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## RECKLESS ENDANGERMENT, ASSAULT, HOMICIDE AND DECIPHERING DEPRAVED INDIFFERENCE

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### INTRODUCTION

When lay people think of violent criminal conduct, it's usually in terms of acts committed (e.g., strangling, stabbing, shooting) with the INTENT to effectuate a certain outcome such as physical injury, serious injury or death of the victim.

The Penal Law, however, accounts for a variety of culpable mental states (i.e., mens rea) besides intent (i.e., a conscious objective to achieve a certain result) such as criminal negligence (PL § 15.05[4], the failure to perceive a substantial and unjustifiable risk of a certain result), knowing misconduct (PL § 15.05[2], awareness of the criminal nature of the conduct) and RECKLESSNESS (PL § 15.05[3]) where the actor is aware of a SUBSTANTIAL AND UNJUSTIFIABLE RISK of a certain outcome but CONSCIOUSLY DISREGARDS IT.

While criminal negligence might be established, for example, by pushing a person from a height into a body of water not knowing its depth (or whether the individual can swim), recklessness might well arise from pushing the victim when the actor knows the water is too shallow or that the pushed party cannot swim.

As noted in *People v Montanez* (41 NY2d 53 [1976]), the defendant's AWARENESS OF THE RISK determines the DEGREE OF CULPABILITY. If he/she FAILS TO PERCEIVE a SUBSTANTIAL and UNJUSTIFIABLE RISK (in this case) of death in his/her conduct, then he/she is guilty of CRIMINALLY NEGLIGENT HOMICIDE. On the other hand, if he/she is AWARE of the grave risk of death and disregards it, he/she acts RECKLESSLY and is guilty of Manslaughter 2d degree.

In either case, to invite criminal liability, the risk of harm must be of SUCH NATURE AND DEGREE that the failure to perceive it or disregard thereof constitutes a GROSS DEVIATION FROM THE STANDARD OF CONDUCT THAT A REASONABLE PERSON WOULD OBSERVE IN THE SITUATION.

### RECKLESS ASSAULT

At its most basic level, Assault 3d degree, PL § 120.00 [2], a class A misdemeanor, is committed when the defendant RECKLESSLY CAUSES PHYSICAL INJURY to another person.

According to the CJ (nycourts.gov), a person acts recklessly with respect to physical injury when he/she:

- a. engages in conduct which creates a substantial and unjustifiable risk that physical injury to another person will occur, and

- b. he/she is AWARE of and CONSCIOUSLY DISREGARDS that risk, and
- c. the risk is of such NATURE AND DEGREE that disregard of it constitutes a GROSS DEVIATION FROM THE STANDARD OF CONDUCT THAT A REASONABLE PERSON WOULD OBSERVE IN THE SITUATION.

A person also is deemed to act recklessly when he creates such a risk but is unaware of it SOLELY because of VOLUNTARY INTOXICATION.

PHYSICAL INJURY is defined in PL § 10.10 (9) as IMPAIRMENT OF PHYSICAL CONDITION OR SUBSTANTIAL PAIN, (i.e., more than fleeting pain or minor bruising from petty slaps. *See generally, In re Phillip A.*, 49 NY2d 198 [1980], *People v Henderson*, 92 NY2d 677 [1999], *People v Chiddick*, 8 NY3d 445 [2007]).

Whether conduct amounts to recklessness, negligence, or no criminal culpability at all naturally depends on the facts of each case and the line between them is not always easy to decipher. In *People v Brown* (17 NY3d 863 [2011]), for example, the Court of Appeals reduced the defendant's conviction from reckless assault to criminally negligent assault where the defendant, while horsing around with her nephew, doused his back with water from a pot on the stove (causing first and second-degree burns) after he splashed her with water from the sink. In the court's view, the defendant's conduct in this situation reflected more of a failure to appreciate than a conscious disregard of the risk of injury attendant to such conduct.

Also, in *People v Cabrera* (10 NY3d 170 [2008]), the Court reversed the defendant's conviction for criminally negligent homicide which was based on the defendant's speeding with no other evidence of risk-taking behavior.

In contrast, see *People v Hart* (8 AD3d 402 [2d Dept 2004]), where the defendant's assault conviction as an accomplice to his co-defendant (driver's) reckless behavior during a drag race resulting in injury to the passenger in another vehicle was upheld. The reckless manslaughter convictions arising from the death of both drivers were also upheld.

But see *People v Perniciaro* (58 NY2d 751 [1982]), where there was no showing that the defendant/passenger did anything to aid the driver who pulled up several times right behind the complainant's vehicle, thereby restricting the complainant's ability to maneuver.

#### RECKLESS ENDANGERMENT 2D DEGREE: NO INJURY NECESSARY

As stated in PL § 120.20, a person is guilty of this crime, (also a class A misdemeanor) when he/she recklessly engages in conduct which creates a SUBSTANTIAL RISK of SERIOUS PHYSICAL INJURY (SPI) to another person.

As is evident, it is not the fact of serious injury but the substantial risk of it, arising from the defendant's reckless conduct, that constitutes this crime. (PL § 10.00 [10], SPI is physical injury that creates a SUBSTANTIAL RISK of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or loss or impairment of the function of any bodily organ).

In *People v Botting* (8 AD3d 1064 [4<sup>th</sup> Dept 2004]), the Fourth Department held that the evidence was legally SUFFICIENT to support the defendant's conviction for reckless endangerment where the

defendant swerved into the oncoming lane of traffic (nearly hitting two vehicles) before crashing into a third vehicle. Even though the defendant's drunken passenger was pulling on the steering wheel, the defendant, instead of pulling over or slowing down, continued to drive at a high rate of speed.

And in *People v Dann* (17 AD3d 1152 [4<sup>th</sup> Dept 2005]), the Fourth Department held that it was error not to instruct the jury on Reckless Endangerment 2d degree (as a lesser included offense of Reckless Endangerment 1<sup>st</sup> degree) where the evidence of the defendant's firing birdshot from a shotgun at the victim's house from 50 yards away only created a substantial risk of SPI (rather than a grave risk of death as required by the 1<sup>st</sup> degree offense).

## RECKLESS MANSLAUGHTER

As with reckless endangerment and assault, the element of RECKLESSNESS is the same for Manslaughter 2d degree (PL § 125.15[1]), except that the outcome is a fatality (as opposed to just creating a substantial risk of SPI [PL § 120.20] or causing physical injury [PL § 120.00[2]]).

Pursuant to PL § 125.15 (1), a person commits reckless manslaughter (a class C, non-violent felony) when he/she RECKLESSLY CAUSES the death of another person.

In this context, the CJJ states that a person acts recklessly with respect to DEATH when he/she:

- a. engages in CONDUCT that CREATES or CONTRIBUTES to a SUBSTANTIAL and UNJUSTIFIABLE RISK that another person's death will occur, and
- b. when he/she is AWARE of and CONSCIOUSLY DISREGARDS that risk, and
- c. when that risk is of such NATURE and DEGREE that disregard of it constitutes a GROSS DEVIATION from the standard of conduct that a reasonable person would observe in the situation (*People v Boutin*, 75 NY2d 692 [1990]).

In *People v Licitra* (47 NY2d 554 [1979]), the Court of Appeals upheld the defendant's conviction where the evidence established that he pulled a loaded revolver from his pants and swung it across his body with his finger on the trigger and the gun went off, striking his wife in the head. The Court said that while the shooting was likely unintentional, the jury properly considered whether the RISK CREATED by the defendant's conduct was substantial and unjustifiable and amounted to a GROSS DEVIATION from the standard of care expected of a reasonable person in such situation.

See also *People v Botting*, *supra*, where the defendant's continued speeding despite ongoing interference from a drunken passenger was enough to support the defendant's convictions for reckless manslaughter arising from the deaths of other motorists with whose vehicles the defendant collided.

And in *People v Collins* (167 AD3d 1493 [4<sup>th</sup> Dept 2018]), the Fourth Department affirmed the defendant's convictions upon proof that he left his two young children home alone while a generator was operating in the basement, thus permeating the house with carbon monoxide (*See also People v Santiago*, 22 NY3d 740 [2014], finding the evidence sufficient for Manslaughter 2d degree rather than intentional homicide where the defendant/mother held her hand over child's nose to keep her quiet, resulting in child's demise).

## BREAKING BAD

In *People v Peters* (126 AD3d 1029 [3d Dept 2005]), the evidence was found to be sufficient to support the Manslaughter 2d degree conviction where the defendant and another person (while cooking crystal meth in a remote cabin), placed three plastic pitchers of lantern fuel oil on the hot surface of a wood-burning stove in the basement, went upstairs after which the fuel ignited and caused a fiery explosion resulting in the death of the last person out of the house.

## DEPRAVED INDIFFERENCE TO HUMAN LIFE

Reckless conduct becomes significantly more BLAMEWORTHY (thus triggering greater potential punishment) when the reckless conduct is committed under circumstances evincing a DEPRAVED INDIFFERENCE TO HUMAN LIFE, thereby creating a GRAVE RISK OF DEATH to another person (PL § 120.25), also causes SPI (PL§ 120.10 [3]) or death of another person (PL § 125.25[2]).

New York courts at all levels have struggled over the meaning of DEPRAVED INDIFFERENCE, seemingly unsure whether it should apply only to conduct that endangers more than one person, and whether it constitutes a SUBJECTIVE MENTAL STATE above and beyond recklessness (i.e., wickedness) or simply describes the circumstances in which the defendant's wanton reckless should be OBJECTIVELY EVALUATED. (See *People v Feingold*, 7 NY3d 288 [2006]).

Consequently, courts have had to contend with the proliferation of multi-count indictments, especially in one-on-one homicide cases where the defendant is charged with both INTENTIONAL MURDER and DEPRAVED INDIFFERENCE (formerly, "DEPRAVED MIND" MURDER), and juries have returned convictions for the latter even though the conduct clearly reflected intentional conduct.

In *People v Payne* (3 NY3d 266 [2004]), for example, the Court of Appeals REVERSED the defendant's conviction for depraved indifference murder where the evidence established that the defendant shot his former friend in the chest at point-blank range after learning that the friend had been accused of sexually abusing his young daughter's playmate. The defendant was acquitted of intentional murder.

The Court noted that this conviction could not stand because, unlike intentional homicide which requires a conscious objective to kill (which the facts here clearly supported), depraved indifference murder constitutes extremely dangerous and ultimately fatal conduct performed not with homicidal purpose but with a depraved wantonness reflecting the absence of any concern whether death might result.

Conversely, in *People v Roe* (74 NY2d 20 [1989]), the defendant's depraved indifference murder conviction was upheld upon proof that the defendant, while playing Russian Roulette, fired a shotgun at the 13-year-old victim's chest from 10 feet away not knowing whether there was a live or dummy round in the chamber. (He had loaded both kinds into the weapon).

## DEPRAVED INDIFFERENCE ASSAULT 1<sup>st</sup> DEGREE

Penal Law 120.10 (1) states that a person is guilty of this crime (a class B violent felony) 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 SPI to another person.

Drawing upon *People v Feingold* (7 NY3d at 294), the CJJ states that DEPRAVED INDIFFERENCE to human life refers to a person's STATE OF MIND in RECKLESSLY engaging in conduct which creates a grave risk of death. A person has a depraved indifference to human life when he/she has an UTTER DISREGARD for the VALUE OF HUMAN LIFE, a WILLINGNESS TO ACT, NOT because he/she MEANS to cause grievous harm (to the person injured) but because he/she SIMPLY DOES NOT CARE WHETHER GRIEVOUS HARM WILL RESULT (*People v Suarez*, 6 NY3d 202, 214 [2005]).

Put another way, a person who is DEPRAVEDLY INDIFFERENT is not just willing to take a grossly unreasonable risk to human life, he/she DOES NOT CARE how the risk turns out (*People v Lewie*, 17 NY3d 348, 359 [2011]).

Depraved Indifference to human life reflects a WICKED, EVIL, OR INHUMAN STATE OF MIND, as manifested by BRUTAL, HEINOUS and DESPICABLE ACTS. It is evinced by conduct that is WANTON, DEFICIENT IN A MORAL SENSE OF CONCERN, AND DEVOID OF REGARD FOR THE LIFE/LIVES OF OTHERS. (*People v Russell*, 91 NY2d 280, 287 [1998]).

In *People v Bentley* (7 AD3d 414 [1<sup>st</sup> Dept 2004]), the First Department affirmed the defendant's conviction for Assault 1<sup>st</sup> degree where the defendant stabbed the victim in the back (resulting in a collapsed lung) as he tried to protect his sister from the defendant's attack upon her. A medical expert opined that such wound could have been fatal, and the court concluded that the defendant's reckless infliction of serious injury created a grave risk of death under circumstances evincing a depraved indifference to whether such result would occur.

See also *People v Wilson* (32 NY3d 1 [2018]): Depraved indifference assault can consist of an ONGOING CRIME where depravity is demonstrated over a prolonged period. In this DV case, the defendant subjected the victim to protracted abuse resulting in serious injuries which an expert testified could have resulted in death if the victim had not been brought to the ER.

It is important to note, however, that reckless conduct does NOT establish depravity just because the defendant's conduct creates a grave risk of death. Mental depravity has significance separate and apart from the gravity of the risk inherent in the defendant's conduct, and it is thus the additional element of wickedness or moral bankruptcy as reflected in despicable acts that elevates reckless conduct to depraved indifference (*People v Suarez*, 6 NY3d at 214).

See also *People v Swinton* (7 NY3d 776 [2006]): Conviction for depraved indifference assault was reduced to Assault 3<sup>rd</sup> because the evidence was insufficient to support the conclusion that the defendants (parents of a young child) acted with depraved indifference by feeding the child food which resulted in severe malnutrition.

## RECKLESS ENDANGERMENT 1<sup>ST</sup> DEGREE

Unlike Reckless Endangerment 2d degree which involves reckless conduct creating a substantial risk of SPI to another person, this crime (a class D felony) requires that the defendant, UNDER CIRCUMSTANCES EVINCING A DEPRAVED INDIFFERENCE TO HUMAN LIFE, recklessly engage in conduct which CREATES A GRAVE RISK OF DEATH to another person.

Though no serious injury or death is required, the grave and unjustifiable risk of death must be such that the defendant's disregard of it constitutes a serious departure from the standard of conduct of a reasonable person, and, beyond the substantial risk of death, the defendant's conduct must also reveal a complete disregard for human life such that he/she couldn't care less whether another person (or persons) perished as a result (*People v Feingold*, 7 NY3d at 294).

See *People v Chrysler* (85 NY2d 413 [1995]): Reckless Endangerment 1<sup>st</sup> degree criminalizes the RISK created by the defendant's conduct rather than any particular outcome or injury.

In *People v Barnes* (156 AD3d 1064 [4<sup>th</sup> Dept 2013]), the Fourth Department affirmed the defendant's conviction for Reckless Endangerment 1<sup>st</sup> degree upon proof that the defendant, in an effort to escape from police who responded to a burglary (the defendant's third that day), drove his car across the front yard at a high rate of speed, forcing the officer (who was about 10 feet away), to jump out of the way. Though the issue was deemed unpreserved, the court nevertheless found that the defendant's reckless conduct created a grave risk of death under circumstances evincing a depraved indifference to human life (citing *People v Robinson*, 16 AD3d 768 [3d Dept 2005]).

In contrast, see *People v Lostrumbo* (107 AD3d 1385 [4<sup>th</sup> Dept 2013]), where the Fourth Department REDUCED the defendant's conviction from Reckless Endangerment 1<sup>st</sup> to 2<sup>nd</sup> degree because the defendant's flight from police (in a dump truck), leading them on a 40-minute chase failed to establish that the defendant revealed an utter regard for human life. Even if he had engaged in conduct that created a grave risk of death to identified members of the public, such conduct did not demonstrate a depraved indifference (citing, *inter alia*, *People v People v Prindle*, 16 NY3d 768 [2011]).

## DANGEROUS (BUT NOT DEPRAVED) SEXUAL BEHAVIOR

In *People v Williams* (24 NY3d 1129 [2015]), the defendant was indicted for Reckless Endangerment 1<sup>st</sup> degree based upon evidence that he engaged in repeated acts of sexual intercourse with his boyfriend, knowing for several months (but not disclosing) that he was infected with HIV, and repeatedly assuring the victim that there was no need for protection.

Eventually, the defendant revealed that he "might" have HIV from a prior infected partner with whom he'd had unprotected sex. A few months after breaking up with the defendant, the victim became ill from HIV and had to undertake a regimen of medications to stave off AIDS. The defendant then reached out to the victim on social media, confessing that he had engaged in sex with him, knowing about his HIV and expressing remorse for infecting the person he loved.

The lower court REDUCED the charge to Reckless Endangerment 2d degree based mainly on expert testimony presented to the grand jury about significant advances in the treatment of HIV and AIDS which have virtually eliminated the grave risk of death from these conditions. Accordingly, the court ruled that there was insufficient evidence that the defendant acted with a depraved mental state.

The Fourth Department affirmed (111 AD3d 1435 [4<sup>th</sup> Dept 2013]), concluding that the evidence did not make out a prima facie case of wanton cruelty, brutality or callousness required to establish depraved indifference to the life of a single victim. Nor was there evidence of a grave risk of death.

The Court of Appeals AFFIRMED, finding no indication that the defendant exposed the victim to the risk of HIV out of any malevolent desire that the victim contract the virus (which would seem to suggest criminal intent) or with utter indifference to his fate (citing *People v Lewie*, 17 NY3d 348 [2011]).

In the majority's view, the evidence demonstrated that the defendant cared too little rather than not at all, and while his behavior was clearly reckless, selfish, and reprehensible, it did not make out a prima facie case of depraved indifference (citing, *inter alia*, *People v Suarez, supra*, *People v Feingold, supra*).

The majority viewed the defendant's subsequent, unprompted expression of remorse as constituting some circumstantial evidence of a less-than-depraved mind at the time of the crimes (citing *People v Feingold*, 7 NY3d at 296).

#### DAMNING DISSENT

The dissenting Judge (Pigott) dismissed as irrelevant the defendant's post-crime, public expression of contrition, and concluded that the evidence presented to the grand jury satisfied the requirements of CPL 190.65 (1) (a), (b) and would warrant a conviction at a trial unless otherwise explained or contradicted (citing, *inter alia*, *People v Jennings*, 69 NY2d 103 [1986], *People v Bello*, 92 NY2d 523 [1998]).

The dissenter pointed out that the defendant's wanton callousness was evident from his repeated acts of unprotected sexual intercourse, knowing that he had HIV and in utter disregard of his partner's expressions of concern about engaging in dangerous behavior. (When the victim reached for a condom, the defendant took it away and falsely claimed that everything was ok).

As the dissenter viewed it, the grand jury was satisfied that that the defendant didn't care at all, and just because other inferences may be drawn from the facts presented is irrelevant to the question of legal sufficiency of the evidence before that body (*People v Bello, supra* at 526).

#### DISAGREEMENT OVER DEPRAVED INDIFFERENCE

In *People v Suarez*, and its companion, *People v McPherson* (6 NY3d 202 [2005]), the Court of Appeals traced the evolution of depraved indifference murder from a crime limited to the endangerment of multiple victims (i.e., depraved mind murder) to a "small and finite" category of cases of one-on-one homicides where the defendant's conduct was so morally reprehensible as to be on par with intentional murder.

The problem, as noted at the outset, however, is that prosecutors would routinely hedge their bets by charging defendants with both intentional and depraved indifference murder, and jurors would convict on the latter (perhaps concluding that every act of murder involves some degree of depravity) when the facts supported only the former. Consequently, in virtually every major decision, there has been something less than unanimity or uniformity in the Court of Appeals' interpretation of depraved indifference.

In *Suarez*, the Court of Appeals REVERSED the defendants' depraved indifference murder conviction, finding that his acts of stabbing the victim (during an argument) in the throat, chest and abdomen were not converted from intentional murder (of which the defendant was acquitted) to depraved indifference murder simply because the defendant took off and left her to bleed to death.

A similar conclusion was reached in *McPherson* where the defendant, during an argument with her ex-boyfriend over child support, pulled a knife from her purse (after he pushed her and raised his hand) and stabbed him in the chest. Unlike, *Suarez*, this defendant called for an ambulance.

The Court noted that since the statute requires depraved indifference, which is at odds with proof establishing a manifest intent to kill (*People v Payne*, 3 NY3d at 270), the number of single-victim cases falling into this category should be few and far between.

Some oft-cited examples of depraved indifference singular killings include leaving a particularly vulnerable victim in harm's way (*People v Kibbe*, 35 NY2d 407 [1974], defendants dump a drunken-and-barely-dressed robbery victim on a snowy roadway where he is then fatally struck by a truck), pushing a child into a body of water and watching him drown, only to tell others that he saw him swim away (*People v Mills*, 1 NY3d 269 [2003]), or continued beating of a young child over several days (*People v Poplis*, 30 NY2d 85 [1972], *People v Best*, 85 NY2d 826, affirming the 4<sup>th</sup> Department, 202 AD2d 1015 [4<sup>th</sup> Dep't 1994]).

The Court continued that depraved indifference murder is not simply a heinous intentional killing because when the defendant's conscious objective is to cause death, the depravity of the circumstances under which the killing is carried out is technically irrelevant. (It certainly might have an adverse effect on sentencing, however). Otherwise, the Court feared, every bad intentional homicide would qualify as a depraved indifference murder (citing *People v Gonzalez*, 1 NY3d 464 [2004]).

To qualify, then, as depravedly indifferent, the defendant's conduct must be so wanton and lacking in moral concern for human life as to warrant the same level of culpability and condemnation as for one who commits intentional murder (citing *People v Russell*, 91 NY2d 280 [1998]). Consequently, in the Court's view, most killings do not meet this definition, and it is counterproductive (and wrong) to confuse intent (to cause death) with depraved indifference where the defendant is entirely dismissive of the possibility of death (citing *People v Payne*, 3 NY3d at 272).

As the Court stated, "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. Reflecting wickedness, evil or inhumanity, as manifested by brutal, heinous, and despicable acts, (it) is embodied in conduct that is so wanton, so deficient in a moral sense of concern, so devoid of regard for the life/lives of others, and so blameworthy as to render the action as culpable as one whose conscious objective is to kill" (citing *People v Russell*, 91 NY2d at

287, *People v Jernatowski*, 238 NY 188 [1924]: Defendant fired several shots into a house knowing there were people inside, killing the decedent; *People v Gomez*, 65 NY2d 9 [1985]: Defendant drove vehicle at high speed several blocks on crowded sidewalks, killing two children and endangering others).

Noting that depraved indifference represents an additional (aggravating) factor beyond reckless disregard of a grave risk of death, (citing *People v Register*, 60 NY2d 270 [1983]), which has meaning apart from the gravity of the risk, the *Suarez* Court cautioned that trial judges should be hesitant in twin-count indictment cases to submit both intentional and depraved indifference murder counts, expecting juries to make fine distinctions between a substantial risk of death (consistent with reckless manslaughter) and the grave, transcendent risk of death (indicative of depraved indifference homicide) (citing *People v Wall*, 29 NY2d 863 [1971]).

#### MULTIPLE CONCURRENCES

A trio of concurring Judges (G.B. Smith, R.S. Smith, and Rosenblatt) concluded that the Court's earlier interpretation of depraved indifference murder (*People v Register*, *supra*, *People v Sanchez* 98 NY2d 373 [2002]) was too broad (in terms of requiring only a reckless mental state under circumstances objectively indicating depraved indifference), thus opening the floodgates to convictions for depraved indifference murder in cases where the facts supported intentional murder (or an appropriate lesser included offense).

These concurring Judges pointed to the concurring opinions in *People v Payne* and the cases of *People v Hafeez* (100 NY2d 253 [2003]) and *People v Gonzalez* (1 NY3d 464 [2004]) which reversed depraved indifference murder convictions where the facts supported intentional rather than depraved indifference killings. And while it cannot be said that one-on-one killings can never qualify as the latter, they rarely do (*see, for example, People v Roe, supra*).

Concurring Judges (Graffeo and Read), while agreeing in the outcome, argued that the Court showed too little faith in the ability of juries to differentiate between different types of homicide.

Pointing to *People v Register*, *supra* at 274 (which held that depraved indifference refers NOT to a mental state beyond recklessness but defines the factual setting in which the risk-creating conduct must occur), Judges Graffeo and Read concluded that the Court interpreted depraved indifference in an overly restrictive manner that is inconsistent with the statute and contrary to precedent.

According to the concurring Judges, the statute would permit prosecution for depraved indifference murder, by the majority's reckoning, only in a few specific scenarios where, for example, the defendant leaves a very vulnerable victim at death's door or engages in brutal, protracted torture of a vulnerable victim even though the statute is silent about matters such as the helplessness of the victim or the nature and duration of the attack. They argued that the proper focus should be, as it always had been, on an objective assessment of the circumstances surrounding the defendant's reckless conduct and the degree of risk he/she created rather than injecting an element of a heightened mental state (i.e., evil, wickedness) not contained in PL § 125.25 (2)(citing *People v Sanchez*, 98 NY2d at 383).

The better approach, in their view, would be to submit both intentional murder and depraved indifference murder counts to the jury where the facts so warrant. If the evidence supports intentional murder, the depravity of the circumstances is irrelevant (citing *People v Gonzalez supra*). And it is only when the jury decides that the defendant did not intend to cause death, but instead acted recklessly,

that it must then determine whether the OBJECTIVE CIRCUMSTANCES of the crime reflected a DEPRAVED INDIFFERENCE to human life.

The purpose of such an inquiry, then, is to decide whether the defendant created such a grave, exceptionally high risk of death that murder (rather than reckless manslaughter) has been committed (citing *People v Register*, supra and *People v Sanchez*, supra). Judges Graffeo and Read observed, jurors are perfectly capable of making such determinations, so courts should not be creating artificial categories of depraved indifference not supported by the Penal Law.

#### REGISTER OVERRULED

In *People v Feingold* (7 NY3d 288 [2006]), the Court of Appeals, following the recommendation of the trio of concurring Judges in *People v Suarez*, supra, overruled *Register's* reliance upon an objective assessment of the factual circumstances. *Feingold* held that DEPRAVED INDIFFERENCE constitutes a SUBJECTIVE MENTAL STATE reflecting wickedness and wanton disregard for human life that aggravates reckless behavior, thus distinguishing Manslaughter 2<sup>nd</sup> degree from Murder 2<sup>nd</sup> degree and Reckless Endangerment 2<sup>nd</sup> degree from its felony counterpart.

The defendant, an attorney/ALJ, caused a serious explosion in a Manhattan apartment building when, consumed by depression (and after taking tranquilizers), he sealed his 12<sup>th</sup> floor apartment, turned out the pilot light on his stove and turned on the gas which eventually ignited a spark (apparently from a refrigerator compressor). Although his apartment and those of several neighbors were heavily damaged, the defendant somehow survived and no one else was killed or seriously injured.

The defendant was indicted for Reckless Endangerment 1<sup>st</sup> degree. He claimed that he was so fraught with grief that he really didn't stop to think about the potential danger to his neighbors.

Relying on *Register*, the trial judge who was also the fact finder at this bench trial, found the defendant guilty as charged but went out of the way to state that the defendant's mental state did not reflect depraved indifference. The AD affirmed as did the Court of Appeals. The majority concluded that it was compelled to do so by the trial judge's on-the-record findings which it construed as negating the core element of the offense.

The People argued that the defendant's mens rea argument was unpreserved, but the Court concluded that it had been addressed by the trial judge (citing *People v Prado*, 4 NY3d 725 [2004]). For his part, the defendant urged the Court to evaluate his conduct through the lens of subjectivity which would require a mindset reflecting utter indifference to the consequences of his conduct. The People pointed out that *Register* (and PL § 120.25) only requires a reckless mental state, and depraved indifference is determined by objectively evaluating facts surrounding the reckless conduct.

In *Register*, the defendant, who had been drinking in a bar, fatally shot the victim in the chest for no apparent reason. Though indicted for both intentional and depraved indifference murder, he was convicted only of the latter offense. The Court of Appeals affirmed, concluding that the only culpable mental state that the Legislature intended was recklessness, and the element of depraved indifference defined the circumstances which must be present to raise a homicide from manslaughter to murder (60 NY2d at 278).

Three dissenting Judges in *Register*, however, took the position that under PL § 125.25 (2), like its predecessor statutes, depraved indifference implies a culpable mental state. (*Id* at 282).

In *People v Sanchez* (98 NY2d 373 [2002]), the Court also affirmed the defendant's murder conviction upon evidence that the defendant shot and killed the victim at point-blank range (albeit at an angle) in an act of instantaneous impulse which the Court construed to constitute recklessness under circumstances reflecting depraved indifference. (The defendant was acquitted of intentional murder).

One dissenting Judge (G.B. Smith), saw the majority's approach as inviting a substitution of depraved indifference for intentional murder whenever one person shoots another (*Id* at 393), and another dissenter (Albert M. Rosenblatt), could envision no circumstance under which an intentional murder charge would not also be susceptible to a conviction based on depraved indifference. (*Id* at 394).

The majority in *Feingold* noted that that the Court began to move away somewhat from *Register* and *Sanchez* when, in *People v Hafeez, supra*, it reversed the defendant's conviction for depraved indifference murder, finding that there was no valid line of reasoning to support the conclusion that the defendant "possessed the mental culpability required" for depraved indifference murder (100 NY2d at 259).

The concurring Judge in *Hafeez* (Rosenblatt) saw the Court as limiting *Sanchez* by "properly rejecting the incongruous notion that an intentional killing can reflect depraved indifference," and pointing out that the critical element of this type of homicide is NOT recklessness but depraved indifference (100 NY2d at 260).

*Feingold* also cited *People v Gonzalez* (1 NY3d 464 [2004]) where the Court held that a defendant could not be convicted of depraved indifference murder upon evidence that clearly demonstrated intentional murder (of which the defendant was acquitted). There, the defendant shot the victim in the chest from a few feet away, shot him in the head as he fell and then fired eight more times for good measure as he laid on the floor.

*Gonzalez* cautioned that depraved indifference murder does not signify a particularly heinous intentional killing. Rather, it involves a killing where the defendant, rather than harbor an intent to cause death, displays a wanton indifference to whether death occurs (1 NY 3d at 467-468).

Similarly, in *People v Payne, supra* (defendant shot his former friend/alleged child abuser in the chest with an elephant gun), the Court held that the conviction for depraved indifference murder could not stand because depraved indifference is not a substitute for an intentional killing. As the court stated, "indifference to life contrasts with the intent to take it" (3 NY3d at 270).

In *People v Suarez, supra*, the Court noted that only rarely can single-victim killings support a depraved indifference murder charge, and three concurring Judges went so far as to urge that *Register* and *Sanchez* (which seemed to open the door to depraved indifference murder convictions upon facts better suited to intentional murder) be expressly overruled.

The majority in *Feingold* took them up on their suggestion and held in no uncertain terms that DEPRAVED INDIFFERENCE IS A CULPABLE MENTAL STATE.

The Court noted that the decisions in *Hafeez, Gonzalez* and *Payne* did not have to address the mens rea issue (because, in those cases, by any measure, depraved indifference was found to be lacking), but in

*Feingold*, the Court felt it had no choice but to resolve it because of the trial court's on-the-record determination that the defendant's mental state was NOT one of depraved indifference. (Had the trial court simply returned a guilty verdict of Reckless Endangerment 1<sup>st</sup> degree without the editorial comment, the Court said it could well have affirmed).

As the majority noted, however, "given the trial judge's findings, we cannot affirm the conviction because we cannot conceive that a defendant may be guilty of depraved indifference without being depravedly indifferent" (citing *People v Suarez, supra*).

The *Feingold* court appeared to be swayed by the trial court's findings that the defendant acted not out of malice, wickedness, or callousness to his neighbors but rather out of depressed self-absorption that apparently made him oblivious to the possibility that other people could be harmed by his extremely reckless conduct. Moreover, in the majority's view, that several people were put in harm's way does not necessarily mean that the defendant was depravedly indifferent, especially where the factfinder went out of his way to find otherwise.

Citing *Suarez*, the Court said 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 HE/SHE SIMPLY DOES NOT CARE WHETHER GRIEVOUS HARM RESULTS OR NOT.

Finding that the evidence, as described by the factfinder, did NOT reflect the CULPABLE MENTAL STATE OF DEPRAVED INDIFFERENCE TO HUMAN LIFE, the Court REDUCED the defendant's conviction to RECKLESS ENDANGERMENT 2<sup>nd</sup> DEGREE.

#### DISSENTING DUO

##### #1

The first dissenting Judge (Ciparick) argued that the defendant's conviction should be affirmed because nothing in the previous cases interpreting Reckless Endangerment 1<sup>st</sup> degree (or Murder 2<sup>nd</sup> degree) requires the introduction of a separate, culpable mental state to the element of depraved indifference to human life.

Agreeing that depraved indifference reflects a defendant's utter disregard for human life bordering on wickedness manifested by brutal, heinous, or despicable acts (*People v Suarez*, 6 NY3d at 214), Judge Ciparick saw no need to require a showing that the defendant subjectively harbored an evil mind as the majority now required.

In Judge Ciparick's view, turning on the gas in an occupied apartment building FOR WHATEVER REASON was SO DEFICIENT IN A MORAL SENSE OF CONCERN AND SO DEPRAVED IN ITS LACK OF REGARD FOR THE LIVES OF OTHERS AS TO RENDER THIS DEFENDANT AS CULPABLE AS ONE WHO INTENDED TO HARM OTHERS (citing *People v Suarez, supra* at 214).

As Judge Ciparick saw it, the defendant's act of CREATING AN EXPLOSIVE GAS ENVIRONMENT EVINced A DEPRAVED INDIFFERENCE TO THE NEARLY CERTAIN CONSEQUENCES OF HIS CONDUCT, AND THE FACT THAT HE MAY HAVE BEEN CONSUMED BY HIS OWN PROBLEMS (thus blinding him to the presence of others in the building) DID NOT RENDER HIS CONDUCT ANY LESS CULPABLE, nor should it shield him from felony prosecution.

Viewed in this way, it was not necessary for the People to prove that in addition to the extremely reckless nature of his conduct, the defendant acted with an uncommonly evil state of mind (citing *People v Sanchez*, 98 NY2d at 383). Rather, it should have been enough that the defendant RECKLESSLY engaged in conduct which created a grave risk of death to others under circumstances (objectively) indicating a depraved indifference to human life.

Judge Ciparick did not feel hamstrung by the trial judge's findings, noting that his disagreement with *Register* did not preclude him from following the law, applying its reasoning to the facts, and finding the defendant guilty as charged. It seems that the trial judge could have just found the defendant guilty of Reckless Endangerment 2<sup>nd</sup> degree and saved the Court of Appeals a lot of wrangling over the meaning of depraved indifference.

## #2

The second dissenting Judge (Kaye) also considered it unnecessary and ill-advised to overrule *Register* and define depraved indifference as a mental state. It was enough, in the chief Judge's view, to draw the line at *Suarez* which underscored depraved indifference as the key factor which, when objectively viewed, separates conduct that creates a grave risk as opposed to a substantial risk of harm so that lawyers, judges and juries can better distinguish one level of criminal conduct (e.g., manslaughter) from another (e.g., depraved indifference murder) (*People v Suarez*, 6 NY3d at 215).

Like her dissenting companion, this Judge concluded that it did not matter that the defendant acted out of grief rather than malice because either way, his heedless and highly dangerous conduct in turning an occupied apartment building into a ticking time bomb bespoke an utter disregard for the value of human life. If people had been killed, by the majority's reckoning, there would have been no basis to prosecute the defendant for depraved indifference murder.

Consequently, in this dissenter's view, whether the defendant thought about his neighbors and maliciously dismissed them as potential collateral damage or failed to consider them at all, his conduct, objectively viewed, constituted the epitome of depraved indifference. Moreover, the majority's transformation of the long-held meaning of depraved indifference from an objective factual evaluation into a subjective mens rea requirement cannot be reconciled with either the language of the statute or previous precedent interpreting it (citing *People v Suarez*, 6 NY2d at 219).

## FINAL THOUGHT

Though the only mens rea specifically mentioned in statutes defining depraved indifference crimes is RECKLESSNESS, the Court of Appeals has made it clear that, despite statutory language suggesting otherwise, this aggravating factor reflects a SUBJECTIVE STATE OF MIND (rather than an objective set of circumstances) which reflects wicked indifference to whether the defendant's conduct could result in serious injury or death to others.

While judges and juries must consider the gravity of the risk created by the defendant's actions, that alone will not be enough to elevate recklessness to depraved indifference. As *Feingold* suggests, there must be that added ingredient of villainous evil in the defendant's mind as reflected by egregious conduct and callous indifference to the dangerous and/or deadly consequences to others.

However vile the defendant's behavior, juries should not be allowed to misconstrue an intentional crime with conduct reflecting depraved indifference. And, where there may be mitigating factors, as in *Feingold*, that explain the defendant's conduct (i.e., suicidal depression rather than malevolence), fact finders may be less inclined to find depraved indifference where only recklessness resides. In light of *Feingold*, defense counsel should not hesitate to highlight such distinctions in appropriate cases.