but may itself have added to the confusion that had already developed through prior case law. Proposed herein is one possible solution to these problems.

Under the current analysis, as noted above,⁹² the measure of culpability for depraved mind murder is the cognitive element of “recklessness” plus the factual setting. This approach requires the consideration of objective attendant circumstances. The proposed analysis also looks to the same cognitive element, but replaces consideration of the factual setting (the “plus” element), with the elements of subjective attitude toward the risk of death and subjective attitude toward the resulting death. This formulation will properly ascribe culpability subjectively to the individual, rather than objectively.

A. Particulars of the Analysis

1. The Cognitive Element

The cognitive element is what is understood to be the *mens rea* of recklessness. In essence, the determination of recklessness is a bifurcated analysis. “A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists.”⁹³ This portion of the definition describes the necessity that a defendant recognize the degree of risk he is creating.

However, there is also an objective determination as to the risk itself: “The risk must be of such a nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.”⁹⁴

Finally, the legislature imposed a limitation prohibiting any evidence of intoxication to negate this particular *mens rea*.⁹⁵

91. *Id.* at 880.

92. *See supra* notes 16, 19-23 and accompanying text.

93. PENAL LAW § 15.05(3).

94. *Id.*

95. *Id.*

2. Subjective Attitudes⁹⁶

There are three subjective attitudes to be ascribed to the defendant by the trier of fact: an affirmative attitude, a reconciled attitude, and an unreconciled attitude.

An affirmative attitude is a desire to bring about a certain circumstance or result. If, for example, the defendant has an affirmative attitude (desires) toward the risk of death and has an affirmative attitude toward the actual death, the trier of fact may ascribe to the defendant a culpability greater than wanton disregard (i.e., intent).⁹⁷

However, it is possible for a defendant to have an affirmative attitude only toward the risk of death, yet be merely reconciled toward the result.⁹⁸ This is the most egregious form of wanton disregard, though it is readily distinguishable from any greater culpability (i.e., intent).

A reconciled attitude may be properly described as an attitude neither affirmative nor unreconciled, but callously indifferent. Thus the reckless defendant may have a reconciled attitude to the risk of death, though his attitude to any resulting death is unreconciled.⁹⁹

The unreconciled attitude describes the defendant who would want to avoid either the risk of death or the resulting death, or both (as in mere recklessness), but is aware of the possibility of death by his act and disregards it. An unreconciled attitude for both subjective categories also constitutes mere recklessness.¹⁰⁰

Intoxication poses no problem to this analysis. Recklessness, by legislative fiat, may not be negated by evidence of intoxication. Since wanton disregard is a *mens rea* greater than mere recklessness, that is, "recklessness plus," evidence of intoxication should not fall within this statutory prohibition.

B. Application

An application of this analysis can be made using the facts from the first hypothetical presented in this Comment. Four students in

96. The idea of classifying culpability on the basis of subjective attitude is not without precedent. Under German and Soviet law, a mental state resembling recklessness is assimilated to intent when accompanied by an attitude of callous indifference under the label of *dolus eventualis*. See generally FLETCHER, *supra* note 54, at 442-49; Bein, *Knowledge Which Reached a High Degree of Probability*, 2 ISRAEL L. REV. 18 (1967). However, the framework proposed here, though based on the preceeding scholarship, is the author's.

97. See Chart, line 1.

98. See Chart, line 2.

99. See Chart, line 5.

100. See Chart, line 6.

possession of a revolver loaded with one bullet, engaged in a game of “Russian poker,” whereby the defendant, Steve, held the revolver to Ken’s head and unintentionally killed him.

Was Steve reckless? That is, was he aware that he was creating a substantial and unjustifiable risk of death and did he disregard it, at the time he pulled the trigger? The answer must be yes. Was the act, in fact, unjustifiable? Yes. Therefore, he possessed the threshold *mens rea*, recklessness. What was Steve’s attitude toward the risk of death when he pulled the trigger? Clearly, he desired to create the risk, so his attitude was “affirmative.” What was his attitude toward any resulting death at the time he pulled the trigger? Since he did not desire the resulting death, he was at most reconciled to it. This is the fact pattern of the thrill-seeker.¹⁰¹ He is aware of the possibility that his act may result in the death of another, and wants to create that risk, but either wants to avoid the resulting harm or is indifferent to it. His culpability is greater than mere recklessness, yet less than intent or even substantial certainty. His *mens rea* is wanton disregard.

If Steve had had an affirmative attitude toward the resulting death, as well as toward the risk of death, his culpability would have been that of intent. However, given that he was at most reconciled toward the resulting death, must he be held equal in actual or moral blameworthiness as a killer acting with knowledge or intent (i.e., affirmative attitudes toward both risk and result)? Under this wanton disregard analysis, a distinction is possible. Moreover, it is contended that even a reconciled attitude toward the resulting death would not be equivalent to knowledge or intent, and should remain within the wanton disregard category.¹⁰²

Returning then to the original facts of hypothetical No. 1, if the students were intoxicated before they decided to play “Russian poker,” although evidence of intoxication may not negate a mere reckless *mens rea*, the attendant subjective attitudes, necessary components of wanton disregard, should be negatable. The negation of an element of a crime by intoxication is accomplished by first focusing on the actual cognitive state of awareness and accompanying subjective attitudes, which characterize recklessness, at the time the defendant acted. If the defendant’s intoxication actually prevented him from forming or retaining a given attitude, then he should not be held accountable for that attitude unless it existed when he began

101. See Chart, lines 2 and 3.

102. See Chart, line 4.

drinking and his actions were “bolstered”¹⁰³ by the alcohol. Therefore, the highest crime the hypothetically inebriated student should be guilty of, under New York law, is first degree manslaughter.

CONCLUSION

Application of the wanton disregard analysis to depraved mind murder in the case of *Register* reveals its usefulness. If Bruce Register had been sober, given the same fact pattern, then at the time he fired into the barroom crowd, he was aware of the substantial and unjustifiable risk of death and disregarded it. This more than satisfies the cognitive element of recklessness, though it falls below intent, the required element for the next higher homicide offense. Did he desire and/or was he reconciled to the creation of the risk of death? Yes. Finally, was he reconciled to the resulting death as opposed to being unreconciled to it, perhaps even wanting to avoid it? Again, yes. Therefore, the sober Bruce Register, capable of forming the subjective attitudes to his act, possessed the *mens rea* of wanton disregard which satisfies “depraved indifference” under the New York statute and described by the “recklessness plus” test of *Poplis*.

However, Bruce Register was intoxicated. Under the proposed definitional framework of wanton disregard, Register’s subjective attitude toward creating the risk of death may either have been affirmative or merely reconciled, and his subjective attitude toward any resulting death must have been unreconciled, perhaps even wanting to avoid it.

Therefore, evidence of intoxication, it is contended, should be admitted because it could establish whether his particular subjective attitudes were those which characterize wanton disregard (which constitutes depraved indifference) or whether they were those which characterize mere recklessness. By definition, the worst offense Bruce Register would be guilty of is first degree manslaughter.

103. See *supra* note 8.

