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THE CRIME THAT WASN'T THERE: WYOMING'S ELUSIVE SECOND-DEGREE MURDER STATUTE

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I. INTRODUCTION

Under current Wyoming case law, second-degree murder has two mental components. First, the defendant must intend to perform the act that causes the other person's death, though he need not intend to cause the death itself.¹ Second, the defendant must perform this act either with "hatred, ill will, or hostility" or "without legal justification or excuse."² This definition of second-degree murder is largely a product of the Wyoming Supreme Court's 1986 decision in *Crozier v. State*.³ The *Crozier* decision has been criticized for having "enlarged the

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¹ *Butcher v. State*, 2005 WY 146, ¶ 20, 123 P.3d 543, 550 (Wyo. 2005); see also WYOMING CRIMINAL PATTERN JURY INSTRUCTIONS (CRIMINAL) § 21.04 (2004).

² *Id.* at ¶ 24, 123 P.3d at 550-51 (concluding that the definition of malice from *Keats v. State*, 2003 WY 19, ¶¶ 16-33, 64 P.3d 104, 109-14 (Wyo. 2003), applies to second-degree murder). Wyoming's current pattern jury instructions on second-degree murder provide that a person commits the offense if he or she "purposely" and "maliciously" kills a human being, WYOMING PATTERN JURY INSTRUCTIONS (CRIMINAL) § 21.04 (2004). The pattern instructions also define the two critical terms:

"Purposely" means that the act which caused the death was intentionally done.

"Maliciously" means the state of mind in which an intentional act is done without legal justification or excuse. The term "maliciously" conveys the meaning of hatred, ill will, or hostility toward another.

Id. § 21.04B.

³ *Crozier v. State*, 723 P.2d 42 (Wyo. 1986).

reach of second-degree murder, transferring some killings from the category of manslaughter to that of second-degree murder.”⁴ The real trouble with *Crozier*, though, is not that it remade the law of second-degree murder, but that it remade it so badly.

Neither of the two mental components of the current definition of second-degree murder has any real content. An “intentional act” is an element of *every* criminal offense, including, for example, reckless manslaughter and negligent homicide.⁵ So the requirement of an “intentional act” cannot serve to distinguish second-degree murder from either of these lesser forms of homicide, nor can it serve even to distinguish it from innocent conduct. Further, the current definition of malice—which requires the state merely to prove *either* that the defendant acted “without legal justification or excuse” *or* that the defendant acted with “hatred, ill will, or hostility”⁶—is a throwback to the unhappy days when judges used the word “malice” in “the old vague sense of ‘wickedness in general.’”⁷

These defects in the existing definition of second-degree murder are more than theoretical. They made themselves felt, for example, in *Lopez v. State*,⁸ where a jury convicted the defendant of second-degree murder on evidence that he had caused the victim’s death by “slapp[ing him] on the head with an open hand and push[ing] him back down onto a couch.”⁹ The slap caused the victim’s death only because the victim “had numerous health problems that made him susceptible to death by the slap,” including “veins so fragile they could easily rupture from sudden movement.”¹⁰ But it could hardly be disputed either that the slap was an “intentional act” or that the slap was delivered with “hatred, ill will, or hostility,” and so the jury convicted Lopez. The Wyoming Supreme Court reversed the conviction on the ground that “the evidence is insufficient as a matter of law that Lopez acted maliciously.”¹¹ The court’s holding, though, was limited to its facts; the court did not reformulate its general definition of “malice” to make the definition inapplicable to cases like Lopez’s. After *Lopez*, as before, the state is

⁴Theodore Lauer, *The Wyoming Criminal Code Revisited: Reflections After Fifteen Years*, 33 LAND & WATER L. REV. 523, 553 (1998).

⁵ See Michael Corrado, *Is There An Act Requirement In The Criminal Law?*, 142 U. PA. L. REV. 1529, 1560 (1994).

⁶ *Butcher*, 2005 WY 146, ¶ 24, 123 P.3d at 550-51 (explaining that trial court erred in requiring state to prove *both* of these alternatives at Butcher’s trial).

⁷ *Regina v. Cunningham*, 41 Crim. App. 155, 2 Q.B. 396, 399, 2 All Eng. Rep. 412 (1957).

⁸ *Lopez v. State*, 2004 WY 28, 86 P.3d 851 (Wyo. 2004).

⁹ *Id.* at 855.

¹⁰ *Id.* at 856.

¹¹ *Id.* at 859.

required merely to prove that the defendant acted either with “hatred, ill will, or hostility” toward another person or “without legal justification or excuse.”¹²

The intuitions underlying the court’s decision in *Lopez* are right. The existing definition of second-degree murder is wrong. The purpose of this Article is to identify the confusions that lie behind the Wyoming Supreme Court’s current definition of second-degree murder and to formulate an alternative definition that captures the intuitions underlying the court’s decision in *Lopez*. I will begin with a brief summary of the historical background of Wyoming’s second-degree murder statute and a brief summary of the *Crozier* decision. Then I will argue, first, that an intentional act is an element of every criminal offense; second, that the word “maliciously,” as used in the second-degree murder statute, should be reinterpreted to require something akin to a “depraved heart” or extreme recklessness; third, that in formulating its current definition of second-degree murder, the Wyoming Supreme Court understandably fell victim, as many other courts have also, to confusion engendered by the terms “general intent” and “specific intent.”

II. HISTORICAL BACKGROUND

A. A brief history of the statute’s language

Wyoming’s 1983 revised criminal code defines second-degree murder as a killing committed “purposely and maliciously, but without premeditation.”¹³ The wording of this definition has deep historical roots. Wyoming’s territorial criminal code, which was enacted by the Council and House of Representatives of the Wyoming Territory in 1869, provided that “[a]ny person who shall *purposely and maliciously*, but without premeditation, kill another . . . shall be deemed guilty of second-degree murder.”¹⁴ This early Wyoming provision was based, in turn, on an Ohio statute originally enacted in 1815.¹⁵ The Ohio statute defined second-degree murder as a killing committed “*purposely and maliciously*, but without deliberate and premeditated malice.”¹⁶

¹² *Butcher*, 2005 WY 146, ¶ 24, 123 P.3d at 550-51.

¹³ WYO. STAT. ANN. § 6-2-104 (LexisNexis 2005).

¹⁴ 1876 COMPILED LAWS OF WYOMING, ch. 35, § 16 (emphasis added).

¹⁵ Act of Jan. 27, 1815, ch. 28, § 2, 1814-1815 Ohio Acts. This influential Ohio formulation eventually was adopted not only in Wyoming but also in Indiana, Nebraska, and Washington. See Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 154-55 (2004).

¹⁶ *Id.* (emphasis added).

In cases predating the enactment of Wyoming's territorial criminal code, the Ohio courts interpreted this language to require proof that the defendant intended to cause the death of another person; to require, as the Model Penal Code now puts it, that the death of the other person was the defendant's "conscious object."¹⁷ In its 1857 decision in *Fouts v. State*, for example, the Ohio Supreme Court reversed a defendant's conviction for second-degree murder on the ground that the indictment was "insufficient for want of a positive and direct averment of a purpose or intention to kill, in the description of the offense."¹⁸ In concluding that "purpose or intent to kill" was an essential element of second-degree murder, the court relied on decisions dating back to 1831.¹⁹ "This interpretation of the statute," said the court, "has been consistently followed as the settled law of Ohio for the last twenty-five years."²⁰

Early Wyoming decisions interpreting Wyoming's second-degree murder statute likewise required proof of intent to kill.²¹ For example, in its 1899 decision in *Ross v. State*,²² the Wyoming Supreme Court said that murder committed with "a distinctly formed intention to kill, not in self-defense, and without adequate provocation,"²³ is "only murder in the second degree, which must be done purposely and maliciously; that is, it must be done with the intent to kill, and with malice, or else it is not even murder in the second degree."²⁴ In 1916, the court reiterated that a homicide in which "the intention to kill was present in the mind of defendant at the time the act was committed . . . under our statute would constitute murder in the second degree."²⁵

¹⁷ MODEL PENAL CODE § 2.02(2)(a) (1985) (defining "purposely" to require that it be the actor's "conscious object . . . to cause [the proscribed] result").

¹⁸ *Fouts v. State*, 8 Ohio St. 98, 112, 122-23 (Ohio. 1857); see also *Robbins v. State*, 8 Ohio St. 131 (Ohio 1857).

¹⁹ *Fouts*, 8 Ohio St. at 111-12 (citing, e.g., Wright's Rep. 27 (1831) (holding that "[m]alice and a design to kill, are essential ingredients of the crime of murder, in either degree")).

²⁰ *Id.* at 112.

²¹ It would have been natural for the Wyoming courts to conclude that Wyoming's territorial legislature had been aware of the settled interpretation of Ohio's second-degree murder statute when it adopted that statute verbatim as part of the territory's new criminal code. And thus it would have been only logical for the court to assume that the territorial legislature meant to adopt not only the Ohio statute but also "the construction placed thereon by the courts of the state." *Jordan v. Natrona Lumber Co.*, 75 P.2d 378, 413 (Wyo. 1928) (holding that a statute borrowed by Wyoming from another state will be presumed to have been adopted with the construction placed upon it by the courts of that state).

²² *Ross v. State*, 8 Wyo. 351, 57 P. 924 (Wyo. 1899).

²³ *Id.* at 384-85, 57 P. at 932.

²⁴ *Id.* at 385, 57 P. at 932.

²⁵ *Parker v. State*, 24 Wyo. 491, 161 P. 552 (Wyo. 1916).

This interpretation of the statute appears to have persisted well into the latter half of the twentieth century. In the Wyoming Supreme Court's 1942 decision in *Eagan v. State*,²⁶ for example, Justice Blume said of a jury instruction challenged by the defendant that "it was correct in telling the jury that they should not convict of murder in the first or second degree, unless it was committed 'intentionally, and with the purpose of killing.'"²⁷ Likewise in *Cullen v. State*,²⁸ the court approved a jury instruction that required the state to prove, "beyond a reasonable doubt, that [the defendant] intended to kill the deceased."²⁹ In 1979's *Goodman v. State*,³⁰ the court explicitly approved jury instructions that required the state to prove "the essential element of intention to kill" as an element of second-degree murder, saying: "These instructions are correct and complete in their statement of the pertinent law."³¹

This was how things stood when the Wyoming Legislature, in the early 1980's, undertook the task of revising and modernizing Wyoming's criminal code. In 1981, the criminal code revision subcommittee of the Joint Judiciary Interim Committee proposed a first draft of the revised code, which would have combined first- and second-degree murder into one offense.³² As the Wyoming Supreme Court later would explain, this first draft came in for heavy criticism on the ground that "the draft, if enacted, would destroy 90 years of Wyoming case law in the area of homicide."³³ In response to this criticism, the criminal code revision subcommittee, and the legislature as a whole, chose ultimately "to retain the existing second-degree murder statute without change."³⁴

This re-enactment of the existing second-degree murder statute might have been perceived as placing a kind of legislative *imprimatur* on the Wyoming Supreme Court's existing interpretation of the statute. After all, in the ordinary case where a statute has been construed by a court of last resort and has subsequently been re-enacted in the same or substantially the same terms, the legislature is presumed to have been familiar with its construction and to have adopted that construc-

²⁶ *Eagan v. State*, 58 Wyo. 167, 128 P.2d 215 (Wyo. 1942).

²⁷ *Id.* at 222.

²⁸ *Cullen v. State*, 565 P.2d 445 (Wyo. 1977).

²⁹ *Id.* at 452 (holding that "all the instructions taken together do not relieve the State of proving intent beyond a reasonable doubt as an essential element of second degree murder, as contended by defendant"). The court also said in *Cullen*: "There is no question but what intent is a necessary element of the crime of second-degree murder, a showing that the killing was done purposely and maliciously without premeditation." *Id.* at 451.

³⁰ *Goodman v. State*, 601 P.2d 178 (Wyo. 1979).

³¹ *Id.* at 186, 187.

³² See *Crozier v. State*, 723 P.2d 42, 51 (Wyo. 1986) (recounting criminal code revision process).

³³ *Id.*

³⁴ *Id.*

tion as part of the law, unless a contrary intent clearly appears.³⁵ With respect to Wyoming's second-degree murder statute, of course, it is not really necessary to "presume" the legislature's familiarity with and approval of the existing law; as the Wyoming Supreme Court itself has acknowledged, the decision to re-enact the existing language was driven at least in part by the legislature's expressed desire to retain "90 years of Wyoming case law in the area of homicide."³⁶ One might have expected, then, that the Wyoming Supreme Court's prior decisions interpreting the second-degree murder statute would assume the status of "super-precedents" in the wake of the 1983 criminal code revision.

That is not how things turned out, however. In 1986, just three years after the Wyoming Legislature's adoption of the revised criminal code, the Wyoming Supreme Court jettisoned its longstanding interpretation of the second-degree murder statute. The occasion for re-evaluation of the court's precedents came in *Crozier v. State*.³⁷

B. Crozier v. State

The principal issue in *Crozier* was whether the trial court had erred in instructing the jury that voluntary intoxication was not a defense to second-degree murder.³⁸ Defendant Dennis Crozier had been charged with first-degree murder after he strangled a six-year-old boy. At his trial, he introduced evidence that he had drank an entire bottle of brandy on the night of the murder. Over Crozier's objection, the trial judge instructed the jury that voluntary intoxication was a defense to first-degree murder but not to the lesser included charges of second-degree murder and manslaughter.³⁹ After the jury returned a verdict of guilty of second-degree murder, Crozier appealed his conviction, arguing in part that voluntary intoxication was a defense to second-degree murder. The Wyoming Supreme Court rejected this claim.

The court started with the principle "that in Wyoming intoxication may negate the existence of a specific-intent element of a specific-intent crime but is not a factor affecting a general-intent crime."⁴⁰ The court defined a "general-intent crime" as a crime whose statutory definition does not require proof of

³⁵ *Carpenter & Carpenter v. Kingham*, 56 Wyo. 350, 109 P.2d 463 (Wyo. 1941).

³⁶ *Id.*

³⁷ *Crozier*, 723 P.2d 42.

³⁸ *Id.* at 51.

³⁹ *Id.*; see also WYO. STAT. ANN. § 6-1-202(a) (LexisNexis 2005) ("Self-induced intoxication of the defendant is not a defense to a criminal charge except to the extent that in any prosecution evidence of self-induced intoxication of the defendant may be offered when it is relevant to negate the existence of a specific intent which is an element of the crime.").

⁴⁰ *Id.*

“intent” beyond the intent “to do the proscribed act;”⁴¹ in other words, a crime is a “general-intent crime” if the statute requires only “that the prohibited conduct . . . be undertaken voluntarily.”⁴² And the court defined a “specific-intent crime” as a crime whose statutory definition requires proof of the “intent to do a further act or achieve a future consequence.”⁴³ After articulating these two definitions, the court set out to determine whether second-degree murder was a “specific-intent crime” or a “general-intent crime.” It examined in turn the statute’s two ostensibly-mental elements: “maliciously” and “purposely.”

The court concluded that the element of “malice” was a general-intent element describing “the act to be committed and not an intention to produce a desired specific result.”⁴⁴ The court made little effort to give the element of “malice” any definite content. It did, however, quote a North Carolina decision where malice had been defined very broadly as “any act evidencing wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief.”⁴⁵ According to the quoted portion of the North Carolina decision, malice is present where a defendant voluntarily performs an act that satisfies this broad definition, regardless of whether his actions are accompanied by any other intent.⁴⁶ “Malice” therefore is a form of “general intent,” not “specific intent.”⁴⁷

The court reached the same conclusion with respect to the requirement that the defendant kill “purposely.” This conclusion obviously was at odds with the court’s longstanding interpretation of the second-degree murder statute; after all, an “intent to kill” plainly is an “intent to . . . achieve a future consequence.”⁴⁸ In order to reach the conclusion that “purposely” did not refer to a specific-intent element, then, the court was required to abandon its existing interpretation of “purposely.” In place of its earlier view that the word “purposely” denotes intent to kill, the court adopted the view that the word “purposely” merely denotes an intent to perform the physical act that causes the victim’s death.⁴⁹ “The word ‘purposely’ as used in the second-degree murder statute describes the act to be committed and not an intention to produce a desired, specific result.”⁵⁰ In adopting this view, the court relied on cases interpreting the word “willfully” and on out-of-state cases.⁵¹ It said nothing about those prior cases where it had held that

⁴¹ *Id.* at 52 (quoting *Dean v. State*, 668 P.2d 639, 642 (Wyo. 1983)).

⁴² *Id.*

⁴³ *Id.* at 53 (quoting *Dorador v. State*, 573 P.2d 839, 843 (Wyo. 1978)).

⁴⁴ *Crozier*, 723 P.2d at 53 (quoting *Dean*, 668 P.2d at 642).

⁴⁵ *Id.* (quoting *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905, 917 (1978)).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 52 (defining “specific intent”) (internal citation omitted).

⁴⁹ *Id.* at 54.

⁵⁰ *Crozier*, 723 P.2d at 54.

⁵¹ *Id.* at 54-56.

second-degree murder “must be done with the intent to kill, and with malice.”⁵² Having determined that neither the word “maliciously” nor the word “purposely” denotes a “specific intent,” the court concluded that the trial court had been correct in instructing the jury not to consider Crozier’s intoxication in deciding whether he was guilty of second-degree murder.

Little has changed in the intervening years. The court has continued to emphasize that the word “purposely,” as used in the second-degree murder statute, requires the state to prove only that the defendant “acted purposely, not that he killed purposely.”⁵³ Though the court’s definition of the word “maliciously” has changed somewhat, the definition remains undemanding. The requirement of “malice,” according to the Wyoming court’s latest decisions, is satisfied where the state proves *either* that the defendant acted “without legal justification or excuse” *or* that the defendant acted with “hatred, ill will, or hostility.”⁵⁴

C. Why not require intent to kill?

Before I begin the real project at hand—constructing a workable definition of second-degree murder that is consistent with the basic outlines of *Crozier*—I need to address an obvious objection. Namely, why try to salvage *Crozier* at all? After all, *Crozier*’s interpretation of the statute is at odds both with the plain language of the second-degree murder statute, which requires the state to prove that the defendant “purposely . . . kill[ed]” any human being,⁵⁵ and with roughly 150 years of history, during which this language was consistently interpreted to require an intent to kill. Why not simply wipe the slate clean and return to the pre-*Crozier* requirement of intent to kill?

The first, and most obvious, reason is *stare decisis*. As the Wyoming Supreme Court has recognized, *stare decisis* is “an important principle which furthers the ‘evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.’”⁵⁶ Considerations of *stare decisis* “are particularly forceful in the area of statutory construction,”⁵⁷ since the legislature always “remains free

⁵² See *Ross v. State*, 8 Wyo. 351, 385, 57 P. 924 (1899).

⁵³ *Butcher v. State*, 2005 WY 146, ¶ 20, 123 P.3d 543, 550-51 (Wyo. 2005).

⁵⁴ *Id.* at ¶ 24, 123 P.3d at 550-51 (explaining that trial court erred in requiring state to prove *both* of these alternatives at Butcher’s trial); see also *Strickland v. State*, 2004 WY 91, ¶ 15, 94 P.3d 1034, 1043 (Wyo. 2004); *Keats v. State*, 2003 WY 19, ¶¶ 16-33, 64 P.3d 104, 109-14 (Wyo. 2003).

⁵⁵ WYO. STAT. ANN. § 6-2-104 (LexisNexis 2005).

⁵⁶ *In re ANO*, 2006 WY 74, ¶ 6, 136 P.3d 797, 799 (Wyo. 2006) (quoting *Goodrick v. Stobbe*, 908 P.2d 416, 420 (Wyo. 1995)).

⁵⁷ *IBP, Inc. v. Alvarez*, 126 S. Ct. 514, 523 (2005).

to alter what [the courts] have done.”⁵⁸ The two decades that have passed since *Crozier* was announced have substantially enhanced its precedential force; the statute, as interpreted in *Crozier*, has been applied frequently and consistently during that time, so the Wyoming Legislature has had both the occasion and the opportunity to change it.⁵⁹ In my view, *stare decisis* dictates that the court adhere to *Crozier* to the degree that the holding of *Crozier* actually is workable.

The second, and far less obvious, reason for adhering to *Crozier* is that interpreting the second-degree murder statute to require proof of intent to kill would create a conflict with Wyoming's manslaughter statute. The trouble arises from the first clause of the manslaughter statute, which limits the statute's scope to homicides committed “without malice, expressed [sic] or implied.”⁶⁰ This provision, which has been part of Wyoming's criminal code since 1890, obviously means that homicides traditionally classified as “implied malice” murder—“extreme indifference” homicides, for example—cannot be punished as manslaughter in Wyoming. Thus, unless we are to assume that the legislature meant for the perpetrators of extreme-indifference homicide to go unpunished, we must conclude that the legislature meant this form of homicide to fall within the scope of the murder statutes. If this form of homicide falls within the scope of the murder statutes, the murder statutes cannot be said to require intent to kill.

At common law, murders were broken down into two categories: those involving “express malice” and those involving “implied malice.” “Express malice” was said to be present when the defendant intended to cause the death of the victim; when, in other words, the death of the victim was the defendant's conscious objective.⁶¹ “Implied malice” is harder to define. It would undoubtedly be correct, though somewhat unhelpful, to say that “implied malice” encompasses “any state of mind sufficient for murder while lacking that specific intent [to kill].”⁶² This

⁵⁸ *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989).

⁵⁹ *Shepard v. United States*, 544 U.S. 13, 23 (2005) (observing, in support of application of *stare decisis*, that “time has enhanced even the usual precedential force, nearly 15 years having passed since [the relevant precedent] came down, without any action by Congress”).

⁶⁰ WYO. STAT. ANN. § 6-2-105 (LexisNexis 2005).

⁶¹ See *ROLLIN PERKINS & RONALD BOYCE, CRIMINAL LAW* 76 (3d ed. 1982) (observing that “*express malice*” is generally employed to indicate that type of malice aforethought represented by an intent to kill”); *Downing v. State*, 11 Wyo. 86, 70 P. 833, 835 (1902) (quoting from jury instruction that defined “express malice” as “that deliberate intention unlawfully of taking away the life of a fellow creature which is manifested by external circumstances capable of proof”); see also *Walker v. People*, 489 P.2d 584 (Colo. 1971) (“express malice is that deliberate intention, unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof”); *Kelsey v. State*, 532 P.2d 1001, 1004 (Utah 1975) (malice “is express when there is manifested a deliberate intention unlawfully to take the life of a fellow creature”).

⁶² *PERKINS & BOYCE, supra* note 61, at 76.

definition tells us at least that “implied malice” actually is a “state of mind,” rather than a set of external circumstances; it tells us that implied malice is, in the words of Professors Perkins and Boyce, “a psychical fact just as homicide is a physical fact.”⁶³ Thus, when courts say (as they very often do) that implied malice can be *inferred* from, e.g., the use of a deadly weapon, they mean simply that the use of a deadly weapon may provide a factual basis for inferring the existence of a particular state of mind.⁶⁴ They do not mean that using a deadly weapon is a form of “implied malice.”⁶⁵

So exactly what “state of mind” does the term “implied malice” signify? The term “implied malice” has its origins in a time when “authorities assumed the necessity of an intent to kill”⁶⁶—when they assumed, that is, the necessity of proving as an element of murder that the defendant actually wanted to bring about the victim’s death. The courts resorted to the term “implied malice” to accommodate those cases where the defendant’s “foresight of the consequences” made him as culpable as a person who actually meant to kill.⁶⁷ These historical origins are reflected in modern definitions like the one found in *State v. Wardle*,⁶⁸ a Utah case that (as we will see) played a pivotal role in the Wyoming Supreme Court’s decision in *Lopez v. State*.⁶⁹ In *Wardle*, the court equated “implied malice” with

⁶³ *Id.* at 74.

⁶⁴ See, e.g., *Moya v. People*, 484 P.2d 788 (Colo. 1971) (holding that “malice may be inferred where homicide is committed by use of deadly weapon or instrument in such a manner as would naturally and probably cause death; inference of malice is one of fact for jury determination from the evidence”). The danger of misinterpretation is evident, for example, in *Wardle v. State*, where the Utah Supreme Court said that “ordinarily a blow with the fist does not imply malice or intent to kill.” 564 P.2d 764, 766 (Utah 1977). Where, as here, courts refer to malice being “implied” from the circumstances of the conduct, it is possible to conclude that the courts mean that “implied malice” may inhere in the existence of certain circumstances. *Id.* This is wrong, however, for malice is a mental state like any other. It may, of course, be *inferred* from external circumstances, as indeed any mental state may be. What the court in *Wardle* really meant was that, as it said elsewhere, “when the assault from which death resulted was intended with such circumstances of violence, excessive force, or brutality, an intent to kill or malice may be inferred.” *Id.* at 765-66.

⁶⁵ As early as 1854, it was apparent that the term “implied malice” was “calculated to mislead and to engender false ideas.” *Darry v. People*, 10 N.Y. 120, 140 (1854). Specifically, it was apparent that “[i]t tended to introduce confusion, through the indiscriminate use of the word *implied* in two conflicting senses, one importing an inference of actual malice from facts proved, the other an imputation of fictitious malice, without proof.” *Id.* It is in the second sense that the phrase “implied malice” has survived.

⁶⁶ PERKINS & BOYCE, *supra* note 61, at 59.

⁶⁷ See OLIVER WENDELL HOLMES JR., *THE COMMON LAW* 53 (Little Brown ed. 1951); PERKINS & BOYCE, *supra* note 61, at 74.

⁶⁸ *State v. Wardle*, 564 P.2d 764 (Utah 1977).

⁶⁹ *Lopez v. State*, 2004 WY 28, ¶ 22, 86 P.3d 851, 858 (Wyo. 2004).

a killing committed “under circumstances evidencing a depraved indifference to human life.”⁷⁰

It bears mention that the meaning of “implied malice” will vary depending on whether the jurisdiction defines murder simply to require that the defendant act “maliciously” (as Wyoming does) or instead defines murder to require that the defendant act “with malice aforethought.” “Malice aforethought” is a technical term⁷¹ that encompasses four different forms of *mens rea*: (1) the intent to kill; (2) the intent to inflict grievous bodily harm; (3) extreme indifference to the value of human life; (4) the intent to commit a felony (which leads to culpability under the felony-murder rule).⁷² In jurisdictions where murder is defined as a killing with “malice aforethought,” the term “implied malice” may be used to refer to any of the latter three of these forms of *mens rea*.⁷³ But in jurisdictions where the legislature—like Wyoming’s—has eschewed the technical term “malice aforethought” in favor of the broader legal term “maliciously,”⁷⁴ the better view is that the law requires proof of either (1) the intent to bring about the proscribed result or (2) foresight of the consequences that imports an equivalent degree of culpability.⁷⁵

With this background, it is possible to explain in somewhat greater detail why interpreting the second-degree murder statute to require “intent to kill” would prove problematic. Before 1890, Wyoming’s criminal code contained three

⁷⁰ *Wardle*, 564 P.2d at 765 n.1.

⁷¹ GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* § 30 at 75 (2d ed. 1961) (cautioning “that the phrase ‘malice aforethought,’ in murder is a technical one, and that the word ‘malice’ does not here bear its usual legal meaning”); *see also* *People v. Jefferson*, 748 P.2d 1223, 1226 (Colo. 1988) (explaining that “[o]ver time, the phrase malice aforethought became an arbitrary symbol used by common law judges to signify any of a number of mental states deemed sufficient to support liability for murder”).

⁷² BLACK’S LAW DICTIONARY 969 (7th ed. 1999).

⁷³ PERKINS & BOYCE, *supra* note 61, at 59.

⁷⁴ By “broader” I mean that the word “maliciously,” unlike the term “malice aforethought,” is used in a wide array of contexts *other than* criminal homicide. *See, e.g.*, WYO. STAT. ANN. § 6-3-101 (LexisNexis 2005) (defining first-degree arson to require, among other elements, that the defendant act “maliciously”); *see also* WYO. STAT. ANN. § 37-12-120 (LexisNexis 2005) (defining offense of “interference with or injury to electric utility poles or wire” to require that the defendant act “maliciously or mischievously”).

⁷⁵ PERKINS & BOYCE, *supra* note 61, at 860; *see also* KENNY’S OUTLINES OF THE LAW OF ENGLAND § 108 at 147 (J.W.C. Turner ed. 1962) (urging courts to jettison technical meaning of implied “malice aforethought” in favor of a definition “based on foresight of the consequences”); HOLMES, *supra* note 67, at 53 (arguing that “intent will again be found to resolve itself into two things; foresight that certain consequences will follow from an act, and the wish for those consequences working as a motive which induces the act”).

statutes defining the offense of manslaughter.⁷⁶ Two of these statutes specified that the offense must be committed “without malice.”⁷⁷ It would have been possible to construe these bare references to “malice” as references to “express malice,” which was after all the original form of common-law malice. This construction would, then, have facilitated a narrow construction of the second-degree murder statute. If “implied malice” or “depraved heart” homicides could be prosecuted under the manslaughter statutes, then there would be no need to interpret the second-degree murder statutes to reach them.

This changed in 1890, when the territorial legislature adopted a unified and revised manslaughter statute that specifically limited the statute’s reach to homicides committed “without malice, express or implied.”⁷⁸ With this revision, it became apparent that the legislature meant to exclude from the definition of manslaughter not just homicides committed with “express malice,” but those committed with “implied malice” as well. Thus, unless the legislature meant for “implied malice” homicides simply to go unpunished, it must have assumed that those homicides would be prosecuted under the second-degree murder statute. So it was not, ultimately, the Wyoming Supreme Court’s decision in *Crozier* that “enlarged the reach of second-degree murder, transferring some killings from the category of manslaughter to that of second degree murder.”⁷⁹ It was the legislature’s decision explicitly to exclude “implied malice” homicides from the scope of the manslaughter statute.

There is, finally, an additional reason for adhering to the basic outlines of the *Crozier* decision—in addition, that is, to the dictates of *stare decisis*, and in addition to the problems created by the manslaughter statute. The notion that foresight of consequences sometimes carries a degree of culpability equal to intent has profound intuitive appeal. It was this intuitive appeal that led historically to the erosion of the requirement of “express malice” and to the creation of the legal fiction of “implied malice.” And, in more recent times, it was this intuitive appeal that led the drafters of the Model Penal Code to assign the same degree of fault to homicides “committed recklessly under circumstances manifesting extreme indifference to the value of human life” as it did to homicides committed “purposely

⁷⁶ The first category encompassed any killing committed “without malice, either upon a sudden quarrel or unintentionally, while the slayer is in the commission of some unlawful act.” 1876 WYOMING COMPILED LAWS ch. 35, § 18. The second category encompassed any killing committed “in the heat of passion, by means of a dangerous weapon, or in a cruel and inhuman manner.” *Id.* § 19. The third category encompassed any killing committed “without malice, either upon sudden quarrel, or unintentionally or by any culpable neglect or criminal carelessness.” *Id.* § 20.

⁷⁷ 1876 WYOMING COMPILED LAWS ch. 35, §§ 18, 20.

⁷⁸ 1890 Wyo. Sess. Laws Ch. 73, § 17.

⁷⁹ Lauer, *supra* note 4, at 553.

or knowingly.”⁸⁰ This provision, as the Wyoming Supreme Court explained in *O'Brien v. State*,⁸¹ “reflect[s] the judgment that there is a kind of reckless homicide that cannot fairly be distinguished in grading terms from homicides committed knowingly or purposely.”⁸² *Crozier*, whatever its analytical flaws, is intuitively sound in recognizing the moral equivalence of express and implied malice.

III. THE REQUIREMENT OF A VOLUNTARY ACT

In the decisions interpreting the second-degree murder statute, the Wyoming Supreme Court has given pride of place to the requirement that the act that causes the victim's death be performed “purposely.” Indeed, when the court has summarized the second-degree murder statute, it sometimes has left out the requirement of malice entirely, saying simply that the statute “require[es] proof only of acting purposely or voluntarily.”⁸³ The court likewise has emphasized that the mens rea “purposely” applies only to the act performed by the defendant, not to the death that results from his actions: “second-degree murder is a general intent crime in which the ‘purposely’ element requires only that the State prove the [defendant] acted purposely, not that he *killed* purposely.”⁸⁴

The requirement that the act resulting in death be performed “purposely” or “intentionally” sounds as if it would serve to distinguish second-degree murder from a wide array of other, less culpable forms of criminal homicide. As the Wyoming Supreme Court itself has said repeatedly in defining second-degree murder, the requirement that the act be performed purposely or intentionally “distinguishes the act from one committed ‘carelessly, inadvertently, accidentally, negligently, heedlessly, or thoughtlessly.’”⁸⁵ This point seems intuitively inescapable. After all, in common parlance an act performed “purposely” is plainly more culpable than one performed, say, negligently.

But this intuition is wrong. As I will explain, the perverse truth is that even “negligent” acts are performed “purposely,” as too are “careless” acts, “heedless” acts, and “thoughtless” acts. The implied ascription of blame associated with each of these terms presupposes that the negligent or careless or heedless *act* was itself

⁸⁰ MODEL PENAL CODE § 210.2 (1985).

⁸¹ *O'Brien v. State*, 2002 WY 63, 45 P.3d 225 (Wyo. 2002).

⁸² *Id.* at ¶ 16, 45 P.3d at 231.

⁸³ *Young v. State*, 849 P.2d 754, 759 (Wyo. 1993); *see also* *Wilks v. State*, 2002 WY 100, ¶ 37, 49 P.3d 975, 990 (Wyo. 2002) (remarking that “second-degree murder is a crime of general intent requiring only proof of acting purposely or voluntarily”); *Bowkamp v. State*, 833 P.2d 486, 493 (Wyo. 1992) (remarking that “second degree murder is a general intent crime, requiring only proof of the element of voluntariness”).

⁸⁴ *Butcher v. State*, 2005 WY 146, ¶ 20, 123 P.3d 543, 550 (Wyo. 2005).

⁸⁵ *Id.* (quoting *Lopez v. State*, 2004 WY 22, ¶ 18, 86 P.3d 851, 857 (2004) (quoting *State v. Keffer*, 860 P.2d 1118, 1138 (Wyo. 1993))).

performed “purposely.” The words “negligent,” “careless,” and “heedless” do not serve to identify the defendant’s mental state with respect to the act itself, but serve rather to identify his mental state with respect to the real or possible consequences of the act.⁸⁶ In short, to say that someone has performed a “negligent act” is to say that he has purposely or intentionally performed an act with negligence of the consequences of that act. And to say that someone has performed a “careless act” is to say that he has purposely or intentionally performed an act with carelessness of the consequences.

This is a difficult (if uncontroversial) point. Perhaps the best place to begin is with an example. Let us imagine, first, a standard-issue case of criminally negligent homicide, where a driver attempts to pass another car on a curve that is marked as a no-passing zone and then, despite swerving and applying his brakes, collides with an oncoming car, killing the other car’s driver.⁸⁷ In a case like this one, the usual charge will be negligent or perhaps reckless homicide, despite the fact that the act resulting in the death was performed “purposely”—the defendant *meant* to drive across the center line to pass. It is with respect to the *consequences* that the driver was “negligent.” In the words of Wyoming’s statutory definition of “criminal negligence,” the driver culpably “fail[ed] to perceive a substantial and unjustifiable risk that the harm he is accused of causing [would] occur.”⁸⁸ It is with respect to the risk of harm, not with respect to his “act,” that the driver was negligent.

There are harder cases, of course, where the voluntary or intentional act underlying the imposition of liability for negligence or carelessness is harder to identify. Consider, for example, the relatively common case where a defendant’s car simply drifts across the center line and into oncoming traffic. Juries sometimes impose criminal or civil liability for negligence in cases like this, despite being unable to say exactly what caused the defendant’s car to cross the center line.⁸⁹ But the juries’ decisions in these cases critically presuppose the performance of *some* voluntary act, whether it was, say, the driver’s decision to change the radio station, or was instead just the driver’s decision to continue driving without attending adequately to the task of driving.⁹⁰ If the crossing of the center line truly was

⁸⁶ See, e.g., WYO. STAT. ANN. § 6-1-104(a)(iii) (LexisNexis 2005) (providing in part that “[a] person acts with criminal negligence when, through a gross deviation from the standard of care that a reasonable person would exercise, he fails to perceive a substantial and unjustifiable risk *that the harm he is accused of causing will occur*, and the harm results” (emphasis added)).

⁸⁷ See, e.g., State v. Wilcoxon, 639 So.2d 385 (La. Ct. App.1994)

⁸⁸ WYO. STAT. ANN. § 6-1-104(a)(iii) (LexisNexis 2005).

⁸⁹ See, e.g., Uteley v. State, No. CR 05-1400, 2006 WL 1516454 (Ark. June 1, 2006); Panther v. State, 780 P2d 386 (Alaska Ct. App. 1989).

⁹⁰ See RESTATEMENT (SECOND) OF TORTS § 282, comment a (1965) (explaining that civil liability for negligence presupposes a volitional act or omission); § 2, comment a (explain-

attributable to something other than a voluntary act—was attributable, say, to the defendant's falling asleep, or to a seizure or convulsion—then this nonvoluntary event obviously could not provide the basis for imposition of negligence liability.⁹¹

There are, of course, plenty of cases where the courts have imposed liability for criminal negligence on drivers who fall asleep at the wheel of a car, or who suffer seizures or convulsions at the wheel. But not only do these cases not *disprove* the claim that negligence liability presupposes a voluntary act, they go a long way toward proving it.

Consider, for example, *People v. Decina*,⁹² where the defendant suffered an epileptic seizure while driving and, as a result, drove onto a sidewalk, killing four schoolchildren. On this basis, he was charged with “criminal negligence in the operation of a vehicle resulting in death,”⁹³ and this charge was sustained by the New York Court of Appeals. In *Decina*, of course, the defendant obviously did not *purposely* or *volitionally* steer the car onto the sidewalk, so the court's decision to sustain the charge might seem to suggest, at first glance anyway, that even non-volitional events can provide a basis for negligence liability.⁹⁴ But it does not. The court sustained the indictment not on the basis of the defendant's “act” of driving onto the sidewalk, but rather on the basis of his earlier voluntary decision to drive despite his susceptibility to fits:

[T]his defendant knew that he was subject to epileptic attacks and seizures that might strike *at any time*. He also knew that a

ing that “[t]here cannot be an act without volition”); *see also* RESTATEMENT (THIRD) OF TORTS, Proposed Final Draft, § 3, comment c (2006) (explaining that in a case where the driver fails to brake as he approaches the other car, “it can be stated that the driver is negligent for the dangerous action of driving the car without taking the precaution of braking appropriately”); *Utley*, 2006 WL 1516454 (Hannah, J., dissenting) (asking, in attempt to identify voluntary act that formed basis for imposition of liability for negligent homicide: “What happened to Utley? Did he doze off? Was he changing a CD or the radio? Did his mind wander?”).

⁹¹ RESTATEMENT (SECOND) OF TORTS § 2, comment a (1965) (explaining that “a contraction of a person's muscles which is purely in reaction to some outside force, such as a knee jerk or the blinking of the eyelids in defense against an approaching missile, or the convulsive movements of an epileptic, are not acts of that person. So too, movements of the body during sleep when the will is in abeyance are not acts.”).

⁹² *People v. Decina*, 138 N.E.2d 799 (N.Y. 1956).

⁹³ *Id.* at 808 (Desmond, J., dissenting).

⁹⁴ This was how the dissenters characterized the majority opinion, in fact. *See id.* at 808 (Desmond, J., dissenting) (arguing that “[o]ne cannot be ‘reckless’ while unconscious. One cannot while unconscious ‘operate’ a car in a culpably negligent manner or in any other ‘manner.’”).

moving motor vehicle uncontrolled on a public highway is a highly dangerous instrument capable of unrestrained destruction. With this *knowledge*, and without anyone accompanying him, he deliberately took a chance by making a conscious choice of a course of action, in disregard of the consequences which he knew might follow from his conscious act, and which in this case did ensue.⁹⁵

In other words, the court looked backward in time to identify a voluntary act that was a cause of the victims' death and that was performed with negligence of the consequences.

The same thing is true of cases where courts have imposed liability on parents who roll onto their infant children while sleeping. In *Bohannon v. State*,⁹⁶ for example, the Georgia Court of Appeals sustained the defendant's conviction for involuntary manslaughter on evidence that she had placed her infant daughter in the bed shared by defendant and her partner, and that her partner had, "in a drunken sleep, roll[ed] on top of the child thereby inflicting injuries to the child's head and asphyxiating her."⁹⁷ The court appeared to agree with the defendant (and with the dissent) that "the averred act of the [partner] of rolling onto the baby, while being in a drunken sleep," could not provide the basis for imposition of criminal liability on *either* the defendant or her husband.⁹⁸ The court recognized that the conviction instead would have to be grounded on "the act of appellant [in] plac[ing] her less than three-month-old baby in the bed to sleep between herself and the male co-defendant who she also then knew was 'intoxicated.'"⁹⁹ The court explained: "as the 'conscious disregard' arose at the moment the child was positioned in the bed, it is of no relevance regarding appellant's culpability that she and her co-defendant were asleep when the resulting act of fatal overlay occurred."¹⁰⁰ So the court in *Bohannon*, too, looked backward in time to identify a voluntary act that was the cause of death.

⁹⁵ *Id.* at 804.

⁹⁶ *Bohannon v. State*, 498 S.E.2d 316 (Ga. Ct. App. 1998).

⁹⁷ *Id.* at 320.

⁹⁸ *Id.* at 322.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 323; *see also* *Hemby v. State*, 589 S.W.2d 922 (Tenn. Ct. App. 1978) (upholding defendant's conviction for involuntary manslaughter on evidence that the defendant, after falling asleep on a bed in which his infant son was sleeping, "apparently rolled over on the baby, with the weight of the defendant's body suffocating the sleeping infant"); *United States v. Red Eagle*, 60 Fed. Appx. 155 (9th Cir. 2003) (striking down conviction on ground that defendant lacked any "subjective awareness of the risk posed by putting his child in the bed and going to sleep with him while intoxicated").

The requirement of a voluntary or intentional act as a prerequisite to the imposition of criminal liability is neither novel nor controversial.¹⁰¹ The basic point was explained by Aristotle, who illustrated it by saying that an indispensable element of moral culpability would be missing “if [the actor] were to be carried somewhere by the wind, or by men who had him in their power.”¹⁰² Aristotle’s examples would have to be conceded even today. Thus, a person charged with fishing commercially in a closed area might validly defend by asserting “that he had made the set in legal waters but that his boat had been caused to drift into closed waters by the wind and the tide.”¹⁰³ And a person charged with the offense of “appear[ing] in any public place” while “intoxicated or drunk” might validly defend by asserting that he had been “involuntarily and forcibly carried to that place by the arresting officer.”¹⁰⁴

There is, admittedly, some controversy at the boundaries about exactly what will qualify as a voluntary act. In *Fulcher v. State*,¹⁰⁵ for example, the justices of the Wyoming Supreme Court split on the question whether a person who performs complex actions¹⁰⁶ while “in an automatic state” really acts “without intent, exercise of free will, or knowledge of the act.”¹⁰⁷ Academics too have disagreed about the boundaries of the concept. H.L.A. Hart questioned the viability of existing definitions of “voluntariness” in a 1968 lecture,¹⁰⁸ as did Michael Corrado in a 1994 law review article.¹⁰⁹ But the existence and necessity of the require-

¹⁰¹ WAYNE LAFAYE & AUSTIN SCOTT, *SUBSTANTIVE CRIMINAL LAW*, vol. 1, § 3.2(c) at 278 (1986) (“a voluntary act is an absolute requirement for criminal liability”); Maura Caffrey, *A New Approach to Insanity Acquittee Recidivism: Redefining the Class of Truly Responsible Recidivists*, 154 U. PA. L. REV. 399, 427 (2005) (“Both negligence and recklessness presuppose voluntary action.”).

¹⁰² THE NICOMACHEAN ETHICS OF ARISTOTLE, BOOK III, § 1 (W.D. Ross transl. 1958).

¹⁰³ *Love v. State*, 457 P.2d 622, 635 (Alaska 1969) (Nesbett, J., dissenting).

¹⁰⁴ *Martin v. State*, 17 So.2d 427 (Ala. Ct. App. 1944); *see also* *Kuhlmann v. Rowald*, 549 S.W.2d 583, 584 (Mo. Ct. App. 1977) (holding that trial court had erred in instructing jury on contributory negligence where plaintiff had been pushed into the path of the defendant’s oncoming car by one of her companions; “plaintiff’s ‘movement’ into the path of defendant’s oncoming car was not an act of her own volition,” and so could not form the basis for a finding of contributory negligence).

¹⁰⁵ *Fulcher v. State*, 633 P.2d 142 (Wyo. 1981).

¹⁰⁶ The defendant in *Fulcher* was charged with aggravated assault after he kicked and stomped on his cellmate’s head. *Id.* at 143.

¹⁰⁷ *Id.* at 145. The three justices in the majority took the position that “[b]ecause these actions are performed in a state of unconsciousness, they are involuntary.” *Id.* at 145. The two concurring justices appeared to agree that some forms of unconsciousness would defeat the imposition of liability. *Id.* at 156-57 (discussing the commentary to MODEL PENAL CODE § 2.01). But they argued that automatism should be treated as a form of insanity rather than as a form of unconsciousness. *Id.*

¹⁰⁸ H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 90-112 (1968).

¹⁰⁹ Corrado, *supra* note 5.

ment are utterly uncontroversial. Everybody agrees that the criminal law includes a “requirement that something be done intentionally.”¹¹⁰ For everybody agrees that only an intentional act can signal either the sort of “moral deficiency” that justifies retributive punishment¹¹¹ or the sort of dangerousness that calls for rehabilitation.¹¹²

At first glance, this argument might seem to be at odds with the fact that juries rarely are instructed on the requirement of an intentional act in cases involving, say, recklessness or criminal negligence. But there are good reasons for this seeming anomaly. One reason why “[o]rdinarily, no special instruction is needed concerning the requirement of a voluntary act [is that] this issue is not disputed.”¹¹³ Another reason why no special instruction is needed is that standard instructions requiring the jury to determine, say, whether the defendant “acted recklessly” will be interpreted by jurors, in keeping with common usage, to require them to determine whether the defendant performed an intentional act with recklessness toward the consequences of his act.¹¹⁴

¹¹⁰ *Id.* at 1560.

¹¹¹ *Fulcher*, 633 P.2d at 146 (adopting the view that “a person who is completely unconscious when he commits an act otherwise punishable as a crime cannot know the nature and quality thereof or whether it is right or wrong); *see also* NICHOMACHEAN ETHICS, BOOK III, § 1 (arguing that “to distinguish the voluntary and the involuntary is presumably necessary for those who are studying the nature of virtue, and useful also for legislators with a view to the assigning both of honours and of punishments”).

¹¹² *Id.* (asserting that “[t]he rehabilitative value of imprisonment for the automatistic offender who has committed the offense unconsciously is nonexistent”).

¹¹³ *Mooney v. State*, 105 P.3d 149, 155 (Alaska Ct. App. 2005).

¹¹⁴ *See Nelson v. State*, 927 P.2d 331, 334 (Alaska Ct. App. 1996) (rejecting defendant’s claim that special instruction on requirement of voluntary act was necessary, and agreeing with the prosecution that “jurors who are asked to decide whether a defendant has . . . ‘recklessly’ caused some result will approach their task correctly if they are told the statutory meaning of . . . ‘recklessly’”). In its brief in the *Nelson v. State* appeal, the State had argued:

[R]eplacement of the word “recklessly” with a complex formula [requiring the jury to decide whether the defendant intentionally or knowingly performed an act with recklessness of the consequences] will not alter jurors’ verdicts. Just as a baseball player *knows* how to swing a bat, an ordinary person *knows* how to use the word “recklessly,” regardless of whether he can formulate the rules that govern his participation in this activity. Here, as elsewhere in our experience, the ability to participate in a particular activity is not dependent, or perhaps even related to, the ability to identify and describe its constituent parts.

Brief of Appellee, *Nelson v. State*, No. A-5688, at 14 (citing Ludwig Wittgenstein, *Philosophical Investigations*, Part I, § 60 (G.E.M. Anscombe trans. 1958)).

Nor is “the requirement of a voluntary act” any less a requirement by virtue of the fact that the Wyoming courts impose on the defendant the burden of raising the “defense” of involuntariness and the burden of proving by a preponderance of the evidence that his acts were performed involuntarily.¹¹⁵ Imposition of the burden of persuasion on the defendant does not signify that criminal liability sometimes is appropriate even in the absence of a voluntary act; rather, it signifies only that the law ordinarily *presumes* the voluntariness of the defendant’s actions¹¹⁶ and that the defendant is better situated than the state to acquire information about the voluntariness of his actions. Whether proven or presumed, a voluntary act remains an essential prerequisite to the imposition of moral blame, and so, to the imposition of criminal liability.

The existence of this fundamental “requirement that something be done intentionally”¹¹⁷ as a prerequisite to the imposition of *any* form of criminal liability—even strict liability¹¹⁸—suffices to show why the first prong of the definition of second-degree murder is without substance. As defined by the Wyoming Supreme Court, this first prong “require[s] proof only of acting purposely or voluntarily.”¹¹⁹ But if the law requires proof of “acting purposely or voluntarily” as an element of every crime, then the first prong of the statute cannot serve to distinguish second-degree murder from reckless manslaughter, or negligent homicide.

Nor even can the requirement of an intentional act serve to distinguish criminal homicide from wholly innocent conduct. This point was explained by Justice Holmes more than a hundred years ago in *The Common Law*. “The act is not enough by itself,” he wrote, to justify the assignment of blame or the imposition of criminal liability, even though “[a]n act, it is true, imports intention in a certain sense.”¹²⁰ Glanville Williams made much the same point, in language that seems weirdly responsive to *Crozier*: “The requirement of an act with its element of will is not so important a restriction upon criminal responsibility as it may first appear.”¹²¹ A voluntary act, though necessary to justify criminal liability, is

¹¹⁵ *Fulcher*, 633 P.2d at 147.

¹¹⁶ *Cf.* *Clark v. Arizona*, 126 S. Ct. 2709 (2006) (referring to “universal” presumption “that a defendant has the capacity to form the *mens rea* necessary for a verdict of guilt”).

¹¹⁷ *Corrado*, *supra* note 5, at 1543.

¹¹⁸ *Id.* at 1536 (acknowledging “the fact that even for strict liability, the agent must be doing something intentionally”).

¹¹⁹ *Young v. State*, 849 P.2d 754, 759 (Wyo. 1993).

¹²⁰ HOLMES, *supra* note 67, at 54. Holmes explained that “to crook the forefinger with a certain force is the same act whether the trigger of the pistol is next it or not.” Thus, a person who intentionally crooks his forefinger can be said to have “purposely acted” whether he knew of the trigger’s presence. And thus, “[a]n act cannot be wrong, even when done under circumstances in which it will be hurtful, unless those circumstances are or ought to be known.” *Id.*

¹²¹ WILLIAMS, *supra* note 71, § 8 at 13.

not close to being sufficient. A requirement that the defendant “act purposely” cannot, finally, be the gravamen of second-degree murder or any other serious crime.

IV. THE REQUIREMENT OF MALICE

What remains of second-degree murder is the requirement that the defendant’s voluntary act be performed “maliciously.” Under current Wyoming case law, this requirement of malice is satisfied where the state proves *either* that the defendant acted “without legal justification or excuse” *or* that the defendant acted with “hatred, ill will, or hostility.”¹²² This definition of malice originated in Justice Blume’s 1924 opinion in *State v. Sorrentino*,¹²³ a second-degree murder case. The definition was recovered in a 2003 arson case, *Keats v. State*,¹²⁴ where the court concluded that Wyoming’s definition of malice had “always contained the alternative theories of actual hostility or ill will and the doing of an act without legal justification or excuse.”¹²⁵ Two years later, in *Butcher v. State*, the court said that this definition would be applied not only in arson cases but in second-degree murder cases, too.

The trouble with this definition of “malice,” as I will explain below, is that it adds little of substance to the requirement of a voluntary act. The *Keats* definition of malice works in the arson setting because the arson statute, in addition to requiring proof of malice, also requires proof of another culpable mental element—“intent to destroy or damage an occupied structure.”¹²⁶ In the second-degree murder setting, by contrast, the job of differentiating culpable from non-culpable conduct falls entirely on the shoulders of the malice element; the requirement of a voluntary act, as we have seen, does little or nothing to separate culpable from non-culpable conduct. Neither the vague requirement of “hostility or ill will” nor the alternative requirement of absence of “legal justification or excuse” can handle the heavy lifting required of malice here.

What Wyoming’s second-degree murder statute needs is something akin to the definition of malice currently applied by most other states. This modern definition of malice requires proof of “either (a) an actual intent to cause the particular harm which is produced or harm of the same general nature, or (b) the wanton and willful doing of an act with awareness of a plain and strong

¹²² *Butcher v. State*, 2005 WY 146, ¶ 24, 123 P.3d 543, 550-51 (Wyo. 2003) (explaining that trial court erred in requiring State to prove *both* of these alternatives at Butcher’s trial).

¹²³ *State v. Sorrentino*, 31 Wyo. 129, 224 P. 420 (1924).

¹²⁴ *Keats v. State*, 2003 WY 19, ¶ 32, 64 P.3d 104, 114 (Wyo. 2003).

¹²⁵ *Id.*

¹²⁶ WYO. STAT. ANN. § 6-3-101(a) (LexisNexis 2005).

likelihood that such harm may result.”¹²⁷ The Wyoming Supreme Court moved subtly toward this definition in *Lopez v. State*, where the court, in holding that defendant Lopez’s open-handed slap did not suffice to show malice, relied on cases from other states that use “malice” in roughly this sense. In this part of the Article, I will urge the court to follow *Lopez* to its logical conclusion; to make the modern form of malice an element of second-degree murder.

A. Why the existing definition of malice is unworkable

In *Keats v. State*,¹²⁸ the first-degree arson charge was based on Keats’s actions in setting several small fires in his residence during a standoff with police.¹²⁹ At his trial, Keats asked the judge to instruct the jury that “malice” requires “hatred, ill will, or hostility toward another,” apparently in the hope that the jury would conclude that he meant only to harm himself.¹³⁰ It was in reviewing the trial judge’s refusal to give this instruction that the Wyoming Supreme Court undertook a comprehensive review of the meaning of “malice.” This review led the court to conclude that the requirement of malice is satisfied where the state proves *either* that the defendant acted “without legal justification or excuse” *or* that the defendant acted with “hatred, ill will, or hostility.”¹³¹

The *Keats* decision is defensible as an interpretation of the first-degree arson statute. Under this statute, a “person is guilty of first-degree arson if he maliciously starts a fire or causes an explosion with intent to destroy or damage an occupied structure.”¹³² Because this statute requires proof of “intent to destroy or damage an occupied structure,” the element of malice serves a very limited—and purely negative—purpose. Specifically, it serves to remove from the arson statute’s reach those rare cases where a person intentionally destroys or damages an occupied structure with a lawful justification and without hostility or ill will. The element of malice would, for example, be absent where “fire departments . . . perform training exercises by burning old structures with the owners’ permission.”¹³³ In this setting, as the Wyoming Supreme Court said in *Keats*, “[t]he fire is set with

¹²⁷ PERKINS & BOYCE, *supra* note 61, at 857-60 (referring to the current “clear recognition of the non-necessity of any element of hatred, spite, grudge or ill-will”; and summarizing the modern sense of malice as requiring “either (a) an actual intent to cause the particular harm which is produced or harm of the same general nature, or (b) the wanton and willful doing of an act with awareness of a plain and strong likelihood that such harm may result”).

¹²⁸ *Keats v. State*, 2003 WY 19, 64 P.3d 104 (Wyo. 2003).

¹²⁹ *Id.* at ¶¶ 3-5, 64 P.3d at 106.

¹³⁰ *Id.* at ¶ 17, 64 P.3d at 109.

¹³¹ *Id.* at ¶ 32, 64 P.3d at 114.

¹³² WYO. STAT. ANN. § 6-3-101(a) (LexisNexis 2005).

¹³³ *Keats*, 2003 WY 19, ¶ 28 n.5, 64 P.3d at 113 n.5.

the specific intent to damage or destroy the structure, but there is no unlawful intent.”¹³⁴

Keats's definition of “malice” cannot, however, plausibly be extended to second-degree murder. It can be said of nearly every homicide that the act that caused death was performed *either* with “hostility or ill will” *or* without “legal justification or excuse.” For starters, the words “hostility” and “ill will” are broad enough to encompass a wide array of innocuous conduct. A bicyclist who hollers “asshole” at a rude motorist, for example, certainly acts with “hostility,” but few of us would be willing to convict the bicyclist of second-degree murder if the motorist, in turning to glare at the bicyclist, were to lose control of his vehicle and suffer a fatal rollover accident. Worse, the alternative criterion of “without legal justification or excuse” is even broader. The phrase “legal justification or excuse” appears to encompass just those situations where, as in cases of self-defense¹³⁵ or defense of property, the defendant has some affirmative statutory or common law justification for his actions. But *every* form of criminal homicide—including negligent homicide—requires that the defendant's act be performed without this sort of justification. This very difficulty was remarked by the Wyoming Supreme Court itself in *Helton v. State*,¹³⁶ another second-degree murder case:

While many definitions may be found of “Legal Malice”, “Implied Malice” and “Constructive Malice”, which say in substance that such malice denotes merely the absence of legal excuse, legal privilege or legal justification, these definitions fail to satisfy when they are placed under the scrutiny of close analysis or of subjective reasoning. In homicide, if the killing be legally excusable, legally privileged or legally justifiable, there can, of course, be no legal conviction of any crime. Conversely, if legal conviction is had, there must be an absence of legal excuse, privilege or justification. Hence, if such definitions are accurate, then in every legal conviction of homicide there would be legal malice, implied malice or constructive malice. This, of course, is not so.¹³⁷

At first glance, my conclusion—that the *Keats* definition of malice cannot workably be extended to second-degree murder—seems to be at odds with precedent; after all, the *Keats* definition of malice *originated* in a second-degree murder

¹³⁴ *Id.*

¹³⁵ See *Butcher*, 2005 WY 146, ¶ 25, 123 P.3d at 551 (in addressing question whether defendant acted “without legal justification or excuse,” court addressed defendant's claim that he had stabbed the victim in self-defense).

¹³⁶ *Helton v. State*, 73 Wyo. 92, 276 P.2d 434 (1954).

¹³⁷ *Id.* at 114-15, 276 P. at 442.

case, *State v. Sorrentino*.¹³⁸ But this first glance is deceiving. In 1924, when Justice Blume announced the court's decision in *Sorrentino*, second-degree murder was thought to require proof of another mental element in addition to malice—namely, the intent to kill. Just a few years after *Sorrentino*, in *Eagan v. State*, Justice Blume would say of a jury instruction challenged by defendant Eagan: “it can hardly be denied that [the instruction] was correct in telling the jury that they should not convict of murder in the first or second degree, unless it was committed ‘intentionally, and with the purpose of killing.’”¹³⁹ Nor was *Eagan* anomalous in this respect. In the century or so that intervened between the adoption of the second-degree murder statute and the court's decision in *Crozier*, the Wyoming Supreme Court repeatedly had said that second-degree murder required proof of intent to kill.¹⁴⁰

This explains why a minimalist definition of malice would have seemed suitable to Justice Blume in *Sorrentino*. Just as the arson statute's requirement of “intent to destroy or damage an occupied structure” relieves the arson statute's “malice” element of any substantial role in differentiating innocent conduct from criminal conduct, so too did second-degree murder's former requirement of “intent to kill” leave that statute's malice element with little work to do. In 1924, the only purpose served by the malice element in second-degree murder was to remove from the statute's reach those very rare cases where the defendant was legally justified in intentionally killing another person. It was only after the court in *Crozier* eliminated the requirement of “intent to kill” that the task of differentiating second-degree murder from less culpable forms of homicide fell onto the shoulders of the malice requirement. In short, the workability of Justice Blume's definition of malice in 1924 says nothing about its workability post-*Crozier*.

¹³⁸ *State v. Sorrentino*, 31 Wyo. 129, 224 P. 420 (1924).

¹³⁹ *Eagan v. State*, 128 P.2d 215, 222 (Wyo. 1942) (emphasis added).

¹⁴⁰ Indeed, in *Sorrentino* itself, Justice Blume said that a “verdict of murder in the second degree necessarily implies the finding of all the facts essential to the offense of voluntary manslaughter.” *Sorrentino*, 31 Wyo. at 149, 224 P. at 426. “[I]n voluntary manslaughter,” as the Wyoming Supreme Court long had recognized, “there is an intentional killing, but without any element of malice or premeditation.” *Brantley v. State*, 9 Wyo. 102, 107, 61 P. 139, 140 (1900); see also *Ivey v. State*, 24 Wyo. 1, 8-9, 154 P. 589, 590-91 (1916) (holding that “one who upon a sudden heat of passion aroused by great and sufficient provocation, but without malice, but as the result of the passion so aroused solely, voluntarily assaults another with intent to kill him, and inflicts upon him a wound causing death, is guilty of voluntary manslaughter under our statute”) (emphasis added); *Goodman v. State*, 601 P.2d 178, 186-87, (Wyo. 1979) (characterizing as “correct and complete in their statement of the pertinent law” jury instructions that included statement that “If the essential element of intention to kill is excluded, the defendant cannot be found guilty of murder in the first degree, or of murder in the second degree, or of voluntary manslaughter”); *Jahnke v. State*, 692 P.2d 911, 917 (Wyo. 1984) (“in the case of voluntary manslaughter there is an intentional killing but without any element of malice or premeditation”, quoting *Brantley*);

Further, these difficulties with the definition of malice would remain even if the state were required to prove *both* constituent parts of the *Keats* test—both “with hatred, ill will or hostility toward another” and “without legal justification or excuse”—as the state apparently was required to do before *Keats*.¹⁴¹ The bicyclist who causes a fatal rollover accident by shouting “asshole” at a rude motorist obviously would satisfy both of these requirements, as would, say, a person who causes another’s death by slapping him once. This latter case is *Lopez v. State*,¹⁴² of course, where the victim of the slap unfortunately “had numerous health problems that made him susceptible to death by the slap.”¹⁴³ Though the Wyoming Supreme Court in *Lopez* concluded that the slap was insufficient to prove malice, it reached this conclusion only by momentarily ignoring its own definition of malice in favor of precedent from Utah and Colorado. The state in *Lopez* unquestionably had offered sufficient proof both that Lopez had acted with “hatred, ill will, or hostility toward another” and that he had acted without “legal justification or excuse.”

B. *What Lopez teaches indirectly about malice*

As I have said, the *Lopez*¹⁴⁴ decision will provide my starting point for formulating a new definition of malice. But it is important to emphasize, as a preliminary matter, that the *Lopez* decision did not itself formulate a new definition of malice. The focus of the *Lopez* decision was on identifying certain states of affairs from which malice can and cannot be *inferred*. It said, for example, that malice *can* sometimes be inferred from “repeated use of fists or feet or boots.”¹⁴⁵ And it said that malice *cannot* be inferred from an open-handed slap or from “a harmless shove.”¹⁴⁶ But identifying the circumstances from which malice can be inferred is not the same as saying what malice is. Malice is, after all, a “psychical fact,” not a physical one.¹⁴⁷ Even if the appellate courts were to catalogue exhaustively all of the circumstances from which malice could be inferred, each trial jury would still have to decide whether to *draw* the inference.¹⁴⁸ And before it could decide

¹⁴¹ The current pattern jury instruction defines “maliciously” as follows:

“Maliciously” means the state of mind in which an intentional act is done without legal justification or excuse. The term “maliciously” conveys the meaning of hatred, ill will or hostility toward another.

WYOMING PATTERN JURY INSTRUCTIONS (Criminal) § 21.04(b) (1996), *quoted in* *Butcher v. State*, 2005 WY 146, ¶ 19, 123 P.3d 543, 549-50 (2005).

¹⁴² *Lopez v. State*, 2004 WY 28, 86 P.3d 851 (Wyo. 2004).

¹⁴³ *Id.* at ¶ 8, 86 P.3d at 856.

¹⁴⁴ *Lopez v. State*, 2004 WY 28, 86 P.3d 851 (Wyo. 2004).

¹⁴⁵ *Id.* at ¶ 21, 86 P.3d at 858.

¹⁴⁶ *Id.* at ¶¶ 22-23, 86 P.3d at 859.

¹⁴⁷ PERKINS & BOYCE, *supra* note 61, at 74.

¹⁴⁸ *See* *Moya v. People*, 484 P.2d 788, 789 (Colo. 1971) (holding that “inference of malice is one of fact for jury determination from the evidence”).

whether to draw the inference, the jury would have to be told exactly what mental state it was being asked to infer. On this point, the *Lopez* decision offers no direct guidance.¹⁴⁹

Thankfully, *Lopez* offers an abundance of *indirect* guidance. First of all, *Lopez* tells us indirectly that malice cannot really be defined as “ill will, hatred or hostility toward another.” As a matter of common sense, there is a strong basis for inferring “ill will, hatred or hostility” when one person physically strikes another in the face, regardless of whether the attacker’s hand is open or closed. By holding that an open-handed blow *never* can provide a factual basis for inferring malice, then, the *Lopez* court signaled unambiguously that malice must be something other than “ill will, hatred or hostility toward another.” Nor should this come as any surprise. Though in ordinary speech the word “malice” is roughly synonymous with the “hatred,” “ill-will,” and “hostility,”¹⁵⁰ other courts long have recognized that “malice” in its “legal sense” does not describe a feeling of “ill-will against a person.”¹⁵¹

¹⁴⁹ There is one statement in *Lopez* that might, at first glance anyway, appear to point toward a formula for defining “implied malice.” *Lopez*, 2004 WY 28, ¶ 22, 86 P.3d at 858. The court made this statement in the course of explaining why an open-handed slap could not supply the factual basis for inferring malice:

Death or great bodily harm must be the reasonable or probable consequence of the act to constitute murder. The striking of a blow with the fist on the side of the face or head is not likely to be attended with dangerous or fatal consequences, and so no inference of malice is warranted by such proof.

Id. This statement is drawn almost verbatim from an Illinois case, *People v. Crenshaw*, 131 N.E. 576 (Ill. 1921). Where the original differs from the *Lopez* version is in the last line, where the Illinois court said not that “no inference of malice is warranted” but that “no inference of an *intent to kill* is warranted.” *Id.* at 577 (emphasis added). This comparison with the original only confirms what might have been apparent from the *Lopez* statement itself: that neither court’s concern is with defining the mental state that constitutes “malice”; both courts are concerned rather with identifying circumstances from which that mental state—whatever it might be—can plausibly be inferred. The “reasonable or probable consequence” formulation appears no place else in the Wyoming cases.

¹⁵⁰ OXFORD AMERICAN THESAURUS 456 (Lindberg ed., 1999) (identifying “hatred,” “hostility,” and “ill will” as synonyms of “malice”).

¹⁵¹ *Bromage v. Prosser*, 4 Barn. & Cres. 255 (K.B. 1825) (explaining that “[m]alice, in common acceptance, means ill-will against a person, but in its legal sense, it means a wrongful act, done intentionally, without just cause or excuse”); see also PERKINS & BOYCE, *supra* note 61, at 857-60 (referring to the current “clear recognition of the non-necessity of any element of hatred, spite, grudge or ill-will”); *Commonwealth v. Buckley*, 18 N.E. 577 (Mass. 1888) (holding that “[t]he malice required by the [arson] statute is not a feeling of ill-will towards the person threatened, but the willful doing of the act with the illegal intent”); *York’s Case*, 9 Met. 93 (Mass. 1845) (Lemuel Shaw, J.) (explaining that

The *Lopez* decision also tells us indirectly that “malice” cannot really mean “wickedness in general.”¹⁵² The Wyoming Supreme Court frequently has said, as indeed it did again in *Lopez* itself, that “malice” denotes a “wicked, evil, or unlawful purpose”¹⁵³ But this definition of the word “malice” is inconsistent with the result in *Lopez* itself, since it certainly would have been possible for *Lopez*’s trial jury to conclude—in the words of the state’s brief on appeal—that “*Lopez* acted with a ‘wicked’ mind when he struck [Robert Herman].”¹⁵⁴

Nor should it come as any surprise that the Wyoming Supreme Court proved reluctant to apply this definition of malice. This use of the word malice is a holdover from the time when courts first began requiring proof of *mens rea*.¹⁵⁵ In this early stage of the criminal law’s development, “mens rea . . . meant little more than a general immorality of motive”¹⁵⁶ or general “moral blameworthiness.”¹⁵⁷ Accordingly, *mens rea* was essentially fungible; a defendant’s belief that he was committing, say, fornication, might suffice to establish the requisite culpability for a different and more serious offense like statutory rape.¹⁵⁸ This blunt-knife approach to criminal liability is illustrated by Wyoming “misdemeanor-manslaughter” statute, which was part of Wyoming’s territorial criminal code and which survived until 1983.¹⁵⁹

the word “malice” “is not to be understood in that narrow, restrained sense to which the modern use of the word ‘malice’ is apt to lead one”); *People v. Sedeno*, 518 P.2d 913, 926 (Cal. 1974) (holding that “[i]ll will toward or hatred of the victim are not requisites of malice as that term is used in defining murder”).

¹⁵² *Regina v. Cunningham*, 41 Crim. App. 155, 2 Q.B. 396, 2 All Eng. Rep. 412 (1957).

¹⁵³ *Lopez*, 2004 WY 28, ¶ 19, 86 P.3d at 858 (reciting the rule that “[t]he required state of mind for a murder conviction is that degree of mental disturbance or aberration of the mind that is wicked, evil and of unlawful purpose, or of that willful disregard of the rights of others which is implied in the term malice”).

¹⁵⁴ *Id.* at ¶ 20, 86 P.3d at 858.

¹⁵⁵ See Frank Remington & Orrin Helstad, *The Mental Element In Crime—A Legislative Problem*, 1952 WIS. L. REV. 644, 648-49 (1952) (describing the historical “transition from strict liability to the requirement of a mental element” and identifying “[t]he early concept of *mens rea* [as] little more than a general notion of moral blameworthiness”); KENNY’S OUTLINES OF CRIMINAL LAW, *supra* note 75, § 158a at 202 (noting that first edition of Kenny’s treatise in 1902 had characterized this use of the term “malice” as “the old vague sense of ‘wickedness in general’”).

¹⁵⁶ Francis Sayre, *The Present Signification of Mens Rea in the Criminal Law*, HARVARD LEGAL ESSAYS 399, 411-12 (1934).

¹⁵⁷ Remington & Helstad, *supra* note 155, at 649; see also Sanford Kadish, *The Decline of Innocence*, 26 CAMBRIDGE L. J. 273, 274 (1968).

¹⁵⁸ See W.M. CLARK, HANDBOOK OF CRIMINAL LAW § 36 at 86-87 (2d ed. 1902) (compiling cases).

¹⁵⁹ In 1976, seven years before the misdemeanor-manslaughter provision finally was superseded, the Wyoming Supreme Court held that the vehicular homicide statute had impliedly repealed the misdemeanor-manslaughter provision, at least to the extent that an act “malum prohibitum” was involved. See *Bartlett v. State*, 569 P.2d 1235 (Wyo. 1977).

Under this statute, a person was guilty of manslaughter if he killed any human being “in the commission of some unlawful act.”¹⁶⁰ What this—and similar statutes—meant in practice was that the defendant’s mere intent to commit a misdemeanor supplied all of the culpability required for imposition of homicide liability,¹⁶¹ regardless of whether the misdemeanor carried any perceptible risk of death.¹⁶² Thus, the statute did not require offense-specific culpability—did not require, as Wyoming’s current manslaughter statute does, that the defendant either wanted to bring about or at least foresaw the *possibility* of bringing about the proscribed social harm.

This late change in Wyoming’s manslaughter statute is, then, illustrative of the broader historical trend, in which the vague requirement of “wickedness” gradually has been replaced by finely calibrated requirements of offense-specific culpability.¹⁶³ First-year law students usually learn about this change by reading *Regina v. Cunningham*.¹⁶⁴ Cunningham removed the gas meter from the basement of his residence for the purpose of stealing coins that had been deposited in the meter.¹⁶⁵ His removal of the gas meter caused the release of coal gas, which poisoned the occupant of the adjacent residence, who happened to be Cunningham’s mother-in-law. At trial, the judge instructed the jury that the “malice” element of the poisoning statute would be satisfied if the defendant’s actions were “wicked.”¹⁶⁶ This instruction would, of course, have permitted the jury to find “malice” on

¹⁶⁰ 1876 WYOMING COMPILED LAWS ch. 35, § 18; *see also* State v. Cantrell, 64 Wyo. 132, 146 186 P.2d 539, 543 (1947) (observing that a charge of manslaughter will lie where the killing occurs *either* “in the commission of an unlawful act *or* by any culpable neglect or criminal carelessness”).

¹⁶¹ Comber v. United States, 584 A.2d 26, 37 (D.C. App. 1990).

¹⁶² State v. Pray, 378 A.2d 1322, 1323 (Me. 1977) (criticizing misdemeanor-manslaughter rule on the ground that it imposes liability “even though [a] person’s conduct does not create a perceptible risk of death”). In this respect, liability under the misdemeanor-manslaughter statute differs from felony-murder liability, which generally attaches only with respect to felonies that create a perceptible risk of death. *See, e.g.*, WYO. STAT. ANN. § 6-2-101(a) (LexisNexis 2005) (limiting application of felony-murder rule to “sexual assault, arson, robbery, burglary, resisting arrest, kidnapping or the abuse of a child under the age of sixteen”).

¹⁶³ *See* Paul Robinson & Jane Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 687-88 (1983).

¹⁶⁴ *Regina v. Cunningham*, 41 Crim.App. 155, 2 Q.B. 396, 2 All Eng. Rep. 412 (1957). Among the first-year Criminal Law casebooks that include the *Cunningham* decision are, *e.g.*, RICHARD BONNIE, ANNE COUGHLIN, JOHN JEFFRIES JR. & PETER LOW, CRIMINAL LAW 180 (2d ed. 2004); JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 144 (3d ed. 2003); WAYNE LAFAVE, MODERN CRIMINAL LAW: CASES, COMMENTS AND QUESTIONS 114 (3d ed. 2001); SANFORD KADISH & STEPHEN SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 204 (7th ed. 2001).

¹⁶⁵ *Cunningham*, 41 Crim.App. 155, 2 Q.B. 396, 2 All Eng. Rep. 412.

¹⁶⁶ *Id.* at 397.

the basis of Cunningham's intent to steal, for Cunningham "had clearly acted wickedly in stealing the gas meter and its contents."¹⁶⁷ In reversing, the appellate court concluded that Cunningham's intent to steal could not supply "malice" of the right sort. In its modern sense, the court said, "malice" requires "either (1) [a]n actual intention to do the particular kind of harm that [the statute proscribes], or (2) recklessness as to whether such harm should occur or not."¹⁶⁸

C. Toward an alternative definition of malice

An updated definition of "malice" would presumably take much the same form as the definition of malice in *Cunningham*: it would require proof that the defendant either wished to bring about or consciously disregarded a risk of bringing about the very social harm—death—that is an element of second-degree murder. At the same time, however, it would have to require more than ordinary recklessness, since reckless homicide is a form of manslaughter in Wyoming.¹⁶⁹ *Lopez* points the way toward such a definition by its heavy reliance on precedent from Utah and Colorado.¹⁷⁰ In Utah and Colorado, and indeed in much of the rest of the country, "express malice" is defined to require the intent to bring about the proscribed result,¹⁷¹ while "implied malice" is defined to require something

¹⁶⁷ *Id.* at 401.

¹⁶⁸ *Id.* at 399. In Wyoming's criminal code, this modern approach to culpability finds expression not only in statutes defining specific offenses—like the statute defining manslaughter—but in Wyoming's statutory definitions of recklessness and criminal negligence. These definitions require the government to prove that the defendant either consciously disregarded or culpably overlooked *the very social harm that is proscribed by the statute under which the defendant is being prosecuted*. Under these definitions, "[a] person acts recklessly when he consciously disregards a substantial and unjustifiable risk that *the harm he is accused of causing* will occur"; he acts with criminal negligence when "he fails to perceive a substantial and unjustifiable risk that *the harm he is accused of causing* will occur." WYO. STAT. ANN. § 6-1-104(a) (LexisNexis 2005) (emphasis added). The same calibration of mental state to social harm occurs as a matter of course where the law requires proof that the defendant *intended* to bring about the very social harm that is the statute's target. A defendant who is charged with first-degree arson must intend "to destroy or damage an occupied structure," WYO. STAT. ANN. § 6-3-101 (LexisNexis 2005), while a defendant who is charged with larceny must intend "to steal or deprive the owner of the property," WYO. STAT. ANN. § 6-3-402 (LexisNexis 2005). Though both intentions are wicked, they are not interchangeable.

¹⁶⁹ See WYO. STAT. ANN. § 6-2-105(a)(ii) (LexisNexis 2005).

¹⁷⁰ *Lopez*, 2004 WY 28, ¶ 22, 86 P.3d at 858-59.

¹⁷¹ See *Walker v. People*, 489 P.2d 584, 176-77 (Colo. 1971) ("[E]xpress malice is that deliberate intention, unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof."); *Kelsey v. State*, 532 P.2d 1001, 1004 (Utah 1975) (malice "is express when there is manifested a deliberate intention unlawfully to take the life of a fellow creature").

akin to “extreme recklessness.”¹⁷² It is, of course, the latter half of this definition—the “implied malice” component—that interests us here. There has never been any question whether “express malice”—the intent to kill—would satisfy the malice element of second-degree murder.¹⁷³ The difficult question for the Wyoming courts has always been what *else*—in addition to intent to kill—would suffice. And on this point, the Colorado and Utah decisions that were cited in *Lopez* point unambiguously to a single clear answer.

The Utah decision that was cited in *Lopez* was *Wardle v. State*.¹⁷⁴ *Wardle* was a second-degree murder case, where the evidence showed that the defendant had caused the victim’s death by jumping up and down on him. The question on appeal was whether this conduct could support an inference that the defendant had acted with any of the three culpable mental states specified by Utah’s second-degree murder statute: intent to kill; intent to cause serious bodily injury; or “depraved indifference to human life.”¹⁷⁵ The court concluded that it could. What matters for our purposes, though, is that in so doing the court equated the last of these three culpable mental states—“depraved indifference to human life”—with “implied malice.”¹⁷⁶ And, at the same time, the court made reference to another traditional definition of implied malice: “when the circumstances attending the killing show an abandoned and malignant heart.”¹⁷⁷ In Utah, then, the “implied malice” that can be inferred from stomping but not slapping is equivalent to the mental state that has variously been described as “depraved indifference,” “depraved heart,” and “an abandoned and malignant heart.”

The same is true in Colorado law. The Colorado Supreme Court’s 1969 decision in *Pine v. People*,¹⁷⁸ which was cited in *Lopez*,¹⁷⁹ does not define “implied

¹⁷² PERKINS & BOYCE, *supra* note 61, at 860 (defining implied malice to require “the wanton and willful doing of an act with awareness of a plain and strong likelihood that [death] may result”).

¹⁷³ *Downing v. State*, 11 Wyo. 86, 70 P. 833, 835 (1902) (quoting from jury instruction that defined “express malice” as “that deliberate intention unlawfully of taking away the life of a fellow creature which is manifested by external circumstances capable of proof”).

¹⁷⁴ *Wardle v. State*, 564 P.2d 764 (Utah 1977).

¹⁷⁵ UTAH CODE ANN. § 76-5-203(2).

¹⁷⁶ *Wardle*, 564 P.2d at 765 n.1 (saying of the “depraved indifference” provision: “The terminology of this section indicates an implied malice, viz., when the circumstances attending the killing show an abandoned and malignant heart.”); *Id.* at 766 (concluding that “there was a question of fact for the jury as to defendant’s intention to kill or to cause serious bodily injury, or his implied malice”).

¹⁷⁷ *Id.* at 765 n.1. In more recent cases, the Utah Supreme Court has clarified that the requisite culpable mental state for this form of second-degree murder is “knowledge [by the defendant] that his conduct created a grave risk of death to another.” *Fontana v. State*, 680 P.2d 1042, 1047 (Utah 1984).

¹⁷⁸ *Pine v. People*, 455 P.2d 868 (Colo. 1969).

¹⁷⁹ *Lopez*, 2004 WY 28, ¶ 22, 86 P.3d at 858.

malice." But other contemporaneous Colorado decisions say that "implied malice" exists "[1] where there is no considerable provocation for killing or [2] where circumstances show an abandoned or malignant heart."¹⁸⁰ The second part of this definition—"where circumstances show an abandoned or malignant heart"—is the same as Utah's definition. The Colorado court has equated this formula to "depraved heart"¹⁸¹ and "extreme indifference"¹⁸² and has said that all three concepts define an extreme form of recklessness:

The essential concept was one of extreme recklessness regarding homicidal risk. Thus, a person might be liable for murder absent any actual intent to kill or injure if he caused the death of another in a manner exhibiting "a wanton and willful disregard of an unreasonable human risk," or, in the confusing elaboration of one court "a wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty." Since "depraved heart" murderers exhibit the same disregard for the value of human life as deliberate or premeditated murderers, they are viewed as deserving of the same serious sanctions.

Examples of the kinds of conduct which would demonstrate "depraved heart" murder at common law include: the firing of a loaded gun, without provocation, into a moving train and the resultant death of an innocent bystander, the discharge of a firearm into a crowd of people, operating a vehicle at high speed, placing obstructions on a railroad track, throwing a heavy piece of timber from a roof onto a crowded street, pointing a revolver loaded with a single cartridge and firing it on the third pull of the trigger during a game of Russian Roulette, firing several shots into a home known to be occupied, intending to shoot over a victim's head in order to scare him, but hitting him by "mistake," and throwing a heavy beer glass at a woman carrying a lighted oil lamp.¹⁸³

¹⁸⁰ *People v. Spinuzzi*, 369 P.2d 427, 430 (Colo. 1962).

¹⁸¹ *People v. Jefferson*, 748 P.2d 1223 (Colo. 1988).

¹⁸² *Id.* at 1230. Colorado adopted a revised criminal code in 1972. In this revised criminal code, the extreme-indifference formulation replaced the old "abandoned and malignant heart" formulation. Under COLO. REV. STAT. § 18-3-102(1)(C), a person commits first-degree murder if "[u]nder circumstances manifesting extreme indifference to the value of human life, he intentionally engages in conduct which creates a grave risk of death to a person other than himself, and thereby causes the death of another."

¹⁸³ *Jefferson*, 748 P.2d at 1227 (citations omitted).

What, then, can be made of the first clause of Colorado's definition of "implied malice," which says that "'implied malice' exists where there is no considerable provocation for killing"? It cannot mean that every homicide that occurs without provocation will qualify as murder; after all, most negligent and accidental homicides occur without provocation.¹⁸⁴ The answer to this seeming conundrum is that the first part of Colorado's definition of implied malice—"where there is no considerable provocation"—does not define an *alternative* way of proving implied malice, but rather defines a separate and essential component of malice, implied *or* express. Where the state proves that the defendant killed the victim intentionally or with a depraved heart, no finding of "malice" will be warranted if "considerable provocation appears in the case"¹⁸⁵ or if the killing was justified or excused. That is: in addition to the *positive* requirement of intent to kill or depraved indifference, malice includes a separate, *negative* component requiring that the homicide occur without "justification, excuse, or recognized mitigation."¹⁸⁶

Unfortunately, courts often mistakenly refer to this purely negative requirement as "implied malice" in recognition of the fact that it will be "implied" or "presumed" unless the defendant produces affirmative evidence of justification, excuse, or mitigation—in recognition, that is, of the rule "that the prosecution is not required to prove in the first instance as part of its case in chief . . . that [the killing] did not result from the privileged use of deadly force or that it did not result from the sudden heat of passion engendered by adequate provocation, or other matters of this kind."¹⁸⁷ This confusion explains why the Colorado Supreme Court would say that "implied malice" exists "[1] where there is no considerable provocation for killing *or* [2] where circumstances show an abandoned or malignant heart."¹⁸⁸ And perhaps it also explains why, in cases like *Butcher v. State*,¹⁸⁹ the Wyoming court has treated the absence of "legal justification or excuse" as sufficient proof of malice. In any event, the positive core of Colorado's definition of implied malice, and of Utah's and many other states',¹⁹⁰ remains the requirement of "depraved indifference" or "extreme indifference."

¹⁸⁴ See *Helton v. State*, 73 Wyo. 92, 115, 276 P.2d 434, 442 (1954).

¹⁸⁵ *Lucas v. State*, 91 S.E. 72 (Ga. 1916) (holding that "it was not erroneous to charge [the jury]: 'Wherever it is shown that one person kills another intentionally, whenever that appears and no considerable provocation appears in the case, then that case would be a case of murder and the law would imply malice'").

¹⁸⁶ PERKINS & BOYCE, *supra* note 61, at 860.

¹⁸⁷ *Lucas*, 91 S.E. at 76.

¹⁸⁸ *People v. Spinuzzi*, 369 P.2d 427, 430 (Colo. 1962) (emphasis added).

¹⁸⁹ *Butcher v. State*, 2005 WY 146, ¶ 24, 123 P.3d 543, 550-51 (Wyo. 2005).

¹⁹⁰ See, e.g., *People v. Sedeno*, 518 P.2d 913, 926 (Cal. 1974) (quoting a jury instruction which said that a homicide is committed with malice if "the killing was proximately caused by 'an act, the natural consequences of which are dangerous to life, which was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard of life'").

This relationship between “extreme indifference” and “implied malice” has not escaped the attention of the Wyoming courts. Wyoming trial courts occasionally have used the alternative “abandoned and malignant heart” formulation in instructing juries on the meaning of “implied malice.”¹⁹¹ And the Wyoming Supreme Court itself has had occasion to explore the meaning of “extreme indifference” in cases interpreting Wyoming’s aggravated assault and battery statute, which provides in part that a person is guilty of the offense if he “causes serious bodily injury to another intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life.”¹⁹² The court has recognized that the terms “implied malice” and “depraved heart” were the predecessors of the term “extreme indifference.”¹⁹³ Even more usefully, the court in *O’Brien v. State* seems tacitly to have adopted the view that the “extreme indifference” provision in the assault and battery statute is “designed to more severely punish battery where the defendant’s state of mind would have justified a murder conviction had his victim not fortuitously lived.”¹⁹⁴

From this observation, it is but a small step to the conclusion that second-degree murder requires proof either of intent to kill or of “extreme indifference to the value of human life.” Given the general unworkability of the current two-part *Keats* definition of malice in the second-degree murder context; given the inconsistency of that definition with the result reached, correctly, in *Lopez v. State*; and given, finally, the rough moral equivalence of intent-to-kill homicide and “extreme indifference” homicide; the Wyoming Supreme should adopt a modernized version of “implied malice” like the one applied in Utah and Colorado and in Wyoming’s own aggravated assault and battery statute.¹⁹⁵

¹⁹¹ See *Vigil v. State*, 563 P.2d 1344, 1355 n.12 (Wyo. 1977); *Wiggin v. State*, 206 P. 373, 374 (Wyo. 1922); *Downing v. State*, 70 P. 833, 834-35 (Wyo. 1902); *Ross v. State*, 57 P. 924, 930 (Wyo. 1899).

¹⁹² WYO. STAT. ANN. § 6-2-502(a)(i) (LexisNexis 2005).

¹⁹³ See *O’Brien v. State*, 2002 WY 63, ¶ 13, 45 P.3d 225, 230 (Wyo. 2002), where the court said:

In many other states, the “extreme indifference” language was preceded by the “depraved heart” and “implied malice” terms to distinguish between homicides such as second degree murder and involuntary manslaughter, and each term was recognized to mean that it contemplated circumstances which make a defendant more blameworthy than recklessness alone.

¹⁹⁴ *Id.* at ¶ 17, 45 P.3d at 231; see also *id.* at ¶ 23, 45 P.3d at 233 (appearing tacitly to adopt defendant’s assertion on appeal that aggravated assault is “the functional equivalent of a murder in which, for some reason, death fails to occur”).

¹⁹⁵ I want to emphasize that my suggestion that the court should move toward a new definition of implied malice in connection with second-degree murder is not meant to suggest that *Keats v. State* was wrongly decided. *Keats* was an arson case, and, as the Wyoming Supreme Court acknowledged in *Keats* itself, the word “malice” can mean dif-

V. THE ORIGINS OF THE *CROZIER* DECISION IN CONFUSION OVER GENERAL AND SPECIFIC INTENT

Why did the court in *Crozier* define “malice” in keeping with “old vague sense of wickedness,” instead of adopting the modern view of malice? The answer, as Professor Lauer has hinted,¹⁹⁶ appears to lie in the court’s concern that adoption of a more specific, more substantial definition of implied malice would have made the defense of voluntary intoxication available to *Crozier* and to other defendants charged with second-degree murder. The court began its analysis, after all, by reciting the common law rule that voluntary intoxication is a defense to “specific intent crimes” but not to “general intent crimes.”¹⁹⁷ From there, it appears to have worked backward, constructing definitions of “purposely” and “maliciously” whose only apparent virtue was their lack of anything that might remotely be characterized as “specific intent.”

Though I share the court’s guiding intuition—that the voluntary intoxication defense should not be available to defendants charged with second-degree murder—I disagree with the court’s apparent conclusion that this intuition requires the adoption of vague, insubstantial definition of “malice.” As I will argue in this section, second-degree murder is a general-intent crime, regardless of how malice is defined.

A. *Why the Crozier court might have supposed that intoxication evidence would be admissible to negate “extreme indifference”*

In *Crozier v. State*, the principal question on appeal was whether “intoxication should have been considered by the jury as bearing upon the question of intention regarding the second-degree murder charge.”¹⁹⁸ In Wyoming, the question whether voluntary intoxication “has bearing upon the question of intention” in a particular case must be resolved—as it has been since territorial days¹⁹⁹—by

ferent things in different settings. *Keats v. State*, 2003 WY 19, ¶¶ 19, 25, 64 P.3d 104, 109, 112 (Wyo. 2003). The court accordingly framed the question posed by the *Keats* case in the narrowest way possible: “the important question is not what ‘maliciously’ may have meant as part of common law arson, or even as part of the earlier statute, but what it means in the current statute.” *Id.* at ¶ 25, 64 P.3d at 112. The fact that the *Keats* definition of malice does not suffice in the second-degree murder setting does not, then, necessitate reconsideration of *Keats*.

¹⁹⁶ Lauer, *supra* note 4, at 553.

¹⁹⁷ *Crozier v. State*, 723 P.2d 42, 51 (Wyo. 1986).

¹⁹⁸ *Id.*

¹⁹⁹ See 1876 COMPILED LAWS OF WYOMING, ch. 35, tit. I, § 9 (providing in part that “[w]here a crime rests in intention, the inebriated condition of the defendant at the time of committing the offense may be proven to the jury, as being upon the question of intention”).

resort to statute.²⁰⁰ The Wyoming criminal code provides that “[s]elf-induced intoxication of the defendant is not a defense to a criminal charge except that in any prosecution evidence of self-induced intoxication of the defendant may be offered when it is relevant to negate the existence of a specific intent which is an element of the crime.”²⁰¹ Thus, as the Wyoming Supreme Court said in *Crozier*, the question whether intoxication was relevant to second-degree murder required application of the distinction between crimes of “specific intent” and crimes of “general intent”: “in Wyoming intoxication may negate the existence of a specific-intent element of a specific-intent crime but is not a factor affecting a general-intent crime.”²⁰²

The distinction between specific-intent crimes and general-intent crimes has been a perennial source of confusion.²⁰³ (In *Keats*, the court understated the problem considerably when it said that “the differences between the concepts [are] not always readily discernable.”²⁰⁴) Wyoming’s formula for distinguishing general-intent crimes from specific-intent crimes does, at least, have the virtue of being clearly worded. Under Wyoming’s formula, a crime qualifies as a “general intent crime” if “it is sufficient to demonstrate that the defendant undertook the prohibited conduct voluntarily, and his purpose in pursuing that conduct is not an element of the crime.”²⁰⁵ A crime will qualify as a “specific intent crime” if it “requires the state to prove that the defendant intended to commit some further act, or achieve some additional purpose, beyond the prohibited conduct itself.”²⁰⁶

²⁰⁰ WYO. STAT. ANN. § 6-1-202(a) (LexisNexis 2005).

²⁰¹ *Id.*

²⁰² *Crozier*, 723 P.2d at 51.

²⁰³ MODEL PENAL CODE § 2.02, cmt at 231 n.3 (1985) (referring to this distinction as “an abiding source of confusion and ambiguity in the penal law”).

²⁰⁴ *Keats v. State*, 2003 WY 19, ¶ 10, 64 P.3d 104, 107 (Wyo. 2003).

²⁰⁵ *Jennings v. State*, 806 P.2d 1299, 1303 (Wyo. 1991).

²⁰⁶ *Id.* A similar formula appeared in the California Supreme Court’s widely cited opinion in *People v. Hood*, 462 P.2d 370 (Cal. 1969). There, Justice Traynor wrote for the court:

When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant’s intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent.

Id. at 456-57. See also *Crosby v. People*, 27 N.E. 49, 52 (Ill. 1891) (crime is one of specific intent “where a particular intent is charged, and such intent forms the gist of the offense, as contradistinguished from the intent necessarily entering into every crime”).

At first glance, this definition of “general intent crime” seems clear enough. It is easy to think of crimes that require the state merely to “demonstrate that the defendant undertook the prohibited conduct voluntarily.” This definition obviously reaches crimes of strict liability, for which the bare “volition” accompanying the act is sufficient proof of culpability to justify the imposition of liability. This definition also is thought uncontroversially to reach crimes like rape and trespass, which, in addition to the requirement of a volitional bodily movement, require some minimal knowledge of the circumstances in which the bodily movement takes place—require, for example, knowledge by the defendant that he or she is engaging in sexual intercourse, or knowledge by the defendant that he is breaking into a building.²⁰⁷

Likewise, Wyoming’s definition of “specific intent crime” seems clear enough at first glance. An example of a crime that “requires the state to prove that the defendant intended to commit some further act” would be burglary, which requires the state to prove that the accused entered or remained within a structure “with the intent to commit a larceny or a felony therein.”²⁰⁸ An example of a specific-intent crime that requires the state to prove that “the defendant intended to . . . achieve some additional purpose beyond the prohibited conduct itself”²⁰⁹ would be first-degree murder, which requires not only that the defendant voluntarily or intentionally perform the *act* that causes another person’s death but that he intend as well to cause another person’s death.²¹⁰

The principal trouble with these definitions is not that they are unclear, but that a great many offenses satisfy neither of them.²¹¹ A great many offenses require

²⁰⁷ Susan Mandiberg, *The Dilemma of Mental State in Federal Regulatory Crimes: The Environmental Example*, 25 ENV’L L. 1165, 1231 n.370 (1995) (arguing that “[s]ometimes awareness of the circumstances is required as part of general intent”); see also *People v. Colantuono*, 12 Cal.Rptr.2d 134, 139 (Cal. App. 2 Dist. 1992) (“In general intent crimes, such as rape, *present* conduct (sexual intercourse) is coupled with a *present-looking* state of mind (knowledge of the act).”); SANFORD KADISH & STEPHEN SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 216 (7th ed. 2001) (observing that “the actor who broke into a building would be guilty of trespass, a general intent crime[,] so long as he knew the nature of the acts he performed”).

²⁰⁸ WYO. STAT. ANN. § 6-3-301(a) (LexisNexis 2005); see also *Jennings v. State*, 806 P.2d 1299, 1303 (Wyo. 1991) (“Both at common law and under the Wyoming statutory definition, burglary is a crime requiring specific intent.”).

²⁰⁹ *Jennings v. State*, 806 P.2d 1299, 1303 (Wyo. 1991).

²¹⁰ See *Young v. State*, 849 P.2d 754, 759 (Wyo. 1993) (holding that first-degree murder “is a specific intent crime, requiring proof that the defendant killed purposely and with premeditation”).

²¹¹ See PAUL ROBINSON, *CRIMINAL LAW DEFENSES* § 65(e) (1984) (suggesting that the distinction between general and specific intent fails to provide a workable rule to determining the availability of the intoxication defense because “[i]t fails to recognize the variety of culpability requirements contained in offense definitions”).

the state to prove something *more* than a “voluntary act” but *less* than an “inten[t] to commit some further act[] or achieve some additional purpose.” Take, for example, the crime of reckless manslaughter. Reckless manslaughter, as defined in Wyoming and nearly everywhere else, requires the state to prove, first, that the defendant voluntarily performed that act that caused the victim’s death. But it also requires the state to prove that the defendant was reckless with respect to the harm caused²¹²—i.e., that he consciously disregarded a substantial and unjustifiable risk that his voluntary act would cause another person’s death.²¹³ This additional mental element of recklessness is not, however, the equivalent of a requirement that the defendant specifically “intend[] to commit some further act[] or achieve some additional purpose.” Thus, reckless manslaughter—and indeed any crime whose definition requires knowledge or recklessness or negligence—fits comfortably neither within the standard definition of “general intent crime” nor within the standard definition of a “specific intent crime.”

Courts have responded to this seeming dilemma in one of two ways. Some courts have treated crimes of recklessness as general-intent crimes, on the theory that these crimes do not require proof that the defendant “intended” to bring about the proscribed result.²¹⁴ These courts, in construing the phrase “specific intent,” have read the word “intent” in its narrowest sense, to refer exclusively to those cases where the proscribed result is the defendant’s conscious objective.²¹⁵ Under this approach, then, a crime is a “specific intent crime” only if it requires proof that the defendant specifically “intended” to bring about the social harm that is an element of the offense. A crime is a “general intent crime,” by contrast, “if the actor can be convicted upon proof of any lesser state of mind,” as where the required mental state with respect to the social harm is “knowingly, recklessly, or negligently.”²¹⁶

²¹² WYO. STAT. ANN. § 6-2-105(a)(ii) (LexisNexis 2005).

²¹³ WYO. STAT. ANN. § 6-1-104(a)(ix) (LexisNexis 2005) (defining “recklessly”).

²¹⁴ See, e.g., *People v. Carr*, 97 Cal. Rptr. 2d 143, 148 (Cal. Ct. App. 2000) (observing that “[t]ypically, when a crime requires mere recklessness, it will be characterized as a general intent offense”); *Holbrook v. State*, 772 A.2d 1240, 1250 (Md. 2001) (identifying “reckless and wanton disregard for the consequences” as a “general intent” element); *State v. Zanger*, 851 A.2d 134, 139 (N.J. Super. Ct. Law Div. 2004) (identifying “offenses involving recklessness or criminal negligence” as “general intent offenses”); *Spicer v. State*, 42 P.3d 742, 748 (Kan. Ct. App. 2002) (holding that “[s]pecific intent requires a demonstration of a greater culpable mental state than mere recklessness or negligence”).

²¹⁵ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 136 (3d ed. 2001) (“Sometimes, courts draw the following distinction: an offense is ‘specific intent’ if the crime requires proof that the actor’s conscious object, or purpose, is to cause the social harm set out in the definition of the offense.”).

²¹⁶ *Id.*; see also SANFORD KADISH & STEPHEN SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 216 (7th ed. 2001) (“General intent can mean a number of different things, but in this context it generally means that the defendant can be convicted if he did what in ordinary speech we would refer to as an intentional action.”).

Other courts have, in contrast, treated crimes of recklessness as specific-intent crimes, on the theory that they require proof of something more than a voluntary act or voluntary conduct.²¹⁷ Under this approach, the word “intent” in the phrase “specific intent” effectively is read in its broader sense, to refer generally to any “mental element” *other than* the bare volition that accompanies a voluntary act.²¹⁸ Thus, if the statute defining the offense requires proof that the defendant acted “purposely,” “knowingly,” or “recklessly” with respect either to the proscribed harm or to an attendant-circumstance element, then the crime is a specific-intent crime.²¹⁹ Concomitantly, a crime is a general-intent crime only if the statute defining the offense “requires no further *mental state* beyond willing commission of the act proscribed by law.”²²⁰

This second approach has considerable allure. If the Wyoming statute permitting the introduction of intoxication evidence on questions of “specific intent” is based on relevance concerns, as its wording arguably implies,²²¹ then there can be

²¹⁷ See *State v. Brown*, 931 P.2d 69, 75-77 (N.M. 1996) (holding that extreme-recklessness element of murder statute, because it requires subjective awareness of risk, must be treated as equivalent to “specific intent”); see also *Jennings v. State*, 806 P.2d 1299, 1303 (Wyo. 1991) (defining crime of general intent as one where “it is sufficient to demonstrate that the defendant undertook the prohibited conduct voluntarily”).

²¹⁸ See WAYNE LAFAVE, *CRIMINAL LAW* § 5.2(e) at 252 (4th ed. 2003) (acknowledging that “the phrase ‘criminal intent’ is sometimes used to refer to criminal negligence and recklessness”). This broader use of the word “intent” was remarked upon by the Wyoming Supreme Court in *Dean v. State*, 668 P.2d 639, 642 (Wyo. 1983), where the court acknowledged that the word “intent” sometimes is used to encompass mental states like “criminal negligence.” The court criticized this use of the word intent, saying: “it is not a very apt term to describe the mental element requisite for each crime.” *Id.*

²¹⁹ Thus, when courts say (as they often do) that rape is a “general intent offense,” they mean not only that the state need not prove that the defendant specifically “intended to overcome his victim’s resistance” but also that the state need not prove even that the defendant knowingly or “recklessly disregarded his victim’s lack of consent.” *Steve v. State*, 875 P.2d 110, 116, 116 n.3 (Alaska Ct. App. 1994); see also *People v. Witte*, 449 N.E.2d 966, 971-72 n.2 (Ill. App. 1983) (holding that “the only intent necessary to support rape is the *general* intent to perform the physical act”; “the crime of rape must be understood as *not* including an element of knowledge of the woman’s lack of consent.”); *Commonwealth v. Lopez*, 745 N.E.2d 961, 965 (Mass. 2001) (in prosecutions for rape, “the relevant inquiry has been limited to consent in fact, and no mens rea or knowledge as to the lack of consent has ever been required”).

²²⁰ *People v. Sargent*, 970 P.2d 409, 414 (Cal. 1999) (emphasis added); see also, e.g., *State v. Anderson*, 773 A.2d 328, 340 (Conn. 2001) (holding that crime qualifies as “general intent crime” where “the elements of a crime consist of a description of a particular act and a *mental element not specific in nature*”); *Commonwealth v. Sibinich*, 598 N.E.2d 673, 676 n.3 (Mass. App. Ct. 1992) (observing that “[s]pecific intent’ is intended to emphasize a particular *state of mind* at the time of the conduct in question.” (emphasis added)).

²²¹ WYO. STAT. ANN. § 6-1-202(a) (LexisNexis 2005) (providing that evidence of voluntary intoxication “may be offered when it is relevant to negate the existence of a specific intent”).

no basis for distinguishing purpose from, say, recklessness. After all, the capacity to be aware of risk—which is an essential component of recklessness—is surely no less affected by intoxication than is the capacity to entertain a “conscious objective.”²²² Moreover, this second approach to defining specific and general intent is consistent with the way these terms are used in other settings. Courts often have said, for example, that a mistake of fact must be reasonable to provide a defense to a general-intent crime,²²³ but need *not* be reasonable to provide a defense to a specific-intent crime.²²⁴ Even an unreasonable mistake of fact sometimes will negate the mental state of recklessness.²²⁵ So, at least for purposes of the rules governing the mistake-of-fact defense, recklessness is a form of “specific intent.”

Treating recklessness as a form of “specific intent” is appealing for another reason, too. At common law, it was not a defense to a general-intent crime that the defendant, as a result of a mistake of fact, reasonably believed that he was engaged in committing an offense *different or less serious than* the charged offense.²²⁶ The defendant, it was said, “cannot set up a defence by merely proving that he

²²² See *State v. Brown*, 931 P.2d 69, 75 (N.M. 1996) (remarking that “[t]he capacity to possess ‘subjective knowledge’ may be just as affected by intoxication as the capacity to intend to do a further act”).

²²³ CAL. JURY INSTR.—CRIM. 4.35, comment (2006) (remarking that “[m]istakes of fact . . . must be reasonable to negate general criminal intent”); see also, e.g., *Dressler*, *supra* note 215, § 12.03[D] at 155; *United States v. Welstead*, 36 C.M.R. 707, 710 (U.S. Army Bd. of Rev. 1966) (holding that where offense “requires a specific intent, the defense of mistake . . . need not include a showing that the mistake was both honest and reasonable but only that it was an honest mistake In general intent cases a mistake or ignorance of fact must be both honest and reasonable in order to constitute a defense”); *Simms v. District of Columbia*, 612 A.2d 215, 218 (D.C. Cir. 1992) (holding that “[i]n general intent crimes, such as tampering with another’s vehicle, . . . defendant may interpose a mistake of fact defense if the defendant proves ‘to the satisfaction of the fact finder that the mistake was both (1) honest and (2) reasonable’”); *Commonwealth v. Simcock*, 575 N.E.2d 1137, 1141 (Mass. App. Ct. 1991) (observing that “an honest and reasonable mistake of fact may be a defense even if the offense charged requires proof of only a general intent”).

²²⁴ *Wayne LaFave*, *supra* note 219, at 283; see also *Perkins & Boyce*, *supra* note 61, at 1046 (“[E]ven an unreasonable mistake, if entertained in good faith, is inconsistent with guilt if it negates some special element required for guilt of the offense such as intent or knowledge.”).

²²⁵ For example, if a defendant is absolutely certain that a gun is unloaded and therefore lacks any conscious awareness of the risk that pulling the trigger will cause his friend’s death, then the defendant’s decision to pull the trigger in jest cannot be deemed reckless, regardless of how unreasonable the defendant’s belief was. See WYO. STAT. ANN. § 6-1-104(a)(ix). (defining “recklessly” to require that defendant “consciously disregard[]” the risk in question).

²²⁶ See Norman Finkel & Jennifer Groscup, *When Mistakes Happen: Commonsense Rules of Culpability*, 3 PSYCHOL. PUB. POL’Y & L. 65, 73-74 (1997) (identifying lesser-moral-wrong and lesser-legal-wrong doctrines as features of the common law’s treatment of “general-

thought he was committing a different kind of wrong from that which in fact he was committing.”²²⁷ The culpability required for general-intent crimes was, then, literally “general,” rather than “specific”; any sort of blameworthy mental state at all would supply the requisite “general intent.” This reading of the term “general intent” also might be thought to explain why voluntary intoxication does not negate general intent: the blameworthiness associated with the decision to become intoxicated supplies the requisite degree of general blameworthiness.²²⁸ As one court has said:

Self-induced intoxication . . . by its very nature involves a degree of moral culpability. The moral blameworthiness lies in the voluntary impairment of one’s mental faculties with knowledge that the resulting condition is a source of potential danger to others. . . . It is this blameworthiness that serves as the basis for [declaring voluntary intoxication incompetent to disprove general intent].²²⁹

On this view, then, the term “general-intent offense” refers exclusively to those offenses whose only mental element (beyond bare volition) is a kind of generalized blameworthiness.

It is possible to come away from this analysis with the sense that we have uncovered a deep, fundamental connection among the various uses of the terms “general intent” and “specific intent.” The considerable allure of this approach to defining general and specific intent might well explain why the Wyoming Supreme Court in *Crozier* was reluctant to adopt a more demanding definition of implied malice. The court might have supposed, in keeping with this unitary definition of general and specific intent, that if the term “maliciously” were interpreted to require “extreme indifference,” then second-degree murder would qualify as a specific-intent offense, to which voluntary intoxication was a valid defense. Extreme-indifference homicide, after all, plainly requires offense-specific culpability, rather than general blameworthiness. The allure of the unitary definition would explain, too, why the court ultimately defined malice to require something akin to general wickedness.

intent offenses”); *see also* JOSHUA DRESSLER, *TEACHER’S MANUAL TO ACCOMPANY CASES AND MATERIALS ON CRIMINAL LAW* 52-53 (2003) (treating lesser-legal-wrong doctrine as relevant only to general-intent crimes).

²²⁷ *Regina v. Prince*, 2 Crim. Cas. Res. 154 (1875).

²²⁸ *Remington & Helstad*, *supra* note 155, at 649 (arguing that “voluntary intoxication was itself considered morally wrong and—therefore did not negative moral blameworthiness”).

²²⁹ *Hendershott v. People*, 653 P.2d 385, 393-94 (Colo. 1982) (citations omitted); *see also*, *e.g.*, *State v. Burge*, 487 A.2d 532 (Conn. 1985); *Fields v. Commonwealth*, 12 S.W.2d 275, 282 (Ky. 2000).

B. Why the unitary theory of general intent is false

The allure of this unitary definition of general and specific intent is false. And, indeed, any effort to develop coherent definitions of these terms is misguided. The terms “general intent” and “specific intent” have no meaning beyond their crude function as “devices for seeking a compromise verdict.”²³⁰ They are designed, in other words, purely to memorialize a pragmatic compromise “between the conflicting feelings of sympathy and reprobation for the intoxicated offender.”²³¹ It is practice, and not theory, that has given content to this compromise. Where homicide is concerned, the prevailing practice is clear and well-established: voluntary intoxication is a defense to first-degree murder, but is not a defense to any less serious form of homicide. Second-degree murder is, then, a general-intent crime, to which voluntary intoxication is not a valid defense. The Wyoming Supreme Court therefore need not be concerned that the adoption of a more demanding definition of malice will make voluntary intoxication a valid defense to second-degree murder.

Before the nineteenth century, the common law apparently “made no concession whatever because of intoxication, however gross.”²³² During the nineteenth century, however, judges in England and the United States began searching for a “more humane, yet workable, doctrine.”²³³ A potential avenue for ameliorating the harsh effects of the common law rule emerged in 1819, when Holroyd, J., held in a murder case that voluntary intoxication, though not a defense, could negate the mental element of premeditation.²³⁴ The broader theory underlying this decision—that “intoxication could be considered to negate intent, whenever intent was an element of the crime charged”²³⁵—carried the potential, however, to undermine the traditional rule entirely, since some form of mens rea is an element of nearly every offense. The basis for a compromise emerged in 1849, when Coleridge, J., said that evidence of voluntary intoxication was relevant only if it deprived the defendant of “the power of forming any specific intention.”²³⁶ Other courts appear to have seized on this newly-forged distinction—between “specific intention” and other forms of mens rea—as a way of “limit[ing] the operation of the doctrine and achiev[ing] a compromise between the conflicting feelings of sympathy and reprobation for the intoxicated offender.”²³⁷

²³⁰ See GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 850 (1978).

²³¹ *People v. Hood*, 462 P.2d 370, 377 (Cal. 1969).

²³² Jerome Hall, *Intoxication and Criminal Responsibility*, 57 HARV. L. REV. 1045, 1046 (1944); see also *Montana v. Egelhoff*, 518 U.S. 37, 45 (1996); *Hood*, 462 P.2d at 455.

²³³ *Hood*, 462 P.2d at 455-56.

²³⁴ *Rex v. Grindley*, quoted in *Rex v. Carroll*, 7 C. & P. 145, 173 Eng. Rep. 64 (1835).

²³⁵ *Hood*, 462 P.2d at 456.

²³⁶ *Regina v. Moorhouse*, 4 Cox C.C. 55 (1849).

²³⁷ *Hood*, 462 P.2d at 456; see also Hall, *supra* note 232, at 1049-50.

What this distinction meant in practice was that voluntary intoxication was a defense to first-degree murder but not second-degree murder.²³⁸ Remarkably, this practice seems not to have varied despite fundamental differences among the states' definitions of first- and second-degree murder. In states where the necessity of proving an intent to kill was what distinguished first- and second-degree murder, the element of intent to kill was said to be a specific-intent element.²³⁹ In states where "depraved indifference to the value of human life" was what distinguished first- and second-degree murder, the element of depraved indifference was said to be a specific-intent element.²⁴⁰ And in states where premeditation was what distinguished first- and second-degree murder, only the element of premeditation was said to qualify as a "specific intent" element.²⁴¹ This last category of states included Wyoming, where premeditation was long thought to be what

²³⁸ Hall, *supra* note 232, at 1051 (explaining that "[t]he application of the doctrine in homicide cases results mostly in conviction for second degree murder"); Brett Sweitzer, Comment, *Implicit Redefinitions, Evidentiary Proscriptions, and Guilty Minds: Intoxicated Wrongdoers After Montana v. Egelhoff*, 146 U. PA. L. REV. 269, 276 (1977) (explaining that courts' application of the distinction between general- and specific-intent offenses resulted in "a general amelioration of the harsh English common law (which provided for capital punishment for a wide variety of offenses), checked by courts' refusal to allow intoxication to mitigate second degree murder to manslaughter").

²³⁹ See, e.g., *People v. Langworthy*, 331 N.W.2d 171, 178 (Mich. 1982) (holding that intoxication does not negate the mental element of second-degree murder because second-degree murder does not require proof of intent to kill); *Commonwealth v. Edward*, 555 A.2d 818 (Pa. 1989) (approving jury instruction that permitted jury to consider evidence of intoxication only on the question whether defendant was guilty of first-degree, intent-to-kill murder).

²⁴⁰ See *State v. Brown*, 931 P.2d 69, 75-77 (N.M. 1996) (holding that "extreme indifference" element in first-degree murder statute is a specific-intent element that may be negated by intoxication); cf. *Langford v. State*, 354 So.2d 313, 315 (Ala. Cr. App. 1978) (reversing conviction for first-degree "depraved mind" murder on the ground that intoxicated driver, as a result of his intoxication, probably had not "realized the likelihood of a collision").

²⁴¹ Hall, *supra* note 232, at 1051-52 (explaining that a majority of American courts chose to "implement the exculpatory doctrine only as regards premeditation"); see also, e.g., *Hopt v. People*, 104 U.S. 631, 634 (1881) (holding that "when a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reasons of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury"); *Aszman v. State*, 24 N.E. 123, 126 (Ind. 1890) (holding that intoxication is relevant to question of premeditation, "which, under our statute, . . . is the distinguishing ingredient [of first-degree murder]"); *Gustavenson v. State*, 10 Wyo. 300, 324, 68 P. 1006, 1010 (1902) (holding that evidence of voluntary intoxication was to be considered only "in determining whether premeditation was present or absent").

distinguished first- and second-degree murder.²⁴² In *Gustavenson v. State*,²⁴³ the Wyoming Supreme Court held that evidence of intoxication was to be considered only “in determining whether premeditation was present or absent.”²⁴⁴ “What constitutes murder in the second degree by a sober man,” the court said, “is equally murder in the second degree if committed by a drunken man.”²⁴⁵

It would be wrong to criticize *Gustavenson* and its kin for having failed consistently to apply the categories “general intent” and “specific intent,” or for having somehow missed the fundamental point of the distinction between general and specific intent. In developing a rule for limiting the intoxication defense, the courts did not appropriate a pre-existing or commonsensical²⁴⁶ distinction between crimes of general intent and specific intent. Rather, they appear to have created a new distinction from the whole cloth.²⁴⁷ What is more, the better interpretation of the case law is that these terms were never intended to operate as anything but terms of art—they were never intended to be used except as names for somewhat arbitrary-seeming categories of crimes. In this role, “the doctrines concerning general and specific intent [have] operated to produce the precise results desired”²⁴⁸—namely, a “plausible mediation” between complete exculpation of the intoxicated offender and the harshness of the old common-law rule.²⁴⁹

Not surprisingly, though, courts in many recent cases have been reluctant simply to define “specific intent” as “whatever mental element happens to distin-

²⁴² See *supra* text accompanying notes 13-16.

²⁴³ *Gustavenson v. State*, 10 Wyo. 300, 68 P. 1006 (1902).

²⁴⁴ *Id.* at 324, 68 P. at 1010.

²⁴⁵ *Id.*

²⁴⁶ *People v. Kelley*, 176 N.W.2d 435, 443 (Mich. Ct. App. 1970) (“It has been observed that neither common experience nor psychology knows of any phenomenon as ‘general intent’ or ‘specific intent.’”).

²⁴⁷ Mitchell Keiter, *Just Say No Excuse: The Rise and Fall of the Intoxication Defense*, 87 J. CRIM. L. & CRIMINOLOGY 482, 492 (1997) (asserting that “[c]ourts developed the distinction between specific and general intent crimes in response to the problem of the intoxicated offender”); Scott Anderegg, Note, *The Voluntary Intoxication Defense in Iowa*, 73 IOWA L. REV. 935, 937 (1988) (observing that “the common-law courts developed the distinction between ‘general’ and ‘specific’ intent as a method of limiting the mitigating effect of the voluntary intoxication defense”).

²⁴⁸ Hall, *supra* note 232, at 1061.

²⁴⁹ *Id.*; see also ROBINSON, *supra* note 211, § 65(e) at 298 (arguing that “the confusion over the distinction [between general and specific intent] arises from the fact that it is a device, conceived at common law, to achieve a certain result rather than reflecting a coherent theory”); *People v. Gutierrez*, 225 Cal. Rptr. 885, 887 (Cal. Ct. App. 1986) (explaining that “the distinction between general[-]intent and specific[-]intent crimes is at bottom founded upon a policy decision regarding the availability of certain defenses”).

guish the most serious degree of an offense from the next most serious.”²⁵⁰ They have instead assumed, with impeccable logic but with a very poor sense of history, that the concepts “specific intent” and “general intent” must have some genuine content, and so they have set out in search of that content.²⁵¹ Over time, the courts’ efforts have borne fruit in general definitions like the one adopted by the Wyoming Supreme Court in *Jennings v. State*.²⁵² In *Jennings*, the court said that a crime is a specific-intent crime if it “requires the state to prove that the defendant intended to commit some further act, or achieve some additional purpose beyond the prohibited conduct itself.”²⁵³ Courts applying similar definitions have arrived, again with impeccable logic, at the conclusion that intoxication is a defense to second-degree murder if second-degree murder invariably requires an intent to kill.²⁵⁴

Other courts have adopted theories of general and specific intent that carry the potential for even more dramatic change. In *State v. Brown*,²⁵⁵ for example, the New Mexico Supreme Court concluded that the mental state of “extreme indifference to the value of the human life,” though it does not strictly speaking qualify as *either* “specific intent” or “general intent,” must be treated as the equivalent of specific intent.²⁵⁶ The court reasoned that the capacity for subjective awareness of risk “may be just as affected by intoxication as the capacity to intend to do a further act.”²⁵⁷ Though the result reached in *Brown* itself—that intoxication can negate the required mental element of first-degree “extreme indifference” murder—is unobjectionable, the court’s theory if carried to its logical conclusion would make intoxication relevant to negate every form of *mens rea* except

²⁵⁰ *But see* Commonwealth v. Graves, 334 A.2d 661, 666 (Pa.1975) (Eagan, J., dissenting) (arguing that evidence of intoxication is admissible “to lower the *degree of guilt* within a crime, but only where the Legislature has specifically provided for varying degrees of guilt within the crime”).

²⁵¹ See GEORGE FLETCHER, RETHINKING CRIMINAL LAW 850 (1978) (observing that “[t]he distinction between general and specific intent is frequently litigated, for the simple reason that the courts tend to employ these terms as though they had a meaning beyond their function as devices for seeking a compromise verdict”).

²⁵² *Jennings v. State*, 806 P.2d 1299, 1303 (Wyo. 1991).

²⁵³ *Id.*

²⁵⁴ See, e.g., *State v. Hayes*, 17 P.3d 317, 322 (Kan. 2001) (holding that “[i]ntentional second-degree murder is a specific intent crime” and that a defendant charged with second-degree murder therefore “may rely on the defense of voluntary intoxication”); *State v. Patterson*, 752 So.2d 280 (La. Ct. App. 5 Cir. 2000) (holding that the intoxication is a defense to second-degree murder, which requires proof that “the offender has specific intent to kill or inflict great bodily harm”).

²⁵⁵ *State v. Brown*, 931 P.2d 69 (N.M. 1996).

²⁵⁶ *Id.* at 76.

²⁵⁷ *Id.* at 75.

negligence.²⁵⁸ Intoxication would be relevant to disprove, for example, the mental element of reckless manslaughter. And the common law's pragmatic compromise between public-safety concerns and sympathy for the intoxicated offender would collapse.

Worse, this sort of theoretical approach to the definition of specific and general intent threatens to distort the courts' interpretation of statutory mental elements even in cases where intoxication is not at issue. For example, if theory appears to dictate (as it did in *State v. Brown*) that intoxication is relevant to negate any subjective mental element whatever, then courts might well strip the statute defining an offense of subjective mental elements for fear of making the defense of intoxication available. Something like this appears to have happened in cases interpreting the element of "extreme indifference." A number of courts have concluded, somewhat dubiously,²⁵⁹ that "extreme indifference" describes not "a subjective state of mind, but a degree of [objective] divergence from the norm of acceptable behavior."²⁶⁰ Some of these courts, as Professor Alan Michaels has cogently argued, "apparently follow this approach to avoid allowing an intoxication defense to depraved heart murder, because intoxication, which can arguably negate a mental state, plainly cannot negate objective circumstances."²⁶¹

Roughly the same process appears to have been at work in *Crozier v. State*. In *Crozier*, the court's inquiry into the meaning of "maliciously" was undertaken for the expressed purpose of deciding whether malice was a specific-intent element

²⁵⁸ Professor Jerome Hall makes this very point, arguing that, if carried to its logical conclusion, this theory—that intoxication is a defense to any crime requiring intent—would enable the defendant to use intoxication as a defense to any charge but negligent homicide. Hall, *supra* note 232, at 1052.

²⁵⁹ See Kenneth Simons, *Does Punishment for 'Culpable Indifference' Simply Punish for 'Bad Character'? Examining the Requisite Connection Between Mens Rea and Actus Reus*, 6 BUFF. CRIM. L. REV. 219, 312 (2002) (characterizing this interpretation as "dubious").

²⁶⁰ *State v. Dufield*, 549 A.2d 1205, 1206-07 (N.H. 1988); see also *State v. Dodd*, 503 A.2d 1302, 1305 (Me. 1986) (holding that "depraved indifference" murder requires conduct which objectively viewed manifests a depraved indifference to the value of human life); *People v. Word*, 689 N.Y.S.2d 36, 37 (N.Y. App. Div. 1999), *appeal denied*, 722 N.E.2d 513 (N.Y. 1999) (holding that whether an act was committed under "circumstances evincing a depraved indifference to human life" requires not an evaluation of the defendant's subjective mental state but an objective assessment of the degree of risk created by the defendant); *State v. Blanco*, 371 N.W.2d 406, 409 (Wis. Ct. App. 1985) (holding that a defendant's objective conduct is sufficient to demonstrate the element of a depraved mind).

²⁶¹ Alan Michaels, *Acceptance: The Missing Mental State*, 71 SO. CAL. L. REV. 953, 1008 n.211 (1998); see also Bernard E. Gegan, *More Cases of Depraved Mind Murder: The Problem of Mens Rea*, 64 ST. JOHN'S L. REV. 429, 436 (1990) (arguing that "[s]o tenuous is the [Register] court's rationale for refusing to recognize depraved indifference as a mens rea element, and so superfluous did its interpretation render the statutory language, that

which could be negated by evidence of intoxication. Before undertaking this inquiry, the court defined “general intent” very narrowly, saying that “[g]eneral intent implies that *the intent is not an element of the crime* and requires that the prohibited conduct must be undertaken voluntarily.”²⁶² It would have been reasonable for the court to suppose, as indeed it appears to have done, that only if malice were stripped of any real content would it qualify as “general intent.” This would explain why the court repeatedly implied that the element was purely objective. The court said, for example, that the word “malice” “*describe[s] the act to be committed* and not an intention to produce a desired specific result.”²⁶³ It also said—in what otherwise appears to be a complete non sequitur—that “malice may be inferred from the facts and circumstances.”²⁶⁴ And when forced finally to adopt a definition of malice, the court turned to a definition—taken from a North Carolina decision—that focused on the character of the *act*, not on the defendant’s mental state. According to this definition, “any act evidencing ‘wickedness of disposition, hardness of heart, cruelty, recklessness or consequences, and a mind deliberately bent on mischief . . . is sufficient to supply the malice necessary for second[-]degree murder.”²⁶⁵ Whatever this definition describes, it certainly is not a “specific intent.”

The point of this long digression is, finally, that concerns about making the intoxication defense available to defendants charged with second-degree murder ought not to deter the Wyoming Supreme Court from adopting a modern definition of implied malice. There is no “underlying rationale” other than compromise for the distinction between general and specific intent. It is wrong to think, for example, that the reason why voluntary intoxication does not negate “general intent” is that the act of becoming intoxicated supplies some minimal element of blameworthiness.²⁶⁶ And it is likewise wrong to think that the reason why

one can speculate that the court was simply reaching a desirable result on the precise issue before it: whether evidence of intoxication can negate the necessary mental element of depraved mind murder”); Alan Michaels, Note, *Defining Unintended Murder*, 85 COLUM. L. REV. 786, 809 n.119 (1985) (arguing that “[s]tates which follow both the degree of risk approach and the objective circumstances approach may have adhered to these standards in fear of providing an intoxication defense”).

²⁶² *Crozier v. State*, 723 P.2d 42, 52 (Wyo. 1986) (emphasis added).

²⁶³ *Id.* at 53 (emphasis added) (quoting *Dean v. State*, 668 P.2d 639, 642 (Wyo. 1983)).

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 53-54 (quoting *State v. Wilkerson*, 247 S.E.2d 905, 917 (N.C. 1978)).

²⁶⁶ *See Hendershott v. People*, 653 P.2d 385, 396 (Colo. 1982). It cannot be true that a defendant who is convicted of, say, second-degree murder need be no more culpable than anybody else who decides to become intoxicated, and that the only thing separating the murderer from the ordinary drunk is the mere fortuity that one person’s intoxication led by “bare chance” to a death while the other’s did not. *See Hall, supra* note 232, at 1071-72 (arguing that the fact “[t]hat the accused ‘voluntarily’ became intoxicated, even if that is assumed to describe his conduct accurately, does not provide an ethical defense for the imposition of the severe sanctions that are typically imposed”). In truth, what principally

intoxication negates “specific intent” is that any subjective mental state may be affected by intoxication.”²⁶⁷ The distinction between general and specific intent comes down to nothing more than a practical compromise, as Justice Mosk once nicely explained in arguing that “implied-malice murder is not a specific intent crime”:

“General intent” and “specific intent” are shorthand devices best and most precisely invoked to contrast offenses that, as a matter of policy, may be punished despite the actor’s voluntary intoxication (general intent) with offenses that, also as a matter of policy, may not be punished in light of such intoxication if it negates the offense’s mental element (specific intent).²⁶⁸

In other words, the Wyoming Supreme Court’s classification of second-degree murder as a general-intent crime is not grounded on the application of criteria governing membership in the class of “general-intent crimes,” because no such criteria exist. The classification instead is grounded exclusively on a policy determination—namely, that voluntary intoxication, though it might occasionally serve to reduce first-degree murder to second-degree murder, ought never to reduce first- or second-degree murder to manslaughter. There is, then, no reason to suppose that the classification of second-degree murder as a general-intent crime will change if the mental elements of second-degree murder are redefined. And so there is no reason to suppose that redefinition of second-degree murder will make the intoxication defense available.

VI. CONCLUSION

In *Crozier v. State*,²⁶⁹ the Wyoming Supreme Court broke with precedent in holding that second-degree murder does not require an intent to kill. This aspect of *Crozier* is not invulnerable to criticism.²⁷⁰ But reinstating the requirement of intent now—after the passage of twenty years and dozens of murder prosecutions—would involve the court in the same vice to which it fell victim in *Crozier* itself: disrespect for precedent. It would be far better for the court to adhere to *Crozier*’s basic outlines while modifying what is unworkable about *Crozier*. As

lies behind the rule denying import to voluntary intoxication in prosecutions for “general intent” crimes is a complex set of pragmatic concerns, including “the relative rarity of cases where intoxication really does engender unawareness as distinguished from imprudence” and “the impressive difficulties posed in litigating the foresight of any particular actor at the time when he imbibes.” MODEL PENAL CODE § 2.08, cmt. at 359 (1985).

²⁶⁷ See *State v. Brown*, 931 P.2d 69, 75 (N.M. 1996).

²⁶⁸ *Whitefield v. State*, 868 P.2d 272, 287 (Cal. 1994) (Mosk, J., dissenting).

²⁶⁹ *Crozier v. State*, 723 P.2d 42 (Wyo. 1986).

²⁷⁰ See Lauer, *supra* note 4, at 553.

the jury verdict in *Lopez v. State*²⁷¹ demonstrated, what is unworkable about *Crozier* is its definition of implied-malice murder. Neither the requirement that the defendant “purposely” perform the act that causes death nor the requirement that the defendant act with “hatred, ill will, or hostility” is sufficiently demanding to mark the boundary of second-degree murder. A better definition of implied malice can be found in the Colorado and Utah decisions to which the Wyoming court turned for guidance in *Lopez*.²⁷² The court should follow these decisions in holding that implied malice requires extreme indifference to the value of human life.

There is no reason to fear that reinterpretation of the second-degree murder statute will lead to a flood of litigation by persons previously convicted under the statute. Even if the reinterpretation were to be given retroactive effect, defendants whose convictions already had become final would face significant procedural hurdles if they tried to take advantage of the reinterpretation.²⁷³ They would, first, have little hope of succeeding under Wyoming’s post-conviction-relief statutes, which create a procedural bar to any post-conviction claim that “could have been raised but was not raised in a direct appeal.”²⁷⁴ They likewise would have little hope of succeeding under Wyoming’s habeas-corpus statutes, which afford relief only to prisoners who assert claims “going to the subject matter or personal jurisdiction of the court.”²⁷⁵ It is doubtful whether a vagueness claim targeting the old interpretation would be deemed to go to “subject matter jurisdiction.”²⁷⁶ And it is

²⁷¹ *Lopez v. State*, 2004 WY 28, 86 P.3d 851 (Wyo. 2004).

²⁷² See *People v. Jefferson*, 748 P.2d 1223 (Colo. 1988); *State v. Wardle*, 564 P.2d 764 (Utah 1977).

²⁷³ See *Bousley v. United States*, 523 U.S. 614, 620 (1998) (recognizing that, even if decision interpreting federal statute was given retroactive effect, defendant who sought to take advantage of change in the law would have to overcome effects of his procedural default). As a general rule, “a case becomes final after judgment and sentence is entered and an appellate decision affirming the conviction has been made, or the time for taking an appeal expires without perfection of an appeal, or after the voluntary dismissal of such an appeal.” *Nixon v. State*, 2002 WY 118, ¶ 9, 51 P.3d 851, 853-54 (Wyo. 2002). Further, “once a criminal case becomes final pursuant to the general rule, a trial court loses its power to act in that case unless it is expressly permitted to do so by statute or court rule.” *Id.* at 854.

²⁷⁴ WYO. STAT. ANN. § 7-14-103(a)(i) (LexisNexis 2005).

²⁷⁵ *Nixon v. State*, 2002 WY 118, ¶ 12, 51 P.3d 851, 854 (Wyo. 2002).

²⁷⁶ See *State v. Thomas*, 685 N.W.2d 69, 84 (Neb. 2004) (holding that defendant’s vagueness challenge “does not raise an issue of subject matter jurisdiction”); *Sodergren v. State*, 715 P.2d 170, 174-75 (Wyo. 1985) (treating constitutional vagueness argument as non-judicial); *but cf.* *Ochoa v. State*, 848 P.2d 1359, 1362 (Wyo. 1993) (holding that defendant’s vagueness challenge was jurisdictional for purposes of rule that guilty plea is a waiver of all non-judicial defects).

doubtful too whether any defendants would be able to show—as they would have to—that their own conduct fell at the margins of the statutory proscription.²⁷⁷

It is doubtful because, despite the emptiness of the current definition of second-degree murder, prosecutors and juries with few exceptions have applied the statute only in cases where the defendant obviously acted either with intent to kill or with “extreme indifference to the value of human life.” It is hard to quarrel with application of the second-degree murder statute in cases where, for example, the defendant shot the victim in the chest with a .41 caliber handgun;²⁷⁸ where the defendant, after his first shot dropped the victim to the ground, stood over the victim and shot him twice in the face;²⁷⁹ where the defendant plunged a hunting knife deep into the victim’s chest as the victim tried to get away;²⁸⁰ where the defendant shot the victim in the face at close range with a .38 caliber handgun;²⁸¹ where the defendant shot the victim four times in the back at close range;²⁸² and where the defendant shot the victim and then, after the victim had fallen to the floor, shot him again and kicked him.²⁸³

The consistency with which prosecutors and juries have applied the statute is reassuring. But no showing of consistency in application could obviate correction of the current definition. Due process requires that crimes be defined with “sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”²⁸⁴ It is not enough, then, that jurors and prosecutors *happen* to agree in their intuitions about what qualifies as second-degree murder. The standards that lie behind those intuitions must be made explicit. This the current definition of second-degree murder fails utterly to do.

²⁷⁷ See *State v. Sherman*, 653 P.2d 612, 614-15 (Wash. 1982) (holding that “[i]f one’s conduct is within the hard-core arena (conduct the statute is clearly intended to proscribe), one may not bring a vagueness claim, unless the claim includes a claim of unconstitutional [i.e., First Amendment] overbreadth”); see also *Hobbs v. State*, 757 P.2d 1008, 1011 (Wyo. 1988) (reiterating that “[v]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand”).

²⁷⁸ *Sanchez v. State*, 2006 WY 12, 126 P.3d 897 (Wyo. 2006).

²⁷⁹ *Pena v. State*, 2004 WY 115, 98 P.3d 857 (Wyo. 2004).

²⁸⁰ *Butcher v. State*, 2005 WY 146, 123 P.3d 543 (Wyo. 2006).

²⁸¹ *Wilks v. State*, 2002 WY 100, 49 P.3d 975 (Wyo. 2002).

²⁸² *Lane v. State*, 12 P.3d 1057 (Wyo. 2000).

²⁸³ *Edwards v. State*, 973 P.3d 41 (Wyo. 1999).

²⁸⁴ *Greigo v. State*, 761 P.2d 973, 975 (Wyo. 1988) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).