Judging Evil

Rethinking the Law of Murder and Manslaughter

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vicious blow to another.[103] Such cases also illustrate justified outrage in re
:tion to serious attacks on human value.

By comparing claimed instances of provocation to these new examples of
rious physical attack, we can limit the tendency of provocation to reflect
ass, gender, and race biases, because we should agree that wrongs as severe
these assaults transcend any group differences. If the new paradigms take
old in our legal culture, they should push to the fringes of provocation doc
ine the old examples of adultery and mutual combat. As we have seen,
me cases involving infidelity may support provocation, but only under spe
al circumstances. Similarly, homicides following mutual combat might still
ll under provocation's rule, but only when the killer suffered a serious and
nwarranted physical assault by the victim prior to the homicide. A verbal
sult to male honor should not suffice, nor should the fact that a combat was
ontaneous and fairly fought.[104]

Conclusion

or the scholar of criminal law, studying provocation proves both an inspir-
g and a humbling experience: inspiring because the doctrine provides raw
aterial for nearly every imaginable kind of responsibility theory—and
mbling for the same reason. It contains the raw material to argue against
rtually any theory. Indeed, the doctrine defeats all theory in the end. As a
mpromise rule, a fact-sensitive doctrine that seeks to encompass rather
an reduce the complexity of human interaction, the rule resists any per-
anent categorization.

Determining provocation in particular cases proves an especially messy
siness. Like an elected official who must take tenuous, compromise posi-
ns to retain public support, the doctrine requires drawing lines between is
d ought, between blame and reprieve that constantly threaten to collapse
to unprincipled power preferences. Contemporary critics have shown that
ovocation has often partially condoned the moral shortcomings of certain
oups in society, namely hot-tempered, patriarchal, heterosexual men, at the
nificant expense of other groups. Indeed, the argument against provoca-
n today is so strong that it admits of only two viable responses: abolition
reform. Because I believe that a reconceptualized provocation expresses
ch an important moral judgment that it should be part of the decision
aking of trial juries, I favor reform.

9

Crimes of Indifference

"I'm not a racist. I don't hate anybody."

"He's not a bad person. He didn't mean to hurt anyone."

"The worst you can say of her is that she was a little careless. She did not realize what would happen."

Each of these speakers makes a common assumption about evildoing. Each assumes that to do evil a person must act with hostile intent or at least with the awareness that harm to another is likely to result. Each assumes that without intent or awareness, the actor is blameless. I disagree. The failure to look out for and prevent doing harm to others may be culpable, even without actual awareness of risk. It represents one of the most common forms of evil, which deserves more attention in both law and everyday morals.

In this chapter we move from intentional to unintentional criminal homicide. Specifically, we take up the mens rea rules for depraved heart murder and involuntary manslaughter.[1] I argue that the modern trend to require that the defendant have actual awareness of fatal risks for serious criminal punishment is a mistake, based on a misconception of responsible choice. When a person acts in a way that involves obvious and unjustified risks to human life and causes death, punishment may be deserved even if the actor never realized the risks of her behavior, as long as the person's conduct demonstrates an attitude of indifference to the welfare of others.

We begin the consideration of the two rival approaches to culpability—what I call the awareness and the indifference approaches—with a review of the basic law of murder and manslaughter as applied to unintentional homicides. We then move to an overview of the basic arguments in favor of awareness of risk as the key to culpability. We find that at the center of the dispute between indifference and awareness approaches is a disagreement about responsible choice—about what kinds of mental activities count as choices. Awareness advocates see choice as what occurs following perception of certain morally critical facts; indifference advocates urge that the perceptive process be considered part of choice, so that the failure to

perceive certain facts may sometimes be attributed to a blameworthy choice. This focus on choice leads to a brief digression into new work in cognitive science, which inspires new ways of understanding the interaction between perception and decision making. The argument then returns to familiar ground—an application of the responsibility theory set out in part 1 to a number of particular cases. The chapter closes with a proposed redefinition of murder and manslaughter offenses based on the indifference approach to culpability.

An Introduction to Depraved Heart Murder and Involuntary Manslaughter

Anglo-American criminal law divides unintentional criminal homicides into two basic categories: depraved heart murder and involuntary manslaughter. Excluding felony murder, which also covers fatal carelessness, depraved heart murder represents the most serious form of unintentional homicide in Anglo-American law. Its hallmark is extremely dangerous conduct for which there is no justification. In the eighteenth century William Blackstone described it by reference to a workman who throws a heavy object, such as a large stone or timber, from a rooftop into the street below, killing a pedestrian.[2] He noted this would not constitute a crime if the workman shouted a warning first and if the incident occurred in a country village with few passersby. If the workman threw the stone or timber, after a warning, from a roof in London, or other populous town, where people are continually passing, "the fatal action would constitute the lesser crime of manslaughter," Blackstone wrote, "[b]ut if the workman knows that people are passing below and throws the stone or timber without warning, then he commits murder, for then it is malice against all mankind."[3]

As they did with other common law offenses, early English and American courts defined depraved heart murder in terms of moral character. Instead of focusing on a particular state of mind of the offender, courts condemned the moral traits revealed by the offender's action.[4] An early Pennsylvania court described depraved heart murder as a killing that demonstrates "wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty."[5] Courts have typically labeled such conduct as "wanton," "wicked," and "vicious," all demonstrating an "abandoned and malignant heart."[6]

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The modern law of depraved heart murder bears a close resemblance to its common law ancestors. The factors Blackstone identified as critical in the eighteenth century remain important today in resolving the legal status of homicidal acts, but the law's articulation of the required mens rea has changed.[7] Today the Anglo-American law of murder relies primarily on assessment of the accused's awareness and notice of risk. Under English law, depraved heart murder is encompassed within a general mens rea of intent to kill or intent to do great bodily harm, though this latter phrase is given a broad interpretation.[8] American law generally permits a murder conviction based on extreme recklessness that demonstrates great moral callousness. To oversimplify somewhat, United States jurisdictions take two different views of the recklessness required for murder. Many jurisdictions take the awareness approach to culpability and require proof that the defendant was aware of a great, unjustified risk to life. The rules of these jurisdictions will be the main focus of the chapter. In a second group of jurisdictions, greater emphasis is placed on the obviousness of risk, its severity and lack of justification than on awareness of risk. These latter jurisdictions have essentially adopted the indifference approach, although not in the explicit terms that are proposed later in this chapter.[9]

The Model Penal Code's definition of reckless murder provides a good example of the view that full awareness of risk is critical to criminal responsibility. The MPC divides the mens rea for reckless murder into four parts: that the offender have (1) consciously disregarded, (2) a substantial, and (3) unjustifiable risk to human life, (4) under circumstances manifesting extreme indifference to the value of human life.[10] I will refer to these components as the awareness, danger, necessity, and indifference elements. The danger and necessity elements require proof that the defendant's conduct created a significant risk to human life for no good reason. The risk must be so substantial and unnecessary that "its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation."[11] The standard permits risk taking where there is an overriding necessity. Thus, surgeons and police officers may knowingly risk others' lives as long as they have an overriding medical or legal reason for their conduct. The awareness element requires that the defendant realize: (1) the great dangers of his conduct, and (2) its lack of justification. In most cases the key question will be whether the defendant realized the dangers involved.[12] The last requirement, that the circumstances demonstrate extreme indifference to the value of human life, calls for a qualitative judgment of the moral attitude demonstrated by the risk taker.

The lesser offense of involuntary manslaughter has traditionally lain in the shadow of murder, defined largely by reference to the greater offense. If not murder, a culpable, careless act that causes the death of another must be manslaughter.[13] Involuntary manslaughter normally covers less risky behavior than that of depraved heart murder: conduct that is less obviously dangerous and, perhaps, more justifiable.[14] Most importantly, involuntary manslaughter usually involves a different mens rea: negligence rather than recklessness.[15] In most states, involuntary manslaughter requires proof of grossly negligent conduct causing death: that the offender should have realized his conduct represented a substantial and unjustifiable risk to human life.[16] Here the individual need not have been aware of the risk; it is enough that a reasonable person in his situation would have been.[17]

As noted in chapter 6, the reasonable person standard represents a modern form of allusive mens rea, in which the decision maker must compare the conduct of the accused with that of a person possessed of ordinary prudence and self-control. The breadth of reasonableness analysis may be illustrated by the MPC's definition of criminal negligence. The MPC provides that a person acts negligently if "considering the nature and purpose of his conduct and the circumstances known to him," the individual's conduct "involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation."[18] As the Commentary notes, there is "inevitable ambiguity" in determining what the phrase "actor's situation" should cover.[19] After setting out a few illustrations of what should and should not be included, the drafters left further articulation to the courts.

Awareness versus Indifference: Arguments about Choice

For the last thirty years or more, criminal law scholars have debated whether awareness of risk should be a prerequisite for criminal culpability for careless harmdoing. One group of scholars has argued that without awareness, we cannot say the person chose to put another at risk, and so the person does not deserve criminal liability.[20] Others have contended that notice of risk is the key: if a person acted in disregard for obvious and unjustifiable dangers to others we may judge her guilty of indifference to the value of others. Indifference proponents contend that moral and legal responsibility includes the obligation to look out for harms to others when one acts.[21] In doctrinal terms the debate has concerned the difference between recklessness, which normally requires actual awareness of risk, and negligence, which rests on a judgment that under the circumstances the offender should have been aware of risk, though he was not.

To paraphrase Justice Jackson's famous dictum about mens rea, the notion that culpability depends on awareness of risk is no passing fancy of morality.[22] Responsibility arguments of many kinds turn on the assumption that the individual's awareness of certain facts determines his responsibility. It is built into much of our moral discourse. The assertion that the person understood the likelihood of hurting another before acting almost always counts as an aggravating factor; the assertion that the person did not understand usually counts as a mitigating factor, and often a complete excuse.

The law's paradigm examples of depraved heart murder—fatalities caused by wanton shots fired into occupied structures, games of Russian roulette, and racing cars careening down streets crowded with cars and pedestrians—also suggest a central place for awareness of risk in the legal scheme of culpability.[23] These cases seem to exemplify conscious risk taking. How could anyone engage in such activities without understanding the risks involved? Indeed, why would anyone act so dangerously, for so little justification, if danger was not in some sense the point? In such cases we are struck by the underlying hostility of the actor. Even if the offender did not intend to kill a particular person, he acted with evil intent toward people in general. This reading of the paradigm cases brings us back to the model of intentional wrongdoing with which the chapter opened. In this sense, cases of culpable but unintentional killing merely represent a subset of the larger category of intentional wrongs.

But are we always sure that persons who endanger others in obvious ways are actually aware of those dangers? And are we confident that persons who are not aware of the dangers of their conduct are therefore excused from the most serious kinds of blame? Can we ever blame for failing to *consider* the risks involved? In England, appellate courts have gradually moved away from a strict awareness-of-risk conception of mens rea toward one where notice of risk plays a critical role. In that nation an offender may be found criminally reckless not only if he was actually aware of a significant and unjustified risk, but also where he "fail[ed] to give any thought to whether or not there is any such risk in circumstances where, if any thought were given to the matter, it would be obvious there was."[24] Here the key to culpability is the failure to exercise the mental faculties needed to realize the risk.

Many commentators on English law have criticized this change, arguing that awareness of risk must be a precondition to culpability. In essence, critics contend that seriously blameworthy choices involve what a person

decides to do *after* perceiving a risk. If the person sees the risk and ignores it, he chooses to endanger others and may be punished. If the person does not see the risk, then he does not, in a sense, make a choice about endangering others. At least for purposes of criminal law, the argument is that perception of risk occurs (or does not) prior to responsible choice.[25] By contrast, indifference advocates argue that at least in some cases, a person may be responsible for choosing not to perceive. The failure to look out for others may in itself be a blameworthy choice. This allows us to see that the dispute between approaches is fundamentally a dispute about choice. What kinds of mental activities, or inactivities, should we hold ourselves responsible for? Or to put it another way, what kinds of choices are associated with unintentional wrongdoing?

Choice and Perception: From Internal Choosers to Neural Networks

The puzzle of choice in the context of unintentional conduct may be introduced by a personal story. My older daughter has always held her parents to the highest standards of family care. My wife and I try hard, but alas, we sometimes fall short. For example, when she was a toddler, we would often set out on trips without some vital item—toy, blanket, food—that we had planned to bring, and that she was counting on. I would tell Leah: "I'm really sorry. I just forgot." In response, Leah would ask: "Why did you forget?"

Ever the teacher, I was always sorely tempted to educate my daughter on the concept of a category mistake. I wanted to tell her that she had asked a why question, appropriate to ascertain the intent of an intentional action, but inappropriate when addressed to an unintentional action. Forgetting, after all, involves a mental stumble, an instance when intents do not match up with actions. By definition, forgetting describes the absence of a critical choice. It makes no sense to ask about the reason for a choice when there was no choice in the first place.

But the more I thought about Leah's question, the more it struck me as an important one. Forgetting does not occur randomly. It often can be traced to choices for which we are responsible. For example, deciding to pack the morning of departure instead of the night before greatly increases the chance of forgetting. In moral terms, we often blame for carelessness, even when the harm done was unintended and unanticipated. Leah's question suggested the need to think harder about the kind of choice involved in unintentional wrongdoing.

Returning now to unintentional homicide and the awareness approach, we must judge failures of perception rather than failures of memory. We ask: Does it make sense to blame persons for failing to perceive risk? Awareness advocates urge a negative answer, arguing that failures of perception are not chosen. And oftentimes, the awareness position will prove correct; culpability does stand or fall on extent of actual perception of the risk. But with the help of recent work in cognitive science, I will argue that the awareness approach in criminal law often goes too far; failures of perception sometimes should be attributed to blameworthy choices.

As the discussion so far should illustrate, assumptions about the intentionality of choice play a large role in our assumptions about responsibility. The way we talk about chosen action often emphasizes the importance of awareness. Asked to recount a choice, we normally speak in terms of what we had in mind at the time. Consider an automobile accident in which a driver swerves to avoid one vehicle, then strikes another. Asked to explain her decision to swerve, the driver will likely say something like: "I figured it was my only chance to avoid a collision," an answer indicating that she deliberatively weighed various options before swerving. Or the driver may say: "It all happened so fast I had no time to think. I just reacted instinctively." This suggests a belief that instinctive action differs from chosen action, perhaps because instinct is not self-aware.

Such introspective accounts of choice (introspective because they are produced by the person's own thinking about choice) usually take a narrative form; they tell a story with a beginning, middle, and end. The beginning is perception, the middle is organization and preliminary evaluation of information perceived; the end is the decision reached. Asked to recount what happened, the driver in the accident will likely tell what she perceived (I saw the truck cut in front of me), how she evaluated that perception (I could tell I did not have enough room to stop), and what she decided (so I swerved right to try to avoid the truck). Such narratives suggest a basic and normative distinction between perception and decision making. Perception involves the passive gathering of relevant information; choice occurs only when this information has been sorted and presented to the self-conscious mind. In the narrative of rationality, choice represents the last act, the climax of the narrative. Introspection about choice suggests that if the narrative stops short of self-conscious decision making, we do not choose.

This picture of choice should sound familiar; it accords with the internal chooser metaphor reviewed and critiqued in the previous chapter. Again we see the seductive power of the metaphor. We know that good

decision making requires good information. We need efficient sense organs sensitive ears to hear and sharp eyes to see. We need a clear head (i.e., well organized, powerful brain) to assemble relevant information in an orderly fashion to understand our options. The metaphor suggests that if the internal chooser is blessed with skilled information gatherers and collators, the dangers of a particular activity will be dramatically presented before a decision is made. Cognitive bells will ring and lights flash, warning the internal chooser prior to decision making. A less fortunate internal chooser, who works with blurry vision, muddled hearing, or incompetent information collators, may receive such poor information that he may entirely miss the dangers involved. We naturally conclude that failures to perceive should be treated like mechanical malfunctions; cause for dismay and remedial efforts, but not blame.

The common view of perception assumes that it is a passive, mechanical process that happens to the real person. In fact, the gathering and selecting of relevant information represents an affirmative mental activity of the individual. Information processing is something we do, not something that is done to us.[26] We speak of *paying* attention as opposed to *falling* asleep. Like talking or eating, perception requires affirmative effort by the individual even if it does not demand a great deal of conscious direction.[27] Nor is perception mechanical in the sense that it is hard-wired in the brain. While some basic perceptive abilities may be genetically encoded, the great majority must be learned. An infant will instinctively duck to avoid an object overhead, but she must literally learn to see. Genetic patterns may provide the structure to learn perception, but not the details of its functioning.[28]

But none of this changes the basic fact of humanity that our perceptive abilities have severe limitations. We cannot process all the information available to our senses. For example, although the brain can simultaneously process different kinds of information for different purposes, we recognize that human abilities in this regard are limited.[29] When my children ask me something while I am on the telephone, I often lose track of both their question and my phone conversation. Realizing this, I try to limit the information I have to handle at one time. I tell my daughter, I'm sorry, I can't talk to you when I'm on the phone. Or, if I am driving in the car, trying to negotiate a contested L.A. intersection, I may ask others in the car to be quiet for a moment. These relatively conscious decisions about information intake mirror less conscious decisions we make about what we will attend to and

what we will ignore. Which brings us to the central responsibility problem: recognizing that our perceptive resources are limited, do we use them in a morally acceptable fashion?[30]

Our perceptions of the world depend largely on preestablished attention hierarchies.[31] For example, I read the sports page every day but I read much more about basketball and soccer than baseball or football. At parties I attend to conversations about relationships, politics, and the movies but tune out talk of restaurants and real estate. In short, I attend most to those matters which engage me most—in which I am most interested.[32] The same kinds of attention hierarchies affect more morally significant activities, such as how we wield power at work, how we interact with friends and partners. They affect what we hear and thus what we understand about the needs of those with whom we deal.

The awareness advocate may interject at this point: your description is fine, but what about prescription? If you want to hold a person responsible for his attention agendas, you must show that the person chose that agenda. Unless the person rationally and without coercion decided at some point to become disinterested in a particular set of risks, how can he be blamed for not looking out for those risks? Herein lies a problem. No one seems to deliberately choose his or her attention agendas. Most attention agendas seem to be the product of unconscious mental processes—they simply develop without our own understanding—and once formed, prove quite resistant to conscious efforts to change. This hardly looks like a choice for which we should be held responsible.

I agree that most of our attention agendas do not stem from highly self-aware decision making and in this sense they are not the products of conscious choice. But the line between conscious and unconscious decision making here proves more tenuous, and less significant than it first appears. There is no clear boundary between conscious and unconscious thought that can distinguish responsible from nonresponsible mental activity.

Recent work in cognitive science emphasizes the similarities between what are commonly called unconscious and conscious thought processes. Many scientists assert that, contrary to common belief, conscious and unconscious thought do not involve fundamentally different kinds of mental activity.[33] Instead, many researchers view consciousness as an emergent property, a state or function that arises out of nonconscious mental activity rather than a separate brain function that supervenes on nonconscious information

processing.[34] We become more self-aware as the brain performs more levels of data processing, not because data is processed in a different way or in a different place. The line between aware and unaware mental activity appears very much a matter of degree.

Cognitive scientists report a complex interaction between conscious and nonconscious processes. Deliberative processes affect nonconscious thought processes and vice versa. One way of understanding the interaction is through the distinction that cognitive scientists make between automatic and controlled mental processes.[35] A controlled mental process involves full self-conscious awareness. My writing this chapter represents a controlled process because I self-consciously decide what words to put on the page. An automatic process is one directed by preestablished patterns, without conscious direction. Most daily activities depend on automatic processes. Once we learn to walk, run or drive a car, these activities require little conscious awareness to perform. Notice that most automatic processes begin as controlled processes—we had to learn to walk, drive, and speak. Moreover, even after the processes become automatic, they remain subject to conscious control. We still can—and often do—make self-aware decisions about walking, driving, and speaking.

Attention depends on a similar interaction between aware and unaware processes. Whether we notice a particular fact about the world usually depends on automatic processes, on preset attention agendas and patterns of recognition. But the automatic processes of perception are subject to conscious direction at all times, albeit to different degrees. At some point in the past we made decisions about perception priorities, priorities we can change if we wish.

All of which brings us to the bottom line: What does cognitive science tell us about choice in unintentional harmdoing? Do our new understandings of the brain favor the awareness or the indifference approach? The answer is that cognitive science is agnostic on the responsibility question that concerns us here. Sound moral arguments can be made for either indifference or awareness based on what we have recently learned about human information processing. My aim in taking this brief excursion into cognitive science has not been to find the extramoral or extralegal data that will settle the question, but only to open up the reader's mind to another view of choice. My main target remains the venerable internal chooser and the metaphor's assumption that perception is necessarily divorced from choice. Developments in cognitive science demonstrate how we *might* hold persons responsible for failure

to perceive. We may focus our judgments on the person's perceptive priorities. Science will not tell us whether we should do so, however. That argument must be played out in the moral and legal arenas, with the traditional tools of moral and legal reasoning.

Responsibility for Indifference: A Preliminary Account

According to the basic theory of responsibility developed in part 1, we should blame persons for unintentional harms when their risky conduct demonstrates culpable indifference to the value of others. Just as intentional wrongdoing toward another merits blame because the wrongdoer has demonstrated a disregard for others that challenges our community's fundamental values, so there are cases where a failure to look out for another may demonstrate a callousness that challenges the principle of universal human worth on which a moral society must stand.

In most instances of culpable indifference, we judge that the wrongdoer was actually aware of the danger his conduct posed to others. Our judgment of culpability rests on the determination of the actor's decision to proceed, regardless of his own high degree of consciousness of the harms he might do. But in some cases we may judge that the individual was only dimly aware of the risk, or perhaps was not conscious of it at all, yet still acted with culpable indifference. Culpability here rests on a judgment that the failure to perceive risks stems from bad perception priorities. In such a case we judge the person guilty of choosing to assign too low a priority to the value of other human beings.

Where the accused did not perceive the risks involved at the time of his conduct, culpability rests on a judgment about why the person failed to perceive. Did the failure stem from a culpable lack of concern for the victim, or should we attribute it to other factors for which the individual should not be blamed? In illustration, consider two cases in which a driver runs a red light and fatally injures a pedestrian in the cross-walk. In both cases the driver saw neither the red light nor the pedestrian prior to the collision. One case involves a father rushing his severely injured child to the hospital. Another involves a teenager showing off for his friends. Immediately we see the moral significance of the reasons for perceptive failure. Indeed, the reasons for perceptive failure in these cases prove far more significant than the fact of that failure. The father's lack of perception may be attributed to his over-

riding and morally worthy desire to help his child. The teenager's failure to perceive may be attributed to morally blameworthy priorities. The teenager placed a higher value on winning the admiration of friends than on attending to the risks of fast driving. The teenager's conduct demonstrates an attitude of indifference toward others, a morally culpable state to which society should forcefully respond by conviction and punishment. The father's conduct demonstrates a tragic conflict between valuing his child and valuing others. If he is deemed guilty of indifference to the lives of others—and he may be—his indifference will be of a lesser order than that of the teenage driver.

In unintentional homicide, a determination of culpable indifference depends on three factors: (1) notice of danger, (2) extent of danger, and (3) the defendant's reasons for acting in a dangerous fashion. The more notice of danger, the more likely it is that the person was actually aware, and, even if not aware, the more likely that the person should be blamed for bad perception priorities. The extent of danger goes to our expectations for looking out for others. The greater the potential danger involved in an activity, the higher the moral obligation to consider and minimize those dangers, and the more we blame for failure to consider the dangers. Finally, we must examine the defendant's reasons for acting dangerously—was there an overriding moral justification, or were there constraining circumstances for which the individual should not be blamed? Or was the conduct the result of misplaced priorities?

Indifference in Current Law: Medical Risks and Intoxication

Having laid out the basics of indifference analysis, we now return to the doctrinal arena to see how it works in particular cases. We will see that indifference analysis does not change the outcome of many cases but does promise the significant benefit of better explaining and justifying the outcomes of certain cases than the awareness approach.

We begin with a case involving risky medical conduct that on its surface seems to present a classic instance of wrongdoing according to the awareness approach, but that on closer inspection provides an even better example of the power of indifference analysis. We then take up the law's treatment of intoxication in unintentional wrongdoing and find another kind of support for indifference.

Medical Risks

In 1974, Tony Protopappas, a licensed dentist and oral surgeon, opened a dental clinic in Costa Mesa, California. By September 1982 the clinic employed five dentists and two office managers along with a number of dental assistants. Protopappas established many standard procedures to foster efficient medical processing. These included standardized "setups" of anesthetic injections to anesthetize surgery patients and standardized instructions for his staff dentists on how to maintain patients under anesthesia. Although Dr. Protopappas was the only one at the clinic licensed to administer general anesthetics, much of the actual responsibility for administering and overseeing anesthesia fell to other staff.

On September 28, 1982, Protopappas operated on Kim Andreassen to do a root canal, three fillings, and a crown. Protopappas recognized that the eighty-five-pound, twenty-four-year-old woman was in frail health. Andreassen had told the doctor that she suffered from lupus, total kidney failure, high blood pressure, a heart murmur, and chronic seizure disorder. After contacting Andreassen's general physician, the office manager told Protopappas that Andreassen should not to be put under general anesthesia. Protopappas administered anesthetic drugs by his standardized method, putting Andreassen to sleep.[36] Although Protopappas later denied it, a nurse said that he administered a general anesthetic.

During the procedure Andreassen showed signs of toxicity from the anesthetic drugs and severe respiratory problems. When an assistant brought the respiratory problems to Protopappas's attention, he said, "Maybe that's normal for her because she is so ill." He completed the procedure. By the time he finished she was breathing normally again.

Shortly after finishing, however, Andreassen showed signs of respiratory collapse. After another dentist's efforts did not produce any improvement in the woman's condition, Protopappas administered oxygen by a disposable mask. Such masks provide oxygen for persons who can breathe unassisted; more elaborate positive pressure oxygen equipment is required for a person whose lungs are not functioning on their own. The clinic did not have such equipment. After brief treatment with the disposable mask, Protopappas called paramedics. Andreassen was clinically dead by the time they transported her to the hospital.

Medical experts later said that Andreassen died of a drug overdose. One oral surgeon declared that the drugs given would be massive for anyone "let alone a sickly 88 pound girl," and that their combination was "crazy" because the mix made it impossible to determine their impact on the patient.

> Two other patients of Protopappas died in February 1983, also as a result of respiratory failure due to overdose of anesthetic drugs. Medical experts testified at trial that Protopappas demonstrated extreme recklessness in his administration of anesthetics, in his supervision of staff, and in his overall treatment of these patients. A jury found Protopappas guilty of three counts of depraved heart murder.

As the California Court of Appeal noted in its lengthy review of the case, Tony Protopappas did not wish to harm any of his patients: "Dying patients would be bad for business; and nothing shines through this record quite as brightly as Protopappas's enthusiasm for making money—lots of it."[37] Under California law, Protopappas's guilt depended on proof of recklessness—the extent to which he was aware of substantial and unjustifiable risks of death to his patients. At trial and on appeal, Protopappas argued that the prosecution had not proven he was aware of such risks. The jury and Court of Appeal disagreed. Citing numerous instances where the doctor received warnings or made comments indicating his awareness of a hazard, the appellate court held that the prosecution had produced ample evidence to support a determination of recklessness.[38]

As a matter of deference to the original fact finder, the appellate court's decision seems correct. Protopappas was clearly informed of the risks involved, and from this a jury might find that he was actually aware of the risks. Yet if we take the awareness approach seriously, we should not dismiss the doctor's claim too quickly. If we were to require reliable proof that the doctor truly realized—brought into a high level of consciousness—the great and unnecessary risks of his own conduct, then the defense may have had the stronger argument.

We begin with the assumption that the doctor bore no ill will toward his patients and desired a successful practice. Is it likely that such a doctor would consciously disregard serious and unjustified risks to his patients' lives? To put it another way, do we truly believe that Dr. Protopappas realized that his actions were likely to kill Kim Andreassen but proceeded regardless? Although there was evidence to support such conscious disregard, it is not the best explanation for the doctor's behavior. Much more likely, Protopappas evaluated the risks involved and decided they were minimal. In other words, he evaluated the risks badly. Given the warnings he received, Protopappas should have realized that he was taking enormous and unjustified risks. When he made his critical medical decisions, however, he probably did not actually realize the dangers involved.

My guess is that Protopappas never allowed himself to recognize the real risks of his medical techniques. The doctor's primary concern was with efficient, lucrative medical procedures. He used standardized anesthetics and worked on several patients at the same time to maximize profitability. A decision not to operate, or to use individualized anesthesia, or to stop an operation in the middle, would interfere with his overriding goal of efficient patient processing. This predisposed him to use standardized anesthesia and to finish whatever medical procedures he started.

Ego may also have played a role in the doctor's assessment of risk. Protopappas was a highly educated, highly motivated person with a high-prestige job. Most people with these attributes also have big egos. They have a tremendous financial and psychological investment in their own talents and find it hard to admit a mistake or recognize their own limitations. Perhaps the reason that Protopappas discounted the risks was his ego-based disposition to believe in his own techniques. He was so heavily invested in his own expertise that he could not afford self-doubt.

This interpretation of the case raises several legal and moral problems. First, if proof of actual awareness of substantial risk fails here, despite the repeated warnings given the doctor, then depraved heart murder will effectively be restricted to cases of either overt hostility, or those where the defendant confesses to awareness of risk. Such a constriction of murder would conflict with widely held intuitions about culpability. In order to avoid this result, courts and juries in awareness jurisdictions often interpret the awareness requirement in a rough-hewn, commonsense fashion. Courts focus less on whether the defendant *was* aware than whether, given the obvious dangers involved, he *must have been* aware.[39] This leaves the law open to the criticisms that it does not mean what it says, or that its meaning is unclear.[40] But notice what happens when we employ indifference analysis.

Assuming that the doctor never realized that he was needlessly endangering his patients, we ask: Why? Was this a situation where we could not, in a moral sense, expect him to do better? For example, if these events occurred in an emergency room where time pressures were enormous and not of the doctor's creation, this might rebut the presumption of indifference. But the reasons discussed above—ego and money—are selfish reasons that support a judgment of indifference. The doctor put a higher priority on ego, money, or both, than on the safety of his patients. Regardless of whether he had a high level of awareness of the risks he undertook, Dr. Protopappas was properly judged culpable for the murder of his patients.

Intoxication

Another example of the power of indifference analysis to explain current criminal law is the law's treatment of persons charged with recklessness while intoxicated. Here we find that even those jurisdictions which generally require awareness of risk for criminal conviction make an exception for when the offender was intoxicated. The exceptional treatment of intoxication is usually explained in terms of sober-minded decisions to give up full control, but indifference analysis provides a more complete justification. As always, a particular case will make the point best.

> On the evening of August 2, 1987, thirty-six-year-old Deborah Moquin drove her car southbound on State Route 85 in upstate New York. She had been drinking. She had previously been convicted of two offenses involving drinking and driving: in February of 1983 she had been convicted of driving while her ability was impaired, and in June 1984 of driving while intoxicated.
>
> Moquin drove erratically, changing speeds and lanes. In passing another car, Moquin's speed was estimated at 70 miles an hour. When the road narrowed from four lanes to two, Moquin's southbound car crossed into the lane for northbound traffic. Witnesses said she did not put on her brakes or attempt to return to the southbound lane, even when a station wagon approached from the opposite direction. The two vehicles crashed head-on. The station wagon flipped over on impact and came to rest upside down against a guard rail. Mr. and Mrs. Quinn, who sat in the front of the car, were severely injured. Their fifteen-year-old daughter Kathleen, who sat in the back, was killed.
>
> Police at the scene reported that Moquin's breath smelled strongly of alcohol. They found four empty and one half-empty bottles of beer in her car. A blood test revealed Moquin's blood alcohol level was .24 percent, indicating extreme intoxication.[41] Moquin was charged with murder and was eventually convicted of manslaughter.[42]

Moquin's driving was outrageously dangerous. If she drove this way while sober all would agree that she deserved serious punishment, for we could say with confidence that she knowingly put others on the road at great risk. But she was heavily intoxicated. Some argue that such intoxication changes moral responsibility because it diminishes, or in some cases eliminates, the person's awareness of risk. To evaluate this claim we must take a closer look at intoxication's effect on individual behavior.

Drinking can change basic personality. Intoxicated individuals frequently gain self-confidence and lose inhibitions. Alcohol inspires many to express sexual or aggressive desires they would otherwise repress. Consumption of alcohol also predisposes the individual to focus on short-term pleasures rather than long-term consequences.[43] The drinker cares about having fun now, and pushes aside considerations of harm to others or to herself. Thus Moquin might be a cautious person while sober, but when drunk she might disregard or even pursue great risks to herself and others.

English and American courts have uniformly rejected the idea that intoxication should excuse because of its effect on personality. Indeed, few commentators have supported such an excuse, except in very limited situations involving inexperienced drinkers. Such an excuse would contradict the basic presumption that the physical person determines the self that is held responsible. As we saw in chapter 3, individual responsibility requires a strong presumption that a continuously existing physical person is a single chooser. All of us have many different sides to who we are; we act differently when angry or sad, when drunk or sober; nevertheless we presume that we remain the same person for purposes of basic responsibility. Who else would it be that is angry, sad, or drunk if not the person whose body is engaged in the conduct? Reinforcing the general presumption of identity in voluntary intoxication is the fact that the intoxication is chosen. Assuming an informed choice to drink, the drinker decides to risk change of personality and so should be held responsible for the consequences.[44]

Most who argue for an intoxication excuse do so on the narrower ground that intoxication negates awareness of risk. Alcohol intoxication commonly impairs perception. A drunk driver may be less able to see objects and to judge speed and distance than when sober.[45] Thus Moquin may not have realized how fast she was going, how close other cars were, or even that she was on the wrong side of the road.

Some awareness advocates have argued that persons like Moquin may be justly punished for recklessness because they knew the risks when they began to drink. The argument is that all drinkers know the dangers of intoxication—from impeded motor skills to impaired judgment—and this general awareness of risk may substitute for awareness of the particular hazards taken while intoxicated.[46] Thus we could say that Moquin, like virtually every adult in modern America, knew that drinking and driving is dangerous, and therefore that her drinking and later driving posed a serious risk to others' lives. The problem with this argument is that it conflates two quite different kinds of awareness. Realizing that driving while intoxicated statistically increases the risks of an accident is quite different from realizing that you are driving over the speed limit on the wrong side of the highway. The former supports a conviction for driving under the influence; the

latter is what the awareness approach seems to require for murder in the Moquin case.

The strictest proponents of the awareness approach argue that intoxicated harm-doers deserve punishment only for taking risks they realized when sober. They advocate the creation of a new offense of dangerous drinking, drinking where the individual knows that intoxication may lead to dangerous conduct. Under this approach we might punish Moquin for drinking under circumstances where she knew she was likely to drive while drunk and where, because of her previous convictions, she had been specially warned of the legal and moral wrongs of drunk driving.[47] Liability must rest on sober awareness, though. Once intoxicated, the individual loses sight of the hazards of her conduct and so becomes nonresponsible criminally.

Here, as elsewhere, the strict awareness approach founders in its sharp separation of perception from choice. Advocates argue that we should distinguish between choices to disregard risks of which a person is aware and failures to recognize those risks in the first place. But often the failure to perceive stems from a choice or series of choices that express the person's attitude toward the value of self and others. In deciding to drink heavily, Moquin disregarded a number of risks, including that she would make bad judgments when drunk. In deciding to drive while intoxicated, Moquin disregarded further risks. In speeding down the wrong side of the road Moquin chose an action that heightened risks to others. At each step along the way, Moquin may not have consciously considered the dangers involved. Like Protopappas, her brain may not have fully processed the warning information available to her. As with Protopappas though, that failure to process should not be attributed to a mechanical glitch. The failure to process stemmed from putting a higher priority on other concerns. Like Protopappas, Moquin made a series of choices, motivated by selfish concerns, to commit certain acts and in effect ignore the dangers involved. In Moquin's case, her need to drink motivated the disregard of otherwise obvious, lethal hazards to human life. Looking at her whole course of conduct, we see a person acting according to a philosophy that devalues human life.

By contrast with the liability theory supplied by the indifference approach, consider the awkward moves required to accommodate intoxication in an awareness jurisdiction. For example, the Model Penal Code, which generally takes an awareness approach to culpability, creates an entirely new form of recklessness to apply in cases of voluntary intoxication. When an accused charged with recklessness was intoxicated at the time of the harm doing, the code instructs the decision maker to determine, not whether the intoxicated person was aware of the risk, but whether the person *would have been aware* of the risk if sober.[48] Not only does this seem to contradict the responsibility theory behind the awareness approach, but it requires the decision maker to engage in difficult hypothetical reasoning, imagining what the sober accused would have seen in a situation perhaps critically different (by virtue of intoxication) from the one that actually occurred.

Instead of treating intoxication as an exception to the awareness-culpability principle, we should view it as proof of the indifference-culpability principle. Awareness of risk does yeoman service as a culpability test in most cases, because awareness usually serves as a proxy for indifference. In the usual case, facts that indicate awareness of risk also indicate indifference, while facts that negate awareness tend to negate indifference. Intoxication presents the unusual situation where the same facts that negate awareness (the defendant's intoxication) actually support a finding of indifference. Here the law must choose between the two approaches. We should not be surprised that the law plumps for indifference, for indifference should be the moral principle underlying all punishment of careless conduct causing death.[49]

Indifference and Capacity

One last major objection to the indifference approach remains: that some persons lack the capacity to perceive the risk involved, and so do not deserve punishment. English criminal law theorist Glanville Williams objected to criminal liability for negligent conduct on just such grounds: "Some people are born feckless, clumsy, thoughtless, inattentive, irresponsible, with a bad memory and a slow 'reaction time.' With the best will in the world, we all of us at some times in our lives make negligent mistakes. It is hard to see how justice (as distinct from some utilitarian reason) requires mistakes to be punished."[50] In other words, if the person did not have the capacity to perceive better, he should not be blamed for failing to do better.

The most sophisticated version of a capacity argument in the context of unintentional criminality was that offered by English lawyer and philosopher H. L. A. Hart. Hart contended that persons who acted dangerously despite notice of the risks involved deserved punishment only if their capacity to perceive risk were established. According to Hart, culpability for unintentional harms depends on proof that: (1) a reasonable person would have realized the risk, and (2) the individual had the capacity to comprehend the risk.[51]

Only some instances of unintentional wrongdoing raise capacity concerns. For example, Protopappas had the medical training necessary to understand the medical risks of his conduct. When sober, Moquin could perceive the risks in speeding down a state highway in the wrong lane, and since her loss of capacity when drunk is attributable to voluntary drinking, she might be blamed for its loss. But what about other cases, where the accused, through no fault of her own, seems to lack the capacity to comprehend the risk? Does indifference analysis apply to such cases?

Throughout this book, and especially in chapter 3, I have criticized efforts to ground responsibility on judgments of psychological capacity. I extend that criticism here. Admittedly, the capacity argument has special appeal with respect to perception. Surely we do not wish to punish a person for being nearsighted or hard of hearing or of low intelligence. But as we will see, the perceptive failures that homicide law normally addresses rarely involve these kinds of disabilities. Nevertheless, there may be some cases where persons should be excused for dangerous conduct because they lacked the physical abilities, intelligence, or training necessary to perceive the risks involved. Isn't a capacity excuse necessary to handle these?

I argue that defining liability according to a person's capacity to perceive confuses the responsibility issue. Here, as elsewhere, capacity analysis creates the danger that decision makers will confuse character flaws with excuses. To the extent that capacity analysis involves legitimate moral considerations, it phrases the moral inquiry in a particularly difficult way that requires decision makers to engage in hypothetical reasoning instead of simply judging the reasons for perceptive failures.

As we saw in chapter 3, individual responsibility builds on moral motivation. We blame or excuse according to actions motivated by the person's moral or immoral desires. We do not excuse for the lack of moral motivation; we blame for it. In accord with this baseline principle, motivations to perceive or not perceive should be considered part of the individual's core responsibility. Like urges to hurt or to help, perception priorities help define the person. A kindly, sensitive person is kindly and sensitive because she places a high priority on addressing the needs of others. She is highly motivated to look out for the welfare of fellow humans. A callous person sets a low priority on others' needs, explaining why he may consciously disregard the harmful consequences of his actions, or fail to recognize those consequences in the first place. Like other aspects of character, perception priorities may be neither consciously nor freely chosen. Genetics may influence perception priorities; unchosen environment in the form of a young person's parents and community role models certainly does. But regardless of their source, perceptive motivations are part of what we judge when we judge responsibility. Talk about capacity tends to blur the difference between motivation to perceive and ability to perceive.

Equally important, capacity analysis turns attention away from an important culpability concern, the assessment of reasons for nonperception. While we will find relatively few cases in which the reason for nonperception was inability to perceive, we will find a number of cases—like Protopappas—where the need to attend to other concerns explains the nonperception. In such cases the critical question is the moral status of the other concerns. In Protopappas, concerns with ego and money caused the nonperception, thus supporting a judgment of indifference. The following case represents another side of the same issue. It also presents an excellent vehicle for exploring the difference between capacity and indifference analysis.

The Williams Case

Walter and Bernice Williams were loving parents to seventeen-month-old William Joseph Tabafunda.[52] Walter Williams was twenty-four years of age and worked as a laborer. He was a full-blooded Sheshont Indian and had a sixth-grade education. Bernice was twenty years old, had an eleventh-grade education, and was part Indian. In early September of 1968 little William fell sick. The trial court found:

> The defendants were ignorant. They did not realize how sick the baby was. They thought that the baby had a toothache and no layman regards a toothache as dangerous to life. They loved the baby and gave it aspirin in hopes of improving its condition. They did not take the baby to a doctor because of fear that the Welfare Department would take the baby away from them. They knew that medical help was available because of previous experience. They had no excuse that the law will recognize for not taking the baby to a doctor.[53]

The baby died because he had an abscessed tooth that, left untreated, led to infection and gangrene. These conditions caused malnutrition and a fatal case of pneumonia. During the time when medical care would have saved the child, the baby was fussy, could not keep food down, and had a cheek that swelled and turned bluish. An expert testified that at some point during this period the infection in the baby's mouth may have created the characteristic smell of gangrene: the smell of rotting flesh.

Mr. and Mrs. Williams were convicted of involuntary manslaughter, the trial court finding that they were negligent in failing to contact a physician about their child's illness. The Washington Court of Appeals affirmed the conviction.

Washington law at the time defined involuntary manslaughter as a killing caused by negligence. Unlike most jurisdictions, state law made no distinction between civil and criminal negligence.[54] In *Williams* the court explained that the law requires "the kind of caution that a man of reasonable prudence would exercise under the same or similar conditions. If, therefore, the conduct of a defendant, regardless of his ignorance, good intentions, and good faith, fails to measure up to the conduct required of a man of reasonable prudence," then he is legally negligent.[55] Under this standard, the liability question in *Williams* becomes: Would a reasonably prudent person believe that a small child, who has a tooth problem, becomes fussy, and will not eat over a period of days, then develops a swollen, bluish cheek that emits a terrible smell, should be taken to the doctor? The answer is clearly yes. But if we want to judge culpable indifference, this analysis seems inadequate. Although an unreasonable medical decision concerning the child may be an important factor in assessing indifference to the child, bad diagnosis does not equal indifference.

The *Williams* case appears in the casebook I use in teaching criminal law, and students normally have strong though conflicting reactions to it. Students generally agree with the judgment that persons of ordinary prudence would have taken the baby to a doctor before the final illness set in. They disagree on whether the couple's misunderstanding of the child's medical condition or their fear of the Welfare Department should constitute an excuse, however. Some see the couple as blameless victims of ignorance or of racial discrimination; others blame them for putting their desire to keep the baby ahead of the child's health.

I use the case in class to test H. L. A. Hart's proposed capacity test, mentioned at the top of this section. Because the trial court had described the defendants as "ignorant" and emphasized their relative lack of education, perhaps this is a case where the defendants lacked the capacity to understand the dangers of their conduct. Under Hart's test we ask whether husband and wife had "the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise those capacities."[56] This sounds like a test of intelligence and experience: Were the Williamses smart enough and experienced enough to recognize the risk of treating their child at home, given the signs of serious illness? The answer seems to be yes. Putting aside the racist argument that they were congenitally ignorant because they were Native Americans, we are left with their relative youth and modest education—

hardly exceptional qualities for parents. Both husband and wife were smart enough and experienced enough with children and modern medicine to see that their child suffered a serious medical problem that warranted professional attention.

In fact, the *Williams* case is not about incapacity at all. The key to understanding the Williamses' behavior is their fear of the welfare authorities. Had the Williamses trusted the medical and social work authorities, they likely would have taken their son for early medical treatment. The appellate court noted in three different places that the parents dearly loved their child.[57] The parents knew that medical care was available. Only their fear of what the authorities would do when they saw the child seems to have stopped them. The question is what moral role the parents' fear of authorities should have in resolving the case. Under Hart's capacity test, their fear plays no role. That changes under indifference analysis.

Under an indifference standard, the Williamses could point to their love of their child and active concern for its health as evidence that might rebut the suggestion of indifference raised by their medical misjudgment. Their love would not provide a blanket excuse, though. We might decide that the couple cared more for their own enjoyment of the child than for the child's welfare. This returns us to what should be the central issue in the case: the couple's fear of child welfare authorities.

The Williamses' fear of the authorities likely impeded their diagnosis of little William. Hoping to avoid a trip to the doctor and a confrontation with child welfare authorities, they resisted the idea that he was seriously ill. As Native Americans, a people with a history of governmental discrimination, including the forcible removal of children from Indian families by white authorities, the Williamses had reasons for fearing the authorities that many others would not.[58] The couple should have had the chance to argue that their failure to seek medical attention stemmed from their legitimate fear of the wrongful loss of their child and not from callousness toward the child's welfare.

It's worth noting how different the case would be if the parents had a different explanation for their perceptive failure. For example, if the couple's reason for not considering seriously the need for medical attention was due to their fear that child welfare authorities would discover actual incidents of child abuse or neglect by the parents, or their own drug addiction, or any other misconduct on their part, we would have little trouble condemning the Williamses' inaction. In such a case the parents might still lack actual

awareness of risk; their diagnostic skills would be no different, but the case would have an entirely different moral tone because of our judgment that their perceptive failure was due to selfish and immoral priorities.

Reform Proposals

Finally, we are ready for rule drafting. Based on the arguments already made, the offenses of depraved heart murder and involuntary manslaughter should be based on the indifference approach to culpability, with decision makers asked to assess the degree of risk involved, the degree of notice of risk to the accused, and the degree of indifference demonstrated by the accused's conduct.

Depraved heart murder should be defined as follows:

A person is guilty of murder who causes the death of a human being by the disregard of an obvious, extreme and unjustifiable risk of death, thus demonstrating extreme indifference to the value of human life.

Involuntary manslaughter should be defined as follows:

A person is guilty of involuntary manslaughter who causes the death of another by the disregard of a substantial, unjustified, and reasonably apparent risk to human life, under circumstances that demonstrate a basic lack of concern for the welfare of others.

These offenses would require the prosecution to prove beyond a reasonable doubt that the defendant disregarded major, unjustifiable risks for culpable reasons. By making culpable reasons for disregard an element of the offenses of murder and manslaughter, these statutory definitions would permit some new mens rea arguments. As we have seen throughout this chapter, some of these arguments would assist the prosecution. But there are a number of indifference arguments that would present new avenues for the defense in homicide cases.

In some cases individual intelligence and education level may be relevant to determinations of indifference. In all instances the prosecution must prove that the defendant's disregard of risk was the result of culpable, selfish motivations, meaning that it must rebut any indications that disregard of risk was due to low intelligence or lack of education. In cases involving hazards stemming from complex instrumentalities, education and intellect may prove

quite significant.[59] As suggested by the discussion of the *Williams* case, though, most careless homicide cases turn on issues of notice of risk and individual value priorities, not intellectual ability.

Youth represents another nonculpable cause of poor reasoning ability, though one rarely weighed independently under current law.[60] The indifference standards created by the new offense definitions would permit direct consideration of youth. A jury might find that a young person had not had enough experience with hazardous situations to merit the judgment that careless action demonstrates criminally culpable indifference. A jury might also rely on youth to guide its decision whether a culpable homicide should be categorized as murder or manslaughter.

The use of indifference would make clear the relevance of provocation to culpability, even in unintentional killings. As we saw in chapter 8, most provoked killings are intentional. Nevertheless, we may imagine situations where provocation leads to a careless killing: an angry person may respond with more force than he intends to employ or may try to attack the provoking party but accidentally kill a third party. In both instances the state might charge the defendant with a reckless (to use current terminology) or indifferent (my terminology) murder. Assuming we follow the definition of provocation established in Chapter 8 as a killing where the defendant had good reason for rage at the offender, provocation should negate the charge of murder based on indifference. However, provocation should only operate as mitigation, not excuse. Regardless of its legitimacy, anger never represents a morally justifiable, or excusable, basis for killing. At the minimum, a provoked killing should be punished as involuntary manslaughter.[61]

Finally, the indifference mens rea's would require the state to establish the basic rationality of the accused killer in those cases where the facts cast doubt on the accused's mental stability. To show that nonperception of risk was due to indifference, the prosecution would have to exclude the possibility of disregard of risk due to mental disease. This change would likely affect only a small number of cases. Most homicides by persons with serious mental problems are intentional killings and so would not fall under the indifference offense definitions. Generally the individual's rationality problem contributes the motive for a purposeful attack, such as a paranoid belief that the victim is plotting against the accused. Nevertheless, there may be instances where a defendant's misperception of the situation or the degree of risk involved may be attributed to mental disease and so be relevant to assessment of an unintentional killing.[62]

A Final Test Case: Religious Belief

The greatest challenge that indifference analysis brings is normative. By requiring consideration of the reasons for disregard of risk, indifference requires decision makers not only to make judgments about degree of danger and notice, degree of perception, and perceptive effort, the decision maker must also consider whether rival claims on a person's interests and sometimes even rival values may preclude a judgment of callousness. We caught a glimpse of the difficulties of this analysis in the *Williams* case, where the jury would have to decide whether the couple's fear of a child abuse claim stemmed from a legitimate fear of the authorities or a selfish concern for parental control. Sometimes the issues will be even harder. For example, consider the death of Shauntay Walker.

> Laurie Grouard Walker was the mother of four-year-old Shauntay. In late February 1984 Shauntay came down with what seemed like the flu. After four days of mild illness the child developed a stiff neck. Consistent with her beliefs as a Christian Scientist, Laurie Walker did not seek medical attention for the child, but treated her by prayer. Walker contacted a church prayer practitioner who prayed for and visited the child, and a Christian Science nurse who attended the child on three separate occasions. The child's illness—later determined to be meningitis—grew progressively worse, however. Shauntay lost weight, became irritable and disoriented. After a seventeen-day illness, Shauntay exhibited heavy and irregular breathing. A short time later she died. The Sacramento district attorney later charged Walker with involuntary manslaughter and felony child endangerment for the death of her daughter.[63]

In a pretrial review of the charge against Walker, the California Supreme Court rejected her proposed defense of good motive. The court held that involuntary manslaughter depends on criminal negligence, to be determined by whether "a reasonable person in defendant's position would have been aware of the risk involved."[64] Ms. Walker's concern and good faith in treating her child therefore would not be an excuse.[65] As in *Williams*, this ruling eliminated the defendant's best argument for acquittal.

To most in contemporary America, Ms. Walker's belief that disease is a manifestation of mental errors to be treated by prayer and not medicine is crazy.[66] The healing power of contemporary medicine is demonstrated daily. If we were to take a utilitarian approach to punishment, the case is a fairly simple one. Parents like Walker may be strongly encouraged to seek medical treatment for children by the threat of punishment. But I remain concerned with deserved punishment for homicide. Did Walker's inaction demonstrate moral indifference to her child?[67]

By her calculated refusal to seek medical assistance, Ms. Walker did flout a basic American value. She rejected the value of medical science. But does this amount to moral indifference? According to the stated facts, Walker cared for her daughter as she thought best. The only way we can charge Walker with moral failure here is if we decide that her own need to believe in Christian Science represented a selfish motivation that should not have interfered with a clear-minded concern for her child's health. This involves one of the hardest legal and moral issues under our constitutional scheme because it requires us to judge the worth of Walker's religious beliefs. While religiously inspired acts may be criminally condemned—we should severely punish human sacrifice or deliberate abuse regardless of religious precepts, for example—we are committed to providing maximum space for religious belief within the bounds of basic human value.

The advantage of indifference analysis here is that it makes the central moral issue in the case the most important legal issue. Unlike negligence, which excludes religious motivation from formal consideration, indifference requires the judge or jury to determine its moral weight in this context. This framing of the issue also reveals the disadvantage of indifference analysis, however, for it puts on a decision maker's shoulders a controversial moral question that we might prefer to consign to the legislature or private choice.

Personally, I am inclined to the defendant's side in the Walker case. Given the course of the illness and Walker's efforts to care for her child, I see this as a case of tragically misguided concern rather than of culpable indifference. But I can envision other cases involving unusual religious beliefs where because of differences in notice of risk and active involvement in risk creation I would urge a different result.[68] The bottom line for our purposes is that hard moral cases remain hard under an indifference standard. The major difference between indifference and traditional mens rea forms, especially negligence, is that under indifference the important moral issues in hard cases cannot be swept under the legal rug.

Conclusion

In F. Scott Fitzgerald's *The Great Gatsby*, the narrator, Nick, saves his harshest judgment for Tom and Daisy, a wealthy and charming couple whose callousness proves devastating to all around them. After Tom's mistress is run

over by a car driven by Daisy, Tom and Daisy abruptly depart Long Island, leaving the blame and consequences to others. "It was all very careless and confused," Nick observes. "They were careless creatures, Tom and Daisy—they smashed things and creatures and then retreated back into their money or their vast carelessness, or whatever it was that kept them together, and let other people clean up the mess they had made."[69] With their wealth and charm, Tom and Daisy invited the love of others, but neither fully reciprocated nor considered the consequences. Their desire for a carefree existence inspired them to act carelessly with others.

People like Tom and Daisy do not figure prominently in modern moral and legal culture. We seem more impressed—to the point of obsession—with the purposeful wrongdoer. In our culture of violence, the most celebrated and feared offender is the sadist. When killers appear in fiction, television, or the movies, they invariably commit purposeful homicides and often seem to revel in others' suffering. Our moral discourse reveals the same preoccupation with intentional wrongdoing: we often seem unwilling to condemn harmful conduct absent dramatic evidence of aggressive and deliberate injury to others. Yet the most common cruelties are acts of indifference. In our daily lives we are more likely to confront Tom and Daisy than a serial killer.

Even when we acknowledge the fault of carelessness, we often limit its scope by requiring awareness of risk. We minimize our own obligations to others by denying the duty to look out for risks when we act. We diminish the moral community by divorcing perception from choice. Even in a liberal, capitalist democracy this constitutes too meager a set of moral obligations. Like it or not, we live in close proximity with others and daily employ a host of powerful instruments that may harm them. The modern human community requires more than avoiding deliberate aggression; it requires active concern, at least for the lives of other human beings.

Appendix

Proposed Jury Instructions

Jury instructions occupy a peculiar place in the criminal law. Appellate courts traditionally give jury instructions closer scrutiny than perhaps any other aspect of the trial. Convictions are regularly reversed because of legal misstatements in the instructions or failures to instruct on critical issues. Judicial attention, however, focuses far more on the legal accuracy of instructions—what they mean to the legally trained—than their comprehensibility to laypersons. Courts ask how a reasonable juror would understand the instructions, but as persons deeply familiar with legal terminology and modes of expression, judges are poorly situated to answer the question. When confronted with studies showing poor comprehension of instructions by laypersons, courts often ignore them, preferring to presume that what seems obvious to the court will seem obvious to jurors as well.[1]

Nor have jury instructions received the scholarly attention they merit. Scholarly analysis of mens rea doctrine almost always focuses on the language of statutes or appellate decisions rather than the standard jury instructions used by trial courts. This disregards the enormous problem of translating complex legal principles into comprehensible ordinary language. It is as if a diplomat, called upon to give a speech in a foreign language, endures agonies to find the right words in his native tongue but pays no attention to how those words are translated for his audience. It makes no sense.

What follows is a set of proposed jury instructions corresponding to the main issues addressed in part 2 of the book—definitions of mens rea and the offenses of aggravated murder, voluntary manslaughter, depraved heart murder, and involuntary manslaughter. My aim here is to explain the concepts and rules involved as clearly and efficiently as possible. The instructions should be considered a first-draft effort only. Among other shortcomings, they have not been tested on a lay audience to determine their comprehensibility and reliability. They should give some indication of the possibilities of clear jury instructions, however.

Mens Rea and Its Proof

PROPOSED JURY INSTRUCTION

Once you have resolved that the defendant in this case committed a voluntary act, or a legally sufficient failure to act, you must make a further determination concerning the nature of the defendant's conduct. You must determine what the law calls mens rea.[2] *Mens rea is a Latin term that has been translated in many ways, but for purposes of this case refers to the goals, thoughts, and attitudes that informed the defendant's act. Broadly speaking, mens rea provides one of the most important means of separating criminal from noncriminal acts. Mens rea may distinguish between a deliberate criminal harm and an accidental, noncriminal harm. It may also provide a means of determining the relative severity of an offense.*

Every offense has its own requirements with regard to mens rea, and you should listen closely to the instructions I give about the offenses charged in this case. Before I give those instructions, however, I want to describe generally the basic forms of mens rea and how they may be proven.

The best way to describe the different forms of mens rea, is by example. I will use as my example a case where a defendant is charged with a criminal killing. Assume that in this case that the jury determines that the defendant's voluntary conduct caused the death of the victim. Then the jury must resolve the issue of mens rea. The jury may be asked to decide whether the defendant meant to kill the victim. This form of mens rea is called purpose. If the defendant had purpose to kill, the jury might be further required to decide why he wanted to kill. This form of mens rea is called motive. If the jury finds that the defendant had no purpose to kill, then it may be asked to determine whether the defendant realized that the victim would almost certainly die as a result of his conduct. This form of mens rea is called knowledge. Finally, if knowledge is not proven, a jury might be asked to determine whether the risk of death was obvious to one in the defendant's situation and whether, in light of all the circumstances, the defendant's conduct demonstrated callousness to the well-being of the victim. This form of mens rea is called indifference.

Issues of criminal mens rea require you to determine, if you can, why the defendant committed the alleged criminal act. In making this determination you should consider the circumstances of the conduct, the conduct itself, and any statements the defendant made before, during, or after the incident which might shed light on his conduct. You need not read the defendant's mind to resolve criminal mens rea; instead, you should focus on the defendant's reasons for action. You should evaluate the defendant's mens rea in light of what you know of human nature generally—indeed, this is one reason you have been chosen as jurors—but you should remember that your responsibility is to determine what the defendant actually did in this case. In other words, you must decide whether there is anything about this defendant or the circumstances of this case so that ordinary expectations concerning the conduct do not apply. Finally, you should remember that the prosecution bears the burden of proving, beyond a reasonable doubt, the defendant's criminal mens rea. If you find that the prosecution has not met its burden as to a particular form of mens rea, then you must acquit on the charge that requires that mens rea.

Aggravated Murder

Statutory Definition

Aggravated murder is the purposeful killing of another human being for profit, to further a criminal endeavor, to affect public policy or legal processes, because of animosity toward the victim's race, religion, ethnicity, sex or sexual orientation, or to assert cruel power over another.

PROPOSED JURY INSTRUCTION

Aggravated murder represents the most heinous form of homicide and is reserved for crimes of exceptional depravity. The state must prove that the defendant acted: (1) with purpose to kill, and (2) and for a statutorily specified motive.

The law designates certain motives that support aggravated murder: a killing for profit, to further a criminal endeavor, to affect public policy or legal processes, out of animosity toward the victim's race, religion, ethnicity, sex or sexual orientation, or to assert cruel power over another. In order to satisfy the motive element of the crime, you must decide that the particular motive provided a substantial reason for the defendant's action. The motive need not have been the only reason for the killing, but it must have been an important force behind it.

A killing for profit is one to gain money or property or to prevent the loss of money or property, for the defendant's own enjoyment.

A killing to further a criminal endeavor is a homicide designed to aid criminal activity. Examples include killing a peace officer to escape capture, or killing witnesses to a crime to prevent their later testimony. Such a killing requires proof of ongoing criminality and that the killing was motivated to further the criminality in some fashion, either by achieving some criminal goal, or preventing discovery, investigation, or prosecution. If the victim was a law enforcement officer, the defendant's awareness of that status may be relevant to this motive. In general, the importance of the victim to the success or failure of the criminal scheme should also be considered.

A killing to affect public policy or legal processes is one motivated by the desire to affect the decisions of matters of public interest committed to democratic processes or the desire to affect the legal decisions of authorized institutions.

A killing based on group animus is one substantially inspired by hostility to the victim's race, religion, ethnicity, or sexual orientation. Here the victim is attacked because of his or her group membership or affiliation.

A killing to assert cruel power over another is a killing undertaken for the satisfaction of exercising ultimate power over another human being—the power to take life. Such killings may be shown by the lack of any other reason for the homicide; by extreme cruelty against the victim, including the use of torture; by acts of domination beyond those inherent in killing; by actions indicating pleasure taken in violence, including sex acts by the offender involving the victim or attacks on the victim's sexual parts.

In considering possible indicators of motive listed here, you should remember these are only possible indicators; your responsibility is to decide the killer's actual motive in this case.

Voluntary Manslaughter

Statutory Definition

A killing that would otherwise be murder is voluntary manslaughter if the defendant had good reason to believe that the victim committed a serious wrong against the defendant or a loved one, and if this provoked in the defendant at the time of the homicide a great and justifiable anger at the victim.

PROPOSED JURY INSTRUCTION

Under the law, a homicide that would otherwise qualify as murder is classified as manslaughter if the victim's seriously wrongful conduct inspired in the defendant a violent rage. The law recognizes that when a person suffers from a substantial wrong done by another, extreme anger at the wrongdoer may be justified, and that anger will make it more difficult for the wronged person to refrain from violence. When the defendant had good reason for extreme anger toward the victim and kills in the heat of that anger, the offense is deemed less serious than murder. You should realize, though, that manslaughter remains a serious offense. Even if the defendant had a legitimate grievance with the victim, the law requires all citizens to refrain from redressing grievances with fatal violence.

To find provocation, you must first determine that the defendant experienced extreme anger. This anger must be so strong that it affected the defendant's judgment, significantly reducing [his][her] ability to consider the consequences of action and to refrain from violence.

Second, you must determine that the accused had a good reason for extreme anger. No person can claim provocation because [he][she] became enraged at a trivial slight or minor threat. Cases where a person's extreme anger might be justified include those where the victim has been responsible for a serious harm such as a sexual or other serious, wrongful assault on the defendant, a relative, or a close friend of the defendant. Significant threats to the safety of the defendant or a loved one may also be cause for such anger.

In determining what constitutes a good reason for extreme anger, you act as conscience for the community. Considering the circumstances of the case, you must resolve whether the defendant faced an unusually aggravating situation such that the defendant's violent response merits less punishment than most criminal homicides.

As part of this determination, you must resolve that the defendant's extreme anger was justified at the time of *the homicide. Even when the victim's conduct represents cause for great anger, the law expects that this anger will diminish with the passage of time. Following a reasonable period, the defendant should regain full control of emotions and actions. The length of time needed to restore basic emotional equilibrium will vary from case to case. In evaluating what is often called the "cooling off period," you should consider the nature of the provocation. The more serious the victim's wrongdoing, the longer the cooling-off period may be. The defendant's efforts to avoid violent confrontation with the victim following an originally provoking event and any subsequent acts of provocation by the victim are also relevant to the justification for anger at the time of the homicide.*

Extreme Indifference Murder

Statutory Definition

A person is guilty of murder who causes the death of a human being by the disregard of an obvious, extreme, and unjustifiable risk of death, thus demonstrating extreme indifference to the value of human life.

PROPOSED JURY INSTRUCTION

Conviction of this offense requires proof that the defendant caused the victim's death by actions or legally sufficient omissions to act in which the defendant disregarded an

obvious, extreme, and unjustifiable danger to human life, and proof that defendant's conduct demonstrated an attitude of extreme indifference to the value of human life. I will call these two requirements the disregard requirement and the indifference requirement.

The disregard requirement has three parts: (1) that the defendant's conduct posed a great danger to the life of the victim, (2) that there was no necessity for such a danger at the time, and (3) that the danger and lack of necessity were immediately apparent to one in the defendant's position. For conviction, the degree of danger must be such that death or severe injury of the victim, or a similarly placed person, could be readily expected as a result of the defendant's conduct. The danger must be unnecessary, meaning that there was no overriding justification for it, such as self-defense, defense of another, law enforcement necessity, or medical emergency. Finally, the degree of danger and its lack of necessity must have been obvious to one in the defendant's position. This means that the defendant had enough warning of danger that the defendant, or anyone else with similar physical abilities, training, and knowledge, would have realized the risk involved had they paid minimal attention to the welfare of those endangered. The obviousness of danger may be shown by the nature of the defendant's conduct, by the nature of the situation, by specific warnings given to the defendant, by indications that the defendant was actually aware of the unnecessary danger, or by any combination of these factors.

For a conviction of murder you must also find that the defendant's conduct demonstrated an attitude of extreme indifference to the value of human life. By extreme indifference to human life, the law means a radical lack of concern for the worth of other human beings. Indifferent conduct is that which is cold and callous to others. Persons who are aware of the unjustified and deadly risks of their conduct, and ignore those risks, demonstrate extreme indifference to human life. Persons who are so focused on selfish concerns that they do not consider the obvious, significant, and unjustified risks to others of their conduct also demonstrate indifference to human life.

If you determine that the defendant was not actually aware of the life-threatening nature of his or her conduct, you must determine why the defendant was unaware. You must determine whether lack of awareness was due to a culpable lack of concern for others or whether it may be attributed to other, nonculpable factors. In such cases you should consider any defects in the defendant's reasoning powers caused by mental disease, low intelligence, youth, lack of training, or education. In making this assessment you should remember that all persons are obliged to try to avoid causing lethal harms to others. To the best of their abilities, all persons must look out for serious dangers which their conduct may create for fellow human beings.

[You may also find proof of indifference lacking where the defendant had a legitimate reason for sudden and extreme anger against the victim. Where the defendant reasonably believed that the victim had committed or was about to commit a serious wrong against the defendant, or a loved one of the defendant, the defendant's failure to heed the dangers of conduct should not be deemed proof of extreme indifference to human life.][3]

Remember, it is the prosecution's responsibility to prove, beyond a reasonable doubt, the requirements of disregard and indifference. If, after considering all the evidence, you have reasonable doubts concerning either requirement, you should acquit the defendant of murder.

Involuntary Manslaughter

Statutory Definition

A person is guilty of involuntary manslaughter who causes the death of another by the disregard of a substantial, unjustified, and reasonably apparent risk to human life, under circumstances that demonstrate a basic lack of concern for the welfare of others.

PROPOSED JURY INSTRUCTION

Involuntary manslaughter requires proof that the defendant caused the victim's death by actions or legally sufficient omissions to act in which defendant: (1) ignored a reasonably apparent, significant, and unnecessary risk to human life, and did so (2) under circumstances that demonstrate a basic lack of concern for the victim's welfare. I will call these two requirements the risk requirement and the lack of concern requirement.

The risk requirement has three parts to it. First, the defendant's conduct must have posed significant risks to the life of the victim. Second, the risks must have been unnecessary, meaning that the defendant had no overriding justification for them, such as self-defense, defense of another, law enforcement necessity, or medical emergency. Third, the nature of the risks must have been so apparent that a person of ordinary prudence in the defendant's situation would have recognized them.

For conviction, the defendant's conduct must also demonstrate a basic lack of concern for the welfare of others. The defendant's conduct must show grave irresponsibility. In this regard, you must decide whether the defendant's failure to recognize and avoid the risks involved was due to a culpable lack of concern for others or should be attributed to other, nonculpable factors. Among nonculpable reasons for failing to perceive risk are low intelligence, lack of training or schooling, or mental disease. The mere presence of these factors is not sufficient to resolve the issue, however. In deciding

whether the lack of concern requirement is met, you should remember that all persons are obliged to try to avoid causing lethal harms to others. To the best of their abilities, all persons must look out for serious dangers which their conduct may create for fellow human beings.

Remember as well that it is the prosecution's responsibility to prove, beyond a reasonable doubt, the requirements of risk and lack of concern. If, after considering all the evidence, you have reasonable doubts concerning either requirement, you should acquit the defendant of involuntary manslaughter.

Notes

NOTES TO PREFACE

1. This account is drawn from newspaper stories. For a summary, see Claire Martin, Ernest John Dobbert Jr., Jacksonville Journal, Feb. 2, 1982, at B-1.

2. The reported decisions in the case include: Dobbert v. State, 328 So.2d 433 (Fla. 1976) (affirming conviction); Dobbert v. Florida, 432 US 282 (1977) (same); Dobbert v. State, 375 So.2d 1069 (Fla. 1979) (affirming resentencing).

NOTES TO CHAPTER 1: A QUESTION OF VALUE

1. See Franklin Zimring & Gordon Hawkins, Is American Violence A Crime Problem? 46 Duke L.J. 43 (1996).

While in the last two decades homicide rates around the world have fluctuated, national differences have remained startling. In 1980 the World Health Organization reported that the United States had an annual homicide rate of 10.5 per one hundred thousand persons. This means that for every 100,000 persons, every year more than ten persons would be killed in some form of criminal homicide. The rate for England in 1980 was less than one per 100,000. Bureau of Justice Statistics, *International Crime Rates* (1988). The National Health Center estimated that in 1986–87, for persons aged between fifteen and twenty-four, the homicide rate in the United States was nearly 22 persons for every 100,000 in population. The highest rate for any other industrialized nation for this age group was Scotland, with a rate of 5 per 100,000. Japan had a rate of .3 per 100,000, or not quite one homicide for every 300,000 persons in the same age range. Lois Fingerhut & Joel Kleinman, International and Interstate Comparisons of Homicide Among Young Males, 263 J. Am. Med'l. Assn. (JAMA) 3292 (1990); see also Bureau of Justice Statistics, *International Crime Rates* (1988). While homicide rates have declined significantly in the nineties—compared to earlier U.S. figures—the rates remain far above those of other Western industrialized democracies. For 1995 the U.S. homicide rate was 8 per 100,000 of population. Federal Bureau of Investigation, *Crime in the United States for 1995* (1996).

2. For an excellent introduction to the major punishment theories, see M. M. MacKenzie, *Plato on Punishment* (1981).

3. *An Introduction to the Principles of Morals and Legislation* 170–71 & n. 1 (1823,