GUTIERREZ V. SMITH, A CURIOUS CASE OF DEPRAVED INDIFFERENCE MURDER

Michael J. Yetter*

INTRODUCTION

“And ye shall know the truth, and the truth shall make you free.”1 But what if that truth was that you stabbed someone with the intent to kill them, even though a jury adjudged you not guilty of intentional homicide? Should that truth set you free? In New York, the law treats intentional murder and depraved indifference murder as equally culpable.2 While in either case the defendant must cause the death of some other person, the mental states necessary to satisfy intentional and depraved indifference murder are quite different. To be guilty of intentional murder a person must act “[w]ith intent to cause the death of another person [and] cause[] the death of such person or of a third person.”3 By contrast, a person is guilty of depraved indifference murder when “[u]nder circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person.”4

However, the line between these mental states—and the definition of depraved indifference murder itself—was very blurry in the past.5 In People v. Register6 the New York Court of Appeals

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1 John 8:32 (King James).
2 Both are considered “murder in the second degree” and are categorized as A-I felonies. See N.Y. PENAL LAW § 125.25(1), (2) (McKinney 2014). A person convicted of murder in the second degree in New York is exposed to a minimum sentence of fifteen to twenty five years and a maximum sentence of life imprisonment. See N.Y. PENAL LAW § 70.00(2)(a), (3)(a)(i) (McKinney 2014).
3 PENAL LAW § 125.25(1).
4 Id. § 125.25(2).
6 People v. Register, 457 N.E.2d 704 (N.Y. 1983), overruled by People v. Feingold, 852
held that the depraved indifference murder statute contained three elements: 1) a mens rea of “recklessness”;\(^7\) 2) a voluntary act which creates a “grave risk of death to another person”;\(^8\) and 3) objective circumstances (i.e., “under circumstances [evincing] a [depraved] indifference to human life”).\(^9\) Over time this standard proved to be problematic, as it allowed prosecutors to charge both depraved indifference and intentional murder, even in cases where the evidence strongly indicated that the defendant acted intentionally.\(^10\)

Although \textit{Register} and its progeny required judges and juries to look to the “objective circumstances” surrounding the killing to determine whether the statute was satisfied,\(^11\) there was a period beginning in 2002 and ending in 2006 where the court’s interpretation of the statute was unclear, and through several cases the judges on the court brought about a change in the law.\(^12\) Today, “depraved indifference to human life is a culpable mental state,” and the court has stated that depraved indifference murder convictions, in the context of one-on-one killings, should be rare.\(^13\)

The evolving nature of New York’s depraved indifference murder law not only caused New York state courts difficulty, it has also troubled the federal bench. The question this note addresses is whether the state of disarray surrounding New York’s depraved indifference murder law between 2002 and 2006 created winning arguments for federal habeas corpus defendants who had procedurally defaulted in state court.

In \textit{Gutierrez v. Smith},\(^14\) Omar Gutierrez asked the United States Court of Appeals for the Second Circuit whether a man, acquitted of intentional murder but convicted of depraved indifference murder, could have his conviction vacated when, under current New York case law, his conduct and mental state were insufficient to

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\(^1\) N.Y. PENAL LAW § 15.05(3) (McKinney 2014) (“A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto.”).

\(^7\) PENAL LAW § 125.25(2).

\(^8\) See Register, 457 N.E.2d at 706.

\(^9\) See Martinez, 983 N.E.2d at 753–54.

\(^10\) See id.

\(^11\) See infra Part I-C.

\(^12\) See infra Part I-C.

\(^13\) People v. Feingold, 852 N.E.2d 1163, 1167 (N.Y. 2006).

\(^14\) Gutierrez v. Smith, 692 F.3d 256 (2d Cir. 2012), withdrawn and superseded, 702 F.3d 103 (2d Cir. 2012).
constitute depraved indifference murder.\textsuperscript{15} Initially, it appeared that the court was listening.\textsuperscript{16} On August 31, 2012 the Second Circuit certified two questions to the New York Court of Appeals regarding its construction of New York’s depraved indifference murder statute.\textsuperscript{17} However, in an odd turn of events, on December 11, 2012, the Second Circuit reversed course and decided that certification was not warranted.\textsuperscript{18}

While it acknowledged that Gutierrez had satisfied several procedural requirements,\textsuperscript{19} the court compared the case to several other New York depraved indifference murder cases, and ultimately ruled against Gutierrez on the merits.\textsuperscript{20} In doing so, the court may have overlooked compelling procedural arguments, including its own precedent, which would have allowed it to avoid reaching the merits. While the Second Circuit may ultimately be correct, and there is no doubt that Gutierrez’s argument—that he should go free because he \textit{intended} to kill his victim—is unsettling, the court’s opinion leaves more questions open than it answers.

This note explores Gutierrez’s case along with New York’s struggle with its depraved indifference murder law. Part I examines the history of New York’s ever-malleable murder law from its codification through its application in case law at the Court of Appeals. Part II details the history of Gutierrez’s case and his habeas corpus petition at the Second Circuit. Part III explores whether the court could have disposed of the case on procedural grounds. Part IV concludes and offers some remarks on depraved indifference murder law going forward.

I. BACKGROUND LAW

A. Depraved Indifference Murder Pre-Register

In New York, “[a] person is guilty of murder in the second degree when: . . . [u]nder circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of

\textsuperscript{15} See id. at 258.
\textsuperscript{16} See id. at 260.
\textsuperscript{17} See id. at 268.
\textsuperscript{19} See infra Part II.
\textsuperscript{20} See infra Part III-B.
another person.”

Those forty-three words were first codified in 1967 and have caused judicial headache ever since.

The predecessor to the 1967 statute was the Revised Statutes of 1829. That statute defined depraved mind murder as a killing “perpetrated by any act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual.” Professor Gegan’s 1974 article examined the history of depraved indifference murder law in New York and noted that early interpretations of the 1829 statute focused on the defendant’s mental state.

A notable example is a jury instruction given by Judge John W. Edmonds, wherein he counseled the jurors that they must find: “not only that the act was imminently dangerous to others . . . but they must also find in the prisoner a depraved mind, regardless of human life.” As examples of acts which may constitute depraved mind murder, Judge Edmonds’s instruction included “firing a gun into a crowd” and “turning loose among [a crowd] a wild and savage animal”; however, neither Judge Edmonds nor other jurists of that time indicated that depraved mind murder was limited to situations involving danger to more

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21 N.Y. PENAL LAW § 125.25(2) (McKinney 2014).
22 The 1967 statute was enacted in 1965 with an effective date of September 1, 1967. See 1965 N.Y. Sess. Laws 1585 (McKinney). The practice commentaries accompanying the act provide an example of contemporary interpretation of the statute:
   Subdivision 2 defines the highest crime of reckless homicide, which is very similar to a former Penal Law offense classified as first degree murder (§ 1044[2]). Each version embraces extremely dangerous and fatal conduct performed without specific homicidal intent but with a depraved kind of wantonness: for example, shooting into a crowd, placing a time bomb in a public place, or opening the door of the lions’ cage in the zoo.

   The revised provision . . . is phrased in terms of “conduct which creates a grave risk of death to another person” (§ 125.25[2]). This clearly covers wantonly reckless behavior addressed to a single individual, as well as to many; as, for example, aiming a pistol shot a foot over a person’s head and firing in order to frighten him, but killing him through poor marksmanship.

Richard G. Denzer & Peter McQuillan, Practice Commentary, N.Y. PENAL LAW § 125.25(2), at 235–36 (McKinney 1967).
23 2 N.Y. REV. STAT. pt. IV, ch. I, tit. I, § 5(2) (1829). The use of the term “depraved mind” was left out of the 1967 statute in favor of the term “depraved indifference”; however, no substantive change in the law was intended by the drafters. Bernard E. Gegan, More Cases of Depraved Mind Murder: The Problem of Mens Rea, 64 St. John’s L. Rev. 429, 429 n.3 (1990) (quoting N.Y. STATE COMM’N ON REVISION OF THE PENAL LAW & CRIMINAL CODE, PROPOSED N.Y. PENAL LAW, S.3918, A.5376, at 339 (1964) [hereinafter COMM’N ON REVISION OF THE PENAL LAW]) (“[T]he Revisers . . . said that the new statute was ‘substantially a restatement’ of the old.”).
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than one person.26

Despite these early precedents, the seminal case of the pre-
Register period was *Darry v. People*.27 After killing his wife as a
result of beating her over a period of days, Darry was convicted of
depraved mind murder,28 but the Court of Appeals reversed the
conviction 3–2, with each judge in the majority writing a separate
opinion supporting the proposition that in order for the depraved
mind murder subdivision to be satisfied, the defendant’s conduct
must endanger the lives of more than one person.29 While the
opinion focused heavily on common law principles and the wording
of the 1829 Revised Statutes, it defined depraved mind murder too
narrowly by categorically excluding certain killings where only one
person was endangered.30

As a result, when an almost identical case, *People v. Poplis*,31
arose over one century later under the 1967 statute, the Court of
Appeals affirmed the defendant’s conviction.32 As noted by
Professor Gegan, the court focused on “the prolonged cruelty, the
helplessness of the victim, and the betrayal” of the defendant’s
parental duty toward his victim.33 “A stronger set of facts could
hardly be imagined to support the application of the depraved mind
murder provision to a case of violence directed at a single victim.”34

Even so, the *Poplis* case did not clarify or define the particular
circumstances to which the depraved indifference murder statute
could be applied when only individuals are endangered.

Two years later, in *People v. Kibbe*,35 the victim was “thoroughly
intoxicated” after drinking at a bar, and asked the defendants to

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26 See id.
27 *Darry v. People*, 10 N.Y. 120 (1854).
28 Id. at 120–21.
29 See Gegan, supra note 24, at 427.
30 See id. at 436.
32 See id. at 168–69. In *Poplis*, the defendant beat his wife’s three year old child over five
days, after which the child died. *Id.* at 167. Notably, when describing the requisite mental
state necessary to sustain a conviction of depraved indifference murder, the court said:
The murder definition requires conduct with “depraved indifference” to “human life,”
plus recklessness. This is conduct of graver culpability, and it is the kind which has
been rather well understood at common law to involve something more serious than
mere recklessness alone which has had an incidental tragic result. The continued
brutality toward a child, found by the jury in this case, fits within the accepted
understanding of the kind of recklessness involving “a depraved indifference to human
life.” *Id.* at 168.
33 Gegan, supra note 24, at 452.
34 *Id.*
give him a ride home. Defendants took the opportunity and agreed, because earlier they had seen the victim "flashing" several one hundred dollar bills and decided to rob him. After taking the victim to another bar for more drinks, the defendants brought the victim back to the car, robbed him, and then threw him out onto the snowy streets, about a half mile from a gas station. The victim, still thoroughly intoxicated, walked into the middle of the street and sat down. At approximately 10:00 p.m., the victim was struck and killed by a pickup truck.

The defendants were convicted of, among other things, depraved indifference murder. Their main challenge on appeal was causation. The court easily disposed of this argument, finding that the defendants’ “despicable course of action” was “a sufficiently direct cause” of the victim’s death. While the defendants’ conduct was unquestionably despicable and the victim may have been helpless due to his intoxication, there are no other similarities between Kibbe and Poplis. Kibbe, therefore, engendered more confusion and uncertainty regarding the new depraved indifference murder statute than was necessary. The right result may have been reached—in the sense that those defendants deserved to be punished for their crime—but the state of the law was harmed. The stage was thus set for more confusion, and it was not long before the Court of Appeals took the opportunity to act.

B. Register Changes Depraved Indifference Murder in New York

In People v. Register the evidence showed that Register and a friend went to a downtown Rochester, New York bar on January 15, 1977. Register brought a pistol with him, and the two proceeded

36 Id. at 774.
37 Id.
38 Id. at 774–75.
39 Id. at 775.
40 Id.
41 See id.
42 Id.
43 Id. at 776.
44 Gegan, supra note 24, at 452 (quoting People v. Poplis, 281 N.E.2d 167, 168 (N.Y. 1972)) (“In Kibbe the defendants’ act was not prolonged cruelty; it was the act of a moment. It was not ferocious or brutal; . . . it was remote and contingent. Most of all, the defendants were not willing to kill [the victim]; they intended him to seek the shelter of the gas station one quarter of a mile away. All in all, was this more than what the Court in Poplis called ‘mere recklessness alone which has had an incidental tragic result?’”).
45 People v. Register, 457 N.E.2d 704, 705 (N.Y. 1983).
to drink heavily. Early in the evening Register brandished the gun during a dispute with another patron over money. A second argument occurred shortly after midnight between Register’s friend and a different patron named Willie Mitchell. Register pulled out his gun and shot, attempting to strike Mitchell; however, the bullet struck another patron named Lawrence Evans. As the bar emptied out, Register inexplicably turned and shot his gun a second time, striking and killing a different bar patron, Marvin Lindsey. Register did not deny that the shootings occurred; instead defense “counsel elicited [testimony] during the prosecution’s case” detailing the amount of drinking Register did that night. After trial, Register was convicted of depraved indifference murder and acquitted of intentional murder.

The principal issue on appeal was whether the trial court erred in refusing to charge the jury as to Register’s intoxication evidence, which Register believed could be used to negate the mens rea element of depraved indifference murder. Although the trial court agreed to charge the jury as to the effect of intoxication on the intentional murder and assault charges, it refused to do so for depraved indifference murder. It reasoned that since the mens rea for depraved indifference murder was recklessness, and since the Penal Law precludes evidence of intoxication as a defense to recklessness, the jury could not consider it as to that charge. Register believed that the trial court erred on this point, and argued that “depraved [indifference] murder contains a different or additional element of mental culpability, namely ‘circumstances evincing a depraved indifference to human life,’ which elevates defendant’s conduct from manslaughter to murder and that this additional element may be negatived by evidence of intoxication.”

The Court of Appeals affirmed. It stated that deprived

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46 Id.
47 Id.
48 Id.
49 Id. Evans’s injury was not fatal. Id. Register then fired again, striking Mitchell in the stomach; after this second shot, some of the patrons attempted to remove Mitchell from the bar. Id.
50 Id. Apparently Register and Lindsey were friends but had not seen each other before the shooting. Id.
51 Id. Register’s defense consisted of one witness—a forensic psychiatrist—who spoke about the “debilitating effects” of alcohol consumption. Id.
52 Id.
53 See id.
54 Id. at 706.
55 See id.
56 Id. (citing N.Y. PENAL LAW § 15.25 (McKinney 1967)).
indifference murder was essentially the same as reckless manslaughter,\footnote{See N.Y. Penal Law 15.05(3) (McKinney 2014); N.Y. Penal Law §§ 125.15(1) (McKinney 2014).} except that the killing also occurs under some “objective circumstances” evincing the defendant’s depraved indifference:

Depraved mind murder resembles manslaughter in the second degree (a reckless killing which includes the requirement that defendant disregard a substantial risk), but the depraved mind murder statute requires in addition not only that the conduct which results in death present a grave risk of death but that it also occur “[under] circumstances evincing a depraved indifference to human life.” This additional requirement refers to neither the \textit{mens rea} nor the \textit{actus reus}. If it states an element of the crime at all, it is not an element in the traditional sense but rather a definition of the factual setting in which the risk creating conduct must occur—objective circumstances which are not subject to being negatived by evidence of defendant’s intoxication.\footnote{Register, 457 N.E.2d at 707 (citations omitted). However, in the very next paragraph the court stated: “The phrase ‘[under] circumstances evincing a deprived indifference to human life’ refers to the wantonness of defendant’s conduct and converts the substantial risk present in manslaughter into a very substantial risk present in murder.” \textit{Id.} (citing WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW § 70, at 542 (1972)). This is perplexing, of course, because the term “wantowness” refers to the actor’s mental state, not the objective circumstances. \textit{See} BLACK’S LAW DICTIONARY 1419 (5th ed. 1979) (“Conscious doing of some act or the omission of some duty with knowledge of existing conditions and consciousness that, from the act or omission, injury will likely result.”); \textit{see also} BLACK’S LAW DICTIONARY 1720 (9th ed. 2009) (“Conduct indicating that the actor is aware of the risks but indifferent to the results.”).}

In this decision Court of Appeals not only redefined the depraved indifference murder statute, but also opened the door for a twenty-year flood of prosecutions where depraved indifference murder was charged as a lesser included (or alternative) offense to intentional murder.\footnote{See, e.g., People v. Sanchez, 777 N.E.2d 204, 223–24 (N.Y. 2002) (Rosenblatt, J., dissenting) (discussing the proliferation of indictments containing depraved indifference murder charges post-Register); Abraham Abramovsky & Jonathan I. Edelstein, \textit{Depraved Indifference Murder Prosecutions in New York: Time for Substantive and Procedural Clarification}, 55 SYRACUSE L. REV. 455, 455–56 (2005) (noting that the number of “twin count” indictments—those containing both intentional and depraved indifference murder charges—rose from 14 to 56 percent after Register).} The court’s addition of an “objective” element to depraved indifference murder was likely a response to Register’s argument that he was intoxicated when he committed the crime, and thus could not have formed the requisite “depraved indifference”
required under the statute. In so doing, however, the majority brushed aside several longstanding canons of statutory construction and, in practical effect, eliminated the distinction between manslaughter in the second degree and depraved indifference murder.

Judge Matthew Jasen dissented and took the majority to task for its construction of the depraved indifference murder statute. Judge Jasen’s opinion shows that the majority not only misconstrued the plain language of the statute, but also that the majority’s opinion was inconsistent with the Legislature’s intent, the history of the statute, and the court’s own precedent. First, Judge Jasen considered the evolution of the statute which, as written in 1829, “characterized a homicide as murder ‘[w]hen perpetrated by any act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual.’” While this language was changed in the 1967 revision, the change was not intended to have any substantive effect; rather it was intended to restate the original law. Therefore, Judge Jasen accused the majority of turning a blind eye

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60 See Abramovsky & Edelstein, supra note 59, at 466–67; Gegan, supra note 23, at 436.
61 Abramovsky & Edelstein, supra note 59, at 467–68. According to Abramovsky and Edelstein, the first statutory cannon violated by the Register court was that “words in statutes must be interpreted to avoid surplusage or redundancy.” Id. at 467. They note: Pursuant to section 125.25(2) of the New York Penal Law, one of the elements of depraved indifference murder is that the defendant recklessly engage in conduct “which creates a grave risk of death to another person.” In contrast, manslaughter in the second degree requires only a “substantial and unjustifiable risk.” By defining the element of depraved indifference solely in terms of the degree of risk presented by the defendant’s conduct, the Court of Appeals effectively rendered the “grave risk” element superfluous.” Id. (footnotes omitted). The second statutory canon ignored by the Register majority was that terms should be given their “natural and ordinary meaning” unless there is a contrary legislative directive.” Id. (internal quotation marks omitted) (footnotes omitted). Taking issue with the court’s interpretation of the term “depraved,” they wrote: The natural and ordinary meaning of the word “depraved” connotes moral corruption rather than an objective degree of risk. Indeed, even the common legal understanding of the word “depraved” indicates “an inherent deficiency of moral sense and rectitude . . . a corrupt, perverted or immoral state of mind.” Thus, far from interpreting “depraved” in light of its ordinary and natural meaning, the Register majority effectively coined an entirely new definition of the term.

62 Register, 457 N.E.2d at 710 (Jasen, J., dissenting).
63 Id. at 709–11.
64 Id. at 710 (quoting 2 N.Y. REV. STAT. pt. IV, ch. I, tit. I, §5.2 (1829)).
65 Register, 457 N.E.2d at 710 (Jasen, J., dissenting) (citing COMM’N ON REVISION OF THE PENAL LAW, supra note 23, at 339; GILBERT CRIMINAL LAW AND PRACTICE OF NEW YORK: CODE OF CRIMINAL PROCEDURE PENAL LAW, REVISED PENAL LAW § 130.25, at 1C–63 (1967); Gegan, supra note 24 at 437).
to the legislative intent of the 1967 revision, which made it “abundantly clear” that “the new statute was intended to be ‘substantially a restatement’ of the former.”

Next, Judge Jasen considered the development of the court’s own case law.

In *Darry v. People*, our court held that the statute was designed “to provide for that class of cases, and no others, where the acts resulting in death are calculated to put the lives of [many] persons in jeopardy, without being aimed at any one in particular, and are perpetrated with a full consciousness of the probable consequences.”

Later, in *People v. Jernatowski*, the court held that where a person is “aware that there are human beings in a house [and] fires several shots into it, knowing that some one may be killed and with reckless indifference whether he is or not, he ought not to be relieved from the natural consequences of his act.”

Because the “statute required proof of consciousness of the risks,” Judge Jasen argued that the same requirement should be applicable to Register, thereby allowing Register to introduce proof of intoxication in order to negate an element of the statute. He then considered *People v. Poplis*, one of the first cases to construe Penal Law section 125.25(2), and noted that the court, in 1972, clearly stated that depraved indifference murder requires “conduct of ‘graver culpability’ which involves something more serious than mere recklessness.” Thus, it was clear to Judge Jasen that

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66 Register, 457 N.E.2d at 710 (Jasen, J., dissenting) (quoting COMM’N ON REVISION OF THE PENAL LAW, supra note 23, at 339).
67 Register, 457 N.E.2d at 710 (Jasen, J., dissenting) (alteration in original) (quoting Darry v. People, 10 N.Y. 120, 148 (1854)).
68 People v. Jernatowski, 144 N.E. 497 (N.Y. 1924).
69 Register, 457 N.E.2d at 710 (Jasen, J., dissenting) (quoting Jernatowski, 144 N.E. at 498). The statute at issue in that case, section 1044 of the Penal Law, stated “[t]he killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed . . . By an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any individual.” Jernatowski, 144 N.E. at 497 (citations omitted).
70 Register, 457 N.E.2d at 710–11 (Jasen, J., dissenting).
71 Id. at 711 (quoting People v. Poplis, 281 N.E.2d 167, 168 (N.Y. 1972)); see also N.Y. PENAL LAW § 15.05(3) (McKinney 2014) (“Recklessly: A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto.”).
“depraved indifference” was part of the mens rea and that Register should have been permitted to introduce proof of intoxication in order to call into question his culpability as to that element of the statute.

Judge Jasen then criticized the majority’s reading of the statute itself. While he admitted that the majority correctly outlined the distinction between intentional and depraved indifference murder—depraved indifference murder comes from an indifference to or disregard of risks—he cut through the heart of the majority’s conclusion: “can there be any doubt that to disregard the risks attending his conduct defendant must have at least been aware of those risks?”

The majority, with respect to “the phrase ‘[under] circumstances evincing a depraved indifference to human life,’” stated that it “refers to the wantonness of defendant’s conduct.” The use of the term “wantonness” belied the majority’s construction of the circumstances as an objective measure, however, because wantonness “is commonly defined as requiring a conscious doing of some act with knowledge of existing conditions and an awareness of the risks involved.” Therefore, the majority’s new interpretation of the law presented an unresolved internal conflict: it defined the objective circumstances in terms of a defendant’s mental state.

Judge Jasen also argued that the majority’s interpretation of the law was inconsistent with our historical notions of punishment and upon our criminal law’s “theory of ‘punishing the vicious will.’” Moreover, although there may be a hyper-technical distinction between a “grave” risk and “substantial” risk, Judge Jasen argued that there was only one real practical difference:

Under the majority’s rule, however, a person who possessed only a reckless state of mind when he caused the death of another could be convicted of depraved mind murder and sentenced to a term of 15 years to life imprisonment simply because objective circumstances surrounding the killing presented a “grave risk” of death even though the actor, due to intoxication, was unaware of those circumstances and could not appreciate the risks. The majority would also hold that another person who is fully aware of a “substantial and

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72 Register, 457 N.E.2d at 711 (Jasen, J., dissenting).
73 Id. at 707 (majority opinion) (alteration in original) (emphasis added) (quoting N.Y. PENAL LAW §125.25 (McKinney 2014)).
74 Register, 457 N.E.2d at 711 (Jasen, J., dissenting) (citing BLACK’S LAW DICTIONARY 1419 (5th ed. 1979)); see supra note 60 and accompanying text.
75 Register, 457 N.E.2d at 712 (Jasen, J., dissenting) (quoting Roscoe Pound, Introduction to FRANCIS BOWES SAYRE, A SELECTION OF CASES ON CRIMINAL LAW, at xxix, xxxvi (1927)).
unjustifiable risk” and consciously disregards that risk can only be found guilty of manslaughter in the second degree and sentenced to as little as one and one-half years in jail. While there may be a technical distinction between a “grave” risk and a “substantial” one, the only real difference is about 15 years in prison. To accept this distinction as justification for the disparate penalties which the respective crimes carry defies basic principles of fairness and logic.76

Finally, Judge Jasen predicted that, as a result of the majority opinion, prosecutors would be able to obtain murder convictions with a showing of mere recklessness because the simple fact that the defendant’s conduct resulted in the victim’s death will, with 20/20 hindsight, be proof enough to a jury that the circumstances existing at the time and place of the killing presented a ‘grave risk’ of death and that the defendant, therefore, acted with depraved indifference to human life.77

Although his view did not carry the day, Judge Jasen’s forceful and passionate dissent has been endorsed in subsequent opinions.78

C. Post-Register Cases

The Court of Appeals began to chip away at Register beginning in 2003. In the interim, the court decided two cases important to depraved indifference murder law. In People v. Gallagher,79 the court considered whether an indictment charging a defendant with intentional murder and depraved indifference murder could be submitted to a jury.80 Over the defendant’s objection the trial court had submitted both counts to the jury, with the lesser included offenses of manslaughter in the first degree (for intentional murder) and manslaughter in the second degree (for depraved indifference murder).81 The jury convicted the defendant of intentional murder and manslaughter in the second degree, and a divided appellate division upheld the intentional murder conviction but reversed the

76 Register, 457 N.E.2d at 712 (Jasen, J., dissenting) (citations omitted).
77 Id. at 713.
78 Judge Jasen’s dissent underscores the value of dissenting opinions and their impact on future courts, lawyers, litigants, and students of the law. See generally Robert S. Smith, Dissenting: Why Do It?, 74 ALB. L. REV. 869, 870–72, 874 (2011) (highlighting several reasons judges dissent from their colleagues and noting that the Court of Appeals subsequently overruled Register and accepted Judge Jasen’s dissenting rationale).
80 See id. at 910.
81 Id.
manslaughter conviction. The Court of Appeals reversed, and made it clear that a person cannot simultaneously act intentionally and recklessly towards the same victim because intent and recklessness are inconsistent mental states: “[t]he act is either intended or not intended; it cannot simultaneously be both.”

In the 1989 case People v. Roe, a juvenile defendant was found guilty of depraved indifference murder when he aimed and fired a shotgun (loaded with live and dummy ammunition) into the chest of another youth during a game of “Polish roulette.” This case was “classic” in the sense that Roe’s conduct comported with an example of conduct given by Denzer and McQuillian in the 1967 Practice Commentaries which would typically rise to the level of depraved indifference murder. While Roe knew that the shotgun was loaded with both live and dummy shells, he did not know when he pumped a shell into the chamber whether it was live or whether it was a dummy. Thus, when Roe fired the shotgun he did not intend to kill his victim, however, his actions were so wanton and so reckless as to be “depraved.” Roe’s mental state notwithstanding, the court applied Register and determined that under the objective circumstances, defendant’s conduct evinced a depraved indifference to human life.

Like Register, this case was also accompanied by a strong dissent, this time by Judge Bellacosa. In his view the case “finalize[d] the obliteration of the classical demarcation between murder and manslaughter” in New York, thereby fulfilling Judge Jasen’s prophecy in Register. He noted that

[i]t is difficult to imagine, after this case, any intentional murder situation not being presented to the Grand Jury with a District Attorney’s request for a depraved indifference murder count as well. Thus, the exception designed as a special fictional and functional equivalent to intentional murder becomes an automatic alternative and additional top count accusation, carrying significant prejudicial baggage in its terminology alone. That devastating advantage, among

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82 Id.
83 Id.
85 Id. at 610.
86 See supra note 22.
87 Roe, 542 N.E.2d at 610.
88 Id.
89 Id. at 613.
90 See id. at 614–19 (Bellacosa, J., dissenting).
91 See id. at 615, 616.
others, given to the prosecution provides an unjust double opportunity for a top count murder conviction and an almost certain fallback for conviction on the lesser included crime of manslaughter.\textsuperscript{92}

Perhaps even more troubling was Judge Bellacosa’s recognition that the use of the terms “depraved” and “grave risk” in the statute “prove that the analysis necessarily includes some subjective, gradational assessment” of the facts to determine whether the defendant’s conduct reaches a level of blameworthiness synonymous with that of an intentional murderer.\textsuperscript{93}

Thirteen years later the Court of Appeals decided \textit{People v. Sanchez},\textsuperscript{94} where the defendant, after getting into an argument with his friend, pulled out a gun and fired it into the victim’s chest from a range of twelve to eighteen inches.\textsuperscript{95} Sanchez was charged with both intentional and depraved indifference murder as well as several weapons charges; he also agreed to the charges of “manslaughter in the first and second degree as lesser-included offenses.”\textsuperscript{96} After his trial, Sanchez was acquitted of intentional murder, but was convicted of depraved indifference murder.\textsuperscript{97} Judge Levine, writing for the majority, framed the issue as “whether, on this record, based on an objective assessment of the risk defendant recklessly created and disregarded, the likelihood of causing death from defendant’s conduct was so obviously severe that it evinced a depraved indifference to human life.”\textsuperscript{98} Applying \textit{Register}, the majority determined that under the objective circumstances—firing a gun within eighteen inches of the victim—Sanchez's conduct was dangerous and created “a grave risk of death.”\textsuperscript{99} The court then analogized the objective circumstances in the case to those in \textit{Roe}.\textsuperscript{100} But this analogy was inapt for at least one reason—the defendant in \textit{Roe} did not know whether the shotgun was chambered with a live or dummy round, whereas here, there was no doubt that Sanchez knew the weapon was loaded. Nevertheless, the court concluded that, under these facts, a reasonable jury could have concluded that defendant was guilty of

\textsuperscript{92} Id. at 619.

\textsuperscript{93} Id. at 615–16.

\textsuperscript{94} People v. Sanchez, 777 N.E.2d 204 (N.Y. 2002).

\textsuperscript{95} Id. at 205.

\textsuperscript{96} Id.

\textsuperscript{97} Id.

\textsuperscript{98} Id. at 210–11.

\textsuperscript{99} Id. at 212.

\textsuperscript{100} Id. (“We are persuaded, moreover, that defendant, like the close-range shooter in \textit{Roe}, acted in objective circumstances manifesting depraved indifference.”).
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deprieved indifference murder.\textsuperscript{101}

Sanchez is most remarkable for its three vehement dissents. Judge Smith stated that “[t]his case illustrates the problems attendant to using a charge of deprived indifference as a proxy for intentional murder.”\textsuperscript{102} Because the defendant was acquitted of intentional murder, and because he believed that the evidence was insufficient to establish deprived indifference murder, Judge Smith would have reduced the conviction to manslaughter in the second degree.\textsuperscript{103} The difference in this case, according to Judge Smith, was that the firing of a shot from a range of twelve to eighteen inches did not create a “grave” risk of death, but rather a “certainty.”\textsuperscript{104} Thus, “[t]o uphold the conviction of deprived indifference murder in this case is to authorize the substitution of deprived indifference murder for intentional murder at any time that a person shoots and kills another.”\textsuperscript{105}

Judge Ciparick, by contrast, believed that no reasonable view of the evidence supported a finding of recklessness; thus she would have reversed the deprived indifference murder conviction and dismissed the indictment.\textsuperscript{106} Additionally, Judge Ciparick believed that the majority had “obscured” the “once prominent distinction between deprived indifference murder and intentional murder” in order to reach its conclusion.\textsuperscript{107}

Judge Rosenblatt, who wrote the longest dissent, was the only judge to directly attack the majority’s reliance on Register and explicitly call its holding into question.\textsuperscript{108} He stated, as Judge Jasen did in his Register dissent, that Register was the first time the court “held that the requisite mens rea for [depraved indifference murder] was ordinary recklessness—the exact same mental state required for manslaughter in the second degree.”\textsuperscript{109} Judge Rosenblatt argued that the court should move away from the statute as construed in Register toward an understanding of the statute that defines “depraved indifference” as part of the defendant’s mens rea.\textsuperscript{110} More
specifically, Judge Rosenblatt would “require[] a state of mind so wanton, so morally deficient and so blameworthy as to place that crime on a par with intentional murder.”\textsuperscript{111} As Judge Rosenblatt saw it, such a requirement would not so much make new law as it would be a return to the interpretation of depraved indifference murder statutes pre-\textit{Register}.\textsuperscript{112} And, if the court’s interpretation of the law was not problematic enough, Judge Rosenblatt also demonstrated that the practical effect of its interpretation had led to a “proliferation of depraved indifference murder prosecutions” post-\textit{Register}.\textsuperscript{113}

From 1989 to 2001 the percentage of second degree murder indictments containing both intentional and depraved indifference charges rose from 19 percent to 70 percent.\textsuperscript{114} Clearly Judge Jasen’s fear, over the course of twenty years, became true: “virtually every intentional murder is defined . . . as an act of depraved indifference.”\textsuperscript{115} What was originally intended to be “a rare indictment for a rare breed of criminal” had become an alternative for prosecutors who could not quite prove that the defendant had requisite intent to secure an intentional murder conviction.\textsuperscript{116}

Addressing the specifics of the case, Judge Rosenblatt criticized the People’s argument that the very act of shooting at a victim’s chest “is so depraved (and evinces such indifference) that it qualifies as depraved indifference murder.”\textsuperscript{117} The People’s reasoning was that the court had already moved away from its holding in \textit{Register} when it affirmed a depraved indifference murder conviction where the defendant, along with others, was a participant in a gun battle that killed a bystander. \textit{Id.} at 222; see People v. Russell, 693 N.E.2d 193 (N.Y. 1998).

To constitute depraved indifference, conduct must be so wanton, so deficient in a moral sense of concern, so devoid of regard of the life or lives of others, and so blameworthy as to warrant the same criminal liability as that which the law imposes upon a person who intentionally causes the death of another. \textit{Sanchez}, 777 N.E.2d at 222 (Rosenblatt, J., dissenting) (quoting \textit{Russell}, 693 N.E.2d at 194–95) (internal quotation marks omitted) (emphasis added).

\textsuperscript{111} \textit{Sanchez}, 777 N.E.2d at 223 (Rosenblatt, J., dissenting). Such language reflects Judge Rosenblatt’s way of distinguishing between a mens rea of “recklessness” and the heightened requirement of “depraved indifference.” \textit{Id.}

\textsuperscript{112} See \textit{id.} at 218 (Smith, J., dissenting) (citations omitted) (“Moreover, to the extent [this case] endorses \textit{People v. Register}, the majority also conflates depraved indifference murder with reckless manslaughter. These mergers are out of line with the history of depraved indifference murder, the statute’s purpose and its unique place in the legislative design.”).

\textsuperscript{113} \textit{Id.} at 223–24 (Rosenblatt, J., dissenting).

\textsuperscript{114} \textit{Id.} This occurred at the same time that the total number of murder indictments fell by one-half. \textit{Id.} at 224. In Judge Rosenblatt’s view, the use of twin-count indictments had become “a tactical weapon of choice” for prosecutors, that “skews the process of indictment, trial and plea—just as the dissenters in \textit{Register} and \textit{Roe} rightly predicted.” \textit{Id.}

\textsuperscript{115} \textit{Id.}

\textsuperscript{116} \textit{Id.}

\textsuperscript{117} \textit{Id.} at 226.
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flawed because it “define[d] indifference and depravity by using intentionality—of all things—as its measure.” He further argued that if the People’s view were adopted, deprived indifference would be “illogically conflate[d]” with intent and the deprived indifference statute would become a nullity. The upshot of the People’s analysis, therefore, was that the more intentional a defendant’s conduct towards “the victim . . . the more indifferent the [defendant] is to the victim’s fate.” To Judge Rosenblatt, that view was simply untenable. Beyond the circularity of the People’s position was the danger of misleading the jury into believing that deprived indifference murder was a “milder charge readily available either when intentional murder has not been proved or as a means of extending a measure of leniency.” Such a construction of the statute leads to overcharging by prosecutors to hedge their bets in cases where the proof is not strong enough to ensure a conviction for intentional murder.

Turning to the majority opinion, Judge Rosenblatt applauded the court for recognizing a “heightened recklessness” standard for deprived indifference murder because it tore away a central tenant of Register: that the mens rea required for deprived indifference murder was “recklessness.” But the majority did not go far enough, according to Judge Rosenblatt, because it still placed the focus on the “objective circumstances” rather than incorporating the defendant’s deprived indifference as an element “central” to the mens rea. After Sanchez it was clear that Register was no longer standing on solid ground, and within the next year the Court of Appeals further chipped away at its foundation.

In People v. Hafeez, the court affirmed an Appellate Division reversal of a deprived indifference murder conviction by a vote of 6-1. Hafeez was convicted for deprived indifference murder after he and a co-defendant lured the victim out of a Queens bar; Hafeez pinned the victim against a wall before stepping aside for his co-

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118 Id.
119 Id.
120 Id.
121 Id. at 227.
122 Id. at 232.
123 Id. To Judge Rosenblatt’s mind, a defendant must “evince a wicked and mischievous disregard (i.e., utter indifference) for the nearly certain consequences of his or her irresponsible act” and it is only that “extreme wickedness [that] places the defendant’s culpability on an even plane with . . . intentional murder[.]” Id.
125 See id. at 1062; see also id. at 1064 (Rosenblatt, J., concurring). Judge Read was the lone dissenter. See id. at 1064 (Read, J., dissenting).
The co-defendant struggled with the victim momentarily before he stabbed the victim in the heart. Then they drove off and disposed of the knife in a sewer. Both men were indicted for, among other things, intentional murder in the second degree and depraved indifference murder in the second degree. After a jury trial, Hafeez was acquitted of intentional murder and convicted of depraved indifference murder.

The Appellate Division, Second Department reversed Hafeez’s depraved indifference murder conviction because it was not supported by legally sufficient evidence. The Court of Appeals agreed, finding that no reasonable view of the facts could support Hafeez’s conviction for depraved indifference murder because “[t]he ‘heightened recklessness’ required for depraved indifference murder was simply not present.” The facts presented led inescapably to the conclusion that Hafeez’s conduct—along with his co-defendant’s conduct—was intentional.

Judge Rosenblatt hinted in his concurrence that Register could soon be at an end because six Judges of the court recognized that depraved indifference murder had some limit.

The following year, the court decided two major cases dealing with depraved indifference murder. In People v. Gonzalez, the defendant walked into a barber shop, left momentarily, returned, pulled out a gun, “and shot the victim in the chest from a distance of six to seven feet.” While the victim was falling, Gonzalez fired again, striking the victim in the head. He then walked over to the victim and proceeded to shoot him eight more times in the head and back. Gonzalez was indicted for intentional and depraved indifference murder along with several criminal weapon possession

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126 Id. at 1061 (majority opinion).
127 Id.
128 Id. During the investigation, Hafeez revealed to the police that the co-defendant had shown him the weapon earlier in the night while they were waiting for the victim to come outside. Id. It was later revealed that Hafeez and his co-defendant had been in an altercation with the victim at the same bar months earlier where the victim had thrown a pool ball at the co-defendant, injuring his eye. Id.
129 Id. at 1061–62.
130 Id. at 1062.
131 Id.
132 Id. at 1063 (quoting People v. Sanchez, 777 N.E.2d 204, 208 (N.Y. 2002)).
133 Hafeez, 792 N.E.2d at 1063.
134 Id. at 1064 (Rosenblatt, J., concurring).
136 Id. at 274.
137 Id.
138 Id.
The murder charges were submitted to the jury in the alternative; Gonzalez was convicted of depraved indifference murder and acquitted of intentional murder. At the Appellate Division, Fourth Department, Gonzalez's murder conviction was reversed because, in that court's view, "the evidence was legally insufficient to establish depraved indifference" murder.

The Court of Appeals held that "[t]he only reasonable view of the evidence" was that Gonzalez intended to kill the victim: the gun was aimed at the victim, Gonzalez fired ten rounds from a short range, and Gonzalez continued to fire at the victim after he had fallen to the ground. The People proffered two arguments: first, that the jury may have concluded that Gonzalez recklessly fired the first shot “spontaneously or impulsively” and then decided to intentionally shoot the victim nine more times; and second, that Gonzalez “consciously disregard[ed] the risk that if he came across someone he intended to shoot while carrying a gun, he might intentionally shoot that person, or that if he did, that person would die.” The court disagreed. Chief Judge Kaye stated: “a person cannot act both intentionally and recklessly with respect to the same result. The act is either intended or not intended; it cannot simultaneously be both.”

There was no evidence that Gonzalez consciously disregarded the certainty that shooting the victim ten times would result in his death; instead the evidence confirmed that Gonzalez intended to kill his victim.

Then the court indicated—perhaps for the first time since Register—that it was moving towards incorporating depraved indifference into the mens rea of the crime:

When a defendant’s conscious objective is to cause death, the depravity of the circumstances under which the intentional homicide is committed is simply irrelevant. Nor can the

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139 Id. at 275.
140 Id.
141 Id.
142 Id.
143 Id. at 276.
144 Id. (quoting People v. Gallagher, 508 N.E.2d 909, 910 (N.Y. 1987)).
145 Gonzalez, 807 N.E.2d at 276.
146 Id. at 275–76. The court cited several prior cases to support this proposition. Id. at 276; see People v. Roe, 542 N.E.2d 610, 610, 613 (N.Y. 1989) (shooting a shotgun loaded with live and blank ammunition into a person’s chest during a game of “Polish Roulette”); People v. Gomez, 478 N.E.2d 759, 762 (N.Y. 1985) (driving a car down a crowded sidewalk at high speed); People v. Kibbe, 321 N.E.2d 773, 774–75 (N.Y. 1974) (abandoning an intoxicated person on a snowy highway at night); People v. Poplis, 281 N.E.2d 167, 167 (N.Y. 1972) (repeatedly beating a child over several days); People v. Jernatowski, 144 N.E. 497, 498 (N.Y. 1924) (firing a gun into a house where people were known to be).
wanton disregard for human life inherent in every intentional homicide convert such a killing into a reckless one. To rise to the level of depraved indifference, the reckless conduct must be so wanton, so deficient in a moral sense of concern, so devoid of regard of the life or lives of others, and so blameworthy as to warrant the same criminal liability as that which the law imposes upon a person who intentionally causes the death of another.\textsuperscript{147}

The court then affirmed the order of the Appellate Division and ordered that Gonzalez’s motion for a dismissal of the depraved indifference murder count be issued as a matter of law.\textsuperscript{148}

Judge Rosenblatt had his first opportunity to speak for the majority of the court in \textit{People v. Payne}.\textsuperscript{149} Payne was charged with intentional and depraved indifference murder after he confronted the victim—his friend—with a twelve-gauge shotgun and shot him at point blank range.\textsuperscript{150} Judge Rosenblatt began his analysis by declaring that, after the court’s recent decisions, a point-blank shooting cannot “ordinarily” lead to a conviction of depraved indifference murder.\textsuperscript{151} Reiterating the court’s holding in Gonzalez, that the use of a weapon cannot result in a conviction for depraved indifference murder where “there is a manifest intent to kill,” Judge Rosenblatt further stated that “[a]bsent the type of circumstances in, for example, Sanchez (where others were endangered), a one-on-one shooting or knifing (or similar killing) can almost never qualify as depraved indifference murder.”\textsuperscript{152} By saying so, the court purported to narrow the scope of the depraved indifference murder law to those instances which it had historically recognized before Register and its progeny, such as: firing into a crowd, driving at high speeds on a crowded sidewalk, killing an innocent bystander during a gun battle, and crimes against a particular victim which are marked by particular brutality and a depraved indifference to

\textsuperscript{147} \textit{Id.} at 277 (internal quotation marks omitted) (quoting \textit{People v. Russell}, 693 N.E.2d 193, 194–95 (N.Y. 1998)).

\textsuperscript{148} \textit{Gonzalez}, 807 N.E.2d at 277.

\textsuperscript{149} \textit{People v. Payne}, 819 N.E.2d 634 (N.Y. 2004).

\textsuperscript{150} \textit{Id.} at 634–35. Payne had been friends with the victim, Curtis Cook, for almost twenty years prior to the shooting; however, in the year before the shooting Cook had been accused of sexually assaulting a child who happened to be a friend of Payne’s daughter. \textit{Id.} at 635. On the night of the shooting Payne had been drinking at a local bar; when his girlfriend arrived to pick him up she told him that Cook had phoned to complain about his dog. \textit{Id.} This information precipitated the argument that led to the shooting. \textit{Id.}

\textsuperscript{151} \textit{Id.}

\textsuperscript{152} \textit{Id.} at 636, 637 (emphasis added).
the victim’s plight. In practical effect, the court put an end to Register, and for the second time, endorsed a construction of the statute, which incorporated “depraved indifference” into the defendant’s mens rea. Indeed, Judge Rosenblatt’s opinion did not mention the “objective circumstances” a single time. While the court did not expressly overrule Register until People v. Feingold in 2006, the movement started by the three dissenters in Sanchez was essentially complete.

In Feingold, the defendant attempted to commit suicide by blowing out the pilot lights on his stove, turning the gas on, and taking tranquilizers to fall asleep. He had hoped that the gas would kill him; instead, a spark ignited the gas and caused significant damage to nearby apartments, though nobody (including the defendant) was significantly harmed. The defendant was charged with reckless endangerment in the first degree, which contains the same depraved indifference element as depraved indifference murder. At his non-jury trial defendant was convicted of reckless endangerment, even though the court found that his state of mind was not that of depraved indifference, because the court felt it was bound by Register.

After the Appellate Division affirmed, the Court of Appeals made clear that “the law has changed to such an extent that People v. Register and People v. Sanchez should no longer be followed.” In other words, “depraved indifference . . . is a culpable mental state.” Since the fact finder below determined that the defendant did not act with a depraved indifference to human life, the Court of Appeals reversed.

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153 See id. at 236–37.
155 Feingold, 852 N.E.2d at 1164.
156 Id.
157 See id.
158 Id.
159 Id. at 1164, 1167.
160 Id. at 1168.
161 See id. at 1168–69.
II. THE GUTIERREZ CASE

On June 13, 1999, there was a brawl outside Rick’s Crabby Cowboy Café in Montauk, New York. A fight broke out between two different groups of patrons and as it escalated, the fight moved into the parking lot. There, Gutierrez stabbed Narciso Luis Villaplana. He then chased Narciso’s brother, John Villaplana, down a driveway and stabbed him in the chest, leaving two wound tracks. One wound punctured Villaplana’s heart and the other passed through his lung. Villaplana was pronounced dead at 5:06 a.m. in Southampton Hospital.

Subsequent investigation led to Gutierrez being charged with intentional murder in the second degree, depraved indifference murder in the second degree, and assault in the third degree in connection with the stabbings.

At trial Gutierrez’s counsel made a motion to dismiss the depraved indifference murder charge, arguing that the evidence was legally insufficient to support it; however, the trial judge denied the motion. The jury convicted Gutierrez of depraved indifference murder and assault but acquitted him of intentional murder. Thus, Gutierrez was convicted of deprived indifference murder as a result of a one-on-one stabbing. He was sentenced to an indeterminate sentence of twenty-five years to life in prison.

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162 Rick’s is self-described as Montauk’s number-one family restaurant. See Seafood and BBQ on the Water, RICK’S CRABBY COWBOY CAFE, http://www.crabbycowboy.com (last visited June 1, 2014).

163 Gutierrez v. Smith, 692 F.3d 256, 259 (2d Cir. 2012), withdrawn and superseded, 702 F.3d 103 (2d Cir. 2012).

164 Apparently the dispute was between Mexican patrons and Columbian patrons. Brief for Respondent-Appellee, Gutierrez, 692 F.3d 256 (No. 10-4478-cv), 2011 WL 3267697, at *6.

165 Gutierrez, 692 F.3d at 259.

166 Id. Gutierrez gave a written confession recounting the night and wrote that Luis’s stabbing was an accident that occurred when Luis “ran onto his knife.” Id. at 269.

167 Id. at 259. The Second Circuit noted that that import of the two wounds was unclear: “[t]he presence of two wound tracks might be the result of a retraction and reinsertion of the knife, but could also indicate ‘the victim moving back, and then the victim for some reason going forward again.’” Id.

168 Id.

169 Two Brothers Stabbed, One Fatally, Outside Bar, N.Y. TIMES, June 14, 1999, at B4

170 N.Y. PENAL LAW § 125.25(1) (McKinney 2014).

171 Id. § 125.25(2).

172 N.Y. PENAL LAW § 120.00(2) (McKinney 2014) (“A person is guilty of assault in the third degree when: . . . With criminal negligence, he causes physical injury to another person by means of a deadly weapon or a dangerous instrument.”).

173 Gutierrez, 692 F.3d at 259.

174 Id.

175 Id.

176 Id. In New York the sentencing guidelines are outlined in Article 70 of the Penal Law.
A Curious Case of Depraved Indifference Murder

A. State Appeal

Gutierrez exercised his right to appeal his conviction and raised three main points: (1) that he could only have been convicted of intentional murder; (2) that the evidence was legally insufficient to support a conviction of depraved indifference murder; and (3) that the verdict was against the weight of the evidence. The Second Department held that Gutierrez’s legal insufficiency claim was “unpreserved for appellate review” and declined to reach it in the interest of justice. It was also satisfied that Gutierrez’s conviction was not against the weight of the evidence. Gutierrez then sought leave to appeal to the Court of Appeals; however, the court denied his application on June 14, 2005. His conviction became final on September 12, 2005.

Having exhausted his direct appeals, Gutierrez next collaterally attacked his conviction in 2007 through a Criminal Procedure Law (CPL) 440 motion. He renewed his argument that the evidence was legally insufficient to support a conviction of depraved indifference murder; he further argued that based on three recent Court of Appeals decisions—People v. Hafeez, People v. Payne, and Gutierrez v. Smith, 692 F.3d 256, 261 (2d Cir. 2012), withdrawn and superseded, 702 F.3d 103 (2d Cir. 2012); see SUP. CT. R. 13 (“A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.”). People v. Hafeez, 792 N.E.2d 1060, 1061, 1062 (N.Y. 2003) (holding that defendant’s conduct—luring the victim out of a bar so that his co-defendant could attack him—did not constitute depraved indifference murder because defendant’s guilt was premised on an accomplice liability theory and he could not be guilty of depraved indifference murder if he only aided his co-defendant and shared his mental state). People v. Payne, 819 N.E.2d 634, 634–35 (N.Y. 2004) (holding that a point-blank
and People v. Suarez—the evidence “could only have supported a conviction for intentional murder.” His argument was based on the proposition that reviewing courts should apply the law as it exists at the time of appeal, and not as it existed at the time of conviction. Relying on the recent Court of Appeals decision in Policano v. Herbert, however, the trial court denied Gutierrez’s motion. The Second Department affirmed the decision and order of the lower court, but on separate grounds. The court held that Gutierrez was procedurally barred from arguing that the evidence supported only a conviction of intentional murder because that issue should have been raised at trial. Gutierrez was then denied leave to appeal to the Court of Appeals for a second time.

B. Federal Appeal

Prior to the exhaustion of his state appellate claims, Gutierrez filed a petition for a writ of habeas corpus in the Eastern District of New York on September 12, 2006. Gutierrez proffered three shooting did not constitute deprived indifference murder).

185 People v. Suarez, 844 N.E.2d 721, 724 (N.Y. 2005) (holding that two stabbing cases, as a matter of law, did not constitute deprived indifference murder).

186 Gutierrez, 2007 N.Y. Misc. LEXIS 17, at *2.

187 See People v. Pepper, 423 N.E.2d 366, 369 (N.Y. 1981), where the Court of Appeals stated that retroactive application due to a change in the law “has been limited to those still on direct review at the time the change in law occurred.” Id. The court reinforced three guidelines useful in determining whether retroactive application is appropriate: “(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.” Id. at 369 (citation omitted). “The second and third factors are . . . only given substantial weight ‘when the answer to the retroactivity question is not to be found in the purpose of the new rule itself.’ Policano v. Herbert, 859 N.E.2d 484, 495 (N.Y. 2006) (quoting Pepper, 423 N.E.2d at 369).

188 In Policano, the Court of Appeals declared that “[t]he purpose of our new interpretation of ‘under circumstances evincing a deprived indifference to human life’ is to dispel the confusion between intentional and deprived indifference murder, and thus cut off the continuing improper expansion of deprived indifference murder.” Policano, 859 N.E.2d at 495.

189 Gutierrez, 2007 N.Y. Misc. LEXIS 17, at *8–9 (holding that Gutierrez’s motion was “part of a . . . flood of motions that would result if intentional murderers could have their convictions for deprived indifference murder vacated when the law at the time allowed for a conviction under either subsection). By focusing exclusively on the second and third factors, the county court implicitly recognized that the purpose of the new standard was not served by disfavoring retroactivity in this case. See id. at *9.


191 Id.; N.Y. CRIM. PROC. LAw § 440.10(3)(a) (McKinney 2014).

192 People v. Gutierrez, 908 N.Y.S.3d 932 (N.Y. 2009).

193 Gutierrez v. Smith, No. 06-CV-4093 (SJF), 2010 U.S. Dist. LEXIS 102137, at *1 (E.D.N.Y. Sept. 27, 2010). On his request, the proceeding was held in abeyance until his state appellate claims were exhausted. Id. at *6.
main grounds to support his petition: “(1) that the evidence was legally insufficient to support his conviction of depraved indifference murder; (2) that the Appellate Division erred in denying his legal insufficiency claim as unpreserved; [and] (3) that his trial counsel was ineffective for failing to object to the legal insufficiency of the evidence at trial.”

The federal district court analyzed Gutierrez’s claims in light of the “independent and adequate state ground doctrine.” This doctrine precludes a federal court from reviewing “a federal claim rejected by a state court ‘if the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment.’” Further:

[A] federal court may not review a state prisoner’s federal claims if the claims were denied in state court pursuant to an independent and adequate state procedural rule, “unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.”

The court found that all three of Gutierrez’s claims were barred by the independent and adequate state ground doctrine. It then considered whether Gutierrez had demonstrated cause for the procedural default or whether a fundamental miscarriage of justice would occur if his claim were not reviewed.

The court was unpersuaded by Gutierrez’s argument that the cause for his procedural default was “that it would have been futile for his defense counsel to assert a contemporaneous objection to the insufficiency” claim because the depraved indifference murder case law was changing during his trial. Relying on the Second Circuit Court of Appeals decisions in Brown v. Ercole and DiSimone v. Phillips, the court wrote that “as of 2001, New York state courts...
had not consistently rejected claims challenging the legal sufficiency of evidence adduced to support convictions for depraved indifference murder.”  

Because it found Gutierrez had failed to show cause for the procedural default, the court found it unnecessary to consider whether he was prejudiced by the default.

The court next considered whether Gutierrez’s case met the fundamental miscarriages of justice exception. Gutierrez argued that he was actually innocent of the crime he was convicted of—depraved indifference murder—and that it would be a miscarriage of justice to keep him imprisoned for that conviction. However, the exception only applies “where ‘[a] constitutional violation has probably resulted in the conviction of one who is actually innocent.’ ‘Actual innocence means factual innocence, not mere legal insufficiency.’” Because Gutierrez did not assert he was factually innocent—indeed he argued that he intended to kill Villaplana—the court found that the miscarriage of justice exception was not applicable to him. Concluding that all of his claims had procedurally defaulted and were precluded from federal habeas review, the court dismissed his petition in its entirety.

On March 16, 2011, the Second Circuit granted Gutierrez’s “motion for a certificate of appealability with respect to [his] claim that the evidence was legally insufficient to support his conviction for depraved indifference murder in violation of New York Penal Law § 125.25(2).” In the opinion, authored by Judge Guido Calabresi, the court analyzed the evolution of New York’s depraved indifference murder law. It found that in 2001, when Gutierrez was on trial, Register was the controlling law. So, at the time of Gutierrez’s trial, if the jury found his conduct was “reckless” and evinced a depraved indifference to human life through the “objective circumstances,” then there was sufficient evidence to support the conviction.

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204 Id. at *22 n.6.
205 Id. at *23.
206 Id.
207 Id. (quoting Murray v. Carrier, 477 U.S. 478, 496 (1986); Dunham v. Travis, 313 F.3d 724, 730 (2d Cir. 2002)).
209 Id. at *30.
210 Gutierrez v. Smith, 692 F.3d 256, 260 (2d Cir. 2012), withdrawn and superseded, 702 F.3d 103 (2d Cir. 2012) (internal quotation marks omitted).
211 Id. at 258.
212 See id. at 260–62.
213 Id. at 260.
214 See id. at 260 (summarizing Register standard).
But the Second Circuit pointed out a problem: while Register controlled at the time of Gutierrez’s trial, the law changed in 2002 when he was pursuing his direct appeal.\textsuperscript{215} In People v. Sanchez, a split court voted 4-3 to reject the defendant’s argument that his conduct—shooting another man in the chest from a distance of twelve to eighteen inches—was “consistent only with an intentional killing” and thus the conviction could not be sustained for depraved indifference murder.\textsuperscript{216} As mentioned above, the decision is known for its three separate dissents.\textsuperscript{217} While Sanchez appeared to reaffirm Register, the change in New York’s depraved indifference murder law was beginning. After Sanchez, and while Gutierrez was still pursuing his direct appeal, the Court of Appeals decided Hafeez, Gonzalez, and Payne, beginning the move away from the Register holding towards an approach advocated by the dissenters in Sanchez.\textsuperscript{218}

Next, the Second Circuit addressed the district court’s habeas decision. Contrary to the district court, the Second Circuit determined that Gutierrez “adequately demonstrate[d] ‘cause’ for his trial counsel’s failure to lodge a specific objection and ‘prejudice’ from that failure.”\textsuperscript{219} The court distinguished Gutierrez’s case from Brown and DiSimone, where it had previously rejected the “futility” argument:

In both [Brown and DiSimone] we rejected the argument, finding that “cause” could not be established. Indeed, the district court in the instant case, in declining to reach the merits of Gutierrez’s claim, relied on our decision in Brown. But there is a fundamental difference between DiSimone and Brown, on one side, and the case before us, on the other. It is, quite simply, that Gutierrez’s trial occurred in 2001, before Sanchez was decided, while counsel in DiSimone and Brown had the benefit of Sanchez.\textsuperscript{220}

Put differently, in DiSimone the opportunity to make a sufficiency challenge was available on the defendant’s direct appeal; in Brown, the defendant had the benefit of the Sanchez dissents, as well as Hafeez and Gonzalez—two cases that “reversed deprived indifference murder convictions on grounds that subsequently came

\textsuperscript{215} See id. at 260–61.
\textsuperscript{216} People v. Sanchez, 777 N.E.2d 204, 205 (N.Y. 2002).
\textsuperscript{217} See supra text accompanying notes 102–23 (describing each dissenting opinion).
\textsuperscript{218} Gutierrez, 692 F.3d at 261–62.
\textsuperscript{219} Id. at 263.
\textsuperscript{220} Id. at 264.
to reflect New York law on depraved indifference murder.”221 The court also found “prejudice” because of the “significantly higher potential term of imprisonment” attached to depraved indifference murder than some lesser charge, such as manslaughter.222

Because “[t]he change in New York law on depraved indifference murder has created a series of problems for federal courts on habeas review,” and because “the questions these cases raise are ones that are profoundly of New York Law,” the Second Circuit certified two questions to the New York Court of Appeals: “(1) Is the defendant’s conduct in this case sufficient to convict him of depraved indifference murder? (2) Does People v. Payne apply retroactively to defendants convicted of depraved indifference murder when People v. Register still controlled, but whose appeals were still pending when Payne was decided?”223

Chief Judge Dennis Jacobs, concurring in the opinion, argued that the majority opinion relied on Payne’s dictum, rather than its facts, and that it is not entirely clear how the Court of Appeals would address retroactivity with respect to this case.224 In addition to the questions certified by the majority, he suggested two additional questions for consideration by the Court of Appeals:

1. For the circumstances of a crime to evince depraved indifference—as of September 12, 2005, when the defendant’s conviction became final—must the threat and danger to others inhere in the very gesture that inserts the knife or fires the gun point-blank, or is it enough that defendant endangered a group with his weapon, but then singled out for attack, at random, one victim from the threatened group of persons?

2. Does the evolving standard of depraved indifference law, as it existed on the day defendant’s conviction became final, apply retroactively to a defendant who did not preserve an objection to the sufficiency of his depraved indifference murder conviction; or . . . is the retroactive application limited to “cases brought on direct appeal in which the defendant has adequately challenged the sufficiency of the proof as to his depraved indifference murder conviction”?225

221 Id.
222 Id. at 265.
223 Id. at 265, 268.
224 Id. at 270, 273 (Jacobs, C.J., concurring).
225 Id. at 273.
The questions were certified on August 31, 2012. Before the New York Court of Appeals had the opportunity to respond, however, the Second Circuit withdrew its opinion on October 12, 2012, and issued a new decision on December 11, 2012, wherein it revoked the certified questions and held that a “reasonable jury could have found that Gutierrez committed depraved indifference murder.” The same three-judge panel—Jacobs, Calabresi, and Pooler—apparently had second thoughts and decided that Chief Judge Jacobs had been right all along. The panel, again speaking through Judge Calabresi, reiterated that New York’s depraved indifference law was uncertain as it applied to this case; however, it stated that it was inappropriate to certify its questions to the New York Court of Appeals because “the uncertainty is manifested in cases that are profoundly factual.” The Second Circuit’s sudden change of course may signal the end of the road for Omar Guiterrez, but the lack of clarity in New York’s depraved indifference murder law remains. Instead of wading into its uncertain waters, the court may have been able to resolve the habeas issue on procedural grounds.

III. REGISTER AND FEDERAL HABEAS CLAIMS

A. Did Register and the change in New York Law Between 2001–2006 Create Winning Federal Habeas Arguments for Defendants that Defaulted in State Court?

In its first opinion the court found Gutierrez distinguishable from Brown and DiSimone on the grounds that counsel in those cases had the benefit of Sanchez (and additionally Hafeez and Gonzalez in Brown). But what if Sanchez was not the first case to bring the problems created by Register to life? What if lawyers had been on notice of Register’s problems since the day it was decided? What if

227 Gutierrez, 702 F.3d at 116, 118.
228 Compare Gutierrez, 692 F.3d at 271 (Jacobs C.J., concurring), with Gutierrez, 702 F.3d at 114–15 (unanimous opinion).
229 See Gutierrez, 702 F.3d at 117 (citing Exxon Co., U.S.A. v. Banque De Paris, 889 F.2d 674, 676 (5th Cir. 1989); Santasucci v. Gallen, 607 F.2d 527, 529 (1st Cir. 1979); Eley v. Pizza Hut of Am., 500 N.W.2d 61, 64 (Iowa 1993); W. Helicopter Servs., Inc. v. Rogerson Aircraft Corp., 811 P.2d 627, 630 (Or. 1991)). By declining to certify, the Second Circuit also indicated that it was trying to avoid a slippery slope: “[I]f we were to certify in this case we would feel pressed to certify every time an appeal of a depraved indifference murder conviction presented a somewhat different factual scenario.” Gutierrez, 702 F.3d at 118.
230 Gutierrez, 692 F.3d at 264.
apellate courts in New York had not, to quote DiSimone, “consistently rejected the [legal] insufficiency claim”? Could Gutierrez’s habeas claim be procedurally barred, even in the absence of Sanchez and subsequent depraved indifference murder cases? I address these questions here.

1. Federal Habeas Review of State Court Defaults

“Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate . . . ‘cause’ and actual ‘prejudice,’ . . . .” In Bousley, the Court discussed two instances in which a defendant can demonstrate cause for a procedural default in state court: 1) where the claim “is so novel that its legal basis is not reasonably available to counsel,” and 2) where making the claim would have been futile.

In Ross, the defendant was convicted of murder in North Carolina in March of 1969 and sentenced to life imprisonment. At that time, North Carolina law placed the burden on defendants to prove lack of malice, which Ross asserted at trial. In 1975, the Court held in Mullaney v. Wilbur that it was an unconstitutional violation of due process to require a defendant to prove he lacked malice. Two years later the Court held that Mullaney applied retroactively. Armed with these new cases, Ross sought post-conviction relief in state court. After having his claims

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232 Bousley v. United States, 523 U.S. 614, 622 (1998) (quoting Murray v. Carrier, 477 U.S. 478, 485 (1986)) (citing Wainwright v. Sykes, 433 U.S. 72, 87 (1977)); see generally Wainwright, 433 U.S. at 87–91 (discussing the “cause” and “prejudice” requirement in the context of state contemporaneous objection rules). Alternatively, a defendant can seek habeas on the ground that they are “actually innocent.” Bousley, 523 U.S. at 622 (internal quotation marks omitted) (quoting Murray, 477 U.S. at 496 (citing Smith v. Murray, 477 U.S. 527, 537 (1986)). Typically, a showing that the defendant was convicted under the wrong statute will not suffice because “actual innocence’ means factual innocence, not mere legal insufficiency.” Bousley, 523 U.S. at 623–24 (citing Sawyer v. Whiteley, 505 U.S. 333, 339 (1992)). Since the panel in Gutierrez found that Gutierrez demonstrated “cause” and “prejudice” it did not need to decide whether he was “actually innocent.” See Gutierrez, 702 F.3d at 111. The panel assumed that an actual innocence argument would fail, most likely because Gutierrez’s argument was not one of factual innocence, but rather one of legal insufficiency. Id. at 111 n.4.
233 Bousley, 523 U.S. at 622–23 (quoting Reed v. Ross, 468 U.S. 1, 16 (1984)).
234 Ross, 468 U.S. at 3.
235 Id.
237 Id. at 703.
239 Ross, 468 U.S. at 7.
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summarily rejected, Ross filed a habeas petition in federal district court. The case came before the Supreme Court, where the Court considered whether Ross had demonstrated “cause” for his procedural default.

More specifically, the question for the Court was whether Ross demonstrated cause for his failure to raise the Mullaney issue on his direct appeal. Setting the standard for cause as “where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures,” the Court found that Ross had demonstrated cause for his default. Notably, the Court observed that at the time of Ross’s direct appeal its own precedent allowed States to impose the burden of proof of many affirmative defenses on the defendant, and that North Carolina law had required defendant’s to bear the burden of proving lack of malice for over one hundred years.

In Engle v. Isaac, a change in Ohio law that removed the burden of proving self-defense from the defendant caused the respondents to seek habeas relief. The Sixth Circuit found respondents' futility claim established cause because at the time of their trials, “Ohio had consistently required defendants to prove affirmative defenses by a preponderance of the evidence.” However, the Court reversed because respondents failed to comply with Ohio’s contemporaneous objection rule. The Court found respondents' futility argument (i.e., that it would have been futile to object to the allegedly unconstitutional jury instruction because Ohio courts had previously rejected it) unpersuasive because all respondents could show was that Ohio courts had previously been unsympathetic to the argument. The Court stated that “futility cannot constitute cause if it means simply that a claim was ‘unacceptable to that particular court at that particular time.’” Thus, Engel would appear to require a defendant to press an

240 Id. at 7–8.
241 Id. at 8.
242 Id. at 12.
243 Id. at 16–19.
244 Id. at 18.
246 Id. at 110–11.
247 Id. at 118.
248 Id. at 134.
249 Id. at 130.
250 Id. at 130 n.35 (quoting Myers v. Washington, 646 F.2d 355, 364 (9th Cir. 1981) (Poole, J., dissenting), vacated, 456 U.S. 921 (1982)).
argument on appeal in state court knowing full well that precedent required dismissal of the argument. As the Court more fully explained in Smith v. Murray:

[[I]t is the very prospect that a state court “may decide, upon reflection, that the contention is valid” that undergirds the established rule that “perceived futility alone cannot constitute cause,” for “[a]llowing criminal defendants to deprive state courts of [the] opportunity” to reconsider previously rejected constitutional claims is fundamentally at odds with the principles of comity that animate Sykes and its progeny.\[252\]

Although this language could be accused of being overbroad, the Second Circuit has never carried it to its logical extreme.\[253\] Indeed, the court reiterated in DiSimone, “[w]e have held that it is futile to require exhaustion where prior state case law has consistently rejected a particular constitutional claim.”\[254\]

2. Did Register Create Winning Arguments for Defendants that Defaulted in State Court?

As noted above, Register did not announce an abrogation of the longstanding principle in New York law that a manifestly intentional killing cannot simultaneously constitute depraved indifference murder.\[255\] Indeed, subsequent to Register the Court of Appeals noted in Gallagher that intentional and depraved indifference murder “are inconsistent counts as defined in CPL 300.30(5), because guilt of one necessarily negates guilt of the other.”\[256\] An act “is either intended or not intended; it cannot simultaneously be both.”\[257\] Several reported Appellate Division cases addressed and affirmed this conclusion post-Register.\[258\]
Register itself dealt primarily with the defense of intoxication, and concluded that intoxication cannot excuse recklessness when recklessness is an element of the crime. Thus, Gutierrez's argument that he was acting only intentionally and, therefore, could not be guilty of depraved indifference murder, was not "so novel that its legal basis [was] not reasonably available to counsel."260 Likewise, the Second Circuit could have concluded that it would not have been futile for Gutierrez's trial counsel to specifically move to dismiss the depraved indifference murder count at the end of trial.261 The problems created by Register were not hidden prior to 2002 only to suddenly come to the attention of the bench and bar after the dissents in Sanchez. Indeed, Judge Jasen predicted serious troubles with the majority opinion in his Register dissent,262 and those views were further elaborated on by Judge Bellacosa in his Roe dissent.263 In DiSimone the Second Circuit found the defendants futility argument without merit “because the New York state courts had not consistently rejected the insufficiency claim” that depraved indifference could not be proved in circumstances demonstrating intentional murder.264 Although important, the court did not indicate that Sanchez was essential to its decision to reject DiSimone’s futility claim.265

The Gutierrez panel seems to have overlooked that statement from DiSimone when it relied on the fact that Gutierrez’s trial occurred in 2001—before Sanchez was decided—when Register was still the law, to conclude that a legal insufficiency objection by Gutierrez’s counsel at trial would have been futile.266 While Register didn’t make Gutierrez’s claim any easier, its definition of depraved indifference murder and subsequent application by New York courts, does not equate to a rejection of the claim. Indeed, such a conclusion would run afoul of Supreme Court precedent holding that “futility cannot constitute cause if it means simply that a claim was ‘unacceptable to that particular court at that particular

259 See supra notes 53–60 and accompanying text.
261 A specific motion would have preserved the issue for appellate review. See N.Y. CRIM. PROC. LAW § 470.05(2) (McKinney 2014).
262 See supra text accompanying notes 62–78.
263 See supra text accompanying notes 90–93.
265 See id.
Thus, it appears that there may be some inconsistency in the Gutierrez and DiSimone opinions. Nonetheless, it is hard to see how the Sanchez dissents suddenly put Gutierrez on notice of an argument already raised in both the Register and Roe dissents. If Gutierrez (and other habeas petitioners like him) thought that the evidence allowed only for the conclusion that his conduct was intentional, then he should have made a specific motion at trial to dismiss the depraved indifference murder count of the indictment. Because the argument was available in the case reporters long before Gutierrez’s trial, the Second Circuit could have disposed of the case (and those similar to it) on procedural grounds. Instead, the court addressed the merits of Gutierrez’s claim, which requires a separate analysis under federal law.

### B. Federal Legal Insufficiency Standard

Federal habeas corpus claims of legal insufficiency are subject to a near-impossible standard of review. Petitioners are required to show that, “after viewing the evidence in the light most favorable to the prosecution, [no] rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”

While a reviewing federal appellate court must resolve all inferences in the prosecution’s favor, it must also “look to state law to determine the elements of the crime.”

The Second Circuit set out the definition of depraved indifference murder and looked to Hafeez, Gonzalez, and Payne—the cases Gutierrez proffered for his contention that his conduct was, by definition, intentional.

### C. Second Circuit’s Merits Analysis

Gutierrez argued that substance of those cases leads inescapably

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271 Gutierrez did not rely on Suarez as that case was decided on December 22, 2005, see People v. Suarez, 844 N.E.2d 721, 721 (N.Y. 2005), three months and ten days after his conviction became final. See supra note 160 and accompanying text.
to the conclusion that a one-on-one knifing is “categorically intentional”; therefore, he acted intentionally and did not possess the mens rea sufficient to sustain a conviction for depraved indifference murder.\textsuperscript{272} To the contrary, the court determined that those three decisions merely “establish[ed] that an intentional murder could not be done recklessly[,]” and went on to further distinguish Gutierrez from those cases.\textsuperscript{273} First, the court identified one distinguishing characteristic between the present case and those three cases: in each of them the defendant had some prior relationship or personal disagreement with the victim.\textsuperscript{274} No evidence indicated a past relationship or prior disagreement between Villaplana and Gutierrez.\textsuperscript{275} Second, the court found the case was similar to Roe because, “although [Roe] used a weapon, he recklessly risked the victim’s death without intending to kill.”\textsuperscript{276} Essentially, the court used Roe to support its conclusion that a jury could have found Gutierrez had acted recklessly—that is, that he wielded the knife “haphazardly” without intending to kill and was simply indifferent to his victim’s life.\textsuperscript{277} Third, the court identified the fact that Gutierrez left the scene while Villaplana was still standing as allowing for the inference that an intentional killer might have remained until he was certain that Villaplana was dead.\textsuperscript{278} The impact of the distinctions is subject to debate. For instance, whether Gutierrez, Hafeez, Gonzalez, or Payne had a prior relationship with their victims makes no difference for purposes of the second degree intentional murder statute in New York’s Penal

\begin{footnotes}
\footnotetext[272]{Gutierrez, 702 F.3d at 115.}
\footnotetext[273]{Id. at 114. This is a sufficient departure from the court’s prior opinion where it stated that it was “not sure” how New York would view the facts of the case in light of those three opinions. Gutierrez v. Smith, 692 F.3d 256, 266 (2d Cir. 2012), withdrawn and superseded, 702 F.3d 103 (2d Cir. 2012).}
\footnotetext[274]{Gutierrez, 702 F.3d at 114. The court focused on the fact that the defendant’s “co-defendant had ‘plotted his revenge for months in advance and . . . [schemed] to place the victim in a position where he would be vulnerable to attack.’” Id. at 113–14 (quoting People v. Hafeez, 792 N.E.2d 1060, 1063 (N.Y. 2003)). Of Gonzalez, the court said: “the defendant saw his victim, a man with whom he had a longstanding dispute, in a barber shop. He briefly left the shop, and then returned to shoot the victim ten times.” Gutierrez, 702 F.3d at 114 (citing People v. Gonzalez, 807 N.E.2d 273, 274 (N.Y. 2004)). In Payne, the court noted that the defendant was angry with his neighbor—the victim—and walked over to his home and shot him in the chest with a shotgun. Gutierrez, 702 F.3d at 114 (citing People v. Payne, 819 N.E.2d 634, 635 (N.Y. 2004)).}
\footnotetext[275]{Gutierrez, 702 F.3d at 114.}
\footnotetext[276]{Id.}
\footnotetext[277]{Id.}
\footnotetext[278]{Id. at 115.}
\end{footnotes}
Law. Intent, as it is defined in the Penal Law, does not turn on evidence of past feud or personal disagreement; put simply, that element is satisfied when a “person’s conscious objective or purpose is to cause the death of another.” It does not matter precisely when that intent is formed, so long as it is formed before the crime occurs. Past relationship or disagreement may be useful in determining the actor’s subjective intent, or may be strong evidence of it, but these facts are not necessary.

The court’s comparison of Gutierrez and Roe is likewise inapt. As discussed above, Roe involved a game of “Polish roulette” where the defendant possessed a shotgun loaded with live ammunition and dummy shells. Roe pumped a shell into the chamber, aimed at his victim, and fired without knowing whether he was discharging a live or dummy shell. Because the defendant was oblivious to the type of shell loaded into the chamber, his actions were inconsistent with intentional murder and the court properly found that he was guilty of depraved indifference murder. The same cannot be said of the Gutierrez case. The Second Circuit seemed to think that the jury could place this case into the same category as Roe: because Gutierrez testified that he accidentally stabbed the first victim, a reasonable jury could have concluded that he also stabbed John Villaplana recklessly. But Gutierrez brandished a knife—knowing its capability to inflict a fatal blow—and chased his victim down a driveway before stabbing him in the chest. Whether Gutierrez or Villaplana moved after the stabbing does not affect Gutierrez’s intent in effectuating the stab. Even if Gutierrez acted recklessly with respect to the first victim, it does not necessarily follow that he had the same mens rea with respect to Villaplana.

279 Payne, 819 N.E.2d at 636 (“[I]ntentional murder does not require planning or contrivance.”); see N.Y. PENAL LAW § 125.25(1) (McKinney 2014); William C. Donnino, Practice Commentaries, in N.Y. PENAL LAW § 125.00 (McKinney 2014).

280 Donnino, supra note 279 (citation omitted). Intent can be inferred from the circumstances surrounding the murder. See, e.g., People v. Ross, 704 N.Y.S.2d 560, 560 (App. Div. 1st Dep’t 2000), appeal denied, 733 N.E.2d 243, 243 (N.Y. 2000) (“Defendant’s intent to kill could be reasonably inferred from his conduct, including his infliction of two deep stab wounds in the vicinity of vital organs causing life-threatening injuries.”).


282 Id.

283 Id. at 614.


285 Indeed, as the court noted, Gutierrez bragged that he was “happy that he had used his knife” that night. Id. at 115.

286 Id. at 106.

Finally, the fact that Gutierrez fled the scene without ensuring that Villaplana was dead, in and of itself, does not command the conclusion that his mental state was less than intentional.\(^{288}\) The law does not require, as a condition of conviction, that the murderer remain at the scene after the deadly deed is done. Whether Gutierrez remained or left has no bearing on whether he intended the act. Again, the question is whether he intended the stabbing. As a factual matter, this is exactly the kind of one-on-one killing the Court of Appeals discussed in Payne—that is, the kind that can almost never constitute depraved indifference murder. The mere fact that Gutierrez fled is insufficient to support the theory that he acted with a “depraved indifference” to Villaplana’s life under the depraved indifference murder statute.\(^{289}\)

Without these factual distinctions, the court’s decision loses some of its persuasive force. The court acknowledged that it would “be less than candid” if it did not recognize that New York law after Hafeez, Gonzalez, and Payne could be read to preclude a depraved indifference murder in this case.\(^{290}\) Although the court spoke in terms of a “categorically intentional” rule for one-on-one murders\(^{291}\) that is not necessarily what it would have to decide. The Gutierrez case is different because it does not fit within the two historical one-on-one depraved indifference murder categories discussed in Suarez.\(^{292}\) Therefore, it does not seem to matter whether a

\(^{288}\) Cf. People v. Suarez, 844 N.E.2d 721, 727 (N.Y. 2005) (per curiam) (“Irrespective of what the actor does or does not do after inflicting the fatal injury, depraved indifference murder is not made out unless the core statutory requirement of depraved indifference is established.”).

\(^{289}\) If I am incorrect on this point then it is hard to see how depraved indifference murder does not swallow the remainder of the second degree murder statute. Every time a defendant leaves the scene without confirming the victim’s death would constitute “depraved indifference” and lead to more, unnecessary, twin-count murder indictments. Such a theory violates Suarez’s general statement that just because every killing itself can “in a sense, be considered a ‘depraved’ act does not . . . turn every killing into depraved indifference murder as proscribed by the Penal Law.” Id. at 726.

\(^{290}\) See Suarez, 844 N.E.2d at 729. In Suarez, the Court of Appeals stated that “[w]here comparable facts are not shown . . . a jury is foreclosed, as a matter of law, from considering a depraved indifference murder charge whenever death is the result of a one-on-one confrontation.” Id. at 730 (emphasis added). As to third persons, the court said: “the mere presence of third persons at the scene of a killing does not convert an intentional homicide directed at a particular victim into depraved indifference murder unless others are actually endangered.” Id. at 730 n.7.
reasonable juror could have reasonably made all of the inferences detailed by the court if the state of the law was such that, given the facts and those inferences, the defendant’s conduct could not have satisfied the requirements for depraved indifference murder under the Court of Appeals’ construction of the statute.

IV. CONCLUSION

While the Second Circuit may have reached a just result, in that Gutierrez deserves to be punished for his actions, it did not necessarily have to reach the merits to do so. Instead, it could have simply disposed of Gutierrez’s petition on procedural grounds because it would not have been futile or novel for Gutierrez’s counsel to make a specific objection to the depraved indifference murder count of the indictment during his post-trial motion to dismiss. Although this case represents a situation where a defendant attempted to use the confusion in New York’s depraved indifference murder law from 2002 to 2006 to his advantage, it does not appear that Register and its progeny created winning habeas arguments. In situations where depraved indifference murder defendants attempt to use Register as an excuse for failing to comply with New York’s contemporaneous objection rule, federal habeas courts should look to dispose of the cases on procedural grounds, rather than delve into Register’s murky waters.