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Unintentional Homicides Caused by Risk-Creating Conduct: Problems in Distinguishing between Depraved Mind Murder, Second Degree Murder, Involuntary Manslaughter, and Noncriminal Homicide in New Mexico

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UNINTENTIONAL HOMICIDES CAUSED BY RISK-CREATING CONDUCT: PROBLEMS IN DISTINGUISHING BETWEEN DEPRAVED MIND MURDER, SECOND DEGREE MURDER, INVOLUNTARY MANSLAUGHTER, AND NONCRIMINAL HOMICIDE IN NEW MEXICO

LEO M. ROMERO*

I. INTRODUCTION

Unintentional homicides, those committed without the intent of causing death, may be punished under the New Mexico Criminal Code as first degree murder,1 second degree murder,2 or involuntary manslaughter.3 In addition, unintentional homicides committed while driving an automobile may be punished as a felony under the New Mexico Motor Vehicle Code.4 The range of punishments for an unintentional homicide under New Mexico law, therefore, includes death,5 life imprisonment,6 and basic terms of imprisonment of 18, 9, 3, or 1.5 years.7 Neither the statutory definitions, the New Mexico Uniform Jury Instructions, nor judicial interpretations provide adequate guidance for distinguishing among the different crimes com-

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prising unintentional homicides. The definitions in the New Mexico statutes are inadequate. The New Mexico Uniform Jury Instructions attempt to clarify the statutes as do the New Mexico appellate courts, but the attempts fail because the statutes do not clearly identify or define the culpability requirements for the different degrees of homicide.

This article examines unintentional homicides in New Mexico resulting from risk-creating conduct. It considers the statutory scheme for criminal homicides and examines how unintentional killings are defined, classified, and punished. In particular, it evaluates the distinctions used to assign an unintentional killing involving recklessness or negligence to the crimes of first degree murder, second degree murder, or involuntary manslaughter. This article also analyzes the distinction between criminal and civil liability for unintended deaths. In addition, the article questions the need for two degrees of depraved mind murder and especially the need for grading depraved mind murder as first degree murder. The article concludes with proposed legislative revisions and jury instructions that will remedy the problems in the current law.

This article does not examine unintentional homicides occurring during the commission of a felony, misdemeanor, or other unlawful acts, nor does it consider intentional homicides. Two articles by this author, published in earlier issues of the New Mexico Law Review, addressed first and second degree intentional murders and the crime of voluntary manslaughter. Analysis of the felony-murder rule and the misdemeanor-manslaughter rule will be left for a later article.

II. STATUTORY SCHEME FOR UNINTENTIONAL HOMICIDES

The New Mexico statutes provide for five degrees of criminal homicide. They are murder in the first degree, murder in the second

8. Criminal and civil liability for a homicide overlap to some extent, but not completely. Criminal liability for a wrongful death, intentional or unintentional, will generally mean that civil liability exists. See, e.g., the wrongful death statute, N.M. STAT. ANN. § 41-2-1 (Repl. Pamp. 1989). The converse, however, is not always true. Civil liability may exist without criminal liability. See, e.g., N.M. STAT. ANN. U.J.I. Civ. 13-1601 (Recomp. 1986), where ordinary negligence will suffice for civil liability, although it will not suffice for criminal liability under the involuntary manslaughter statute, N.M. STAT. ANN. § 30-2-3(B) (Repl. Pamp. 1984).


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degree, voluntary manslaughter, involuntary manslaughter, and homicide by vehicle.

The structure of the New Mexico homicide laws can best be analyzed by dividing homicides into intentional killings and unintentional killings although both types of killings may fall within several of the homicide classifications. Intentional killings may amount to first degree murder, second degree murder, or voluntary manslaughter. Unintentional homicides may be punished as first degree murder, second degree murder, involuntary manslaughter, or vehicular homicide. In addition, homicides, both intentional and unintentional, will frequently give rise to civil liability. Some unintentional homicides, however, will be subject to civil liability even though no criminal homicide is committed. If completely without fault, some deaths may result in no liability, criminal or civil. Intentional homicides include only those killings where the actor desires the death of another human being; they do not include a killing where the actor acts intentionally but without the purpose of bringing about death. A person commits an unintentional homicide if the result of death was not intended even though the act causing death was intended. For example, a person who intentionally shoots at the ceiling in a crowded room to celebrate the New Year without intending death to anyone, commits an unintentional homicide if the bullet hits and kills the victim. Though the act causing death (the shooting) was intentional, the killing amounts to an

16. N.M. STAT. ANN. § 30-2-1(A) and (B) (Repl. Pamp. 1984) and N.M. STAT. ANN. § 30-2-3(A) (Repl. Pamp. 1984).
17. See supra notes 1 to 4 and accompanying text.
18. See, e.g., the wrongful death statute in N.M. STAT. ANN. § 41-2-1 (Repl. Pamp. 1989) which creates a cause of action for damages based on wrongful acts, even felonious acts, or negligent acts that cause death. See also the Committee Comment concerning civil liability for intentional torts such as assault and battery in N.M. STAT. ANN. U.J.I. Civ. 13-1624 (Recomp. 1986).
19. See infra notes 168-188 and accompanying text.
20. See infra notes 151 and 168 and accompanying text.
21. See generally 2 W. LAFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW 191 (1986). Although the traditional view of intent included knowledge that the result of death was substantially certain to occur, the modern view limits intent "to instances where it is the actor's purpose to cause the harmful result..." Id.
unintentional homicide because the person did not intend the consequences of death.\textsuperscript{23}

The New Mexico Criminal Code divides unintentional homicides into those that involve an unlawful act and those that do not. The unlawful act homicides include felony-murder,\textsuperscript{24} misdemeanor-manslaughter,\textsuperscript{25} vehicular homicide while driving under the influence of liquor or drugs,\textsuperscript{26} and vehicular homicide by reckless driving.\textsuperscript{27} If a death occurs during the commission or attempt to commit an unlawful act, the homicide will be punished as a criminal homicide.\textsuperscript{28} The degree of the homicide will depend on the nature of the unlawful act. If the unlawful act is a felony, the homicide is murder in the first degree under the felony-murder rule.\textsuperscript{29} If the unlawful act is a misdemeanor, the homicide is involuntary manslaughter under the misdemeanor-manslaughter rule.\textsuperscript{30} Finally, deaths occurring during the commission of either of two unlawful acts under the New Mexico Traffic Code—driving under the influence of liquor or drugs and reckless driving—are punished as vehicular homicides.\textsuperscript{31}

When the act causing death does not violate any law in the criminal code or the two specified provisions in the traffic code, the New Mexico homicide provisions measure culpability by reference to a standard of recklessness\textsuperscript{32} or negligence.\textsuperscript{33} Reckless killings can fall within three degrees of criminal homicide—depraved mind first degree murder,\textsuperscript{34} second degree murder,\textsuperscript{35} and involuntary manslaughter.\textsuperscript{36}

\textsuperscript{23} See R. Perkins and R. Boyce, Criminal Law 83 (3d ed. 1982) (hereinafter Perkins & Boyce), for a discussion of the difference between intentional and unintentional acts and intentional and unintentional killings.


\textsuperscript{32} The New Mexico homicide statutes and corresponding uniform jury instructions do not use the term "reckless" in the definitions of the homicide offenses, but the concept of recklessness is used in deprived mind murder, second degree murder, and involuntary manslaughter. For definitions of reckless, see LaFave & Scott Handbook 1972, supra note 22, at 208-209 ("conduct which involves creating a higher risk than is necessary for ordinary negligence and a subjective awareness that the conduct creates such a risk"); Dresler, Understanding Criminal Law 103 (1987), (hereinafter Dresler) ("conscious taking of substantial unjustified risk."); American Law Institute, Model Penal Code and Commentaries, (hereinafter Model Penal Code) § 2.02(2)(c) ("consciously disregards a substantial and unjustifiable risk."). See also, Romero, New Mexico Mens Rea Doctrine and the Uniform Criminal Jury Instructions: The Need for Revision, 8 N.M. L. Rev. 127, 143 (1978) (acting with awareness and disregard of a risk).

\textsuperscript{33} The New Mexico homicide statutes and corresponding uniform jury instructions do not use the term "negligence" in the definitions of the homicide crimes, but the concept of negligence is used in defining the crime of involuntary manslaughter. For a definition of negligence, see N.M. Stat. Ann. U.J.I. Civ. 13-1601 (Recomp. 1986).


Negligent homicides may be punished as involuntary manslaughter and may also subject the actor to civil liability for wrongful death.\textsuperscript{37}

The chart below illustrates the two types of unintentional homicides and shows the different degrees of criminal homicide and the different punishments for unintentional homicides in New Mexico.

\textbf{Unlawful Act Criminal Homicides}

<table>
<thead>
<tr>
<th>Offense</th>
<th>Degree of Homicide</th>
<th>Punishment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Felony</td>
<td>First Degree Murder</td>
<td>Capital Felony</td>
</tr>
<tr>
<td>Misdemeanor</td>
<td>Involuntary Manslaughter</td>
<td>Fourth Degree Felony</td>
</tr>
<tr>
<td>Driving Under the Influence of Liquor or Drugs</td>
<td>Vehicular Homicide</td>
<td>Third Degree Felony</td>
</tr>
<tr>
<td>Reckless Driving</td>
<td>Vehicular Homicide</td>
<td>Third Degree Felony</td>
</tr>
</tbody>
</table>

\textbf{Criminal Homicides Without Commission of an Unlawful Act}

<table>
<thead>
<tr>
<th>Offense</th>
<th>Degree of Homicide</th>
<th>Punishment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Act Greatly Dangerous To Others Indicating a Depraved Mind</td>
<td>First Degree Murder</td>
<td>Capital Felony</td>
</tr>
<tr>
<td>Acts Creating a Strong Probability of Death or Great Bodily Harm Knowing of the Strong Probability</td>
<td>Second Degree Murder</td>
<td>Second Degree Felony</td>
</tr>
<tr>
<td>Lawful Act Which Might Produce Death Committed In an Unlawful Manner or Without Due Caution or Circumspection</td>
<td>Involuntary Manslaughter</td>
<td>Fourth Degree Felony</td>
</tr>
</tbody>
</table>

\textbf{III. NEED FOR MEANINGFUL DISTINCTIONS BETWEEN UNINTENTIONAL HOMICIDES INVOLVING NO UNLAWFUL ACT}

The New Mexico homicide statute establishes a hierarchy of homicides for purposes of allocating punishment.\textsuperscript{38} Although all

\textsuperscript{37} See the wrongful death statute, N.M. Stat. Ann. § 41-2-1 (Repl. Pamp. 1989), which creates a cause of action for damages for the death of a person "caused by the wrongful act, neglect, or default of another, although such death shall have been caused under circumstances as amount in law to a felony."

\textsuperscript{38} N.M. Stat. Ann. §§ 30-2-1 and 30-2-2 (Repl. Pamp. 1984). See also the chart illustrating the hierarchical scheme of the various homicides in terms of relative punishment in Part II supra.
homicides involve a killing of another human being, the division of homicides into categories reflects the view that killings can be distinguished in terms of their relative reprehensibility and that not all killings deserve the same punishment. The more reprehensible the homicide, the greater the punishment. The gradations thus reflect differences in stigma and moral wrongdoing.

Although all homicides are in some sense different, their division into categories for purposes of differentiating punishments should be based on principled, clear, and workable distinctions. Distinctions are principled when more heinous conduct is punished more severely than less reprehensible conduct. Distinctions are clear and workable if they meaningfully differentiate the two degrees of murder, differentiate murder from manslaughter, and if a jury of lay people can understand and apply the distinctions to determine the degree of homicide.

Applying these criteria to the New Mexico Criminal Code's categories of unintentional homicides which do not occur during the commission of an unlawful act demonstrates that the current statutory distinctions are inadequate. Although the different classifications of homicides should reflect differences in culpability, the statutory definitions do not precisely define the culpability terms used to distinguish the different homicides. The three degrees seem to rely on differences of culpability in risk-taking conduct, but the statutory definitions are illusory and evanesce upon close analysis. Furthermore, attempts to clarify the distinctions, both by the courts and by the drafters of the New Mexico Uniform Jury Instructions, have not been successful. Neither the statutory definitions nor the jury instructions provides adequate guidance to juries who have to apply the distinctions to facts involving unintentional deaths. The scheme also presents problems by attempting to slice homicides caused by risk-creating conduct too finely. The criminal code creates three degrees of reckless homicides: first degree murder, second degree murder, and involuntary manslaughter. Dividing reckless homicides into two degrees presents a sufficient challenge to legislative drafters; a third degree premised on the same concept would challenge philosophers and certainly is beyond the ken of lay jurors. Furthermore, no policy justifies the classification of an unintentional

39. See C. Clarkson and H. Keating, Criminal Law: Text and Materials 559 (1984) (hereinafter Clarkson & Keating) for a discussion of the reasons for differentiation among homicides in terms of their perceived seriousness. The seriousness or gravity of an offense is generally defined in terms of the culpability of the killer. For example, planning and calculating the death of another has traditionally been viewed as a particularly heinous form of killing. G. Fletcher, Rethinking Criminal Law 253 (1978) (hereinafter Fletcher). Also, killing in the heat of passion upon adequate provocation reflects a lesser culpability because "it is generally thought that the actor's self-control is sufficiently impaired to warrant classification as a lower degree of criminal homicide." Id. at 243.

40. See Clarkson & Keating, supra note 39, at 559.
homicide without an unlawful act as first degree murder. No other American jurisdiction includes depraved mind murder within the category of first degree murder or makes it a capital felony.

IV. THE ILLUSORY DISTINCTION BETWEEN DEPRAVED MIND FIRST DEGREE MURDER AND SECOND DEGREE MURDER

The current New Mexico murder statute establishes two degrees of reckless murder, frequently called depraved mind or depraved heart murder, but fails to provide clear and workable distinctions between depraved mind first degree and depraved mind second degree murders. The statutory formulations for each homicide appear to be quite similar. Both provisions apply to acts of the defendant creating a risk of death. Depraved mind first degree murder requires that the act be "greatly dangerous to lives of others" the second degree murder provision requires acts creating "a strong probability of death or great bodily harm to that individual or another." Current law does not distinguish between the two degrees of murder based on the degree of the risk nor on the nature of the risk. The courts' attempts to distinguish between depraved mind murder and second degree murder have used the number of persons exposed to the risk and a subjective-objective knowledge distinction.

A. Degree of Risk

Neither statutory language nor appellate decisions distinguish between depraved mind first degree murder and second degree murder on the degree of risk created. The degree of risk depends on the likelihood of the occurrence of death; a higher probability that death will occur indicates a higher degree of risk. The phrase "greatly dangerous" in the depraved mind statute connotes no greater degree of risk than "strong probability" required for second degree murder. Nothing in the language of the two provisions suggests that the risk required for depraved mind first degree murder differs in degree from the risk specified for second degree murder. An "act greatly dangerous" to life would presumably include acts creating a "strong probability of death." Indeed, it would appear to be a truism that acts creating a strong probability of death are acts greatly dangerous to life.

41. See infra note 101 and accompanying text.
B. Nature of the Risk

Although the textual differences in the two statutes might suggest a distinction based on the nature of the risk, the New Mexico courts have not distinguished first degree depraved mind murder from second degree unintentional murder on this basis. The nature of the risk depends on the type of harm threatened by the conduct. The second degree murder statute includes liability for acts creating a "strong probability of great bodily harm." This phrase, not present in depraved mind first degree murder, may suggest a difference in the nature of those risks subject to first degree depraved mind murder and those subject to second degree murder. Since depraved mind first degree murder requires a risk of death, a risk of great bodily harm that did not include a risk of death would be subject only to second degree murder. The Uniform Jury Instructions define great bodily harm, however, as "an injury to a person which [creates a high probability of death] [or] [results in serious disfigurement] [or] [results in loss of any member or organ of the body] [or] [results in permanent or prolonged impairment of the use of any member or organ of the body]." The first definition of great bodily harm, "high probability of death," does not appear to require any different risk than first degree depraved mind murder which requires that the act be "greatly dangerous to lives of others."

Neither statute distinguishes between the two degrees of murder when a risk of death is involved, so a homicide involving a risk of death would fall under both. Second degree murder, however, may be premised on the other three definitions of great bodily harm: acts creating risks of loss, impairment, or disfigurement, even though no risk of death is involved. Only when death results from an act that risks great bodily harm, but not death, does the statutory language distinguish between the two degrees of murder.

A death that results from an act that risks great bodily harm but not involving a high probability of death might suffice for involuntary manslaughter, but not for murder. Murder should be reserved for deaths caused by indifference to the value of life. To the extent that a person creates a risk of disfigurement but no foreseeable risk of death, the person does not show the extreme

53. Id.
indifference to the value of life that deserves a murder conviction. Only when a person causes an injury that imperils life should he or she be subject to second degree murder. The definition of "great bodily harm" in the uniform jury instructions, however, does not limit the risk of great bodily harm to injuries that imperil life. The jury instruction defines "great bodily harm" as injuries resulting in loss, impairment, or disfigurement of the body even though no risk to life is involved. This definition is too broad for murder liability, although it might be sufficient for involuntary manslaughter.

C. Number of Persons Subjected to the Risk

The New Mexico courts, aware of the similarity between first degree depraved mind murder and second degree murder, have attempted to distinguish the two degrees of homicide on the basis of the number of persons subjected to the risk of death. Relying on the text of the depraved mind murder statute, "any act greatly dangerous to the lives of others," the New Mexico Supreme Court has seized on the plural, "others," to require that the homicidal risk necessary for depraved mind murder be dangerous to more than one person. Second degree murder, however, does not require a risk to more than one person. The statute refers to a risk to an "individual or another." This language does not rule out the application of second degree murder to a defendant whose acts create a risk of death to multiple persons, so there is some overlap in coverage between the two degrees of unintentional murder.

The number of persons subjected to a homicidal risk should not be a determining factor in differentiating between first degree and second degree murder. The number of persons may be a factor in assessing the degree of the risk disregarded, but it should not be determinative of the degree of murder charged. One can easily conceive of situations where the risk of death to one individual may be greater than the risk of death to several persons. For example, a person who shoots a gun aiming near a victim's head

55. See DRESSLER, supra note 32, at 460 (conduct which intentionally interferes with the health and comfort of another, but does not indicate indifference to the value of human life, should be inadequate for murder).
57. Id.
with the intent to scare but without the intent to kill creates a
greater risk of death than a person who shoots a gun at the ceiling
of a crowded room. Both the probability of death occurring and
the culpability seem no lesser and probably greater in the first
example.

The supreme court’s adoption of the multiple person/single person
distinction does not have any valid support. The supreme court
primarily relied on the committee commentary to the New Mexico
Uniform Jury Instructions for depraved mind murder.63 Lifting the
language from the commentary, the court stated, “... that it is
generally believed that this murder occurs when the accused does
an act which is dangerous to more than one person.”64 No other
source is cited by the supreme court. The committee commentary,65
however, cited LaFave and Scott, Criminal Law,66 for its position.
The LaFave and Scott treatise does not support the committee
commentary. The authors indicate that either a homicidal risk to
one person or to a group of persons may be sufficient to establish
a depraved mind murder,67 but they view the critical factor to be
the degree of the risk created and suggest that the number of
persons subject to the risk may bear on the degree of the risk.68
LaFave and Scott, moreover, state that the degree of risk is im-
portant to the distinction between depraved mind murder and in-
voluntary manslaughter. They do not acknowledge the possibility
of two degrees of depraved mind murder.69 The only possible
support for the committee commentary appears in a footnote in
LaFave and Scott which refers to a superseded New York statute
similar to the New Mexico statute in referring to “others.”70 The
New York depraved mind statute has been amended to substitute
the singular for the plural,71 and other jurisdictions with statutory
formulations similar to New Mexico’s have construed the language

66. LAFAVE & SCOTT HANDBOOK, 1972, supra note 22, at 543.
67. Id.
68. Id.
69. The section on depraved-heart murder in LAFAVE & SCOTT HANDBOOK, 1986, supra
note 54, at 620-21 does not mention that this type of murder can be divided into two
degrees. The section on degrees of murder, id. at 642-48, likewise does not indicate that
depraved-heart murder may fall into both first and second degree murder. The authors
acknowledge that a few states place depraved-heart murder in the first degree category,
rather than in the second degree category, but they find such a grading scheme to be
indefensible. Id. at 648. A review of selected jurisdictions confirms the fact that depraved
mind murder is not divided into degrees. See, e.g., ARIZ. REV. STAT. ANN. §§ 13-1104
and 13-1105 (1978); CAL. PENAL CODE § 189 (West 1988); COLORADO REV. STAT. §§ 18-3-102
and 18-3-103 (1986); N.Y. PENAL LAW §§ 125.20 and 125.25 (McKinney 1987).
70. LAFAVE & SCOTT HANDBOOK, 1972, supra note 22, at 543 (“Killing ... by an act
imminently dangerous to others and evincing a depraved mind regardless of human life.”).
71. N.Y. PENAL LAW § 125.25(2) (McKinney 1987).
to apply to risk of death to either one person or more than one person. No other jurisdiction or treatise has suggested that the number of persons subjected to a homicidal risk should be determinative.

**D. Reckless versus Negligent Standard (Subjective versus Objective Knowledge)**

A *mens rea* distinction as the line between depraved mind first degree murder and second degree murder seems even less defensible. Trying to explain the difference between the two homicide offenses, the New Mexico Court of Appeals assumed that different *mens rea* requirements distinguished the two degrees of murder. According to the court of appeals, depraved mind first degree murder requires subjective or actual knowledge of the risk of death; second degree murder may be established if the defendant did not know but should have known of the risk. To say that a person should have known of the risk imposes a negligence standard based on an objective test of what the reasonable person would have known under the circumstances. Appellate cases support the requirement of subjective knowledge for depraved mind first degree murder, but there is doubtful authority for the proposition that objective knowledge is sufficient for second degree murder.

The depraved mind first degree murder provision does not by its terms require subjective knowledge that one's act is greatly dangerous to life. The New Mexico Supreme Court, however, imposed such a requirement in *State v. McCrary*. Without referring to the language in the statute, the court relied on the uniform jury instruction on deprived mind murder and the committee commentary to the instruction. Element number four of the instruction requires that the "defendant knew that his act was greatly dangerous to the lives of others." The committee commentary provides that

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72. See, e.g., Alvarez v. State, 41 Fla. 532, 27 So. 40 (1899); Hogan v. State, 36 Wis. 226 (1874).
73. See, e.g., Perkins, supra note 22, at 35-37; Dressler, supra note 32, at 460-461.
76. Id.
77. See infra notes 169-72 and accompanying text.
81. Id. at 673, 675 P.2d at 122.
“this instruction sets forth a subjective test for ‘depraved mind murder.’”83 Stating that the committee commentary is persuasive authority, although not binding, the court agreed “that the first degree instruction requires a subjective knowledge.”84 The Supreme Court of New Mexico reaffirmed the requirement of subjective knowledge for deprived mind murder in State v. Ibn Omar-Muhammad.85

No New Mexico appellate case has held that second degree murder may be established by objective knowledge of the risk of death. Neither the terms of the second degree murder statute nor the uniform jury instruction suggest that objective knowledge or something less than subjective knowledge is sufficient. Both the statute and the instruction use terms that connote subjective knowledge. Under the statute, a person commits second degree murder if he “knows that [his] acts create a strong probability of death or great bodily harm.”86 Element number two of the jury instruction requires that “[t]he defendant knew that his acts created a strong probability of death or great bodily harm . . . .”87 The use of the term “knows” and the phrase “the defendant knew” suggests that subjective awareness of the risk, or subjective knowledge, is required for second degree murder.

Although the second degree murder statute and the corresponding jury instruction require actual knowledge, the committee commentary to the deprived mind first degree murder instruction states that “[s]econd-degree murder provides an objective test for deprived mind murder.”88 In support of its statement, which contradicts the statutory and instruction terms, the committee commentary quotes a passage from LaFave and Scott’s treatise.89 This passage, however, does not support the committee commentary. The treatise discusses whether a charge of murder that involved a high risk of death should require subjective awareness of the risk or whether inadvertent risk is sufficient. LaFave and Scott conclude that “. . . it would seem that, to convict of murder, with its drastic penal consequences, subjective realization should be required.”90 The passage quoted in the committee commentary indicates that the issue of subjective versus objective knowledge of the risk will not arise very often because a jury will often infer subjective realization of

85. 102 N.M. 274, 277, 694 P.2d 922, 925 (1985).
89. Id.
90. LaFave & Scott Handbook, 1972, supra note 22, at 544. See also LaFave & Scott Hornbook, 1986, supra note 54, at 621.
the risk if a reasonable person would have been aware of the risk.\textsuperscript{91} In other words, LaFave and Scott prefer a standard of subjective knowledge and acknowledge that proof of objective knowledge may often also satisfy the subjective standard. The drafters of the uniform jury instructions' committee commentary lifted a sentence out of context and mistakenly assumed that the treatise supports an objective standard for second degree murder.

The New Mexico Supreme Court has followed reasoning similar to that of LaFave and Scott concerning the \textit{mens rea} standard and evidence sufficient to meet the standard. In \textit{State v. McCrary},\textsuperscript{92} the court agreed that the standard for depraved mind first degree murder is subjective knowledge. The court, addressing a sufficiency of the evidence issue and citing LaFave and Scott, held that "... sufficient subjective knowledge exists if Defendants' conduct was very risky, and under the circumstances known to Defendants they should have realized this very high degree of risk." \textsuperscript{93} Although the court viewed a reasonable person's awareness as proof of what the defendant subjectively realized, the court has not adopted a negligence standard of objective knowledge. In fact, the court reversed a conviction and reaffirmed the requirement of subjective knowledge in \textit{State v. Ibn Omar-Muhammad},\textsuperscript{94} where the jury was erroneously instructed in terms of objective knowledge.

The Supreme Court of New Mexico has not accepted the committee commentary's construction of the statute. Contrary to the committee commentary's statement that second degree murder provides for an objective test, the Supreme Court of New Mexico has twice indicated that second degree murder requires actual knowledge. In \textit{State v. Doe},\textsuperscript{95} the court stated that the elements of second degree murder contained the "specific intent" requirement that a defendant know that his acts create a strong probability of death or great bodily harm.\textsuperscript{96} Because the court in \textit{Doe} used "specific intent" language to describe a knowledge requirement, the court clarified the \textit{mens rea} requirement for second degree murder in \textit{State v. Beach},\textsuperscript{97} stating, "In referring to second-degree murder as a 'specific intent' crime, this court was referring to the fact that second-degree murder, as defined in Section 30-2-1(B), now contains an element of subjective knowledge. ..."\textsuperscript{98} The court added that

\begin{itemize}
\item \textsuperscript{92} 100 N.M. 671, 675 P.2d 120 (1984).
\item \textsuperscript{93} Id. at 673, 675 P.2d at 122.
\item \textsuperscript{94} 102 N.M. 274, 277, 694 P.2d 922, 925 (1985).
\item \textsuperscript{95} 100 N.M. 481, 672 P.2d 654 (1983).
\item \textsuperscript{96} Id. at 484, 672 P.2d at 657.
\item \textsuperscript{97} 102 N.M. 642, 699 P.2d 115 (1985).
\item \textsuperscript{98} Id. at 645, 699 P.2d at 118.
\end{itemize}
“specific knowledge” rather than “specific intent” better describes the standard for second degree murder.99

In view of the New Mexico Supreme Court’s position that both second degree murder and depraved mind first degree murder require subjective knowledge, there does not appear to be a distinction between the two degrees of unintentional murders on the basis of mens rea. The New Mexico Court of Appeals noted the problem when it wrote, “Notwithstanding the language in Beach, we do not believe the supreme court intended to make the elements of second degree murder and depraved mind murder identical.”100 Whatever the supreme court intended, the fact remains that subjective realization of the risk created is required by both degrees of murder.

E. No Justification for First Degree Depraved Mind Murder

The problem of distinguishing between two degrees of unintentional murder stems from the New Mexico legislature’s division of depraved mind murder into two degrees. In fact, the committee commentaries to the uniform jury instructions recognize that New Mexico has two deprived mind murders.101 The common law included deprived mind killings within malice aforethought slayings and therefore murder.102 In jurisdictions that divide murder into first and second degrees, depraved mind murder falls only within the second degree classification.103 Unlike New Mexico’s homicide scheme, no other jurisdiction has created two degrees of deprived mind murder104 and only one, Colorado, has classified deprived mind murder as first degree murder, a capital felony.105

99. Id.
101. The committee commentary following N.M. Stat. Ann. U.J.I. Crim. 14-211 states: “Second degree murder . . . was formerly known as ‘depraved heart’ murder, which is also murder in the first degree.”
103. See DRESSLER, supra note 32 at 451; PERKINS, supra note 22, at 89; and LAFAVE & SCOTT HANDBOOK, 1972, supra note 22, at 567-568.
104. None of the treatises suggest that any state has placed deprived mind murder in both the first and second degree murder categories. See generally, PERKINS, supra note 22, at 88-96; LAFAVE & SCOTT HANDBOOK, 1986, supra note 54, at 642-648; and LAFAVE & SCOTT HANDBOOK, 1972, supra note 22, at 562-568.
105. COLO. REV. STAT. 18-3-102(1)(D). The Colorado Supreme Court, however, declared that the first degree murder violated equal protection of the laws because it could not reasonably be distinguished from the lesser offense of second degree murder, a knowing killing. People v. Marcy, 628 P.2d 69 (Colo. 1981). LAFAVE & SCOTT HANDBOOK, 1972, supra note 22, at 568, states that deprived-heart murder falls into the second degree murder category, but in a footnote states, “In a few states, deprived heart murder is first degree
First degree murder should be reserved for the most serious homicides. Depraved mind killings do not fall into the same class of culpability as intentional homicides. Depraved mind killings do not include purposeful killings but include only unintended deaths caused by conduct that creates a high risk of death. Although depraved mind homicides may show the type of culpability deserving of the murder classification, such unintentional homicides should not be punished as first degree murder. No principled reason supports a homicide scheme that equates an unintentional homicide caused by risk creation with a deliberate purposeful killing.

V. THE INADEQUATE DISTINCTION BETWEEN DEPRAVED MIND MURDER AND INVOLUNTARY MANSLAUGHTER

Unintended deaths may also fall within the crime of involuntary manslaughter. The New Mexico Criminal Code defines manslaughter as "the unlawful killing of a human being without malice." The term "malice" no longer has any significance and should be removed from the statute. Before the 1980 amendments to the homicide statutes, the presence or absence of malice determined whether an unlawful homicide would be murder or manslaughter. The 1980 amendments dropped "malice aforethought" from the definition of murder but left the phrase, "without malice" in the definition of manslaughter. The reference to malice in the manslaughter statute seems to be an oversight by the drafters of the 1980 amendments, and the failure to delete it has no effect on the definitions of either voluntary or involuntary manslaughter.

The Criminal Code further creates two types of involuntary manslaughter—unlawful act and lawful act. The statute provides, "Involuntary manslaughter consists of manslaughter committed in the commission of an unlawful act not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner or without due caution and circum-spection."
The "unlawful act" type of involuntary manslaughter resembles the felony-murder rule since a death occurring during the commission of a misdemeanor will be punished as involuntary manslaughter. Because the unlawful act doctrine excludes felonies which lead to death, the unlawful act doctrine has been called the misdemeanor-manslaughter rule. "Lawful act" involuntary manslaughter punishes lawful acts which do not independently violate any law or ordinance but create a risk of death. Lawful act involuntary manslaughter resembles both negligent acts subject to tort liability and depraved mind murder. If the acts creating a risk of death involve sufficient deviations from acceptable behavior, they may properly be the subject of the criminal sanction in addition to tort liability. If the acts creating a risk of death involve extreme indifference to the value of life, then murder may be the appropriate crime. Involuntary manslaughter, therefore, punishes unintended homicides where the acts creating the risk of death involve criminal culpability but the culpability does not rise to the level of murder.

Both types of involuntary manslaughter involve unintentional killings as the name of the crime suggests. New Mexico appellate decisions acknowledge this by providing that purposeful killings cannot be prosecuted under the involuntary manslaughter statute.

Involuntary manslaughter must be clearly defined to distinguish it from murder and noncriminal homicides. Possible distinctions include differences in the nature of the risk, differences in the degree of the risk, and differences in culpability or mens rea.

A. Nature of the Risk

The difference in the nature of the risks subject to the charge of involuntary manslaughter and second degree murder does not adequately distinguish the lesser from the greater homicide. In fact, the descriptions of the risks in each statute suggest that involuntary manslaughter is the more serious crime. Involuntary manslaughter of the lawful type includes only homicides caused by acts creating

114. See DRESSLER, supra note 32, at 484. Generally the commission of a felony which leads to death is classified as a felony-murder and not as a misdemeanor-manslaughter. However, LaFave and Scott state that for "some reason" a felony that does "not suffice for felony-murder may do for unlawful-act manslaughter." LAFAVE & SCOTT HANDBOOK, 1972, supra note 22, at 594.
115. See LAFAVE & SCOTT HANDBOOK, 1972, supra note 22, at 542.
117. See LAFAVE & SCOTT HANDBOOK, 1972, supra note 22, at 542.
118. See, e.g., DRESSLER, supra note 32, at 462; LAFAVE & SCOTT HANDBOOK, 1972, supra note 22, at 542-543.
a risk of death. The second degree murder statute, by contrast, includes homicides caused by acts creating either a risk of death or a risk of great bodily harm. Accordingly, a person whose acts create a risk of great bodily harm, but not a risk of death, could be convicted of murder but not involuntary manslaughter if death ensues. The definitions of the risks required for both degrees of homicides, therefore, contradict the hierarchy of homicides set forth in the New Mexico Criminal Code which establishes murder as the more serious crime and assigns to murder the more severe penalty.

B. Degree of Risk

The New Mexico courts have not distinguished between involuntary manslaughter and second degree murder on the basis of the degree of the risk. A textual difference in the two statutes would support a distinction on this ground. Second degree murder requires a "strong probability" whereas involuntary manslaughter requires that one's acts "might produce death." The uniform jury instructions for each homicide also suggest a difference in the degree of risk required.

The common law distinguished between depraved mind murder and involuntary manslaughter in large part on the degree of risk. Reckless or grossly negligent conduct creating an unreasonable risk of death could serve as the basis for involuntary manslaughter, but not for murder. Murder required more than an unreasonable risk of death and more than a high degree of risk. Only a "very high degree of risk" could serve as the basis for unintentional murder under the common law. If an unintended killing is to be equated with a purposeful homicide, only conduct creating a

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127. See LAFAVE & SCOTT HORNBOOK, 1986, supra note 54, at 618; see also DRESSLER, supra note 32, at 461-462.
very high degree of risk should be classified in the category of murder. The common law also recognized that different degrees of risk manifested different levels of culpability on the part of persons creating the risk. Acts committed with the intent to kill certainly show a very high degree of risk and such acts should be punished as murder if death results. Acts committed without an intent to kill should amount to murder only when those acts carry a very high degree of risk that death will occur.

Since the hierarchy of criminal homicides, from first degree murder to involuntary manslaughter, reflects differences in culpability, the New Mexico Criminal Code and the New Mexico Uniform Jury Instructions should make clear that a difference in degree of risk is one factor distinguishing unintentional murder from involuntary manslaughter. The statutory language suggests such a difference in degree of risk between the two homicides, but the suggestion is not obvious. Moreover, the uniform jury instructions do not alert the jury to consider differences in the degree of risk. The instructions should explicitly state that a critical difference between murder in the second degree and involuntary manslaughter hinges on the degree of risk and that a "strong probability" rather than a mere possibility is required for murder.

C. Reckless versus Negligent Standard (Subjective versus Objective Knowledge)

The text of each statute does not clearly indicate whether a difference in mens rea distinguishes second degree murder from involuntary manslaughter. The second degree murder statute requires that the defendant "know" of the risk; lawful act involuntary manslaughter requires that the defendant act "without due caution and circumspection." The latter phrase, borrowed from the common law, is not defined in the statute. The New Mexico Court of Appeals has construed the language "without due caution and circumspection" to require "criminal negligence." The court then defined criminal negligence as "reckless, wanton

128. See Clarkson & Keating, supra note 39, at 559 for a discussion of the reasons for differentiation among homicides.
130. See supra notes 123-25 and accompanying text.
131. See supra note 125, for the degree of risk language that both instructions use. Neither instruction, however, refers to degree of risk as a critical factor distinguishing murder from manslaughter.
134. See LaFave & Scott Hornbook, 1986, supra note 54, at 668.
or willful" conduct.\textsuperscript{136} Citing the court of appeals' interpretation of the \textit{mens rea} required for lawful act involuntary manslaughter,\textsuperscript{137} the uniform jury instruction includes both subjective and objective awareness of the risk of death as an essential element. Element number three requires that "The defendant knew or should have known of the danger and acted with a total disregard or indifference for the safety of others."\textsuperscript{138}

The use of the term "knew" in the jury instruction for involuntary manslaughter\textsuperscript{139} and in the instruction for second degree murder\textsuperscript{140} blurs the distinction between the two homicides. Knowledge of the risk, under the jury instructions, would support either second degree murder or involuntary manslaughter. The use of "should have known" in the jury instruction for involuntary manslaughter establishes an alternative, objective standard as sufficient for conviction. The court of appeals' interpretation of the involuntary manslaughter statute does not clearly support the instruction's adoption of an objective standard for involuntary manslaughter. Although the court of appeals' phrase, "criminal negligence,"\textsuperscript{141} might seem to suggest an objective standard based on the awareness of a reasonable person,\textsuperscript{142} the court of appeals also used language that suggests subjective awareness of the risk is required. In defining criminal negligence to mean "reckless, wanton or willful" conduct,\textsuperscript{143} the court of appeals used terms that connote subjective knowledge since reckless and wanton are generally defined to mean a conscious disregard of a substantial risk.\textsuperscript{144} In addition, the use of the term, "willful," suggests subjective knowledge. To willfully disregard a risk, one must be subjectively aware of the risk that is the object of the willful conduct.

The court of appeals' interpretation of the "without due caution and circumspection" language in the involuntary manslaughter statute is ambiguous. The interpretation seems to support either a requirement of subjective or objective knowledge concerning the risk of death. The uniform jury instruction does not choose between the two interpretations but instead permits conviction on either subjective knowledge or a negligent standard based on objective

\textsuperscript{136} Id. at 367, 512 P.2d at 695.
\textsuperscript{139} Id.
\textsuperscript{142} See J. \textsc{Hall}, \textit{General Principles of Criminal Law} 127-28 (2d ed. 1960) (hereinafter \textsc{Hall}).
\textsuperscript{144} See \textsc{Hall}, \textit{supra} note 142, at 127-28.
knowledge. 145 In this way, the instruction sets the objective standard as the minimum level of culpability required for involuntary manslaughter.

The adoption of an objective standard for involuntary manslaughter runs counter to the modern trend in criminal code revisions. Many recent revisions require a subjective consciousness of risk for involuntary manslaughter. 146 In addition, most treatises prefer a subjective standard for involuntary manslaughter. 147 Because involuntary manslaughter is generally classified as a felony, 148 inadvertent risk creation should not be adequate for conviction. The stigma of a felony conviction should require conscious disregard of a risk of death. Only when a person subjectively knows of such a risk but decides to take a chance, does he exhibit the degree of moral blameworthiness deserving punishment at the felony level. If a person is unaware that his conduct creates a risk of death, he may be culpable for being unaware of the risk, but his culpability is of a lesser order than for the person who consciously decides to take the risk of which he is subjectively aware. If the person whose inadvertent risk creation causes death deserves punishment, a misdemeanor homicide should be sufficient to vindicate society's interest in deterring negligent deaths. 149 A number of recent revisions have added a crime of negligent homicide to cover just those cases. 150

VI. THE INADEQUATE DISTINCTION BETWEEN INVOLUNTARY MANSLAUGHTER AND NONCRIMINAL HOMICIDE

Some unintended deaths caused by conduct which creates a risk of death deserve to be punished as crimes 151 or even to be subject to civil liability. 152 Other deaths may be so accidental that no fault can be ascribed to the persons causing them. 153

146. See LaFave & Scott Hornbook, 1986, supra note 54, at 670.
147. Id.; see also Dressler, supra note 32, at 450-451.
149. See Model Penal Code, supra note 32, at § 210.4.
150. See, e.g., N.Y. Penal Law § 125.10 (McKinney 1987); Model Penal Code, supra note 32, at 210.4.
153. If a death caused by a person involved no breach of a duty, no basis for civil liability appears unless the conduct falls within one of a few types of strict liability. Generally, however, fault is required for civil liability. See generally Prosser & Keeton, supra note 152, at 162-64.
The line between noncriminal homicides and involuntary manslaughter should be based on distinctions that reflect a difference in culpability. Two distinctions may serve as suitable benchmarks: the recklessness-negligence distinction and the criminal-civil negligence distinction.

A. Reckless versus Negligent Standard (Subjective versus Objective Knowledge)

New Mexico law does not clearly distinguish between unintentional homicides subject to the crime of involuntary manslaughter and those subject only to civil liability. Both the involuntary manslaughter statute and the corresponding New Mexico Uniform Jury Instruction use language that resembles the standard for civil liability.

The language in the involuntary manslaughter statute, conduct "without due caution and circumspection," does not differ materially from the concept of ordinary negligence sufficient for civil liability. Likewise, element number two of the New Mexico Uniform Jury Instruction for involuntary manslaughter is very much like a tort instruction. It provides, "The defendant's act was such that an ordinary person would anticipate that death might occur under the circumstances." In addition, element number three of the instruction uses the phrase "... should have known of the danger involved," a phrase connoting ordinary negligence.

Upon close scrutiny, several parts of the instruction on involuntary manslaughter suggest that more fault is required for involuntary manslaughter than for civil liability. The requirement that the defendant act "with a total disregard or indifference for the safety of others" imposes a burden on the prosecution that a plaintiff in a civil suit does not bear. A total disregard or indifference for the safety of others seems to require a subjective realization of the risk. One does not disregard a risk of which one is unaware; nor is one indifferent unless one knows of the risk but doesn’t care whether it is realized.

The jury instruction on involuntary manslaughter gives conflicting signals about the mens rea requirement for involuntary manslaug-

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158. Id.
159. Id.
160. If a plaintiff seeks punitive damages, however, the plaintiff bears a burden of showing that the defendant's acts were "willful, wanton, malicious, reckless, grossly negligent, fraudulent, and in bad faith." N.M. Stat. Ann. U.J.I. Civ. 13-1827 (Recomp. 1986).
ter. The requirement that the defendant "should have known" conflicts with the language in the instruction requiring that the defendant "knew" of the risk or "acted with a total disregard or indifference for the safety of others." The use of the different terms in the instruction may suggest that either recklessness, based upon subjective realization of the risk, or negligence, based on the objective standard of what the defendant should have known, will satisfy the culpability requirements for involuntary manslaughter.

Involuntary manslaughter should be reserved for reckless killings where the defendant acted in conscious disregard of a known risk of death. If the defendant was negligent in the sense that he did not realize the risk but should have, then he would not have committed involuntary manslaughter, although he would be subject to civil liability for his negligent conduct. This distinction has the merit of clarity and ease of application. A jury could be instructed in terms of subjective knowledge for involuntary manslaughter and informed that they must acquit if the defendant did not advert to the risk. The Model Penal Code and a number of treatises support this position which requires a reckless mens rea for felony liability and thus for involuntary manslaughter.

B. Criminal Negligence versus Civil Negligence

There is also support for the proposition that some negligent acts that result in a death deserve to be punished criminally. The Model Penal Code recognizes a misdemeanor homicide which it denominates negligent homicide. If the New Mexico legislature wishes to criminalize certain lawful but negligent acts that cause death, then it should create a new offense of negligent homicide and classify it as a misdemeanor. In addition, the involuntary manslaughter statute should be revised to insure that only reckless homicides come within its ambit. In other words, the felony of involuntary manslaughter should exclude negligent homicides.

The addition of negligent homicide to the New Mexico homicide scheme, however, would not resolve the problem of distinguishing between criminal and noncriminal negligent homicides. Since both

162. MODEL PENAL CODE, supra note 32, at § 210.2.
165. MODEL PENAL CODE, supra note 32, at § 210.4.
166. A misdemeanor may be punished by a term in jail less than one year. N.M. STAT. ANN. § 31-19-1(A) (Repl. Pamp. 1987).
167. See supra notes 162-63 and accompanying text.
homicides include inadvertent risk creation, there must be a principled basis for the distinction. Three variables may be used to differentiate criminal from civil negligence—the degree of the risk created, the reason for the conduct creating the risk, and the degree of the deviation from the conduct of the ordinary person.

1. Civil Negligence

Conduct may create a risk of death that is reasonable, and if death results from such conduct, no liability, civil or criminal, attaches.\(^{168}\) If, however, conduct creates an unreasonable risk of harm to an individual or property, such conduct may give rise to civil liability.\(^{169}\) Ordinary negligence is the term frequently used to describe the type of fault in unreasonable risk creation.\(^{170}\) Whether conduct that creates a risk is unreasonable and, hence, negligent, depends on the foreseeability of the risk of harm, the magnitude of the potential harm, its likelihood of occurrence, and the justification for engaging in the conduct creating the risk.\(^{171}\) "A risk is foreseeable if a reasonable person would have envisioned [it]."\(^{172}\) Foreseeability, therefore, turns on an external standard, the reasonable person, as the measuring stick for the defendant's conduct.\(^{173}\)

The justifiability of foreseeable risk creation depends on the importance of the conduct creating the risk of harm.\(^{174}\) To justify the conduct requires balancing the degree of risk created and the probability of its occurrence against the value of the conduct.\(^{175}\)

\(^{168}\) Apart from instances when strict liability applies, only the creation of unreasonable risks gives rise to liability. See, e.g., N.M. STAT. ANN. U.J.I. Civ. 13-1601 (Recomp. 1986), which requires an "unreasonable risk" for negligence. See also DRESSLER, supra note 32, at 100, where the author distinguishes between "innocent risk taking" and "civil negligence."

\(^{169}\) See N.M. STAT. ANN. U.J.I. Civ. 13-1601 (Recomp. 1986); see also DRESSLER, supra note 32, at 100; PROSSER & KEETON, supra note 152, at 169-73; RESTATEMENT (SECOND) OF TORTS § 282 (1965), (hereinafter RESTATEMENT, TORTS) defining tort negligence as "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm."

\(^{170}\) See, e.g., LAFAVE & SCOTT HORNBOOK, 1986, supra note 54, at 235, 669; DRESSLER, supra note 32, at 100-101, uses the phrase "civil negligence."

\(^{171}\) See LAFAVE & SCOTT HORNBOOK, 1986, supra note 54, at 233; DRESSLER, supra note 32, at 100 (quoting Judge Learned Hand's famous formula from United States v. Carroll Towing Co., 159 F.2d 169, 173, reh'g denied, 160 F.2d 482 (2d Cir. 1947), "[i]f the probability of [harm] be called P; the [gravity of] injury L; and the burden B; liability depends upon whether B is less than L multiplied by P; i.e., whether B < PL "); J.W. SALMOND, JURISPRUDENCE 416 (8th ed. 1930) (hereinafter SALMOND); RESTATEMENT, TORTS, supra note 169, at § 291; PROSSER & KEETON, supra note 152, at 169-73.

\(^{172}\) DRESSLER, supra note 32, at 100; see also N.M. STAT. ANN. U.J.I. Civ. 13-1601 (Recomp. 1986) ("reasonably prudent person would foresee").

\(^{173}\) See LAFAVE & SCOTT HORNBOOK, 1986, supra note 54, at 234.

\(^{174}\) See SALMOND, supra note 171, at 416 ("importance of the object to be attained by the dangerous form of activity").

\(^{175}\) Id.; DRESSLER, supra note 32, at 100; LAFAVE & SCOTT HORNBOOK, 1986, supra note 54, at 233; PROSSER & KEETON, supra note 152, at 169-73; RESTATEMENT, TORTS, supra note 169, at § 291.
For example, driving at a speed 15 miles per hour above the speed limit in order to get to a football game for the kickoff creates a risk of harm that is probably not outweighed by the importance of timely attendance at the football game. If the same driver were transporting a bleeding person to the emergency room of a hospital, the greater social utility of the conduct might outweigh the risk created. The balance might change, however, if the driver on the way to the hospital drove through stop lights at busy intersections at high speeds. Negligence, therefore, turns on the relative weights to be given the risk of the foreseeable harm and the importance of the conduct in balancing one against the other. The greater the harm and the greater the probability of its occurrence, the more important the object of the conduct must be to justify the risk created. Conversely, the stronger the reason for the conduct, the greater the risk must be in order for negligence to exist.176

The New Mexico Uniform Jury Instructions for civil cases defines negligence consistently with the common law concepts described above. A negligent act is an act "which a reasonably prudent person would foresee as involving an unreasonable risk of injury to himself or to another and which such a person, in the exercise of ordinary care, would not do."177 The instructions also define "ordinary care" as the care "which a reasonably prudent person would use in the conduct of his own affairs,"178 taking into account the nature of the conduct and the risk of foreseeable danger.179 Conduct which creates a foreseeable risk of harm and which the reasonably prudent person would not do, therefore, will constitute ordinary negligence sufficient for civil liability if the other elements of duty, causation, and harm are established.

2. Criminal Negligence

Criminal negligence, also based on the objective standard of the reasonable person, should involve more culpability than the fault required for civil liability.180 The fault giving rise to civil negligence and the resulting compensation of the victim is very different from the blame attached to a criminal conviction with its resulting stigma and possible loss of liberty.181 Criminal responsibility, therefore, should require a greater degree of wrongful risk-taking than is required for civil liability.

176. See Dressler, supra note 32, at 100 and LaFave & Scott Hornbook, 1986, supra note 54, at 233, for other examples of conduct subject to the balancing test for negligence.
179. Id.
180. See LaFave & Scott Hornbook, 1986, supra note 54, at 235.
181. See Dressler, supra note 32, at 101.
a. Degree of Risk

A difference in culpability can be based on the degree of the risk created. Negligence for civil liability only requires an unreasonable risk of harm. Criminal negligence justifying a homicide conviction should require as a basic minimum a very high risk of death. By so doing, criminal negligence will exist when the probability of the occurrence of death far outweighs the reason for taking the risk.

b. Degree of Deviation

Another factor that should distinguish criminal negligence from ordinary negligence is the degree of deviation from the standard of care exercised by the reasonable person. A person who fails to measure up to the reasonable person is negligent for civil liability. Any deviation from this standard of care will establish civil negligence. Civil negligence should not mark the actor as a person who is not law-abiding. To establish criminal negligence, a gross or substantial deviation from the proper standard of conduct should be required, and only then should the actor be blamed in a criminal sense.

The degree of deviation from the standard of ordinary care may also be expressed in terms of a balance. Ordinary negligence exists if the risk of harm and the probability of its occurrence merely outweighs the importance of the conduct creating the risk. If the balance favors the harm side of the scale, the conduct has created an unreasonable risk and is civilly negligent. Criminal negligence, on the other hand, should require that the risk of harm and the probability of its occurrence greatly outweigh the importance of the conduct. The balance must favor the harm side of the scale to a degree that shows culpability deserving criminal liability.

182. See authorities cited in note 169, supra.
183. See LAFAVE & SCOTT HORNBOOK, 1986, supra note 54, at 669, 618; MODEL PENAL CODE, supra note 32, at § 2.02(2)(d) (requiring a substantial risk).
184. See DRESSLER, supra note 32, at 101.
185. See, e.g., N.M. STAT. ANN. U.J.I. Civ. 13-1601 (Recomp. 1986), which describes negligence as an act "which a person, in the exercise of ordinary care, would not do." Failure to exercise the ordinary care of the reasonable person, therefore, constitutes negligence.
186. See DRESSLER, supra note 32, at 101 ("Criminal negligence constitutes a gross deviation from the standard of care required of the actor") (emphasis omitted); MODEL PENAL CODE, supra note 32, at § 2.02(2)(d) (requiring a "gross deviation from the standard of care that a reasonable person would observe in the actor's situation").
187. See DRESSLER, supra note 32, at 101, for an equation that describes civil negligence when the gravity of the harm and the probability of its occurrence "slightly outweighs" the social value of the defendant's conduct.
188. Id.
VII. PROPOSED LEGISLATIVE REVISIONS

The New Mexico Criminal Code's homicide statutes should be revised in order to draw clearly the lines between the different degrees of unintentional homicides. Because homicides resulting from conduct creating a risk of death may be subject to criminal or civil liability, "the task of the law is to draw lines between various types of risk-taking." 189 Statutory definitions of murder and involuntary manslaughter should reflect a clear difference in culpability that warrants different penalties for each. A new homicide, criminal negligence, carrying a lesser penalty than involuntary manslaughter, should be added to the criminal code. Criminal negligence should be defined so as to distinguish it from involuntary manslaughter and civil negligence. Finally, the homicide statutes should include explicit definitions of the terms, especially the *mens rea* terms, that are used in the substantive provisions.

A. Proposed Depraved Mind Murder Provision

The criminal code should be amended to delete depraved mind murder as a type of first degree murder. Depraved mind murder should be relegated to second degree murder only. The revised depraved mind murder statute should read as follows:

A person commits murder in the second degree when the person recklessly, under circumstances manifesting extreme indifference to the value of human life, causes a risk of death and thereby causes the death of another human being. 190

Recklessly should be defined to require a subjective awareness of the risk of death and the conscious disregard of that risk. In addition, the definition of reckless should require that the risk be substantial and unjustifiable and that the conscious taking of the risk be a gross deviation from the standard of the law-abiding person. A statutory definition of reckless should, therefore, read as follows:

Recklessly means that a person is aware of and consciously disregards a substantial and unjustifiable risk that death will occur. The risk must be of such nature and degree that its disregard involves a gross deviation from the standard of care that a law-abiding person would observe in the situation. 191

189. DRESSLER, supra note 32, at 99.

190. The proposed second degree murder provision comes in large part from PROPOSED CRIMINAL CODE AND COMMENTARIES § 30-4-3 (Prepared for the Legislative Council Service, L. Romero Reporter 1986) (hereinafter PROPOSED CRIMINAL CODE) and the MODEL PENAL CODE, supra note 32, at § 210.2(1)(b).

191. The proposed definition of reckless comes in large part from PROPOSED CRIMINAL CODE, supra note 190, at § 30-4-1(A)(7), and MODEL PENAL CODE, supra note 32, at § 2.02(2)(c).
The proposed definition of depraved mind murder, therefore, makes clear that this type of murder requires recklessness. Only a reckless *mens rea* will suffice for murder, and the degree of recklessness must be extreme before it merits the condemnation of the murder label and sanction. Although the proposed provision is based on a matter of degree, the proposal expresses the degree of recklessness in terms of extreme indifference to the value of human life. Only when the recklessness manifests an extreme indifference to the value of human life does it demonstrate a degree of culpability deserving the murder classification. Whether reckless conduct causing death manifests extreme indifference to the value of human life is a question for the trier of fact.

**B. Proposed Involuntary Manslaughter Provision**

Involuntary manslaughter should be defined to distinguish it clearly from murder. Because involuntary manslaughter is a felony in New Mexico and also at common law, the *mens rea* requirement should reflect sufficient culpability for the felony classification. With these precepts in mind, the involuntary manslaughter statute should state:

A person commits involuntary manslaughter when the person recklessly creates a risk of death and thereby causes the death of another human being.  

This revision adopts the recklessness standard for involuntary manslaughter to insure a sufficient level of culpability for felony liability. The proposed revision relies on the same definition of recklessly set forth in the previous section and used in the definition of reckless murder. Recklessness as used in the proposed involuntary manslaughter provision requires subjective knowledge of the risk created and conscious disregard of the risk. Involuntary manslaughter, therefore, cannot be predicated on negligence.

The proposed revision distinguishes involuntary manslaughter from reckless murder by omitting the requirement, present in the reckless murder proposed provision, that the recklessness manifest extreme indifference to the value of human life. Since recklessness is an element of both degrees of homicide, it is important to limit murder to homicidal risks which are tantamount to intentional killings. Homicides caused by conscious risk-taking that rises to the level of extreme indifference to the value of human life may properly be punished as murder; but if the recklessness resulting in death does not rise to that level, the homicide should be punished as a

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192. The proposed involuntary manslaughter provision comes in large part from PROPOSED CRIMINAL CODE, *supra* note 190, at § 30-4-6, and MODEL PENAL CODE, *supra* note 32, at § 210.3(1)(a).
felony, but not as a murder. The language in the reckless murder proposal describes a kind of culpability that differs in degree but not in kind from the recklessness required for involuntary manslaughter. Whether the recklessness amounts to murder or involuntary manslaughter ultimately depends on an assessment of blameworthiness by the trier of fact.

C. Proposed Criminally Negligent Homicide Provision

The existing involuntary manslaughter statute has been construed to include both reckless and negligent homicides. Because felony liability should not be predicated on a negligence standard, negligence should not suffice for the felony of involuntary manslaughter. Negligence, however, may suffice for criminal liability at the misdemeanor level. For unintentional deaths committed with criminal negligence a misdemeanor criminal homicide should be added to the criminal code. The proposed new crime of negligent homicide, to be classified as a misdemeanor, establishes negligence as the required *mens rea* element. The new homicide offense should read as follows:

A person commits negligent homicide when the person, with criminal negligence, creates a risk of death and thereby causes the death of another human being.\(^\text{[194]}\)

The homicide provisions of the criminal code should also be amended to add a definition for criminal negligence. The definition should provide:

"Criminal negligence" or "criminally negligent" means that a person lacks awareness of a substantial and unjustifiable risk that death will occur and the failure to be aware of the risk constitutes a gross deviation from the awareness of a reasonable person in the situation.\(^\text{[195]}\)

This definition adopts an objective standard measured by the reasonable person. Subjective knowledge of the risk created is not required. Objective knowledge, in the sense that a reasonable person would have known of the risk, establishes sufficient culpability for criminal negligence, and hence for the misdemeanor of criminally negligent homicide.

\(^\text{193. A misdemeanor in New Mexico may be punished by a term in jail less than one year or by a fine not to exceed $1,000.00. N.M. STAT. ANN. § 31-19-1(A) (Repl. Pamp. 1987).}\)

\(^\text{194. The proposed negligent homicide statute comes in large part from PROPOSED CRIMINAL CODE, supra note 190, at § 30-4-7, and MODEL PENAL CODE, supra note 32, at § 210.4.}\)

\(^\text{195. The proposed definition of negligence comes in large part from PROPOSED CRIMINAL CODE, supra note 190, at § 30-4-1(A)(1), and MODEL PENAL CODE, supra note 32, at § 2.02(2)(d).}\)
Criminal negligence differs in degree from ordinary negligence sufficient for civil liability. The definition of criminal negligence includes terms that indicate the differences in degree that distinguish it from civil negligence. First, the definition requires more than an unreasonable risk of death; the risk of death must also be substantial. Second, the definition requires that the failure to perceive the risk must constitute a gross, rather than mere, deviation from the standard of care that a reasonable person would observe under the circumstances. Although the difference between the two types of negligence is one of degree, the question of degree is properly a jury question. The jury should evaluate the actor's conduct and determine whether the negligence is serious enough to warrant condemnation under the criminal law.

D. Chart of the Proposed Revised Provisions for Unintentional Homicides

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<td>Recklessly Creating a Risk of Death Creating a Risk of Death with Criminal Negligence</td>
<td>Involuntary Manslaughter</td>
<td>Fourth Degree Felony</td>
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E. Proposed Uniform Jury Instructions

With clearer definitions for the proposed three homicides involving deaths caused by risk-taking conduct, the uniform jury instructions for each should track the statutory language. In addition, the instructions should include explanations of the distinctions between the different unintentional homicides. The existing uniform jury instructions include an explanation of the difference between second degree murder and voluntary manslaughter, both intentional homicides. The need for such an explanation for unintentional homicides resulting from risk-creating conduct is even

196. N.M. Stat. Ann. U.J.I. Crim. 14-220 (Recomp. 1986) ("The difference between second degree murder and voluntary manslaughter is sufficient provocation. In second degree murder the defendant kills without having been sufficiently provoked ... In the case of voluntary manslaughter the defendant kills after having been sufficiently provoked ... Sufficient provocation reduces second degree murder to voluntary manslaughter.").
greater in view of the fact that the distinctions turn on differences in degree. The proposed jury instructions, following the proposed statutory definitions and containing explanations of the differences, are set forth below.

1. Second Degree Murder Instruction; Unintentional Killing

For you to find the defendant guilty of second degree murder as charged in count ___, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant's acts caused the death of ___;
2. The defendant's acts created a substantial risk of death; a risk is substantial if it involves a very high probability of death;
3. The defendant's acts created an unjustifiable risk of death; a risk is unjustifiable if the risk of death greatly outweighs the social utility of the conduct creating the risk;
4. The defendant was aware of the substantial and unjustifiable risk of death and consciously disregarded it;
5. The defendant's conduct constituted a gross deviation from the standard of care that a law-abiding person would observe in the situation;
6. The defendant's awareness of the risk and conscious disregard of the risk manifested extreme indifference to the value of human life; and
7. This happened in New Mexico on or about the ___ day of ___ year.

2. Involuntary Manslaughter Instruction

For you to find the defendant guilty of involuntary manslaughter as charged in count ___, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant's acts caused the death of ___;
2. The defendant's acts created a substantial risk of death; a risk is substantial if it involves a high probability of death;
3. The defendant's acts created an unjustifiable risk of death; a risk is unjustifiable if the risk of death greatly outweighs the social utility of the conduct creating the risk;
4. The defendant was aware of the substantial and unjustifiable risk of death and consciously disregarded it;
5. The defendant's conduct constituted a gross deviation from the standard of care that a law-abiding person would observe in the situation; and
6. This happened in New Mexico on or about the ___ day of ___ year.
The difference between second degree unintentional murder and involuntary manslaughter is a matter of degree. The two crimes have the same elements except for the language, "manifesting extreme indifference to the value of human life," which expresses the difference in degree that separates them. If a defendant's conduct in consciously disregarding a substantial and unjustifiable risk manifests extreme indifference to the value of human life, the defendant is guilty of second degree murder. However, a defendant is guilty of involuntary manslaughter, and not murder, if the same conduct does not rise to the level of extreme indifference to the value of human life. In determining whether the defendant's conduct manifests extreme indifference to the value of human life, you should consider the degree of the risk of death created by the defendant's conduct in view of the importance of the defendant's conduct.

3. Criminally Negligent Homicide Instruction

For you to find the defendant guilty of criminally negligent homicide, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant's acts caused the death of ___;
2. The defendant's acts created a substantial risk of death; a risk is substantial if it involves a high probability of death;
3. The defendant's acts created an unjustifiable risk of death; a risk is unjustifiable if the risk of death greatly outweighs the social utility of the conduct creating the risk;
4. The defendant was unaware of the risk of death, but should have known of the risk; a person should know of the risk if a reasonable person under the circumstances would have known of the risk of death;
5. The defendant's conduct constituted a gross deviation from the standard of care that a reasonable person would observe in the situation; and
6. This happened in New Mexico on or about the ___ day of ___ year.

The difference between involuntary manslaughter and criminally negligent homicide is the awareness or unawareness of the risk of death created by the defendant's conduct. The elements for both crimes are similar in requiring the creation of a substantial and unjustifiable risk of death. For involuntary manslaughter, the defendant must be aware of the risk of death and then consciously disregard it. If the defendant is unaware of the risk, he cannot be found guilty of involuntary manslaughter. For criminally negligent homicide, the defendant is unaware of the risk of death, but he should have known of the risk because a reasonable person would have realized the risk.
The difference between criminally negligent homicide and negligence sufficient for civil but not criminal liability is a matter of degree. For civil negligence, the risk need only be unreasonable. For criminally negligent homicide, the risk must be more than unreasonable; it must also be substantial and unjustifiable. Another difference between criminal and civil negligence is the degree of deviation from the standard of care. For civil negligence, any deviation from the standard of ordinary care that a reasonable person would observe under the circumstances will be sufficient. For criminally negligent homicide, the deviation from the standard of care must be more substantial; it must be a gross deviation.

VIII. CONCLUSION

The New Mexico legislature needs to address the problems in distinguishing among the different degrees of unintentional criminal homicides. Currently, the lines between the different homicides are not clearly drawn, and the statutory definitions blur instead of clarify the differences. In addition, the uniform jury instructions need to explain the differences between the unintentional homicides even when the lines are clearly drawn. Because the distinctions among the unintentional homicides are based largely on differences in degree, these differences need to be highlighted in the instructions to the jury. Finally, the difference between recklessness, which requires subjective knowledge, and negligence, which requires objective knowledge, needs to be clearly defined in the statutes and in the uniform jury instructions.