



Summer 1998

Criminal Law - The Anomaly of a Murder: Not All First-Degree Murder Mens Rea Standards Are Equal - State v. Brown

Vicki W. Zelle

Recommended Citation

Vicki W. Zelle, *Criminal Law - The Anomaly of a Murder: Not All First-Degree Murder Mens Rea Standards Are Equal - State v. Brown*, 28 N.M. L. Rev. 553 (1998).

Available at: <https://digitalrepository.unm.edu/nmlr/vol28/iss3/8>

CRIMINAL LAW—The Anomaly of a Murder: Not All First-Degree Murder Mens Rea Standards Are Equal— *State v. Brown*

I. INTRODUCTION

In *State v. Brown*,¹ the New Mexico Supreme Court held that fact finders may consider evidence of the defendant's intoxication when determining whether the defendant possessed the requisite mens rea of subjective knowledge for first-degree depraved mind murder.² Before *Brown*, New Mexico allowed consideration of voluntary intoxication only for specific intent crimes.³ With its holding, the *Brown* court has singularly excepted first-degree depraved mind murder from the specific-general intent approach, thereby leaving felony murder as the only first-degree murder for which voluntary intoxication does not provide a defense.⁴ This Note describes *Brown*'s historical context in New Mexico's criminal homicide jurisprudence, examines the *Brown* court's rationale, and explores the implications of the decision.

II. STATEMENT OF THE CASE

Jimmy Brown was arrested and charged on an open count of murder for the shooting death of Oscar Zapata.⁵ Zapata was shot and killed at the house of his girlfriend, Josephine Calanshe. Brown and Calanshe had met about six months earlier. After dating only briefly, the two had remained friends once they began dating other people. Brown and his friends often spent time at Calanshe's house, drinking beer and "hanging out."

On the evening of the shooting, Brown went to Calanshe's house with two friends. When they arrived, Calanshe introduced everyone to Zapata. Brown shook hands with him, with no apparent friction showing between the two. The evening was spent without argument. It is estimated that Brown and his two friends consumed four and one-half cases of beer over the course of that day.

1. 122 N.M. 724, 931 P.2d 69 (1996).

2. See *id.* at 732-33, 931 P.2d at 77-78. In doing so, the court held that the refusal to give an instruction on intoxication constituted reversible error. See *id.* First-degree depraved mind murder is "the killing of one human being by another without lawful justification or excuse, by any of the means with which death may be caused . . . by any act greatly dangerous to the lives of others, indicating a depraved mind regardless of human life." N.M. STAT. ANN. § 30-2-1 (Repl. Pamp. 1994). The subjective knowledge mens rea of first-degree depraved mind murder requires that the defendant "must have had the subjective or actual knowledge of the high degree of risk involved in his conduct." *Brown*, 122 N.M. at 728, 931 P.2d at 73.

3. See *Brown*, 122 N.M. at 729, 931 P.2d at 74 (recognizing that "New Mexico courts have long followed the same common law specific-general intent approach, allowing voluntary intoxication as a consideration only for specific-intent crimes, including premeditated first-degree murder"). The *Brown* court defined a specific-intent crime "as one for which a statute expressly requires proof of 'intent to do a further act or achieve a further consequence.'" *Brown*, 122 N.M. at 729, 931 P.2d at 74 (quoting *State v. Bender*, 91 N.M. 670, 671, 579 P.2d 796, 797 (1978)).

4. See *Brown*, 122 N.M. at 730, 931 P.2d at 75 (affirming New Mexico's common law "general-specific intent analysis to exclude voluntary intoxication evidence for the crime of felony murder" but stating that "in the instant case, however, . . . the specific-general intent analysis does not apply to depraved mind murder").

5. The facts presented are paraphrased from the New Mexico Supreme Court opinion in *State v. Brown*, 122 N.M. 724, 725-26, 931 P.2d 69, 70-71 (1996). All subsequent factual references refer to this citation unless otherwise indicated.

At the time of the shooting, Calanshe and Zapata were kissing. Another person in the room testified that, upon hearing a loud sound, she turned to see Zapata shot in the back of his head, with Brown at the foot of the bed holding a shotgun. Awakened by the shot, one of Brown's friends ran to the room and, in a scuffle, grabbed the shotgun from Brown.

At trial, Brown testified that he recalled nothing of the actual shooting. He remembered certain earlier events of the day, before he fell asleep, and of the shooting's aftermath, such as finding himself facing his friend, who was holding a shotgun and telling Brown to get out. Brown stated that he left without knowing what had happened. Brown also testified that he had experienced previous blackout episodes from drinking. The State's pathologist testified that the single shot killing the victim had been fired from three to six feet away.

The State sought a first-degree murder conviction based on deliberate intent murder⁶ and depraved mind murder.⁷ At the close of the prosecution's case-in-chief, the trial court directed a verdict of not guilty on deliberate intent murder. Uniform jury instructions were given for first-degree depraved mind murder and second-degree murder, but the trial court refused Brown's instruction on voluntary intoxication. Brown was convicted of first-degree depraved mind murder. He appealed on the ground that, because he was so severely intoxicated, "he was not subjectively aware of the seriousness of the risk entailed by his conduct, as required for depraved mind murder."⁸

The New Mexico Supreme Court, in a three to two decision, reversed and remanded the case for failure to instruct the jury on Brown's theory of the case.⁹ The court stated that, given the evidence presented, because intoxication "is clearly relevant to the formation of [the requisite mental state of subjective knowledge,] . . . the defendant must be allowed to show, by reference to intoxication, the absence of that state of mind."¹⁰ The court declined to apply the previously recognized distinction between first-degree depraved mind murder and second-degree murder.¹¹

6. First-degree deliberate intent murder as used by the *Brown* court, see *Brown*, 122 N.M. at 726, 931 P.2d at 71 (1996), refers to "willful, deliberate and premeditated" murder. See N.M. STAT. ANN. § 30-2-1(A)(1)(Repl. Pamp. 1994).

7. See N.M. STAT. ANN. § 30-2-1 (Repl. Pamp. 1994)(defining murder); see also *infra* note 26 and accompanying text, discussing the requisite mens rea for first-degree deliberate intent murder and first-degree depraved mind murder as reflected in the relevant uniform jury instructions.

8. *Brown*, 122 N.M. at 732, 931 P.2d at 77.

9. See *id.*

10. *Id.*

11. See *id.* at 727, 931 P.2d at 72. The prior distinction between first-degree depraved mind murder and second-degree murder was based on the "number of persons subjected to the risk of death." *Id.* First-degree depraved mind murder applied to a murder where more than one person was subjected to the risk of death by defendant's conduct. See N.M. U.J.I. CRIM. 14-203 (committee commentary) (stating that "this murder occurs when the accused does an act which is dangerous to more than one person"); *State v. Sena*, 99 N.M. 272, 274, 657 P.2d 128, 130 (1983) (quoting N.M. U.J.I. CRIM. 14-203 (committee commentary)). Second-degree murder is applicable to a murder which placed only one person at risk. See N.M. U.J.I. CRIM. 14-211 (stating that for second-degree murder, "[t]he defendant knew that his acts created a strong probability of death . . . to [the victim] [or any other human being]") (second set of brackets in the original); Leo M. Romero, *Unintentional Homicides Caused by Risk-Creating Conduct: Problems in Distinguishing Between Depraved Mind Murder, Second Degree Murder, and Involuntary Manslaughter, and Noncriminal Homicide in New Mexico*, 20 N.M. L. REV. 55, 63 (1990) (discussing, with disapproval, the courts' use of the "number of persons subjected to the risk" distinction). The *Brown* court deemed this distinction not determinative in differentiating between first-degree depraved mind murder and second-

Instead, the court carved out a narrow exception to the specific-general intent analysis used to distinguish first-degree from second-degree murder.¹² By reaffirming the application of the specific-general intent analysis to felony murder, first-degree felony murder, designated as a general intent crime, becomes the only first-degree murder for which the "lack of proof" defense of voluntary intoxication is unavailable.¹³

III. HISTORICAL AND CONTEXTUAL BACKGROUND

A. *The 1980 Amendment to the Murder Statutes*

Before 1980, murder was defined as "the unlawful killing of one being by another with malice aforethought, either express or implied, by any of the means with which death may be caused."¹⁴ First-degree murder included: (1) depraved mind murder; (2) willful, deliberate and premeditated killing; and (3) felony murder.¹⁵ Second-degree murder consisted of all murder other than the enumerated first-degree murders.¹⁶ The malice required for murder was either express, when there was "the deliberate intention" to kill,¹⁷ or implied, when the circumstances of the killing showed "a wicked and malignant heart."¹⁸

In 1980, the legislature amended the murder statutes, eliminating "malice aforethought" and repealing definitions of "express" and "implied" malice.¹⁹ The murder statute, as amended, eliminated the general definition of murder, defining first-degree murder as:

the killing of one human being by another without lawful justification or excuse, by any of the means with which death may be caused:

- (1) by any kind of willful, deliberate and premeditated killing;
- (2) in the commission of or attempt to commit any felony; or
- (3) by any act greatly dangerous to the lives of others, indicating a depraved mind regardless of human life.

Whoever commits murder in the first degree is guilty of a capital felony.²⁰

Second-degree murder is defined, in pertinent part, as follows:

Unless he is acting upon sufficient provocation, upon a sudden quarrel or in the heat of passion, a person who kills another human being without lawful

degree murder. *See Brown*, 122 N.M. at 727, 931 P.2d at 72.

12. *See Brown*, 122 N.M. at 727, 931 P.2d at 72 (holding "the specific-general intent analysis does not apply to depraved mind murder"). In establishing this exception, the court explicitly stated that it was not wholly abandoning New Mexico's general-specific intent approach with respect to all offenses. *See id.* at 730, 931 P.2d at 75.

13. *See id.* (affirming New Mexico's "general-specific intent analysis to exclude voluntary intoxication evidence for the crime of felony murder").

14. N.M. STAT. ANN. § 40A-2-1 (1953 & 1963 Supp.) (recompiled as N.M. STAT. ANN. § 30-2-1 (1978)).

15. *See id.* § 40A-2-1(A).

16. *See id.* § 40A-2-1(B).

17. *See id.* § 40A-2-2(A).

18. *See id.* § 40A-2-2(B).

19. *See* N.M. STAT. ANN. §§ 30-2-1, 30-2-2 (Cum. Supp. 1980) (annotations); *State v. Brown*, 122 N.M. 724, 931 P.2d 69, 75 (1996) (quoting *State v. Ortega*, 112 N.M. 554, 565, 817 P.2d 1196, 1207 (1991)).

20. N.M. STAT. ANN. § 30-2-1(A) (Repl. Pamp. 1994).

justification or excuse commits murder in the second degree if in performing the acts which cause the death he knows that such acts create a strong probability of death or great bodily harm to that individual or another.

Murder in the second degree is a lesser included offense of the crime of murder in the first degree.²¹

In amending the statute in 1980, the legislature carried over verbatim the language used to define first degree deliberate murder, depraved mind murder and felony murder but eliminated the malice terminology from the murder statute,²² while retaining it in the manslaughter statute.²³ New Mexico is one of only three states that provides for first-degree depraved mind murder.²⁴ Thus, New Mexico courts have attempted to develop a statutory scheme which, in addition to differentiating murder from manslaughter, must distinguish two degrees of murder (first- and second-degree), including two degrees of unintentional murder: depraved mind murder and second-degree murder.²⁵

B. New Mexico's Criminal Law Before Brown

1. Distinguishing Between Murder and Manslaughter

To distinguish between murder and manslaughter, New Mexico courts have developed a scheme in which the "malice required for . . . murder is 'an intent to kill or an intent to do an act greatly dangerous to the lives of others or with the knowledge that the act creates a strong probability of death or great bodily harm.'"²⁶ Voluntary manslaughter is the unlawful intentional killing²⁷ "without malice"²⁸ but

21. *Id.* § 30-2-1(B).

22. Compare N.M. STAT. ANN. § 40A-2-1(A) (1953 & 1963 Supp.), with N.M. STAT. ANN. § 30-2-1(A) (Repl. Pam. 1994).

23. Both statutes provide: "Manslaughter is the unlawful killing of a human being without malice." See N.M. STAT. ANN. § 40A-2-3 (1953 & 1963 Supp.); N.M. STAT. ANN. § 30-2-3 (Repl. Pam. 1994).

24. The three states are New Mexico, Colorado and Washington. See *State v. Brown*, 122 N.M. 724, 727, 931 P.2d 69, 72 (1996); cf. COLO. REV. STAT. ANN. § 18-3-102 (West 1990) (providing a person commits the crime of murder in the first degree if: "(d) Under circumstances evidencing an attitude of universal malice manifesting extreme indifference to the value of human life generally, he knowingly engages in conduct which creates a grave risk of death to a person, or persons, other than himself, and thereby causes the death of another."); WASH. REV. CODE ANN. § 9A.32.030 (West Supp. 1998) (providing: "(1) A person is guilty of murder in the first degree when: . . . (b) Under circumstances manifesting an extreme indifference to human life, he engages in conduct which creates a grave risk of death to any person, and thereby causes the death of a person; . . .").

25. See *Brown*, 122 N.M. at 727, 931 P.2d at 72.

26. *Id.* at 730, 931 P.2d at 75 (quoting *State v. Ortega*, 112 N.M. 554, 565, 817 P.2d 1196, 1207 (1991)). This scheme reflects a compilation of the mens rea elements found in New Mexico's Criminal Uniform Jury Instructions. Compare N.M. U.J.I. CRIM. 14-201 to -211 (describing the elements of willful and deliberate murder, felony murder, depraved mind murder, and second-degree murder), with N.M. U.J.I. CRIM. 14-220 to -231 (describing the elements of manslaughter, voluntary and involuntary). First-degree willful and deliberate murder requires killing with "deliberate intent." N.M. U.J.I. CRIM. 14-201. First-degree depraved mind murder requires the defendant "to do an act greatly dangerous to the lives of others" and "[t]he defendant knew that his act was greatly dangerous to the lives of others." N.M. U.J.I. CRIM. 14-203. First degree felony murder requires that the actor "intended to kill or knew that his acts created a strong probability of death or great bodily harm." N.M. U.J.I. CRIM. 14-202. Second-degree murder requires that the actor "knew that his acts created a strong probability of death or great bodily harm." N.M. U.J.I. CRIM. 14-210, 14-211.

27. See N.M. U.J.I. CRIM. 14-220 (committee commentary); N.M. U.J.I. CRIM. 14-221 (committee commentary).

28. N.M. STAT. ANN. § 30-2-3 (Repl. Pam. 1994). See also N.M. U.J.I. CRIM. 14-220 (committee

with the knowledge "that his acts created a strong probability of death or great bodily harm" to the victim or any other human being.²⁹ Involuntary manslaughter is either a misdemeanor-manslaughter³⁰ or a criminally negligent homicide,³¹ which applies an objective reasonable person standard in determining mens rea.³²

2. Distinguishing Between First-Degree Murder and Second-Degree Murder

New Mexico courts have based the statutory scheme for murder on culpability, noting that distinguishing between second-degree murder and first-degree murder is of utmost importance in administering New Mexico's criminal justice system.³³ Only the most blameworthy, heinous and reprehensible class of homicides are to be designated as first-degree murder.³⁴ The importance of this culpability distinction between first- and second-degree murder serves to justify the more serious penal consequences of first-degree murder.³⁵

a. Intentional Murder

In distinguishing between first- and second-degree *intentional* murder, focus is placed on the deliberation required in first-degree intentional murder, which is not required in second-degree murder. In *State v. Garcia*,³⁶ the New Mexico Supreme Court approved the statutory scheme establishing first-degree intentional killings as "those that are willful, deliberate, and premeditated" and second-degree intentional killings as those "committed without such deliberation and premeditation" so as to be "unconsidered and [committed on] rash impulse."³⁷

commentary) stating that "[voluntary] [m]anslaughter is an intentional homicide which is committed under adequate legal provocation."); N.M. U.J.I. CRIM. 14-221 (committee commentary) (stating that "[voluntary] manslaughter is essentially second degree murder committed under sufficient provocation"). Thus, "sufficient provocation" equates to an offense committed "without malice."

29. N.M. U.J.I. CRIM. 14-220, 14-221.

30. See N.M. STAT. ANN. § 30-2-3(B) ("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 circumspection.").

31. See *id.* The jury instruction defines the mens rea of involuntary manslaughter as the defendant's willful disregard for the safety of others and assigns to the defendant an awareness of the dangers attendant to his risk-creating conduct that the defendant *should* possess. See N.M. U.J.I. CRIM. 14-231 (emphasis added). Note that this instruction was amended and became effective August 1, 1997 to conform to the holding in *State v. Yarbrough*, 122 N.M. 596, 930 P.2d 131 (1996) (requiring a showing of criminal negligence for conviction of involuntary manslaughter, whether based on an "unlawful act" or "lawful act").

32. See N.M. U.J.I. CRIM. 14-231. The involuntary manslaughter jury instruction provides, in relevant part, that "the state must prove . . . beyond a reasonable doubt [that] . . . [the defendant] should have known of the danger involved by [his] actions [and] . . . [the defendant] acted with a willful disregard for the safety of others [and that said actions] caused the death of [another]" *Id.*

33. See *State v. Brown*, 122 N.M. 724, 727, 931 P.2d 69, 72 (1996) (citing *State v. Garcia*, 114 N.M. 269, 272, 837 P.2d 862, 865 (1992)).

34. See *id.*

35. See *id.* The *Brown* court noted that first-degree murder is a capital crime. See N.M. STAT. ANN. § 30-2-1(A) (Repl. Pam. 1994).

36. 114 N.M. 269, 837 P.2d 862 (1992).

37. *Id.* at 273, 837 P.2d at 866. While the jury instruction for first degree intentional murder requires the state to prove that "[t]he killing was with the deliberate intention to take away the life of [the victim] [or any other human being]," N.M. U.J.I. CRIM. 14-201 (first set of brackets added), the jury instructions for second-degree murder only require proof that the "defendant knew that his acts created a strong probability of death or great bodily harm [to the victim] [or any other human being]." N.M. U.J.I. CRIM. 14-210, 14-211 (first set of brackets added).

b. First-Degree Felony Murder Versus Second-Degree Murder

To distinguish between first-degree felony murder and second degree murder, the court in *State v. Ortega*³⁸ determined that murder which implicates the felony murder rule necessitates "proof of an intent to kill."³⁹ The *Ortega* court recognized that felony murder requires the underlying felony to be a first degree or other inherently dangerous felony.⁴⁰ The *Ortega* court further elaborated that "there must be proof that the defendant *intended* to kill (*or was knowingly heedless* that death might result from his conduct)."⁴¹ The *Ortega* court stated that felony murder elevates second-degree murder, with the requisite criminal intent,⁴² to first-degree murder, when done in the commission or attempted commission of a first-degree or other inherently dangerous felony.⁴³

c. Unintentional Murder

New Mexico courts have encountered difficulties in developing a coherent, principled rule for distinguishing between unintentional murders.⁴⁴ Courts have distinguished first-degree depraved mind murder from second-degree murder in the belief that first-degree depraved mind murder occurs when an actor's conduct endangers more than one person.⁴⁵ This theory was based on the plural language of "lives of others" found in the first-degree murder statute⁴⁶ and accompanying jury instruction⁴⁷ as compared with second-degree murder, which contemplates one victim.⁴⁸

The subjective knowledge element for depraved mind murder was first imposed in *State v. McCrary*.⁴⁹ The court identified distinguishable mens rea elements in the

38. 112 N.M. 554, 817 P.2d 1196 (1991).

39. *See id.* at 557, 817 P.2d at 1199.

40. *See id.* (citing *State v. Harrison*, 90 N.M. 439, 564 P.2d 1321 (1977)).

41. *Id.* at 563, 817 P.2d at 1205 (second emphasis added).

42. *See id.* at 565, 817 P.2d at 1207 (defining the mens rea of second-degree murder as "an intent to kill or with knowledge that the act creates a strong probability of death or great bodily harm").

43. *See id.*

44. *See Romero, supra* note 11, at 61 ("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.").

45. *See State v. Sena*, 99 N.M. 272, 274, 657 P.2d 128, 130 (1983) (quoting N.M. U.J.I. CRIM. 14-203 (committee commentary)) *limited by* *State v. Brown*, 122 N.M. 724, 931 p.2d 69 (1996) (finding the number of persons at risk not a determinative distinction); *State v. DeSantos*, 89 N.M. 458, 553 P.2d 1265 (1976) (finding it reversible error to instruct on depraved mind murder where act is dangerous only to one person) *limited by* *State v. Brown*, 122 N.M. 724, 931 p.2d 69 (1996) (finding the number of persons at risk not determinative).

46. *See* N.M. STAT. ANN. § 30-2-1(A)(3) (Repl. Pamph. 1994) (requiring proof that death was caused by "any act greatly dangerous to the lives of others").

47. *See* N.M. U.J.I. CRIM. 14-203 (requiring, in part, proof that the defendant's act was "greatly dangerous to the lives of others").

48. *See* N.M. U.J.I. CRIM. 14-210, 14-211 (each requiring, in part, proof that the defendant "knew that his acts created a strong probability of death or great bodily harm to [the victim] [or any other human being]") (first set of brackets added).

49. 100 N.M. 671, 673, 675 P.2d 120, 122 (1984). *See Romero, supra* note 11, at 65 (discussing the *McCrary* court's reliance on jury instructions to establish the subjective knowledge requirement for first-degree depraved mind murder).

instructions, such that first-degree depraved mind murder requires a subjective test while second-degree murder requires an objective test.⁵⁰

The *McCrary* court found persuasive the committee commentary on the depraved mind murder jury instruction in developing the subjective-objective test.⁵¹ The *McCrary* court construed the language in the depraved mind murder jury instruction, which provides "[t]he act of the defendant was greatly dangerous to the lives of others, indicating a depraved mind without regard for human life . . . [and that] [t]he defendant *knew* that his act was greatly dangerous to the lives of others,"⁵² as requiring *subjective knowledge*.⁵³ In contrast, the court construed the language in the second-degree murder jury instruction, which provides that "defendant *knew* that his acts created a strong probability of death or great bodily harm,"⁵⁴ to require merely *objective knowledge*.⁵⁵

Given that the accused will rarely admit to having actual knowledge, the *McCrary* court stated that "whether there is a subjective knowledge of risk [is determined] by considering 'what the defendant should realize to be the degree of risk, in light of the surrounding circumstances which he knows.'"⁵⁶ If *actual knowledge* of the risk is determined from what the accused *should realize* from his knowledge of the surrounding circumstances, the court leaves unclear how one determines the objective knowledge required for second-degree murder.⁵⁷ Under the

50. See *McCrary*, 100 N.M. at 673, 675 P.2d at 122. This distinction has encountered criticism. See Romero, *supra* note 11, at 60 (stating that attempts have not been successful by the courts or by the drafters of the jury instructions to clarify the distinctions between different unintentional homicides based on differences of culpability in risk-taking conduct).

51. See *McCrary* at 673, 675 P.2d at 122. The commentary to the relevant jury instruction states, "This instruction sets forth a subjective test for 'depraved mind murder.' Second-degree murder provides an objective test for depraved mind murder." N.M. U.J.I. CRIM. 14-203 (committee commentary).

52. N.M. U.J.I. CRIM. 14-203 (emphasis added).

53. See *McCrary* at 673, 675 P.2d at 122. The Model Penal Code (MPC) provides that "[w]hen knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is *aware* of a high probability of its existence, unless he actually believes that it does not exist." MODEL PENAL CODE § 2.02(7) (1985) (emphasis added). Under the MPC, culpability reaching only to the level of objective knowledge ("should have known" as opposed to "actually knew") is found only in its definition of criminal negligence:

A person acts negligently with respect to a material element of an offense when he *should be aware* of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

MODEL PENAL CODE § 2.02(2)(d) (1985) (emphasis added). Thus, under the MPC, second-degree murder would comprehend a criminal negligence standard of culpability. If this is the standard applied to second-degree murder, then distinguishing second-degree murder from the statutory definition of involuntary manslaughter, which applies an objective standard, becomes problematic. This MPC language is similar to that found in section 30-2-3(B) of the New Mexico Statutes Annotated. See *also supra* notes 21-32 and accompanying text.

54. N.M. U.J.I. CRIM. 14-211 (emphasis added).

55. See *McCrary*, 100 N.M. at 673, 675 P.2d at 122. The textual distinction made is far from clear. Both jury instructions ascribe knowledge to the actor. It is a slim distinction if the court relied solely on the difference in language between an act "greatly dangerous to the lives of others" and an act "creating a strong probability of death or great bodily harm" as determinative.

56. *Id.* (emphasis added) (quoting W. LAFAVE & A. SCOTT, JR., HANDBOOK ON CRIMINAL LAW § 70 (1972)).

57. It is unclear how basing subjective, actual knowledge on what the accused *should realize* is distinguishable from the objective knowledge standard. Subjective knowledge purports to require that the accused "actually knew," but disregarded, the risk attendant to the conduct. Objective knowledge requires that the accused

objective standard of knowledge, second-degree murder requires only proof that the defendant "should have known"⁵⁸ rather than "knew"⁵⁹ of the attendant risks his conduct created, which is contrary to the express language of the second-degree murder statute and corresponding jury instructions.⁶⁰ Nevertheless, the subjective-objective knowledge test has been followed in later decisions involving first-degree depraved mind murder.⁶¹

3. Using the Specific-General Intent Dichotomy in Determining the Relevance of Intoxication Evidence in Homicides

In spite of the confusion over what constitutes a specific intent crime,⁶² the New Mexico courts continue to follow the specific-general intent scheme to determine whether voluntary intoxication may negate the requisite mens rea.⁶³ Under this

"should have known" the risk, in spite of the actor's failure to perceive the risk. The *McCrary* court applied the same inference that Professor Romero found so problematic with the subjective-objective knowledge distinction. See Romero, *supra* note 11, at 66-67 (stating that a jury will often infer subjective realization of the risk if a reasonable person would have been aware of the risk).

58. See *State v. Ibn Omar-Muhammad*, 102 N.M. 274, 277, 694 P.2d 922, 925 (1985) (stating that the erroneous jury instruction given at trial set out an objective standard, using the language "should have known" instead of "knew," the subjective standard).

59. See N.M. U.J.I. CRIM. 14-210, 14-211.

60. The second-degree murder statute provides the source for the language used in the corresponding jury instruction. See N.M. STAT. ANN. § 30-2-1(B) (Repl. Pam. 1994) (requiring an actor "knows . . . [the] acts [if performed] create[d] a strong probability of death or great bodily harm") (emphasis added). See also Romero, *supra* note 11, at 66-67 (criticizing the committee commentary to the first-degree depraved mind murder instruction).

61. See *Ibn Omar-Muhammad*, 102 N.M. at 277, 694 P.2d at 925 (holding that conviction of first-degree depraved mind murder requires proof of subjective knowledge); *State v. Johnson*, 103 N.M. 364, 370, 707 P.2d 1174, 1180 (Ct. App. 1985) (stating that, although the "elements of second degree murder are somewhat similar to depraved mind murder[,] . . . [d]epraved mind murder requires subjective knowledge that one's act is greatly dangerous to the lives of others Second degree murder requires objective knowledge that one's acts create a strong probability of death or great bodily harm."). The courts have applied this subjective-objective knowledge distinction in the depraved mind murder context, which establishes second-degree murder as requiring only objective knowledge. However, there is no indication that the courts require only an objective knowledge standard for a second-degree murder conviction. See Romero, *supra* note 11, at 66. Thus, it remains unclear whether the subjective-objective knowledge distinction is only applicable in the depraved mind murder context or extends to second-degree murder generally.

62. This is evidenced in the New Mexico Supreme Court's difficulty with the term "specific intent." In *State v. Doe*, 100 N.M. 481, 484, 672 P.2d 654, 657 (1983), the court stated that the general criminal intent instruction was not required because 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. As a result, in *State v. Beach*, 102 N.M. 642, 645, 699 P.2d 115, 118 (1985) *overruled in part by State v. Brown*, 122 N.M. 724, 728, 931 P.2d 69, 73 (1996), the court had to admit its use of language in *Doe* was confusing and clarified it by stating that "second-degree murder . . . contains an element of subjective knowledge that does not require an added showing of general criminal intent (i.e., conscious wrongdoing)." The *Beach* court further explained that this "[specified] knowledge [element] is not an equivalent mental state to the intent to do a further act or achieve a further consequence, and a knowledge element does not always make a crime one of specific intent." *Id.* In *State v. Abeyta*, 120 N.M. 233, 242 n.5, 901 P.2d 164, 173 n.5 (1995), the court noted that *Beach* incorrectly classified second-degree murder as a general intent crime. In *State v. Campos*, 122 N.M. 148, 158 n.4, 921 P.2d 1266, 1276 n.4 (1996), the court negated the *Abeyta* dicta, expressly abrogating the *Abeyta* court's error. The *Campos* court indicated that "the better wording" would be "specified mens rea" when discussing the knowledge element in second-degree murder. *Id.* at 158-59, 921 P.2d at 1276-77.

63. See *Campos*, 122 N.M. at 157, 921 P.2d at 1275 (stating that "voluntary intoxication is only a defense to specific-intent crimes").

common law rationale, intoxication evidence is not relevant to the mens rea of a general-intent crime.⁶⁴ The *Campos* court has explained:

[T]he class of specific-intent crimes encompasses those crimes for which the statutory elements include an intent to do some further act or achieve some additional consequence. . . .

A crime defined as requiring the mens rea of knowledge, such as second-degree murder, does not require any further intent [to accomplish a specified further goal] and therefore does not fall within the class of specific-intent crimes.⁶⁵

The court noted that second-degree murder includes both intentional and unintentional killing.⁶⁶ Intoxication would provide a defense only to the specific-intent portion of an intentional, but rash, killing (a second-degree murder).⁶⁷ However, the defense would fail to negate the general-intent portion of such a second-degree murder, the knowledge of the risk of death. The court reasoned that the legislature, when amending the murder statute in 1980, intended only "to modernize the terminology in the statute" as opposed to legislatively overruling a long line of case law.⁶⁸ Thus, second-degree murder continued to be a general-intent crime for which intoxication is not a defense.⁶⁹

Earlier, in *State v. Ortega*,⁷⁰ the court had required a showing of intent to kill (or a knowing disregard of the risk attendant to the defendant's dangerous conduct) to elevate second-degree murder to first-degree felony murder.⁷¹ In purporting to adhere to *Ortega*, the *Campos* court minimized the "intent to kill" language and focused instead on the "knowing disregard of the risk" language. The *Campos* court held that, because intoxication is not a defense to the general-intent crime of second-degree murder, to which attaches the lesser mens rea of knowledge,

64. See *id.* at 159, 921 P.2d at 1277. General-intent crimes include crimes with a mens rea of general criminal intent and those with a mens rea of knowledge. See *id.* at 159 n.5, 921 P.2d at 1277 n.5. In this footnote, the *Campos* court distinguished the terms "general-intent crime" and "specific-intent crime" from the meaning of "general criminal intent" as follows:

It is important not to confuse the phrase "general-intent crime" with that of "general criminal intent," which is a distinct concept. General criminal intent is the term used to define the mens rea for a crime that has no stated mens rea. This mens rea is defined as conscious wrongdoing or the purposeful doing of an act that the law declares to be a crime. The class of general-intent crimes on the other hand is best defined as those crimes which are not specific-intent crimes, which would include both crimes with a mens rea of general criminal intent and those with a mens rea of knowledge.

Id. at 159 n.5, 921 P.2d at 1277 n.5 (citations omitted).

65. *Id.* at 159, 921 P.2d 1277. Employing this traditional analysis, the *Campos* court held that intoxication is not a defense to second-degree murder, since it is a general intent crime with a mens rea of knowledge. See *id.* at 157, 921 P.2d at 1275.

66. See *id.* at 160, 921 P.2d at 1278.

67. See *State v. Garcia*, 114 N.M. 269, 837 P.2d 862 (1992) (holding that second-degree murder includes intentional killings that lack deliberation and premeditation which are committed with the killer's knowledge that his acts create a strong probability of death or great bodily harm); *State v. Johnson*, 103 N.M. 364, 707 P.2d 1174 (Ct. App. 1985) (holding that second-degree murder does not exclude intentional murders).

68. *Campos*, 122 N.M. at 160, 921 P.2d at 1278.

69. See *id.*

70. 112 N.M. 554, 817 P.2d 1196 (1991).

71. See *id.* at 563, 817 P.2d at 1205.

intoxication is, therefore, not a defense for first-degree felony murder.⁷² Only for crimes requiring proof of specific intent⁷³ may the fact finder consider whether the intoxication was so great that the specific intent could not have been formed.⁷⁴

The *Campos* court noted that some states have statutorily barred the use of the intoxication defense to knowledge crimes, such as second-degree murder.⁷⁵ The court also pointed out that, of those states that allow intoxication to negate knowledge, "many still hold that the defense is inapplicable to second-degree murder because, under their statutes, second-degree murder also includes the lesser mens rea element of recklessness," for which intoxication is no defense.⁷⁶

C. The U.S. Supreme Court's Impact on New Mexico's Homicide Jurisprudence

United States Supreme Court decisions have focused the New Mexico courts' attention upon the mens rea elements of the state's homicide statutes.⁷⁷ In 1970, the United States Supreme Court, in *In re Winship*,⁷⁸ explicitly held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."⁷⁹ In *Mullaney v. Wilbur*,⁸⁰ the Court held that the Due Process Clause requires the state to carry the ultimate burden of persuasion by proof beyond a reasonable doubt.⁸¹ The prosecution cannot shift the burden to the defendant beyond requiring the defendant to present some evidence to rebut an otherwise presumed or inferred fact at issue.⁸² The Court, in *Sandstrom v. Montana*,⁸³ held that, where the mens rea element of the crime was at issue, an instruction stating that "the law presumes that a person intends the ordinary consequences of his voluntary acts"⁸⁴ could have been interpreted as a conclusive presumption or as impermissibly shifting the burden of persuasion to the defendant.⁸⁵ The instruction's ambiguity

72. See *Campos*, 122 N.M. at 160-61, 921 P.2d at 1277-78 (citing *Ortega*, 112 N.M. at 564-65, 817 P.2d at 1206-07).

73. First-degree willful, deliberate and premeditated murder is an example. See N.M. STAT. ANN. § 32-1-A(1) (Repl. Pamp. 1994). See also *supra* note 20 and accompanying text (excerpting the statute's relevant language).

74. See *State v. Tapia*, 81 N.M. 274, 276, 466 P.2d 551, 553 (1970). It must be noted that: [T]o authorize an instruction on intoxication the record must contain some evidence showing or tending to show that [the] defendant consumed an intoxicant and the intoxicant affected his mental state at or near the time of the homicide. In deciding whether the instruction is proper, the trial court must not weigh the evidence, but must simply determine whether such evidence exists.

State v. Privett, 104 N.M. 79, 82, 717 P.2d 55, 58 (1986) (citation omitted). Thus, where intoxication is relevant to the offense charged, the defendant must merely present some evidence that his mental state was affected by the intoxicant to justify such an instruction.

75. See *Campos*, 122 N.M. at 161, 923 P.2d at 1279.

76. *Id.*

77. See, e.g., *id.* at 159, 921 P.2d 1277 (citing *Sandstrom v. Montana*, 442 U.S. 510 (1979)); *State v. Brown*, 122 N.M. 724, 731-32, 931 P.2d 69, 76-77 (1996) (citations omitted).

78. 397 U.S. 358 (1970).

79. See *id.* at 364.

80. 421 U.S. 684 (1975).

81. See *id.* at 701-02.

82. *Id.*

83. 442 U.S. 510 (1979).

84. *Id.* at 513.

85. *Id.* at 524.

violated the Due Process Clause requirement that the state must prove every element of a criminal offense beyond a reasonable doubt, and was thus found unconstitutional.⁸⁶

As a result of these decisions, New Mexico courts have sought to clarify the homicide statutes to provide guidance as to the proof required to adequately establish or rebut the mens rea element of each crime. After *State v. Campos*,⁸⁷ but before the New Mexico Supreme Court's decision in *Brown*,⁸⁸ the United States Supreme Court issued its decision in *Montana v. Egelhoff*,⁸⁹ a plurality decision.⁹⁰ The United States Supreme Court in *Egelhoff* upheld a Montana statute that disallowed consideration of a defendant's intoxicated condition when a defendant's state of mind is at issue.⁹¹

Justice Scalia, speaking for a plurality, defended the constitutionality of the Montana statute.⁹² He did so on the ground that the Due Process Clause places limits on the restriction of the right to introduce evidence, but only where such restriction "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."⁹³ Justice Scalia determined that the defendant had failed to establish the rule (allowing a jury to consider evidence of a defendant's voluntary intoxication, where relevant to mens rea) as fundamental and deeply rooted in our traditions.⁹⁴ Justice Scalia referenced the lengthy common law tradition that rejects intoxication as an excuse or justification for crime as undermining the defendant's position.⁹⁵ According to Justice Scalia, as a rule of evidence rooted in the common law with valid justifications today,⁹⁶ the Montana statute does not "violate a fundamental principle

86. *See id.*

87. 122 N.M. 148, 921 P.2d 1266 (1996).

88. 122 N.M. 724, 931 P.2d 69 (1996).

89. 518 U.S. 37 (1996).

90. The New Mexico Supreme Court decided *Campos*, 122 N.M. 148, 921 P.2d 1266 (1996), on May 30, 1996. Chief Justice Frost authored the majority opinion, Justices Ransom, Baca and Minzner concurred in the opinion, and Justice Franchini wrote a dissenting opinion. The United States Supreme Court decided *Egelhoff*, 518 U.S. 37 (1996), two weeks later, on June 13, 1996. Responding to *Egelhoff*, *Campos* sought rehearing before the New Mexico Supreme Court, which was denied on July 24, 1996. About six months after *Egelhoff* and a little over four months after *Campos* was denied a rehearing, the New Mexico Supreme Court decided *Brown*, 122 N.M. 724, 931 P.2d 69 (1996), on December 5, 1996. Justice Franchini wrote the majority opinion, Justices Ransom and McKinnon concurred, and Justice Minzner, joined by now Chief Justice Baca, dissented.

91. *Egelhoff*, 518 U.S. at 56. The statute's relevant mens rea was identified as either purposely or knowingly causing another's death. *See id.* at 54. In so doing, the United States Supreme Court reversed the Montana Supreme Court, reinstating the defendant's conviction, a conviction which the Montana Supreme Court had previously reversed. *See id.* at 41, 56. The Montana Supreme Court had reasoned that the defendant had a right, under the Due Process Clause, "to present and have considered by the jury all relevant evidence to rebut the State's evidence on all elements of the offense charged" (deliberate homicide, in that case). *Id.* at 41 (quoting *State v. Egelhoff*, 900 P.2d 260, 266 (Mont. 1995)). Evidence of intoxication was "clear[ly] . . . relevant to the issue of whether [the defendant] acted knowingly and purposely." *Id.* (quoting *Egelhoff*, 900 P.2d at 265). Thus, the Montana Supreme Court concluded that the Montana statute had prevented the jury from considering that evidence, relieving the State of part of its burden of proof, and therefore denying the defendant due process. *See id.*

92. *See id.* at 42-43.

93. *Id.* at 43 (quoting *Patterson v. New York*, 432 U.S. 197, 201-02 (1977)).

94. *See id.* at 48.

95. *See id.* at 44-51.

96. *See id.* at 51.

of fairness."⁹⁷ Thus, it is within the state's power to reduce its burden of proof in this way.⁹⁸

Justice Ginsburg, concurring in the judgment only, concluded that the statute should not be categorized as simply an evidentiary rule designed to exclude relevant exculpatory evidence.⁹⁹ She viewed the statute as a legislative judgment redefining mens rea, thus encountering "no constitutional shoal."¹⁰⁰ According to Justice Ginsburg:

"[A] state legislature certainly has the authority to identify the elements of the offenses it wishes to punish,"¹⁰¹ and to exclude evidence irrelevant to the crime it has defined.

... "[T]he applicability of the reasonable-doubt standard . . . has always been dependent on how a State defines the offense that is charged."¹⁰²
... States enjoy a wide latitude in defining the elements of criminal offenses, particularly when determining "the extent to which moral culpability should be a prerequisite to conviction."¹⁰³

Dissenting, Justice O'Connor, joined by Justices Stevens, Souter, and Breyer, supported the Montana Supreme Court's determination that the statute violated due process.¹⁰⁴ O'Connor's dissent considered it unconstitutional to prevent a jury from considering evidence relevant to determine the defendant's mental state, where the mental state is an essential element of the offense that must be proved beyond a reasonable doubt.¹⁰⁵ In Justice O'Connor's view, by disallowing evidence that might negate an essential element, Montana eases the State's burden to prove its case.¹⁰⁶ Thus, the State's desire to increase its chances of conviction of a class of defendants, who might otherwise be able to successfully rebut a requisite element of the offense, "violate[s] the due process right to present a defense."¹⁰⁷

Montana v. Egelhoff is the United States Supreme Court's most recent case on the constitutional due process requirements regarding the mens rea elements of state criminal statutes. Five Justices view the Montana statute as a violation of the Constitution's Due Process Clause, if characterized as an evidentiary rule.¹⁰⁸ Thus, *Egelhoff* may prove crucial to the New Mexico Supreme Court's proper reading of the mens rea elements of New Mexico's homicide statutes.

97. *Id.* at 55.

98. *See id.*

99. *See id.* at 57 (Ginsburg, J., concurring).

100. *Id.* By "constitutional shoal," Justice Ginsburg suggests that, absent a legislative judgment redefining mens rea, due process may be violated when evidence that could negate the mens rea element of the offense is disallowed.

101. *Id.* (quoting Justice O'Connor's dissent, *id.* at 71).

102. *Id.* at 58 (quoting *Patterson v. New York*, 432 U.S. 197, 211 n.12 (1977)).

103. *Id.* (citations omitted) (quoting *Powell v. Texas*, 392 U.S. 514, 545 (1968)).

104. *See id.* at 61-73.

105. *See id.* at 61.

106. *See id.*

107. *Id.* at 61-62 (citing *State v. Egelhoff*, 900 P.2d 260, 265 (Mont. 1995)).

108. *See id.* at 57-61 (Ginsburg, J., concurring); *id.* at 61-73 (O'Connor, J., with whom Justices Stevens, Souter, and Breyer join, dissenting).

IV. RATIONALE OF THE *BROWN* COURT

In *Brown*, the defendant appealed the trial court's refusal to instruct the jury that "Brown's intoxication could be considered in determining the mental state required for conviction of depraved mind murder."¹⁰⁹ The court needed to clearly identify the mens rea element of first-degree depraved mind murder and then decide whether evidence of intoxication was relevant to the existence of that mens rea element.¹¹⁰ The *Brown* court held that the mens rea element of subjective knowledge was an essential element of first-degree depraved mind murder.¹¹¹ Thus, where evidence of intoxication is presented, the jury may consider such evidence in determining whether the accused possessed the requisite subjective knowledge for a first-degree depraved mind murder conviction.¹¹²

A. *Subjective Knowledge is an Essential Element of First-Degree Depraved Mind Murder*

As justification for first-degree depraved mind murder's subjective knowledge requirement,¹¹³ the *Brown* court pointed to the fact that "New Mexico is one of only a few states that divides unintentional murder based upon risk-creating conduct into two degrees of homicide, first-degree depraved mind murder and second degree murder."¹¹⁴ Because first-degree murder carries far more serious penal consequences than second-degree murder,¹¹⁵ the *Brown* court inferred the legislature's intention to distinguish between first-degree depraved mind murder and second-degree murder.¹¹⁶ The court considered it "of the utmost importance in the administration of New Mexico's criminal justice system" to provide a sufficient distinction between the two offenses.¹¹⁷ The prior distinction had been based on "the number of persons subjected to the risk of death."¹¹⁸ The *Brown* court considered this distinction not determinative in differentiating between first- and second-degree murder.¹¹⁹ With the legislature having placed depraved mind murder within the most culpable class of homicides, carrying grave penal consequences,¹²⁰

109. *State v. Brown*, 122 N.M. 724, 725, 931 P.2d 69, 70 (1996).

110. *See id.* at 721-22, 730, 931 P.2d at 71-72, 75.

111. *See id.* at 726-27, 931 P.2d at 71-72.

112. *See id.* at 728, 931 P.2d at 73.

113. *See id.* at 726-27, 931 P.2d at 71-72.

114. *Id.* at 727, 931 P.2d at 72 (citing *Romero*, *supra* note 11, at 61); *see also supra* note 24 and accompanying text. Depraved mind murder is a first-degree murder in New Mexico, Colorado and Washington.

115. *See id.* at 727, 931 P.2d at 72 (citing *Romero*, *supra* note 11, at 61); *see also supra* note 24 and accompanying text. New Mexico is one of only a few states where depraved mind murder is a capital felony. First-degree depraved mind murder is a capital crime in New Mexico and Colorado. Washington defines the offense as a class A felony and is not, without more, a capital crime.

116. *See id.*

117. *Id.* (citing *State v. Garcia*, 114 N.M. 269, 272, 837 P.2d 862, 865 (1992)).

118. *Id.* (citing both *State v. Sena*, 99 N.M. 272, 274, 657 P.2d 128, 130 (1983), and *State v. DeSantos*, 89 N.M. 458, 461, 553 P.2d 1265, 1268 (1976)).

119. *Brown*, 122 N.M. at 727, 931 P.2d at 72 (citing *Romero*, *supra* note 11, at 63-65).

120. *See id.* (citing *State v. Garcia*, 114 N.M. 269, 272, 837 P.2d 862, 865 (1992)). The court also noted that "clear, principled distinctions . . . result in the more heinous conduct being punished more severely." *Id.* (citing *Romero*, *supra* note 11, at 60).

the court inferred that the legislature ascribed "an intensified malice or evil intent" to depraved mind murder.¹²¹

The text of the first-degree depraved mind murder provision does not expressly provide that the killing be committed with the knowledge of the high degree of risk attendant to the defendant's conduct.¹²² Instead, the court relied on a number of earlier decisions which held that depraved mind murder requires "proof that the defendant had 'subjective knowledge' that his or her act was extremely dangerous to the lives of others."¹²³ This is in contrast to the mens rea element of second-degree murder, which requires only an objective knowledge of the risk and no required showing of an intensified evil intent.¹²⁴ The court reasoned that "the required mens rea element of 'subjective knowledge' serves as proof that the defendant acted with a 'depraved mind' . . . and with utter disregard for human life."¹²⁵ Following *McCrary*, the *Brown* court continued to rely upon the first-degree depraved mind murder jury instruction and committee commentary as persuasive support for the subjective knowledge requirement for first-degree depraved mind murder.¹²⁶

B. Intoxication is Relevant to Proving the Subjective Knowledge Mens Rea Requirement in First-Degree Depraved Mind Murder

The *Brown* court found that intoxication is relevant to determine the existence of the mens rea element of subjective knowledge and is thus a valid consideration for the fact finder.¹²⁷ In line with the due process requirements of the Constitution, the *Brown* court found that the State's burden of proving each element of first-degree depraved mind murder beyond a reasonable doubt necessitates proving the subjective knowledge mens rea element.¹²⁸ The court defined intoxication as "a disturbance of mental or physical capacities resulting from the introduction of substances into the body."¹²⁹ Intoxication, as so defined, could affect an actor's

121. *Id.* (citing *State v. Ibn Omar-Muhammad*, 102 N.M. 274, 278, 694 P.2d 922, 926 (1985), and *State v. Johnson*, 103 N.M. 364, 368, 707 P.2d 1174, 1178 (Ct. App. 1985)). These cases identified depraved mind murder as requiring outrageous and extreme recklessness performed with a depraved kind of wantonness and evidencing total indifference for the value of human life. *See id.*

122. *See* N.M. STAT. ANN. § 30-2-1(A)(3) (Repl. Pamp. 1994) ("[T]he killing of one human being by another without lawful justification or excuse, by any of the means with which death may be caused . . . by any act greatly dangerous to the lives of others, indicating a depraved mind regardless of human life.").

123. *Brown*, 122 N.M. at 728, 931 P.2d at 73 (citing *Ibn Omar-Muhammad*, 102 N.M. at 277, 694 P.2d at 925, *State v. McCrary*, 100 N.M. 671, 673, 675 P.2d 120, 122 (1984), and *Johnson*, 103 N.M. at 368, 707 P.2d at 1178).

124. *See id.*

125. *Id.*

126. *See Brown*, 122 N.M. at 728, 931 P.2d at 73 (citing N.M. U.J.I. 14-203 (with committee commentary)). For excerpts of the instruction and commentary, see *supra* notes 51-52 and accompanying text. The *Brown* court stated that, in order to satisfy the subjective knowledge mens rea requirement for first-degree depraved mind murder, the defendant "must have had the subjective or actual knowledge of the high degree of risk involved in his conduct." *Brown*, 122 N.M. at 728, 931 P.2d at 73. To review the mens rea subjective-objective standards, see *supra* notes 49-61 and accompanying text.

127. *See Brown*, 122 N.M. at 733, 931 P.2d at 78.

128. *See id.* at 728, 931 P.2d at 73. For a review of the relevant U.S. Supreme Court's due process criminal cases which influenced the *Brown* analysis, see *supra* notes 77-86, 91-107 and accompanying text.

129. *Brown*, 122 N.M. at 729, 931 P.2d at 74 (quoting MODEL PENAL CODE § 2.08(5)(a) (1985)).

ability to form the mens rea of subjective knowledge.¹³⁰ The court recognized that, by the turn of the century, New Mexico, along with "most American jurisdictions," had moved away from the earlier harshness of the strict policy that "voluntary intoxication provided no defense to a criminal act."¹³¹ Instead, New Mexico courts "had adopted the common-law approach which permitted intoxication to be considered where it negates the required element of specific intent."¹³² Under this specific-general intent approach, voluntary intoxication is "a consideration *only for specific-intent crimes*, including premeditated first-degree murder."¹³³

While the *Brown* court denied wholly abandoning New Mexico's specific-general intent analysis with respect to all offenses, it held that this analysis does not apply to depraved mind murder.¹³⁴ The court explained its departure by noting that the specific-general intent approach has been criticized for the difficulties in identifying "whether a particular offense was a specific-intent crime or a general-intent crime."¹³⁵ The court also viewed the *Brown* case as presenting a unique circumstance involving a first-degree offense with the express mental state of subjective knowledge.¹³⁶ According to the *Brown* court, this peculiarity arose from the statutory changes in 1980, which New Mexico courts interpreted as the legislature's effort to redefine and distinguish the mental states required for first-degree depraved mind murder and second-degree murder.¹³⁷ The *Brown* court opined that "[t]he specific-general intent common-law approach does not take into consideration the existence of a 'heightened' mens rea aside from specific intent."¹³⁸ The court reasoned that "[t]he capacity to possess 'subjective knowledge' may be just as affected by intoxication as the capacity to intend to do a further act[,] . . . [whereas] [i]ntoxication . . . usually has no effect on whether a person is purposefully doing something declared to be . . . a general-intent crime."¹³⁹ On this basis, although "depraved mind murder cannot be considered a 'specific-intent' crime because it requires proof of 'subjective knowledge,' . . . it does not fall

130. *See id.*

131. *Id.*

132. *Id.*

133. *See id.* (emphasis added); *see also supra* notes 3-4, 62-76 and accompanying text (discussing the specific-general intent rationale as defined by previous courts, and how it applies to voluntary intoxication). The *Brown* court described a general-intent crime as "requir[ing] only a 'conscious wrongdoing,' or 'the purposeful doing of an act that the law declare[d] to be a crime.'" *Id.* (quoting *State v. Ibn Omar-Muhammad*, 102 N.M. 274, 278, 694 P.2d 922, 926 (1985)). Note that the apparent distinction between general criminal intent and general-intent crimes made in *Campos*, decided by the New Mexico Supreme Court on May 30, 1996, is not precisely followed in *Brown*, decided by the same court on December 5, 1996. *Compare* *State v. Campos*, 122 N.M. 148, 159 n.5, 921 P.2d 1266, 1277 n.5 (1996) (identifying general criminal intent as defining the mens rea for a crime lacking a stated mens rea and defining general intent crimes as including crimes with a mens rea of either general criminal intent or knowledge), *with Brown*, 122 N.M. at 729, 931 P.2d at 74 (including within the class of general intent crimes only those with a general criminal intent). *See also supra* notes 64-65 and accompanying text, for the *Campos* court's treatment of the specific-general intent rationale. In contrast with the *Campos* court, the *Brown* court fails to include the knowledge component in its definition of the mens rea of a general intent crime. *Compare Campos*, 122 N.M. at 159 n.5, 921 P.2d at 1277 n.5 *with Brown*, 122 N.M. at 729-31, 931 P.2d at 74-76.

134. *See Brown*, 122 N.M. at 730, 931 P.2d at 75.

135. *Id.* at 729, 931 P.2d at 74 (citing G. FLETCHER, *RETHINKING CRIMINAL LAW* 846, 849-50 (1978), and PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES* § 65(e), at 297-300 (1984)).

136. *See id.* at 730, 931 P.2d at 75.

137. *See id.*

138. *Id.* (citing ROBINSON, *supra* note 135, § 65(e), at 300).

139. *Id.*

squarably among the class of crimes referred to as the 'general-intent' crimes."¹⁴⁰ Therefore, the *Brown* court considered "evidence of intoxication relevant to the formation of the heightened mens rea element of depraved mind murder," absent any expression from the legislature to the contrary.¹⁴¹

The *Brown* court found support for its subjective-objective knowledge mens rea distinctions in the *Egelhoff* dissent's due process analysis.¹⁴² The *Brown* court particularly noted that Justice O'Connor (joined by three other Justices) considered intoxication evidence relevant in negating a subjective mental state element (i.e., knowledge) of the offense.¹⁴³ While the *Egelhoff* plurality opinion is inapplicable to Brown's case, the court found Justice O'Connor's dissent significant to *Brown*'s analysis because, "[u]nlike Montana, the New Mexico legislature has not chosen to redefine its elements with the enactment of a rule that excludes relevant evidence of voluntary intoxication."¹⁴⁴

The *Brown* court recognized that other jurisdictions generally disallow drunkenness to negate the depraved mind murder mens rea by "blotting out consciousness of risk."¹⁴⁵ However, the court distinguished New Mexico from other jurisdictions.¹⁴⁶ It did so on the basis of "New Mexico's unique position requiring a subjective knowledge element to establish depraved mind murder as well as its unique classification of depraved mind murder as first-degree murder."¹⁴⁷ With New Mexico's unique statutory scheme, the court posited that, since intoxication is "clearly relevant" to the formation of the requisite subjective knowledge mental state, the defendant must be allowed to rebut the existence of subjective knowledge with evidence of intoxication.¹⁴⁸ Thus, the court held that "evidence of intoxication may be considered to reduce first-degree depraved mind murder to second-degree murder," but "[i]t may not be used . . . to reduce second-degree murder to voluntary manslaughter, or involuntary manslaughter or to completely excuse a defendant from the consequences of his unlawful act."¹⁴⁹

V. ANALYSIS

In *Brown*, the New Mexico Supreme Court attempted to formulate clear, principled distinctions between first-degree depraved mind murder and second-

140. *Id.* at 730-31, 931 P.2d at 75-76.

141. *Id.* at 731, 931 P.2d at 76. The *Brown* court further states: "[I]t is for the jury to weigh the credibility of the witnesses and the weight to be given that evidence. Moreover, such concerns should not lessen the state's burden to prove, beyond a reasonable doubt, all elements of the offense." *Id.*

142. *See id.* (citing *Montana v. Egelhoff*, 518 U.S. 37, 61-73 (1996) (O'Connor, J., with whom Justices Stevens, Souter, and Breyer join, dissenting)). *See also supra* notes 89-108 and accompanying text.

143. *See Brown*, 122 N.M. at 731, 931 P.2d at 76.

144. *Id.*

145. *See id.* at 732, 931 P.2d at 77.

146. *See id.*

147. *Id.*

148. *See id.*

149. *Id.* at 733, 931 P.2d at 78. The court found Brown's intoxication evidence highly relevant to the issue of whether Brown had actually possessed a subjective realization of the risk at the time of the shooting. *See id.* at 732, 931 P.2d at 77. The court specifically mentioned as probative, the evidence that Brown had: (1) consumed an excessive amount of alcohol on the day of the homicide, (2) failed to show any rancor toward the victim, and (3) exhibited apparent confusion in the aftermath of the murder. *See id.*

degree murder.¹⁵⁰ Admittedly, the task is particularly problematic because of New Mexico's peculiar statutory homicide scheme.¹⁵¹ It is laudable that the court attempted to reserve convictions for first-degree depraved mind murder, with its extreme punishment, for only those defendants with a clearly elevated mens rea.¹⁵² However, the court's departure from traditional analysis may confuse rather than improve New Mexico's homicide scheme.¹⁵³

The subjective-objective knowledge distinction, as developed by New Mexico courts, is far from clear. Both subjective knowledge and objective knowledge involve what an actor *should have known*.¹⁵⁴ With elements of an actor's knowledge being inferred in both instances, it may be difficult for judges to fashion, or practitioners discern, a workable bright-line distinction between the subjective knowledge requisite of first-degree depraved mind murder and the objective knowledge standard of second-degree murder.

The *Brown* court's subjective-objective knowledge distinction is not the opinion's only shortcoming.¹⁵⁵ The *Brown* court's due process concerns were influential in the court's creation of the first-degree depraved mind murder exception to the specific-general intent analysis.¹⁵⁶ By excepting first-degree depraved mind murder from the traditional specific-general intent analysis, it is

150. See *id.* at 727, 931 P.2d at 72. However, the dissenting opinion questioned the majority opinion's use of the phrase "subjective or actual knowledge." See *id.* at 734, 931 P.2d at 79 (Minzner, J., dissenting). Justice Minzner found the underlying question to be whether the intoxication evidence was sufficient to show that, "if [Brown] fired intentionally, he could have done so without the actual knowledge that his act was greatly dangerous to others." *Id.* Justice Minzner suggests that lack of memory does not establish an inability to know, at the time of the conduct, the highly risky nature of his conduct. See *id.* While admitting that the court has "produced a body of law that provides the thinnest of distinctions between depraved-mind murder and second-degree murder," Justice Minzner does not see the majority opinion's rationale in *Brown* as improving the law. *Id.* She apparently found preferable the rationale that applied the distinction based on the number of persons placed at risk in conjunction with the specific-general intent analysis. See *id.* at 735, 931 P.2d at 80.

151. See *id.* at 727, 931 P.2d at 72 (noting that New Mexico is one of only a few states with first-degree depraved mind murder); see also Romero, *supra* note 11, at 56-57 (enumerating the degrees of criminal homicide, intentional and unintentional homicide). The four degrees of unintentional homicide are: (1) first-degree murder (felony murder and depraved mind murder), see N.M. STAT. ANN. §§ 30-2-1(A)(2), 30-2-1(A)(3) (Repl. Pamp. 1994); (2) second-degree murder, see N. M. STAT. ANN. § 30-2-1(B) (Repl. Pamp. 1994); (3) involuntary manslaughter (misdemeanor manslaughter and criminally negligent homicide), see N.M. STAT. ANN. § 30-2-3(B) (Repl. Pamp. 1994); and (4) vehicular homicide, see N.M. STAT. ANN. § 66-8-101 (Repl. Pamp. 1994).

152. See *Brown*, 122 N.M. at 727, 931 P.2d at 72.

153. The *Brown* court eliminated the distinction based on the number of persons subjected to the risk of death and found the specific-general intent analysis inapplicable to first-degree depraved mind murder. See *id.* at 727, 730-31, 931 P.2d at 72, 75-76. In so doing, the court placed first-degree depraved mind murder outside the developed body of law, leaving the offense distinguished by the unrefined subjective-objective knowledge distinction. See *id.* at 730-31, 931 P.2d at 75-76.

154. In practice, subjective knowledge of a risk is based on a "double imputation," whereas objective knowledge is based on a "single imputation." Subjective knowledge is imputed to the actor for what the actor *should have known* about the risk of causing a death, given his knowledge of the circumstances surrounding his conduct. However, the actor's knowledge of the circumstances is most likely necessarily inferred. Thus a double imputation may be the basis for a finding of subjective knowledge. See *State v. McCrary*, 100 N.M. 671, 673, 675 P.2d 120, 122 (1984); see also *supra* notes 49-61 and accompanying text. Objective knowledge of a risk of death is based on what the actor *should have known* based on facts that a reasonable person should have known. Thus, a single imputation is the basis of objective knowledge; see *State v. Ibn Omar-Muhammad*, 102 N.M. 274, 277, 694 P.2d 922, 925 (1985); see also *supra* notes 58, 61 and accompanying text.

155. See *Brown*, 122 N.M. at 734, 931 P.2d at 79 (Minzner, J., dissenting).

156. The *Brown* court's due process concerns reflect approval of the *Egelhoff* dissent's due process analysis. See *id.* at 731-32, 931 P.2d 76-77 (citing *Montana v. Egelhoff*, 518 U.S. 37 (1996)).

difficult to justify the continued use of the specific-general intent analysis in determining the relevance of intoxication to first-degree felony murder, which requires a mens rea of "knowing" and presents the same due process concerns.¹⁵⁷ Where a second-degree murder is elevated to first-degree murder under the felony murder rule, only "objective knowledge" is required.¹⁵⁸ Under the *Brown* analysis, the culpability attached to such a second-degree murder offense does not necessarily correlate with the punishment received.¹⁵⁹

A. *The Subjective-Objective Knowledge Distinction is Unclear*

The *Brown* court found the subjective-objective knowledge distinction, rather than the multiple person/single person distinction, determinative in differentiating the mens rea of first-degree depraved mind murder from second-degree murder.¹⁶⁰ The *Brown* court relied on *McCrary* and its progeny for the requirement of subjective knowledge to reflect the increased culpability implied by the legislature's classification of depraved mind murder as a first-degree murder.¹⁶¹

The *McCrary* court stated that the subjective knowledge required for first-degree depraved mind murder did *not* require that the actor *actually know* that someone was placed at risk by the conduct.¹⁶² Rather it required, under the circumstances known by the actor, the conduct was so risky that the actor *should have realized* the very high degree of risk.¹⁶³

In adopting the earlier courts' "subjective knowledge" terminology, the *Brown* court failed to clarify the definitions of "subjective knowledge" and "objective

157. First-degree murder includes first-degree willful, deliberate, premeditated (WDP) murder, first-degree felony murder, and first-degree depraved mind murder. See N.M. STAT. ANN. § 30-2-1(A) (Repl. Pamph. 1994). After *Brown*, first-degree felony murder is assigned the most serious of penal consequences on the basis of objective knowledge, for which intoxication is irrelevant, under the specific-general intent analysis. Under *Brown*'s due process analysis, given second-degree murder's statutory "knowledge" element and felony murder's designation as a first-degree murder, due process concerns arise when intoxication is deemed irrelevant to proving the mens rea element of first-degree felony murder.

158. See *Brown*, 122 N.M. at 728, 931 P.2d at 73.

159. See *id.* at 733-735, 931 P.2d at 78-80. As Justice Minzner states in her dissent:

If intoxication is a defense to depraved-mind murder, [one has] difficulty understanding why it is not a defense to second-degree murder, at least on these facts. Yet in *State v. Campos*, [the court] very clearly said it was not. . . . If [the court] recognize[s] the defense here, [the court] ha[s] a difficult time reconciling not only *Campos*, but also explaining why intoxication is not a defense to voluntary manslaughter.

Id. at 735.

160. See *State v. Brown*, 122 N.M. 724, 727, 931 P.2d 69, 72

(1996). The court noted earlier decisions that had found the "number of persons at risk" distinction determinative. See *id.* (citing *State v. Sena*, 99 N.M. 272, 274, 657 P.2d 128, 130 (1983); *State v. DeSantos*, 89 N.M. 458, 461, 553 P.2d 1265, 1268 (1976)).

161. In its discussion, the *Brown* court considered the following cases: *State v. Omar-Muhammad*, 105 N.M. 788, 737 P.2d 1165 (1987); *State v. Ibn Omar-Muhammad*, 102 N.M. 274, 694 P.2d 922 (1985); *State v. McCrary*, 100 N.M. 671, 675 P.2d 120 (1984); *State v. Johnson*, 103 N.M. 364, 707 P.2d 1174 (Ct. App. 1985)). See *id.* at 728, 931 P.2d at 73. See also *supra* notes 120-26 and accompanying text.

162. See *McCrary*, 100 N.M. at 673, 675 P.2d at 122 (1984) (citing LAFAYE & SCOTT, *supra* note 56, § 70).

163. See *id.* See also Romero, *supra* note 11, at 67 ("Although the [*McCrary*] 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 [for first-degree depraved mind murder]."); *supra* notes 49-61 and accompanying text.

knowledge.”¹⁶⁴ The court indicated that in first-degree depraved mind murder, the defendant “must have had the subjective or actual knowledge of the high degree of risk involved in his conduct.”¹⁶⁵

Two problems arise, however, if subjective knowledge is determined as described in *McCrary*.¹⁶⁶ It is unclear what is meant by second-degree murder’s “objective knowledge” in light of the statutory language.¹⁶⁷ It is also uncertain how such “objective knowledge” is to be distinguished from involuntary manslaughter’s objective standard of “criminal negligence.”¹⁶⁸ Thus, either (1) the mens rea of second-degree murder requires some sort of subjective knowledge, in which case there is no identifiable mens rea distinction between first-degree depraved mind murder and second-degree murder; or alternatively, (2) second degree murder requires a mens rea of objective knowledge, in which case there is no mens rea distinction between second-degree murder and involuntary manslaughter. In attempting to make a clear distinction between first-degree depraved mind murder and second-degree murder, the *Brown* court, in effect, made second-degree murder indistinguishable from involuntary manslaughter, if the offenses are to be distinguished on the basis of culpability.¹⁶⁹

164. See Romero, *supra* note 11, at 65-68. Professor Romero criticizes the use of an objective test (“what the reasonable person would have known under the circumstances”) for second-degree murder and suggests that there is “doubtful authority” to support the proposition that a negligence standard “is sufficient for second-degree murder.” *Id.* at 65.

165. *Brown*, 122 N.M. at 728, 931 P.2d at 73 (emphasis omitted).

166. See *McCrary*, 100 N.M. at 673, 675 P.2d at 122.

167. See N.M. U.J.I. CRIM. 14-203 (requiring for first-degree depraved mind murder that the actor “knew that his act was greatly dangerous to the lives of others”) (emphasis added); N.M. U.J.I. CRIM. 14-210, 211 (requiring for second degree murder that the actor “knew that his acts created a strong probability of death or great bodily harm”) (emphasis added); N.M. STAT. ANN. § 30-2-1(A)(3) (Repl. Pamp. 1994) (providing that first-degree depraved mind murder is “the killing of one human being by another . . . by any act greatly dangerous to the lives of others, indicating a depraved mind regardless of human life”); N.M. STAT. ANN. § 30-2-1(B) (Repl. Pamp. 1994) (providing that “a person who kills another human being . . . commits murder in the second degree if in performing the acts which cause the death he *knows* that such acts create a strong probability of death or great bodily harm to that individual or another”) (emphasis added); see also Romero, *supra* note 11, at 67-68 (discussing the difficulties with the posed mens rea standards for depraved mind murder and second-degree murder). Professor Romero was concerned about the lack of distinction between first-degree depraved mind murder and second-degree murder since both seemed to require subjective knowledge, following the language of the statute and relevant jury instructions. To the extent that *Brown* overruled *State v. Beach*, 102 N.M. 642, 699 P.2d 115 (1985), *overruled, in part*, by *State v. Brown*, 122 N.M. 724, 931 P.2d 69 (1996), in holding that second-degree murder does not require subjective knowledge, the concern becomes differentiating this “objective knowledge” mental state from the mens rea of involuntary manslaughter. See *Brown*, 122 N.M. at 728, 931 P.2d at 73.

168. See *State v. Yarborough*, 122 N.M. 596, 603, 930 P.2d 131, 138 (1996) (holding involuntary manslaughter requires at least a mens rea of criminal negligence). Criminal negligence is reckless, wanton or willful conduct showing a disregard of the consequences. See *id.* at 600, 930 P.2d at 135. An objective standard is applied to the mens rea element of involuntary manslaughter, such that the actor is culpable for what he should have known would be the risk attaching to his conduct. See N.M. U.J.I. CRIM. 14-231; see also *supra* notes 30-32.

169. Prior to *Brown*, the New Mexico Supreme Court had yet to adopt an objective knowledge standard for any murder. See Romero, *supra* note 11, at 68. Professor Romero noted that, in *McCrary*, the New Mexico Supreme Court had viewed an ordinary person’s awareness, under the same circumstances in which the defendant knowingly found himself, as *proof* of what the defendant subjectively realized. See *id.* at 67. Professor Romero found the use of such inference as proof of subjective knowledge for first-degree depraved mind murder was not the equivalent of adopting an objective knowledge negligence standard for first-degree depraved mind murder. See *id.* Professor Romero referred to two cases, indicating that the New Mexico Supreme Court required actual knowledge for the mens rea of second-degree murder. See *id.* In his discussion, he considered the implications of *Beach* and *State v. Doe*, 100 N.M. 481, 672 P.2d 654 (1983), as supporting a subjective knowledge requirement for second-degree murder. See Romero, *supra* note 11, at 67. However, the *Brown* decision altered the New

Either second-degree murder has the same "knowing" mens rea as first-degree depraved mind, as the statutory language would suggest, both requiring subjective knowledge, or second-degree murder has the objective knowledge mens rea as does involuntary manslaughter. Thus, the New Mexico Supreme Court has failed to provide clear and workable definitions of "objective knowledge" and "subjective knowledge."

B. The Subjective-Objective Knowledge Distinction Fails to Provide a More Principled Homicide Scheme

New Mexico courts and the Committee on Uniform Jury Instructions have relied heavily on the *LaFave & Scott* treatise in developing distinctions between the mens rea requirements for the degrees of murder.¹⁷⁰ However, this treatise's discussion of depraved mind murder distinguished murder from manslaughter, not degrees of murder.¹⁷¹ Furthermore, according to Professor Romero, the drafters of the first-degree depraved mind murder uniform jury instruction "lifted a sentence out of context and mistakenly assumed that the treatise supports an objective standard for second degree murder."¹⁷² Thus, the proposition stated in the committee's commentary to the first-degree depraved mind murder jury instruction was mistakenly attributed to an authority that actually supported the opposite proposition: that second-degree murder should require a subjective realization.¹⁷³ In turn, New Mexico courts have continued to propagate this error in first-degree depraved mind murder decisions.¹⁷⁴

Mexico Supreme Court's implied position with its express overruling of *Beach*, to the extent that *Beach* held that second-degree murder contains a subjective knowledge element. See *Brown*, 122 N.M. at 728, 931 P.2d at 73 (overruling, in part, *Beach*, 102 N.M. at 645, 699 P.2d at 118). The *Brown* decision establishes that, while first-degree depraved mind murder clearly has a subjective knowledge mens rea element, second-degree murder does not. Under the objective mens rea standard, the defendant's state of the awareness was irrelevant. Thus, the objective mens rea element of second-degree murder is indistinguishable from the mens rea element of involuntary manslaughter.

170. See *supra* notes 160-69 and accompanying text (relying on LAFAVE & SCOTT, *supra* note 56, § 70).

171. See LAFAVE & SCOTT, *supra* note 56, § 70 at 542. "Grossly negligent conduct, or reckless conduct, which results in death may serve as the basis for manslaughter liability, but it will not do for murder." *Id.*

172. See Romero, *supra* note 11, at 67. The committee commentary quotes the following LAFAVE & SCOTT passage:

[M]ost depraved-heart murder cases do not require a determination of the issue of whether the defendant actually was aware of the risk entailed by his conduct; his conduct was very risky and he himself was reasonable enough to know it to be so. It is only the unusual case which raises the issue—where the defendant is more absent-minded, stupid or intoxicated than the reasonable man.

N.M. U.J.I. CRIM. 14-203 (committee commentary)(quoting LAFAVE & SCOTT, *supra* note 56, § 70 at 544).

The excerpted passage does not support the committee commentary's statement that "[s]econd-degree murder provides an objective test for depraved mind murder." *Id.* Rather, the excerpted passage 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 the risk if a reasonable person would have been aware of the risk." Romero, *supra* note 11, at 66-67. This is similar to the reasoning found in *State v. McCrary*, 100 N.M. 671, 673, 675 P.2d 120, 122 (1984), regarding the mechanics of how a jury decides whether the actor possessed subjective knowledge of risk. The treatise dealing with depraved mind murder actually concludes: "[I]t would seem that, to convict of murder, with its drastic penal consequences, subjective realization should be required." LAFAVE & SCOTT, *supra* note 56, § 70 at 544; see also Romero, *supra* note 11, at 67.

173. See Romero, *supra* note 11, at 66-67 (citing N.M. U.J.I. CRIM. 14-203 (committee commentary) and LAFAVE & SCOTT, *supra* note 56, § 70 at 544).

174. See *supra* notes 60-61, 122-23 and accompanying text.

The subjective-objective knowledge discussion has been limited to the mens rea distinction between first-degree depraved mind murder and the lesser included offense of second-degree murder. In *Brown*, the New Mexico Supreme Court expressly accepted the first-degree depraved-mind murder uniform jury instruction committee commentary's subjective-objective construction of the first-degree depraved mind murder statute.¹⁷⁵ The impact of *Brown* goes beyond distinguishing first-degree depraved mind murder from second-degree murder because the objective knowledge standard is generally applicable to second-degree murder.¹⁷⁶ This objective standard is in direct opposition to the language of the second degree murder statute and the corresponding jury instruction, both of which use the term "knows" to describe the actor's awareness of the risk his acts create.¹⁷⁷ Moreover, the *Ortega* court held that the mens rea required for a felony murder (which would constitute second-degree murder committed during a first-degree or inherently dangerous felony) necessitates proof of "an intent to kill in the form of *knowledge* that the defendant's acts 'create a strong probability of death or great bodily harm.'"¹⁷⁸

New Mexico's statutory homicide scheme should require subjective knowledge as the mens rea element wherever a homicide statute expressly requires an actor's "knowledge" within the offense to avoid offending the Due Process Clause.¹⁷⁹ Under such analysis, the *Brown* court's requirement that the existence of

175. See *State v. Brown*, 122 N.M. 724, 728, 931 P.2d 69, 73 (1996).

176. See N.M. STAT. ANN. § 30-2-1 (Repl. Pamp. 1994). As defined in the murder statute, second-degree murder is a lesser included offense of first-degree murder. See *id.* Since first-degree murder includes willful, deliberate and premeditated murder, felony murder and depraved mind murder, second-degree murder, as legislatively defined, encompasses all the attributes of the lesser included offenses of first-degree murders. See *id.* Second-degree murder includes: (1) the intentional killing lacking deliberation and premeditation, see e.g., *State v. Garcia*, 114 N.M. 269, 837 P.2d 862 (1992); (2) a murder (intentional, but rash, or unintentional) not resulting during the commission of an inherently dangerous felony, where the actor intended to kill or knew that his risk-creating conduct created a strong probability of death or great bodily harm, see e.g., *State v. Campos*, 122 N.M. 148, 921 P.2d 1266 (1996); *State v. Ortega*, 112 N.M. 554, 817 P.2d 1196 (1991); and (3) the lesser depraved mind murder, see e.g., *State v. McCrary*, 100 N.M. 671, 675 P.2d 120 (1984). See also *Romero*, *supra* note 11, at 67.

At the time of Professor Romero's article, the Supreme Court of New Mexico had not expressly accepted the uniform jury instruction committee commentary position that second-degree murder requires an objective test. See *Romero*, *supra* note 11, at 67. No New Mexico appellate case had held that the mens rea element of second-degree murder was objective knowledge. See *id.* at 66. Rather, the New Mexico Supreme Court had indicated that second degree murder requires actual knowledge. See *id.* at 67-68. In one such case, *State v. Beach*, 102 N.M. 642, 645, 699 P.2d 115, 118 (1985), the court stated that "[i]n referring to second-degree murder as a 'specific intent' crime, this court was referring to the fact that second-degree murder . . . now contains an element of subjective knowledge." See also *Romero*, *supra* note 11, at 67-68. The *Beach* case concerned first-degree willful, deliberate and premeditated murder, not first-degree depraved mind murder. See *Beach*, 102 N.M. at 643, 699 P.2d at 116. But see *State v. Brown*, 122 N.M. 724, 728, 931 P.2d 69, 73 (1996) (overruling *Beach* to the extent that it held "that second-degree murder contains the same 'subjective knowledge' element as depraved mind murder"). Based on this discussion, it is possible that the objective knowledge element ascribed by the *Brown* court to second-degree murder may apply to second-degree murder, generally.

177. See N.M. STAT. ANN. § 30-2-1(B) (Repl. Pamp. 1994); N.M. U.J.I. CRIM. 14-210 to 14-211.

178. *State v. Ortega*, 112 N.M. 554, 563, 817 P.2d 1196, 1205 (1991). The effect of *Brown* is to completely eviscerate the felony murder rule established in *Ortega*. See *Brown*, 122 N.M. at 728, 931 P.2d at 73 ("Second-degree murder . . . contains a component involving an 'objective knowledge' of the risk, without the required showing that the risk-creating act was performed with a wicked and malignant heart."). Thus in expressly overruling the pertinent portion of *Beach*, the court left no doubt as to the general applicability of the objective knowledge element to second-degree murder. See *id.* (overruling, in pertinent part, *Beach*, 102 N.M. at 645, 699 P.2d at 118).

179. See *supra* notes 77-86, 99-107, 142-44 and accompanying text.

"subjective knowledge" requires consideration of relevant intoxication would extend to second-degree murder.¹⁸⁰ However, under this more principled view, *Brown's* subjective-objective knowledge distinction vanishes along with the distinction between second-degree murder and first-degree depraved mind murder. This result would return the court to its original problem faced in *Brown*, of adequately distinguishing two degrees of unintentional murder based upon risk-creating conduct: first-degree depraved mind murder and second-degree murder.¹⁸¹

The importance to New Mexico's criminal justice system in distinguishing between second-degree murder and first-degree murder is undisputed.¹⁸² The *Brown* court sought to clarify the mens rea with its subjective-objective knowledge distinction. However, on closer analysis, it is questionable that *Brown's* subjective-objective knowledge distinction provides a more principled homicide scheme. Rather, it potentially creates more problems than it solves,¹⁸³ is contrary to the language of the murder statute,¹⁸⁴ and may violate constitutional due process guarantees.¹⁸⁵

C. *The Continued Application of the Specific-General Intent Rationale to New Mexico's Murder Scheme is Unjustified*

The *Brown* court undermined the justification for the continued use of the specific-general intent analysis when it created the subjective knowledge exception for first-degree depraved mind murder. The court noted criticisms that the specific-general intent rationale has garnered.¹⁸⁶ These criticisms are well-deserved as evidenced by the confusion found in New Mexico Supreme Court opinions.¹⁸⁷

Besides the confusion that the specific-general intent analysis provokes, the *Egelhoff* concurring and dissenting opinions cast severe doubt as to the

180. See *Montana v. Egelhoff*, 518 U.S. 37, 61-80 (1996) (O'Connor, J., with whom Justices Souter, Breyer and Stevens join, dissenting) (raising due process concerns about restrictions placed on a defendant's ability to raise an effective defense to a state's accusations where the statute required "purposely" or "knowingly" as the mens rea of the offense); see also *id.* at 57-61 (Ginsburg, J., concurring in judgment) (avoiding due process concerns by comprehending the challenged Montana statute as a legislative measure redefining mens rea); *supra* notes 99-108 and accompanying text.

181. See *Brown*, 122 N.M. at 727, 931 P.2d at 72.

182. See *id.*

183. See *supra* notes 160-69 and accompanying text. The *Brown* court fails to clarify when or under what circumstance second-degree murder requires only a mens rea of objective knowledge. Justice Minzner's dissent in *Brown* suggests that the majority's holding, that intoxication is relevant to proving depraved mind murder, is difficult to reconcile with *State v. Campos*, 122 N.M. 148, 921 P.2d 1266 (1996), which held that intoxication is not a defense to second-degree murder. See *Brown*, 122 N.M. at 735, 931 P.2d at 80 (Minzner, J., dissenting). In her dissent, she further indicates that if *Brown* lacked the ability to form the requisite mens rea of subjective knowledge, the jury "would have had to find that he lacked even the general criminal intent required for second-degree murder or voluntary manslaughter," under the applicable jury instructions. *Id.* (referring to N.M. U.J.I. CRIM. 14-141, 14-210, 14-220). Jury Instruction 14-141 defining general criminal intent provides: "A person acts intentionally when he purposely does an act which the law declares to be a crime." N.M. U.J.I. CRIM. 14-141. Justice Minzner's particular reference to voluntary manslaughter as opposed to involuntary manslaughter is unexplained. See *Brown*, 122 N.M. at 735, 931 P.2d at 80 (Minzner, J., dissenting).

184. See N.M. STAT. ANN. § 30-2-1(B) (Repl. Pamph. 1994) (requiring knowledge for second-degree murder).

185. See *Montana v. Egelhoff*, 518 U.S. 37, 61-80 (1996) (concurring and dissenting opinions); *supra* notes 99-107, 142-44 and accompanying text.

186. See *Brown*, 122 N.M. at 729, 931 P.2d at 74.

187. See *supra* notes 62-65 and accompanying text.

constitutionality of New Mexico's specific-general intent approach.¹⁸⁸ Absent any subsequent legislative redefining of offenses, where a legislature has specifically defined the mens rea element of an offense to be "purposeful" or "knowing," due process requires that intoxication evidence be considered as relevant to rebut the existence of the requisite mens rea.¹⁸⁹

The *Brown* court, in its favorable discussion of the *Egelhoff* dissent, confirmed that "New Mexico does not have a statute that excludes evidence of voluntary intoxication."¹⁹⁰ Despite the New Mexico legislature having expressly defined the mens rea element of second-degree murder as "knowledge of the risk of his acts,"¹⁹¹ second-degree murder is defined as a general intent crime for which intoxication evidence is irrelevant.¹⁹² Under *Campos*, the "felony-murder rule only . . . raise[s] second-degree murder to first-degree murder when murder is committed in the course of a dangerous felony"¹⁹³ and, as such, is a general intent crime, for which intoxication evidence is irrelevant.¹⁹⁴

After *Brown*, it seems arbitrary for the courts to continue to apply the specific-general intent rationale to New Mexico's murder scheme. Both first-degree depraved mind murder and first-degree felony murder were traditionally defined as general intent crimes.¹⁹⁵ After *Brown*, intoxication evidence is relevant to first-degree depraved mind murder but not to first-degree felony murder. Such a dichotomy runs contrary to New Mexico courts' stated commitment to distinguishing between degrees of homicide on the basis of culpable mental states.¹⁹⁶ New Mexico's treatment of first-degree felony murder effectively attaches an irrebuttable presumption of intensified culpability to a second-degree murder committed during an inherently dangerous felony. Such a presumption may be seen as inconsistent with New Mexico's concern that penal consequences be proportional to moral culpability.

Moreover, such a presumption is at odds with the due process analysis presented in Justice O'Connor's dissent in *Egelhoff*.¹⁹⁷ The *Brown* court's apparent adoption of this due process analysis makes constitutionally infirm any continued reliance upon the specific-general intent analysis in determining the relevance of intoxication in rebutting the existence of the knowledge element of murder.¹⁹⁸ First-

188. See *Egelhoff*, 518 U.S. at 57-61 (Ginsburg, J., concurring in judgment) (characterizing the Montana statute as "redefining the mens rea" avoids the due process "constitutional shoal"). See also *id.* at 61-73 (O'Connor, J., with whom Justices Stevens, Souter and Breyer join, dissenting) (stating that due process is violated when relevant intoxication evidence is removed from a jury's consideration in its determination of the existence of the mental state, where it is an essential element of the offense that must be proved beyond a reasonable doubt); *supra* notes 99-107 and accompanying text (discussing in more detail the *Egelhoff* opinions).

189. See *Egelhoff*, 518 U.S. at 61-62.

190. *Brown*, 122 N.M. at 731-32, 931 P.2d at 76-77.

191. N.M. STAT. ANN. § 30-2-1(B) (Repl. Pamp. 1994).

192. See *State v. Campos*, 122 N.M. 148, 157, 921 P.2d 1266, 1276 (1996).

193. *Id.* at 154, 921 P.2d at 1272.

194. See *id.* at 159, 921 P.2d at 1277.

195. See *Brown*, 122 N.M. at 729-30, 931 P.2d at 74-75.

196. See *id.* at 727, 931 P.2d at 72.

197. See *Egelhoff*, 518 U.S. at 61-73 (O'Connor, J., with whom Justices Stevens, Souter and Breyer join, dissenting).

198. The *Brown* court defined the "subjective knowledge" of first-degree depraved mind murder as "an essential element" of the offense. *Brown*, 122 N.M. at 726-27, 931 P.2d 71-72. This is despite the absence of an

degree felony murder is based upon proving that the defendant intentionally killed or "knew that the conduct was greatly dangerous to the lives of others" during the commission of an inherently dangerous felony.¹⁹⁹ The *Brown* court's stated due process concerns suggest that exclusion of exculpatory intoxication evidence in a first-degree felony murder case violates the defendants right to present a defense and impermissibly eases the state's burden to prove its case. However, while expressing such due process concerns with regard to first-degree depraved mind murder, the *Brown* court also reaffirmed the continued application of the specific-general intent analysis to exclude voluntary intoxication evidence for first-degree felony murder.²⁰⁰ Thus, after *Brown*, New Mexico criminal law is left with significant uncertainty due to the tension that exists in New Mexico's homicide scheme between first-degree depraved mind murder and first-degree felony murder.

VI. IMPLICATIONS

A. *Brown* Creates an Irreconcilable Anomaly Between First-Degree Depraved Mind Murder and Felony Murder

The *Brown* court did not recognize or attempt to reconcile the disparity of treatment of intoxication evidence between first-degree depraved mind murder and felony murder.²⁰¹ Prior to *Brown*, both are first-degree murders, subject to the most severe of penal consequences;²⁰² both were defined as general intent crimes for which intoxication evidence was irrelevant to rebut the mens rea element of the crime;²⁰³ and both can involve unintentional killings. With the *Brown* court's application of the subjective-objective knowledge distinction to first-degree depraved mind murder, starkly different "intensified culpability" standards distinguish each of these first-degree offenses from second-degree murder.²⁰⁴

The *Campos* decision held that intoxication is not a defense to first-degree felony murder because, as a second-degree murder (committed during an inherently dangerous felony) it is a general intent crime.²⁰⁵ Under *Brown*'s "intensified

express "knowledge" term in the first-degree murder statute. See N.M. STAT. ANN. § 30-2-1(A) (Repl. Pamph. 1994). Thus the "subjective knowledge" term in first-degree depraved mind murder is implied, whereas the second-degree murder statute expressly requires knowledge of the risk. See N.M. STAT. ANN. § 30-2-1(B) (Repl. Pamph. 1994). It would be somewhat disingenuous to construe the second-degree murder statute's knowledge element as "non-essential" to the offense, so as to avoid any due process constraints.

199. N.M. STAT. ANN. § 30-2-1(B) (Repl. Pamph. 1994) (emphasis added).

200. See *Brown*, 122 N.M. at 730, 931 P.2d at 75.

201. See *id.* at 735, 931 P.2d at 80 (Minzner, J., dissenting).

202. See *id.* at 727, 931 P.2d at 72.

203. See *id.* at 729-30, 931 P.2d at 74-75.

204. See *id.* at 727, 931 P.2d at 72.

205. See *State v. Campos*, 122 N.M. 148, 161, 921 P.2d 1266, 1279 (1996). In *Campos*, the defendant was convicted of first-degree criminal sexual penetration (CSP) and first-degree felony murder. See *id.* at 150, 921 P.2d 1268. The acts causing the victim's death were committed after both the defendant and the victim had been drinking for many hours. See *id.* Over the course of the evening, the two had engaged in horseplay with sexual overtones. See *id.* At one point the victim began acting like a dog. See *id.* Someone commented that he needed a tail. See *id.* A short time later, the defendant twice thrust a mop handle into the victim's anus (two acts of CSP), which resulted in the victim's death. See *id.* at 150-51, 921 P.2d 1268-69. In the trial judge's findings of fact and conclusions of law, the judge noted that "he had a reasonable doubt as to whether Campos knew his acts created a strong probability of death because of Campos's voluntary intoxication." *Id.* at 151, 921 P.2d at 1269.

culpability" reasoning,²⁰⁶ as a general intent crime, to justify felony murder's grave penal consequences, increased culpability must be inferred from the risk-creating conduct (commission of the concomitant dangerous felony). However, where the killing is unintentional, as it may have been in *Campos*,²⁰⁷ it is questionable that the risk-creating conduct, alone, sufficiently "intensifies" the objective knowledge element of second-degree murder to warrant the serious penal consequences of first-degree felony murder. Considering the legislature's description of the risk-creating conduct for first-degree depraved mind murder, this disjunction of culpability is particularly evident.²⁰⁸ Nonetheless, under *Campos*, as affirmed by *Brown*, felony murder is categorized as a general intent crime for which intoxication is irrelevant to rebut this inferred elevated mens rea.²⁰⁹

In contrast, first-degree depraved mind murder requires "subjective knowledge" in addition to the "risk-creating conduct" in order to justify the serious penal consequences of first-degree murder.²¹⁰ After *Brown*, with the requirement of "subjective knowledge," first-degree depraved mind murder is no longer categorized as a general intent crime.²¹¹ The culpable mental state of first-degree depraved mind murder may be rebutted by a "lack of proof" defense based on intoxication evidence.²¹²

An irreconcilable anomaly is created by the New Mexico Supreme Court's failure, in *Brown*, to reconcile the *Campos* holding with *Brown*'s position that risk-creating conduct alone fails to distinguish between the culpability of first-degree murder from that of second-degree murder. The *Brown* court, in effect, added an intermediate "intent" category of "subjective knowledge" to the specific-general intent analysis to distinguish the culpability of first-degree depraved mind murder from second-degree murder. This intermediate level requires an actual awareness of the risk attendant to the actor's conduct, for which intoxication evidence may be considered.²¹³ Felony murder continues to be treated as a general intent crime.²¹⁴ This effectively overrules *Ortega*, which held that second-degree murder requires an actual awareness of the risk, to be elevated to first-degree felony murder. The

206. See *Brown*, 122 N.M. at 727, 921 P.2d at 72.

207. Not only is it difficult to apply the *Brown* court's analysis (with the second-degree mens rea of objective knowledge) to *Campos*, it is contrary to an earlier holding. See *State v. Ortega*, 112 N.M. 554, 563, 817 P.2d 1196, 1205 (1991) (holding that to convict for felony murder requires "proof that the defendant intended to kill (or was knowingly heedless that death might result from his conduct). An unintentional or accidental killing will not suffice.").

208. Compare N.M. STAT. ANN. § 30-2-1(A)(3) (Repl. Pamph. 1994) (defining the risk-creating conduct of first-degree depraved mind murder as "greatly dangerous to the lives of others, indicating a depraved mind regardless of human life") with N.M. STAT. ANN. § 30-2-1(A)(2) (Repl. Pamph. 1994) (defining the risk-creating conduct as commission of any felony). Note that the courts have construed "any felony" to only include inherently dangerous felonies. See *State v. Ortega*, 112 N.M. 554, 563, 817 P.2d 1196, 1205 (1991). Committing a dangerous felony, without more, seems inadequate to elevate the mens rea sufficiently to justify the penal consequences of first-degree murder. Under *Brown*'s intensified mens rea rationale, it would seem equally appropriate to require subjective knowledge of the actor to justify the severe penal consequences of felony murder.

209. See *Brown*, 122 N.M. at 730, 931 P.2d at 75.

210. See *id.* at 727-28, 931 P.2d at 72-73.

211. See *id.* at 731, 931 P.2d at 76.

212. See *id.* at 732, 931 P.2d at 77.

213. See *Brown*, 122 N.M. at 727-28, 921 P.2d at 72-73.

214. See *id.* at 730, 931 P.2d at 75 (affirmatively recognizing the relevant holding of *State v. Campos*, 122 N.M. 148, 160, 921 P.2d 1266, 1278 (1996)).

Brown court did not attempt to justify the anomalous treatment of these two first-degree murders.²¹⁵

B. The Irreconcilable Anomaly Created by Brown Invites Revision of New Mexico's Homicide Scheme

The New Mexico Criminal Code provides New Mexico courts with major obstacles in establishing a coherent homicide scheme.²¹⁶ The New Mexico Supreme Court's interpretation of this scheme is unclear, in part because there are four different classifications of unintentional homicides.²¹⁷ Legislative elimination of depraved mind murder from first-degree murder status would serve to ameliorate some of the New Mexico courts' difficulties in developing clear and principled distinctions between degrees of homicide while bringing New Mexico in line with the majority of states.

Classifying depraved mind murder as a second-degree murder would allow the New Mexico Supreme Court to reevaluate the murder statute and remove the anomaly created by the *Brown* decision. New Mexico would no longer need to apply the specific-general intent analysis to homicides to distinguish between the different degrees of murder. As a result, New Mexico could reject this common law approach to eliminate the due process concerns discussed in Justice O'Connor's *Egelhoff* dissent.²¹⁸

C. The Model Penal Code Provides a Viable Alternative to New Mexico's Specific-General Intent Approach

The Model Penal Code (MPC) provides a viable alternative to the specific-general intent approach to distinguish between grades of homicides in its use of the "recklessness" mens rea in determining the relevance of intoxication.²¹⁹ New Mexico's second-degree murder, as defined and construed, could be described as including rash intentional (purposeful or knowing) killing and reckless killing,

215. See *id.* at 730, 931 P.2d at 75. The *Brown* court stressed that "[f]irst-degree murder is reserved for the most blameworthy . . . class of homicides" and that "the difference in culpable mental states is crucial in justifying the more serious penal consequences of first-degree murder." *Id.* at 727, 931 P.2d at 72. It also stressed the criticism given to the specific-general intent approach. See *id.* at 729, 931 P.2d at 74. However, the court simply noted that it had "recently affirmed New Mexico's approach by applying the general-specific intent analysis to exclude voluntary intoxication evidence for the crime of felony murder." *Id.* at 730, 931 P.2d at 75 (citing *Campos*, 122 N.M. at 157-58, 921 P.2d at 1275-76). As noted earlier, before deciding *Brown* and after the U.S. Supreme Court announced *Montana v. Egelhoff*, 518 U.S. 37 (1996), the New Mexico Supreme Court rejected a motion for rehearing *Campos*. Thus the resulting anomaly between New Mexico's treatment of intoxication evidence for first-degree depraved mind murder and first-degree felony murder remains unexplained.

216. See *Brown*, 122 N.M. at 727, 931 P.2d at 72 (describing New Mexico's statutory scheme as unique in that it classifies depraved mind murder as a first-degree murder as well as having two degrees of unintentional murder based on risk-taking behavior).

217. See *Romero*, *supra* note 11, at 55.

218. See *Egelhoff*, 518 U.S. at 61-73; see also *supra* notes 99-107 and accompanying text.

219. See MODEL PENAL CODE §§ 2.08(2), 210.2(1)(b) (1985) (identifying recklessness as a mens rea in criminal homicides and one for which intoxication is not relevant); cf. *Campos*, 122 N.M. at 161, 921 P.2d at 1279 (referencing MODEL PENAL CODE §§ 2.08(2), 210.2(1)(b) (1985)); *Brown*, 122 N.M. at 735, 931 P.2d at 80 (Minzner, J., dissenting) (referring to the possible higher degree recklessness necessary to distinguish depraved mind murder from second-degree murder).

under the MPC culpability scheme.²²⁰ Voluntary intoxication does not negate the mens rea of recklessness, but would be relevant to rebut a mens rea of either purposeful or knowing, under the MPC.²²¹ By ascribing "recklessness" to the awareness of the risk attendant to second-degree murder, potential due process challenges could also be avoided.

Classifying depraved mind murder, a grossly reckless but unintentional killing, as a second-degree murder eliminates some of the difficulties the New Mexico Supreme Court has encountered in providing clear and principled distinctions between degrees of murder.²²² Under the MPC, to justify categorizing depraved mind murder as a first-degree murder (along with willful, deliberate, and premeditated murder), it would require, at a minimum, a mens rea of "knowingly," for which evidence of voluntary intoxication would be relevant to negate that essential element of the offense. However, such a designation presents an oxymoron of sorts. For example, an actor acts, knowing that such conduct is certain to result in a killing, yet the killing is unintentional. In other words, "I knew it would kill him but I didn't intend for him to die."

Under the MPC, the more appropriate mens rea for depraved mind murder is extreme recklessness, which describes a conscious disregard of an unjustified risk. Thus, under the MPC, it would be inappropriate to categorize depraved mind murder in the most culpable homicide category. Therefore, within New Mexico's murder scheme (which includes two degrees of murder), depraved mind murder cannot properly be designated as a first-degree murder.²²³

If the legislature amends the murder statute by designating depraved mind murder as a second-degree murder, the subjective-objective knowledge scheme for depraved mind murder would become unnecessary. Voluntary intoxication would be irrelevant to the actor's "reckless" mental state during conduct that resulted in death. In turn, involuntary manslaughter could properly be distinguished from second-degree murder, as having a mens rea of objective knowledge.

220. The MPC provides:

A person acts purposely . . . if . . . it is his conscious object to engage in conduct . . . or to cause such a result A person acts knowingly . . . if . . . he is aware that it is practically certain that his conduct will cause such a result. . . . A person acts recklessly . . . when he consciously disregards a substantial and unjustifiable risk

MODEL PENAL CODE § 2.02(2) (1985). Professor Romero described the different degrees of unintentional murder as follows: (1) first-degree felony murder as an unlawful act unintentional criminal homicide; (2) first-degree depraved mind murder as an unintentional criminal homicide without commission of an unlawful act; and (3) second-degree unintentional murder as a criminal homicide without commission of an unlawful act). See Romero, *supra* note 11, at 57-59. He further stated that for criminal homicides without the commission of an unlawful act, "the New Mexico homicide provisions measure culpability by reference to a standard of recklessness or negligence." *Id.* at 58 (footnotes omitted).

221. See MODEL PENAL CODE § 2.08 (1985).

222. See Romero, *supra* note 11, at 58.

223. See *State v. Brown*, 122 N.M. 724, 735, 931 P.2d 69, 80 (1996) (Minzner, J., dissenting) ("I believe it is possible that depraved-mind murder either requires a higher degree of recklessness than second-degree murder, in which case intoxication in theory should not be a defense if we follow *Campos*, or that it requires knowledge of a particular sort not required for second-degree murder, in which case intoxication might be a defense on specific facts."). Given the MPC's definition of "knowing," it is unclear to which type of knowledge Justice Minzner is referring. See MODEL PENAL CODE § 2.02 (1985).

Following this culpability scheme, a problem still remains for which a remedy has already been alluded.²²⁴ Felony murder would still have a mens rea of recklessness, being defined as a second-degree murder that occurred during the commission of an inherently dangerous felony. With a mens rea of recklessness, intoxication would be irrelevant. However, with a more faithful adherence to the *Ortega* rule, to qualify as a first-degree felony murder, a killing would be required to be committed during an inherently dangerous felony with an intent to kill or with the knowledge that such conduct virtually guaranteed a killing would occur. A reckless, unintentional killing, committed during a dangerous felony would qualify only as a second-degree murder. With first-degree felony murder requiring a mens rea of "purposely" or "knowingly," voluntary intoxication would be relevant to negating that mens rea. For the unintentional killing classified as a second-degree murder, with the lesser mens rea of recklessness, intoxication evidence would be irrelevant.

Thus, with one legislative modification, the unworkable subjective-objective knowledge distinction as applied to depraved mind murder could be abandoned and only murders committed with an intent to kill (a mens rea of "purposely" or "knowingly," under the MPC) would qualify as first-degree murders. Under this scheme only willful, deliberate, and premeditated murder and "intentional" felony murder would qualify as first-degree murder. Under this scheme justice is served because New Mexico courts would no longer have to strain to devise fictions to justify, under the culpability framework, the punishment assigned to an offense.

D. The Uniform Criminal Jury Instructions Need to be Revised

The homicide jury instructions can confuse or mislead, rather than provide clarity and guidance.²²⁵ This is particularly evident in the depraved mind murder instruction and committee commentary establishing the subjective-objective knowledge distinction.²²⁶ The *Brown* dissent recognizes that the majority's holding blurs what distinctions there were between the second-degree murder and manslaughter instructions.²²⁷ Justice Minzner's professed difficulty in understanding what the majority means by "subjective knowledge" underscores the problems that practitioners and jurors face in identifying substantive differences between the various homicide instructions.²²⁸ Admittedly, the drafting committee's task is challenging in light of the lack of guidance provided in the present statutory homicide scheme. The revised involuntary manslaughter jury instruction is a first

224. See *State v. Ortega*, 112 N.M. 554, 557, 817 P.2d 1196, 1199 (1991) (establishing the mens rea for first-degree murder as an intent to kill).

225. See *supra* notes 26-75 and accompanying text.

226. See N.M. U.J.I. CRIM. 14-203; see also *supra* notes 51-61.

227. See *Brown*, 122 N.M. at 735, 931 P.2d at 80 (Minzner, J., dissenting).

228. See *id.* at 734, 931 P.2d at 79 (Minzner, J., dissenting).

step.²²⁹ Nevertheless, even modest revisions would be an improvement, with clarifying explanations included with the instructions.²³⁰

E. New Mexico's Homicide Scheme May Prove Inconsistent with Constitutional Due Process Limitations

The dissenting and concurring opinions in *Egelhoff*²³¹ suggest that the exclusion of exculpatory intoxication evidence relevant to rebut the statutory mens rea element of "purposely" or "knowingly" offends the Constitution, absent "legislative redefinition of mens rea."²³² Such exclusion of exculpatory evidence violates the due process right to present a defense while easing the State's burden to prove its case.²³³ Both the *Brown* and *Campos* decisions exclude exculpatory intoxication evidence relevant to rebut the express statutory mens rea element of "knowledge" in second-degree murder.²³⁴ If the "knowledge" mens rea element equates to the MPC's mens rea of "knowingly" as it apparently was used in *Egelhoff*, these holdings would conflict with the due process concerns of five United States Supreme Court Justices.²³⁵ Such potential conflict exposes New Mexico's homicide statutes to federal constitutional challenges. Thus, the New Mexico Supreme Court's exclusion of exculpatory evidence provides significant uncertainty in New Mexico criminal law. When New Mexico removes such conflict, progress will have been made toward the goal of a clear and principled justice system in New Mexico.

229. See N.M. U.J.I. CRIM. 14-231 (as amended by N.M. Order 97-23). The amendment to this jury instruction, effective August 1, 1997, eliminated the unlawful act-negligent act causation dichotomy of the former instruction. The committee commentary indicates that both the lawful and "unlawful" acts "require a showing of an underlying unlawful act." *Id.* (committee commentary). This simplifies involuntary manslaughter prosecutions. The pre-amendment instruction required that "[t]he defendant knew or should have known" of the risk of his conduct. N.M. U.J.I. CRIM. 14-231 (amended 1997). As amended, the instruction requires that the defendant "should have known of the danger of [his] actions." *Id.* (as amended by N.M. Order 97-23). This would seem to remove some confusion. However, this is immediately followed by a requirement that the defendant "acted with a willful disregard for the safety of others." *Id.* (emphasis added). Thus, a lack of clarity persists.

230. See *Romero*, *supra* note 11, at 83-86. In advocating jury instruction revision, Professor Romero poses alternative uniform jury instructions, primarily based on the MPC and contingent upon the legislature providing for only second-degree depraved mind murder. See *id.* In his proposed jury instructions, he clearly distinguishes which offenses use an objective standard and which use a subjective standard. See *id.* Professor Romero advocates that the differences in culpability for unintentional killings be based "on the degree of the risk created" and, where an objective standard is used, on the "degree of deviation from the standard of care exercised by the reasonable person." See *id.* at 79. Where a subjective standard is used, he argues that the mens rea of recklessness should require a "subjective awareness of the risk of death and the conscious disregard of that risk" and that the risk be "substantial and unjustifiable." See *id.* at 80. The mens rea for murder should require a minimum culpability of recklessness, see *id.* at 81, with the degree of culpability determined by the degree of risk and the attendant mens rea. See *id.* at 85. Professor Romero identifies a great need for inclusion of explanations in jury instructions that clarify the distinctions between different offenses. See *id.* at 83-84.

231. See *Montana v. Egelhoff*, 518 U.S. 37, 57-61 (1996) (Ginsburg, J., concurring); *id.* at 61-73 (O'Connor, J., with whom Justices Stevens, Souter, and Breyer join, dissenting); see also *supra* notes 99-107 and accompanying text.

232. See *Egelhoff*, 518 U.S. at 61-73 (O'Connor, J., with whom Justices Stevens, Souter and Breyer join, dissenting); see also *supra* notes 99-107 and accompanying text.

233. See *id.* at 61 (O'Connor, J., with whom Justices Stevens, Souter and Breyer join, dissenting).

234. See *Brown*, 122 N.M. at 732, 931 P.2d at 77; *State v. Campos*, 122 N.M. 148, 160, 921 P.2d 1266, 1278.

235. See *Egelhoff*, 518 U.S. at 57-58 (Ginsburg, J., concurring); *id.* at 61 (O'Connor, J., with whom Justices Stevens, Souter and Breyer join, dissenting).

VI. CONCLUSION

In *Brown*, the New Mexico Supreme Court abandoned the distinction between depraved mind murder and second-degree murder, based on the number of persons subjected to the risk of death. Instead, it opted to create a narrow "specific knowledge" exception to the specific-general intent approach traditionally used to determine the relevance of intoxication evidence in proving an offense. The court held that intoxication is a defense to first-degree depraved mind murder. This offense had traditionally been viewed as a general intent crime for which intoxication was irrelevant. However, in so holding, the court made it clear that it was not completely abandoning the specific-general intent approach. This common law analysis continues to exclude voluntary intoxication evidence for second-degree murder and, therefore, felony murder. While the court apparently sought to provide more principled distinctions between the culpability attached to the different classes of homicides, the court's reasoning fails to justify New Mexico's felony murder doctrine and seriously calls into doubt the continued application of the specific-general intent approach in New Mexico's homicide scheme. The New Mexico Supreme Court has created an irreconcilable anomaly in New Mexico criminal jurisprudence and may expose the New Mexico homicide statutory scheme, particularly second-degree murder and felony murder, to federal constitutional due process challenges, under the *Egelhoff* dissent's analysis.²³⁶

VICKI W. ZELLE

236. See *id.* at 61-73 (O'Connor, J., with whom Justices Stevens, Souter and Breyer join, dissenting).