COMMENT

UTTER CONFUSION: WHY "UTTER DISREGARD FOR HUMAN LIFE" SHOULD BE REPLACED WITH AN OBJECTIVE ANALYSIS OF THE DEFENDANT'S ACTIVITY

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Whether a criminal defendant acts with "utter disregard for human life" alone distinguishes first from second degree reckless crimes in Wisconsin. Though Wisconsin adopted this type of language over one hundred fifty years ago, neither the legislature nor the courts can adequately explain or apply it. Attempts by Wisconsin appellate courts to address the vagueness of "utter disregard" have resulted in arbitrary distinctions that do not accurately reflect differing levels of moral culpability. Swerving immediately before a hit-and-run does not demonstrate "utter disregard," shaking a baby then calling 911 does. This type of precedent does little to remedy the confusion. Defendants do not have adequate notice of the charge against them and are left with the unconstitutional burden of having to disprove "utter disregard." Prosecutors may use the vagueness to their advantage and charge aggravated recklessness in many cases, but are then placed in the uncomfortable position of having to prove something without fully understanding what it is they have to prove. Trial judges, entrusted with the responsibility of explaining the law to the jury, cannot fulfill their role. Wisconsin juries are then asked to evaluate whether the facts of various cases reflect "utter disregard," without any clear direction as to what "utter disregard" requires.

The Wisconsin legislature must therefore abandon "utter disregard" and codify the proposed objective examination of the defendant's reckless activity. The Objective Activity Test asks jurors to analyze whether the defendant engaged in an activity which, viewed objectively under the circumstances, has no purpose outside of threatening or causing harm to others. By shifting the focus away from whether the defendant's activity reflects a certain mindset and on to the nature of the activity itself, the Objective Activity Test will better accomplish the legislature's goal of providing heightened punishment for those offenders whose behavior was particularly reprehensible while remaining consistent with existing precedent. The use of "utter disregard" plagues the Wisconsin criminal justice system, and the legislature must take action.

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INTRODUCTION: *STATE V. MILLER*

"Simply put, this is not an 'utter disregard' case."[1]

One evening in January 1999, James Miller stopped to buy gas as he drove home from a Wisconsin bar.[2] While standing in line to pay, he met a couple and invited them back to his home for a beer.[3] Unbeknownst to Miller, the couple decided to bring along Calvin Nakai, a physically large former marine.[4] Miller's roommate and friends were asleep in the home when the guests arrived.[5]

The couple left after only a few minutes but Nakai stayed behind.[6] Nakai and Miller sat and talked, and Nakai grew increasingly argumentative.[7] Nakai ranted to Miller about what "white people" had

1. *State v. Miller*, 2009 WI App 111, ¶ 44 n.13, 772 N.W.2d 188 (Ct. App. 2009).

2. *See id.* ¶ 3.

3. *Id.*

4. Decision on Motion for Post Conviction Relief Pursuant to Wisconsin Statutes Section 974.06 at 1–2, *State v. Miller*, 2009 WI App 111, 320 Wis. 2d 724, 772 N.W.2d 188 [hereinafter Post Conviction Decision].

5. *Miller*, 2009 WI App 111, ¶ 4.

6. Post Conviction Decision, *supra* note 4, at 1–2.

7. *Miller*, 2009 WI App 111, ¶ 5.

done to his Native American ancestors.[8] Miller agreed and tried to calm Nakai down, but Nakai slapped Miller across the face.[9] Miller testified that he ignored Nakai because he did not want to make the situation worse.[10] Nakai did not calm down. He grabbed a screwdriver and said to Miller: "Do you know what I could do with this?"[11] Miller answered: "You could probably kill me with it, but you are not going to because you are my friend."[12] Miller offered to drive Nakai home, but Nakai refused.[13] Nakai then walked into one of the bedrooms and smacked Miller's sleeping roommate.[14]

At this point, Miller ran to the phone and called 911 to ask for help because Nakai "was very large" and "acting crazy."[15] He returned to the bedroom to find Nakai still hitting his roommate.[16] Miller told Nakai that the police were coming and demanded that he leave, but Nakai instead hit Miller again.[17] Miller still did not do anything to retaliate.[18] Nakai picked up a guitar and smashed it over a chair, then charged at Miller and knocked him down.[19]

Miller testified that he feared for his life and the lives of the others, so he ran to his bedroom, got a shotgun, and returned to find Nakai again holding the screwdriver aggressively in the air.[20] Miller screamed, "[g]et the hell out of here" and pumped the shotgun, but Nakai did not react.[21] Miller admitted that he did not verbally warn Nakai that he would shoot him if he did not drop the screwdriver.[22] Miller waited a few seconds, aimed at Nakai's leg from sixteen or seventeen feet away, and fired one shot which hit Nakai in the hip.[23] After shooting Nakai, Miller called 911 again and told the dispatcher

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8. Post Conviction Decision, *supra* note 4, at 2 (internal quotations omitted).
9. *Id.*
10. *Id.*
11. *Miller*, 2009 WI App 111, ¶ 6 (internal quotations omitted).
12. *Id.* (internal quotations omitted).
13. *Id.* ¶ 7.
14. Post Conviction Decision, *supra* note 4, at 2–3.
15. *Id.* at 3 (internal quotations omitted).
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 3–4.
20. *Id.* at 4–5.
21. *State v. Miller*, 2009 WI App 111, ¶ 12, 772 N.W.2d 188 (Ct. App. 2009) (internal quotations omitted); Post Conviction Decision, *supra* note 4, at 5.
22. Post Conviction Decision, *supra* note 4, at 7.
23. *Miller*, 2009 WI App 111, ¶ 12; Post Conviction Decision, *supra* note 4, at 5–6.

that Nakai was bleeding and needed help.[24] When the police arrived, Miller asked the officer if Nakai would be all right.[25]

At trial, the jury found Miller guilty of first-degree reckless injury and aggravated battery.[26] In Wisconsin, "[w]hoever recklessly causes great bodily harm to another human being under circumstances which show utter disregard for human life is guilty of [first-degree reckless injury]."[27] The Wisconsin legislature codified "utter disregard" as the aggravating factor for reckless offenses in 1988.[28] "Utter disregard for human life" is a guttural feeling; it represents the legislature's belief that there should be heightened punishment for those offenders who act so callously and with so little concern for the victim that their moral culpability rises above simple recklessness.[29] But this vague notion fails on application.

To accomplish what the legislature intended by adopting an aggravating factor for reckless crimes, the legislature must abandon "utter disregard" entirely and replace it with an objective examination of the nature of the defendant's risk-creating activity. This Comment proposes the Objective Activity Test, which asks jurors to conduct an analysis of whether the defendant engaged in an activity that, viewed objectively under the circumstances, had any purpose outside of threatening or causing harm to others. This test provides a more effective means to distinguish offenses while remaining consistent with the intent of the Wisconsin legislature and existing precedent. Without this change, both trial and appellate courts—as the *Miller* case demonstrates—will continue to struggle to interpret and apply "utter disregard."

In response to his conviction, James Miller filed a motion with the trial court pro se, arguing that the evidence was insufficient to prove that he acted under circumstances showing "utter disregard for human

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24. Post Conviction Decision, *supra* note 4, at 6.

25. *See id.* at 10. In its decision, the court of appeals noted that Miller's testimony was overwhelmingly uncontroverted, and that Miller's broad outline of what occurred was the only version of events presented to the jury. *Miller*, 2009 WI App 111, ¶ 43 n.13.

26. *Miller*, 2009 WI App 111, ¶ 15. Though Miller argued self-defense, the jury concluded that Miller's actions did not rise to the level of lawful self-defense because Nakai was not directly charging at him when Miller fired the shot. Brief and Appendix of Plaintiff-Appellant at 26, *State v. Miller*, 2009 WI App 111, 320 Wis. 2d 724, 772 N.W.2d 188 [hereinafter State's Brief].

27. WIS. STAT. § 940.23(1)(a) (2009).

28. Walter Dickey, David Schultz & James L. Fullin, Jr., *The Importance of Clarity in the Law of Homicide: The Wisconsin Revision*, 1989 WIS. L. REV. 1323, 1351.

29. *Id.* at 1355–56.

life."[30] The court agreed and vacated Miller's first-degree reckless injury conviction.[31] The court concluded that Miller's actions before, during, and after the shooting showed regard for Nakai and the others.[32]

The State challenged this decision before the District IV Court of Appeals, arguing that the trial court should have examined whether Miller showed "utter disregard for human life" during the incident itself, at the very moment he shot Nakai.[33] Because the trial court used Miller's actions both before (his repeated attempts to calm Nakai down, his repeated resistance to Nakai's attacks, and his repeated efforts to get Nakai to stop without using violence) and after (his 911 call and attempts to ensure that Nakai was all right), the State argued that the trial court erred in its decision."[34]

The court of appeals, however, agreed with Miller. The court examined the "totality of the circumstances" and concluded that Miller's actions, though perhaps reckless, did not rise to the level of "utter disregard."[35] Citing the Wisconsin Supreme Court case of

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30. *Miller*, 2009 WI App 111, ¶¶ 17–18. In Wisconsin, certain issues, such as ineffective assistance of counsel, must be appealed to the trial court that heard the case before they can be brought before the court of appeals. *State v. Curtis*, 218 Wis. 2d 550, 554, 582 N.W.2d 409 (Ct. App. 1998) (citing *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979)). Because the trial court judge was present during the trial and observed the attorney's actions, he is best situated to evaluate whether or not the defendant has a valid claim. *Id.* Only after a criminal defendant presents these arguments and the trial court denies them may the defendant raise these claims with the court of appeals. *Id.* at 555 n.3.

31. Post Conviction Decision, *supra* note 4, at 10.

32. *Id.*

33. State's Brief, *supra* note 26, at 24–25.

34. *Id.* at 24.

35. *Miller*, 2009 WI App 111, ¶¶ 42–43. The final published opinion was actually the third version of the decision. The court of appeals first issued its opinion on April 23, 2009. It withdrew that opinion on May 12, issued the second version on May 21, and withdrew that version on June 12. It issued the third version on July 2, ordered that decision published on August 26, and *State v. Miller* was finally published on September 8. *See* State v. Miller *Case History*, WISCONSIN COURT SYSTEMS, http://wscca.wicourts.gov/ (search "Appeal Number" for "07AP001052," then click on "Case History") (last visited Mar. 12, 2011) [hereinafter Miller *Case History*]. From the first version of the opinion onward, the court agreed that the evidence was insufficient to prove that Miller acted with "utter disregard." David Ziemer, *Wisconsin Court of Appeals Issues Decision for Third Time*, WIS. L.J., July 13, 2009, at 7. However, in the first two versions of the opinion, the court reached this determination by concluding that Miller's attorney was ineffective for failing to request that the trial court instruct the jury on second-degree reckless injury. *Id.* In the final opinion, the court held that the evidence was insufficient to convict Miller of first-degree reckless injury without addressing whether his attorney was ineffective for failing to request the lesser-included offense. *Id.* The Wisconsin Supreme Court declined to review the court of appeals' decision. *See Petitions for Review Denied,* 2010 WI 5, 322 Wis. 2d 123,

Wagner v. State,[36] the court noted that a defendant acting with "utter disregard" must possess "a state of mind which has no regard for the moral or social duties of a human being."[37] Because Miller acted to protect himself and the others, because he did not physically respond until hours after Nakai first attacked him, and because he called 911 to ensure that Nakai received medical attention, the court of appeals upheld the trial court's reversal of Miller's conviction for first-degree reckless injury.[38]

In its opinion, the court of appeals also addressed the weight that should be given to a defendant's actions after the fact when conducting the "utter disregard" analysis.[39] The court's conclusion, however, arguably conflicts with the Supreme Court's decision in *State v. Jensen*,[40] the State's cornerstone "utter disregard" case. In *Jensen*, the Supreme Court explained: "[a]fter-the-fact regard for human life does not negate 'utter disregard' otherwise established by the circumstances before and during the crime. It may be considered by the fact finder as a part of the total factual picture, but it does not operate to preclude a finding of utter disregard for human life."[41] In a footnote responding to the State's arguments in *Miller*, the court of appeals declared: "we reject the State's suggestion that *Wagner*, *Balistreri*, and *Jensen* may be read to stand for the proposition that evidence of 'after-the-fact' regard for life is of less import than conduct evincing regard for life during and before the act."[42] Thus, under *Jensen*, after-the-fact regard cannot negate "utter disregard" established before and during the act, but under *Miller*, after-the-fact regard should be given equal weight to the defendant's actions before or during the act.

The jury's verdict in *Miller*, the arguments presented on appeal, and the court of appeals' potential conflict with the Supreme Court's ruling in *Jensen* all expose a fundamental problem in Wisconsin criminal law: no one knows what "utter disregard" means or how to apply it to specific cases. First, does "utter disregard" imply no regard whatsoever, or can a defendant show regard and still be guilty of first-degree reckless offenses? Second, when must a defendant show regard? Criminal statutes must be clear: the State needs to know what it has to

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779 N.W.2d 176 (indicating that the Wisconsin Supreme Court denied the *State v. Miller* petition for review on December 14, 2009).

36. 76 Wis. 2d 30, 250 N.W.2d 331 (1977).
37. *Miller*, 2009 WI App 111, ¶ 33.
38. *Id.* ¶¶ 40–43.
39. *Id.* ¶ 35 n.12.
40. 2000 WI 84, 236 Wis.2d 521, 613 N.W.2d 170.
41. *Id.* ¶ 32.
42. *Miller*, 2009 WI App 111, ¶ 35 n.12.

prove; the defendant needs to know how to prepare a defense; the judge needs to know how to instruct the jury; and the jury needs to know how to apply the law to the facts.[43]

The aggravating factor for reckless offenses has serious implications at sentencing. Whether the defendant acted under circumstances that show "utter disregard for human life" alone distinguishes first- from second-degree reckless crimes in Wisconsin. For a defendant charged with reckless injury, "utter disregard" represents the difference between a twelve-and-a-half-year maximum prison sentence and a twenty-five-year maximum prison sentence; for a defendant charged with reckless homicide, the difference is twenty-five years versus sixty years.[44]

Despite the overwhelming significance of the aggravating factor, neither the legislature nor the courts have provided a clear interpretation of the "utter disregard" language. Part I of this Comment examines the history of "utter disregard" in Wisconsin by exploring both the legislative and appellate history of aggravated recklessness before *Miller*. Part II discusses the unanswered questions that remain after *Miller* and presents the ramifications of this confusion on the Wisconsin criminal justice system. Part III proposes the Objective Activity Test and explains how the test will better accomplish the legislature's goals. Part IV concludes that the legislature must abandon "utter disregard" entirely and adopt the Objective Activity Test.

I. "UTTER DISREGARD" IN WISCONSIN LAW

"Utter disregard" serves as the aggravating factor for three offenses in Wisconsin: reckless homicide under Wisconsin Statutes section 940.02; reckless injury under Wisconsin Statutes section 940.23; and recklessly endangering safety under Wisconsin Statutes section 941.30.

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43. *See, e.g.*, Dickey, Schultz & Fullin, *supra* note 28, at 1325 (discussing the importance of clarity in criminal statutes).

44. First-degree reckless injury is a Class D felony punishable by up to twenty-five years in prison, WIS. STAT. §§ 939.50(3)(d), 940.23(1) (2009–10), while second-degree reckless injury is a Class F felony punishable by up to twelve and a half years in prison. §§ 939.50(3)(f), 940.23(2). Additionally, first-degree reckless homicide is a Class B felony punishable by up to sixty years in prison, §§ 939.50(3)(b),940.02, while second-degree reckless homicide is a Class D felony punishable by up to twenty-five years in prison. §§ 939.50(3)(d), 940.06. First-degree reckless endangerment is a Class F felony punishable by up to twelve and a half years in prison, §§ 939.50(3)(f), 941.30(1), while second-degree reckless endangerment is a Class G felony punishable by up to ten years in prison. §§ 939.50(3)(g), 941.30(2).

Wisconsin Statutes section 939.24 defines criminal recklessness: "the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk."[45] Criminal recklessness focuses on the risk to others that the defendant creates through his actions. To prove intentional crimes, the State has to show that the defendant meant for the resulting harm to occur.[46] To prove reckless crimes, the State instead has to prove: (1) that the defendant's conduct created the risk; (2) that the risk was unreasonable and substantial; and (3) that the defendant was aware that his conduct created the unreasonable and substantial risk.[47]

Scholars often conceptualize criminal recklessness as requiring two states of mind: the "belief-state," referring to the defendant's awareness of the risk, and the "desire-state," referring to the defendant's reasons for taking the risk.[48] The desire-state does not indicate a desire to cause harm, but instead either an insufficient aversion to harm or a readiness to create a risk of harm.[49] Determinations of recklessness become what Professor Joshua Dressler refers to as a "criminal law version of the Learned Hand formula."[50] The fact finder considers the level of risk of harm the defendant created in light of the likelihood of that harm occurring, then weighs that against the defendant's apparent reasons for engaging in the behavior.[51] If a defendant knew that his actions created a significant risk but had legitimate reasons for creating those risks (such as speeding down a highway to rush someone to the hospital), a jury may not find his actions to be criminally reckless.

For each of the reckless offenses in Wisconsin, the State must prove both criminal recklessness and the respective level of injury or threat of injury: for reckless endangerment, the State must prove that the defendant's recklessness endangered the safety of another;[52] for reckless injury, the State must prove that the defendant's recklessness caused "great bodily harm" to another;[53] and for reckless homicide, the State must prove that the defendant's recklessness caused the death of

45. § 939.24(1).

46. *See, e.g.*, § 940.01 ("[W]hoever causes the death of another human being with intent to kill that person is guilty . . . .").

47. Wis. JI-Criminal 924 (2010).

48. Joshua Dressler, *Does One Mens Rea Fit All?: Thoughts on Alexander's Unified Conception of Criminal Culpability*, 88 CALIF. L. REV. 955, 957 (2000).

49. Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 466 (1992).

50. Dressler, *supra* note 48, at 957.

51. *Id.*

52. WIS. STAT. § 941.30(1) (2009–10).

53. § 940.23(1).

another.[54] If the State can successfully prove these two elements, then "utter disregard" serves as a third element which, if proven beyond a reasonable doubt, elevates the crime from a second-degree offense to a first-degree offense and exposes the defendant to heightened punishment.[55]

The Wisconsin legislature adopted "utter disregard" to provide additional punishment for those offenders whose behavior reflected extreme callousness toward others, beyond what is required to establish simple criminal recklessness. Because the legislature declined to provide additional insight into the meaning of the language, Wisconsin appellate courts have been given the task of discerning what is and is not indicative of "utter disregard for human life." The resulting case law provides little insight into the language beyond arbitrary distinctions which do not reflect the legislature's original goals.

A. Legislative History

In 1982, the Wisconsin Judicial Council appointed a special committee consisting of judges, prosecutors, defense attorneys, and professors to address statewide confusion over the language of certain criminal statutes.[56] Clarifying the meaning of the "depraved mind" murder statute became one of the Council's top priorities.[57] Under then-existing law, if a defendant killed another person by "conduct evincing a depraved mind, regardless of life" he would be guilty of second-degree murder.[58] Though the legislature intended this statute to apply to those offenders whose actions were particularly heinous, the Council recognized that the language—first codified in 1849—had become a continual source of confusion.[59] Juries thought the language required that the defendant suffered from mental illness; judges struggled to offer clear instructions as to the facts necessary to prove it; and these problems ultimately led to inconsistent results at trial.[60]

So, as one of many amendments to the State's homicide laws, in 1988 the Wisconsin legislature introduced "utter disregard."[61] First-degree reckless homicide replaced second-degree murder, and "under

54. § 940.02(1).

55. *See* §§ 940.02, 940.23, 941.30.

56. Dickey, Schultz & Fullin, *supra* note 28, at 1325–26.

57. *Id.* at 1326–27.

58. *See* § 940.02 note (1988) (Judicial Council).

59. *Balistreri v. State*, 83 Wis. 2d 440, 447, 265 N.W.2d 290 (1978); Dickey, Schultz & Fullin, *supra* note 28, at 1327.

60. Dickey, Schultz & Fullin, *supra* note 28, at 1327.

61. *Id.* at 1333.

circumstances which show utter disregard for human life" replaced "by conduct regardless of life, evincing a depraved mind."[62] The Council emphasized in the judicial notes to Wisconsin Statute section 940.02 that it intended "utter disregard" to have the exact same substantive meaning as "conduct evincing a depraved mind."[63] The legislature changed the language solely to clarify that meaning.[64]

Legal scholars questioned whether the new language would resolve the confusion as the legislature hoped.[65] In 1989, Wisconsin criminal law professors and experts published an article critiquing the revisions to the homicide statutes.[66] Though they agreed with the legislature's decision to change "depraved mind" to "utter disregard," they felt that the legislature should have offered more insight into the meaning of the new standard.[67]

First, they argued that the legislature failed to clarify how simple and aggravated recklessness differ.[68] Second, the legislature did not explain whether "utter disregard" is simply an objective test or whether it requires a subjective analysis of the defendant's mental state.[69] Third, the legislature did not address how intoxication would affect a defendant's ability to demonstrate "utter disregard."[70] Last, and most importantly, they argued that the legislature failed to explain what "utter disregard" means—whether the aggravating factor demands that

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62. *Id.* at 1351.

63. § 940.02 note (1988) (Judicial Council) (internal quotations omitted).

64. *State v. Jensen*, 2000 WI 84, ¶ 19, 236 Wis. 2d 521, 613 N.W.2d 170 ("[T]he 'utter disregard' element was intended to codify prior judicial interpretations of 'conduct evincing a depraved mind, regardless of life.'" (quoting § 940.02 note (1988) (Judicial Council))).

65. *See, e.g.*, Dickey, Schultz & Fullin, *supra* note 28, at 1357.

66. *Id.*

67. *Id.*

68. *Id.* The severity of risk could not be the only basis for distinction, as there could be situations where a heightened level of risk would still not warrant a first-degree conviction. *Id.*

69. *Id.* at 1358. The aggravating factor does not require that the defendant acted with "utter disregard for human life," but instead requires that the defendant acted "under circumstances that show utter disregard for human life." WIS. STAT. §§ 940.02, 940.23, 941.30 (2009–10). So, the experts questioned whether the new test required any sort of analysis into whether the defendant *actually* had utter disregard for human life. Dickey, Schultz & Fullin, *supra* note 28, at 1358.

70. Dickey, Schultz & Fullin, *supra* note 28, at 1360. Under Wisconsin law, voluntary intoxication is no defense to the subjective awareness required for criminal recklessness: "A voluntarily produced intoxicated or drugged condition is not a defense to liability for criminal recklessness if, had the actor not been in that condition, he or she would have been aware." WIS. STAT. § 939.24(3).

the defendant showed no regard whatsoever, or instead merely a low level of regard.[71]

Wisconsin is not the only state that uses this type of language as an aggravating factor for reckless offenses. Under Connecticut law, a defendant is guilty of first-degree reckless endangerment when he recklessly endangers the safety of another "with extreme indifference to human life."[72] New York uses the phrase, "under circumstances evincing a depraved indifference to human life."[73] The Model Penal Code also uses this type of language.[74] Section 210.2(b) states that a defendant is guilty of murder when he recklessly kills another "under circumstances manifesting extreme indifference to the value of human life."[75] Case law from Connecticut and New York parallels the "utter disregard" cases before Wisconsin appellate courts, offering a few discrete examples of what does or does not satisfy the aggravating factor without a clear explanation as to what the language actually means.[76] The drafters of the Model Penal Code specifically noted that they could not and would not offer additional explanation of the statute.[77] Like the drafters of the Model Penal Code, the Wisconsin legislature left the courts with the task of providing further clarity.

B. Application in Wisconsin Courts

With little legislative guidance, Wisconsin courts have long struggled to interpret and apply the "depraved mind" and "utter disregard" aggravating factor. In the 1973 case of *State v. Weso*,[78] the

71. Dickey, Schultz & Fullin, *supra* note 28, at 1358–59.

72. CONN. GEN. STAT. § 53a-63 (2008).

73. N.Y. PENAL LAW § 120.25 (McKinney 2009).

74. MODEL PENAL CODE § 210.2(b) (1985). The Model Penal Code is a body of statutes drafted by the American Law Institute to serve as a guide for state legislatures.

75. *Id.*

76. Connecticut appellate courts have held that a defendant who fired a pistol into an occupied apartment building did demonstrate an "extreme indifference to human life," *see State v. Davila*, 816 A.2d 673, 678 (Conn. App. Ct. 2003), while a defendant who momentarily choked the victim without lasting injury beyond temporary loss of consciousness did not, *see State v. Atkinson*, 741 A.2d 991, 996, 1002 (Conn. Super. Ct. 1999). New York appellate courts have held that defendants who set a fire that injured firefighters and sped down a busy street with pedestrians nearby did demonstrate aggravated recklessness, *People v. Ruiz*, 553 N.Y.S.2d 173 (N.Y. App. Div. 1990); *People v. Koullias*, 465 N.Y.S.2d 748 (N.Y. App. Div. 1983), while a defendant who fired multiple shots in the general direction of a busy street did not act "under circumstances evincing a depraved indifference to human life," *People v. Sallitto*, 508 N.Y.S.2d 612, 613 (N.Y. App. Div. 1986).

77. *See* Dickey, Schultz & Fullin, *supra* note 28, at 1356.

78. 60 Wis. 2d 404, 210 N.W.2d 442 (1973).

Supreme Court of Wisconsin noted that to constitute a depraved mind, "[t]he mind must not only disregard the safety of another but be devoid of regard for the life of another."[79] This holding seems to demand an examination of the defendant's subjective mental state. However, the Court noted that the conduct must only evince a depraved state of mind; the defendant need not have possessed such a mindset in fact.[80]

In the subsequent cases of *Wagner v. State* and *Balistreri v. State*,[81] the Wisconsin Supreme Court held that defendants who drove recklessly—the former striking and killing a pedestrian while engaged in a drag race and the latter striking another vehicle while fleeing from the police—did not evince a depraved mind because both defendants swerved immediately before the collisions.[82] The weight the Court placed on what is now notoriously referred to as the "Balistreri Swerve" indicates that the Court interpreted the aggravating factor to mean that any showing of consideration for the victim, however minute, would prohibit a first-degree conviction. But the Court did not explicitly state this conclusion in either case.[83] Moreover, decades later, the Wisconsin Supreme Court added another level of confusion to the analysis when it held in *State v. Jensen* that a defendant could show regard and still be guilty of the first-degree offense.[84]

In 1991, Wisconsin appellate courts affirmed two first-degree reckless homicide convictions involving firearms.[85] In *State v. Barksdale*,[86] the court of appeals concluded that the evidence was sufficient to convict the defendant of first-degree homicide when he admitted to pointing a loaded machine gun at the victim to try to scare him.[87] In *State v. Blair*,[88] the court of appeals similarly held that the defendant did demonstrate "utter disregard" by repeatedly beating the

79. *Id.* at 411.

80. *Id.*

81. 83 Wis. 2d 440, 265 N.W.2d 290 (1978).

82. *Balistreri*, 83 Wis. 2d at 458; *Wagner v. State*, 76 Wis. 2d 30, 47, 250 N.W.2d 331 (1977).

83. In *Wagner*, the Wisconsin Supreme Court simply noted that, "[a]t the very least, his attempt to avoid striking the victim by swerving to the left indicates some regard for the life of the victim." 76 Wis. 2d at 47. In *Balistreri*, the Court similarly mentioned that the defendant's actions showed "some regard." 83 Wis. 2d at 457.

84. *State v. Jensen*, 2000 WI 84, ¶ 32, 236 Wis. 2d 521, 613 N.W.2d 170.

85. *State v. Blair*, 164 Wis. 2d 64, 66, 473 N.W.2d 566 (Ct. App. 1991); *State v. Barksdale*, 160 Wis. 2d 284, 286, 466 N.W.2d 198 (Ct. App. 1991).

86. 160 Wis. 2d 284, 466 N.W.2d 198 (Ct. App. 1991).

87. *Id.* at 290.

88. 164 Wis. 2d 64, 473 N.W.2d 566 (Ct. App. 1991).

victim over the head with a loaded gun before the gun fired, killing the victim.[89]

The following year, the court of appeals rejected a defendant's contention that he did not demonstrate "utter disregard" when he stopped attacking his ex-wife after chasing her with an axe, hitting her in the stomach with the handle, and repeatedly swinging it at her.[90] The defendant maintained that because he ultimately gave the axe to his son, he did not recklessly endanger his ex-wife's safety under circumstances demonstrating "utter disregard."[91] The "discrete" actions of swinging the axe, he argued, did not rise to the level of "utter disregard."[92] The court of appeals did not agree and asserted that, unlike the defendants in *Wagner* and *Balistreri*, the defendant in this case did not show any regard during the acts.[93] The fact that at some point he chose to stop did not mean that he did not show "utter disregard" for her life while swinging the axe.[94] The Wisconsin Supreme Court did not review any of these cases, and refrained altogether from addressing the meaning of "utter disregard" until the year 2000.

The development of "depraved mind" case law and the shift to "utter disregard" culminated in the case of *State v. Jensen*.[95] The defendant, Jensen, became agitated when his infant son would not stop crying.[96] Jensen testified that he shook the child seven to fifteen times, watching the baby's head snap back, and stopped only when his son stopped crying.[97] Jensen waited thirty seconds to call 911, telling the dispatcher that he tripped over a phone cord while holding his son and feared that the fall hurt his son's neck.[98] Jensen again expressed this concern to the police when they arrived.[99]

After a jury found him guilty of first-degree reckless injury, Jensen appealed, asserting that the evidence at trial was insufficient to prove that he acted with "utter disregard."[100] Jensen made three arguments. First, he argued that the State failed to prove his subjective awareness of the extreme risk of shaking his son.[101] Second, he

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89. *Id.* at 73.
90. *State v. Holtz*, 173 Wis. 2d 515, 516, 496 N.W.2d 668 (Ct. App. 1992).
91. *Id.* at 518.
92. *Id.* at 518.
93. *Id.* at 519–20.
94. *Id.* at 520.
95. *State v. Jensen*, 2000 WI 84, 236 Wis. 2d 521, 613 N.W.2d 170.
96. *Id.* ¶ 6.
97. *Id.*
98. *Id.* ¶¶ 6–7.
99. *Id.* ¶ 7.
100. *Id.* ¶ 1.
101. *Id.* ¶ 2.

contended that "excessive use of disciplinary force" was not indicative of "utter disregard" under Wisconsin case law.[102] Third, he asserted that his 911 call after the shaking demonstrated enough regard to negate "utter disregard."[103]

Jensen presented the Supreme Court with its first opportunity to interpret and explain the meaning of the aggravating factor since the legislature replaced "depraved mind" with "utter disregard."[104] University of Wisconsin Law School professors filed an amicus curiae brief to the Supreme Court.[105] They argued that the Court should use *Jensen* as an opportunity to answer the questions and resolve the confusion that the legislature failed to address in 1988.[106] The fact that this was the first "utter disregard" case, they maintained, put the Court in the unique position of being able to ignore all the conflicting "depraved mind" precedent and "write on a clean slate."[107] The professors asked the Court to explain what "utter disregard" means, and this time they even provided possible answers to choose from.[108]

First, "utter disregard" could require a greater level of harm, such as the risk of death as opposed to the risk of great bodily harm.[109] Second, since criminal recklessness requires a "substantial" risk of harm, "utter disregard" could require an even greater (more substantial) risk of harm than other reckless offenses.[110] Alternatively, since the risk has to be "unreasonable," "utter disregard" could be reserved for those cases where the defendant's actions had no socially acceptable value whatsoever (more unreasonable).[111] "Utter disregard" could also require that the defendant be aware of the heightened levels of risk.[112] Finally, the authors suggested that "utter disregard" could be an analysis of the attitude of the defendant towards his actions.[113] The professors warned that simply labeling "utter disregard" as an objective or subjective analysis of the defendant's attitude would be insufficient to resolve the confusion created by the language.[114]

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102. *Id.*

103. *Id.* ¶ 30.

104. Nonparty Brief of Walter J. Dickey et al. at 2, *State v. Jensen*, 2000 WI 84, 236 Wis. 2d 521, 613 N.W.2d 170 (No. 98-3175-CR) [hereinafter Dickey Brief].

105. *Id.* at 1.

106. *Id.* at 6.

107. *Id.*

108. *Id.* at 7.

109. *Id.*

110. *Id.* at 8.

111. *Id.*

112. *Id.* at 9.

113. *Id.* at 10.

114. *Id.* at 11.

The Court, however, did not adopt any of the proposed suggestions. As the professors feared, the Court instead simply rejected Jensen's assertion that "utter disregard" should include a subjective analysis.[115] The Court explained that although the mental state required to prove criminal recklessness has both objective and subjective elements, "utter disregard" is an entirely separate element that does not demand subjective consideration.[116] Therefore, the Court rejected Jensen's claim that he could not be guilty of acting under circumstances that showed "utter disregard for human life" since he was not subjectively aware of the serious risk of harm inherent in shaking a baby.[117] Though the Court held that a defendant could not use his subjective mental state to disprove "utter disregard," the Court asserted that the State *could* use the defendant's subjective mental state to help prove "utter disregard":

> Although "utter disregard for human life" clearly has something to do with mental state, it is not a sub-part of the intent element of this crime, and, as such need not be subjectively proven. It can be (and often is) proven by evidence relating to the defendant's subjective state of mind—by the defendant's statements, for example, before, during, or after the crime. But it can also be established by evidence of heightened risk, because of special vulnerabilities of the victim, for example, or evidence of a particularly obvious, potentially lethal danger.[118]

The Supreme Court refused to create any per se rules for the "utter disregard" analysis, but the Court did describe factors that a jury should take into consideration when conducting the analysis.[119] Those

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115. *State v. Jensen*, 2000 WI 84, ¶ 16, 236 Wis. 2d 521, 613 N.W.2d 170; *see also* Dickey Brief, *supra* note 104, at 11.

116. "However it is proven, the element of utter disregard for human life is measured objectively, on the basis of what a reasonable person in the defendant's position would have known. If proven, the offender is considered more culpable because the conduct, according to the standards observed by the great mass of mankind, went beyond simple criminal recklessness to encompass something that, although falling short of an intentional crime, still deserves to be treated more seriously under the law and punished more severely."

Jensen, 2000 WI 84, ¶ 17.

117. *Id.*

118. *Id.*

119. *Id.* ¶ 24.

factors include the type and nature of the act, why the defendant engaged in that activity, the extent of the victim's injuries and how much force was needed to inflict those injuries, the age and vulnerability of the victim, and the relationship between the defendant and the victim.[120] After reviewing all of these factors, the Court noted, "finally, we consider whether the totality of the circumstances showed any regard for the victim's life."[121]

The Court rejected Jensen's argument that—under *Wagner* and *Balistreri*—his 911 call demonstrated sufficient regard.[122] The defendants in those cases, "however ineffectively," demonstrated regard before or during the act, while Jensen only showed regard after shaking his son.[123] The Supreme Court concluded that while the jury may consider after-the-fact regard as part of the totality of the circumstances, the jury may not let after-the-fact regard negate "utter disregard" established by the defendant's conduct before and during the act.[124] The court of appeals reached this same conclusion a year earlier in *State v. Edmunds*,[125] another baby-shaking case.[126] *Jensen* became the preeminent "utter disregard" case, and the topic of "utter disregard" seemed somewhat settled at the appellate level—until *State v. Miller*.

II. THE FAILURE OF "UTTER DISREGARD": QUESTIONS AFTER *MILLER* AND THE RAMIFICATIONS OF THIS CONFUSION

The *Miller* case stands as a testament to the confusion that surrounds "utter disregard." Without a firm understanding of what "utter disregard" means or how to apply it, the Wisconsin criminal justice system does not have the foundation necessary to function in reckless cases. The defendant cannot adequately prepare a defense, the State cannot fully understand what it has to prove, the trial judge cannot competently instruct the jury, and the jury cannot properly apply the law to the facts of the specific case.

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120. *Id.*

121. *Id.*

122. *Id.* ¶ 30.

123. *Id.* ¶ 32.

124. *Id.*

125. *State v. Edmunds*, 229 Wis. 2d 67, 598 N.W.2d 290 (Ct. App. 1999).

126. *Id.* at 78. Audrey Edmund's conviction was overturned nearly a decade later in 2008 based on new developments in scientific understanding of shaken baby syndrome. Deborah Turkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 WASH. U. L. REV. 1, 5 (2009).

A. Fundamental Questions Remain Unanswered After State v. Miller

After *Miller*, many questions remain unanswered: First, how much disregard is "utter" disregard? Scholars asked this question in 1989, and neither the legislature nor the courts have answered it.[127] Based on language alone, the word "utter" implies no regard whatsoever.[128] A cursory review of case law suggests that Wisconsin courts agree with this interpretation.[129] In *Weso*, the Supreme Court said that the defendant's actions must be "devoid" of regard;[130] in *Jensen*, the Court explained that the "utter disregard" analysis should be a consideration of whether, under the totality of the circumstances, the defendant's actions showed "any regard for the victim's life."[131] But this is simply not how Wisconsin courts have in fact applied the language. The Wisconsin Supreme Court acknowledged that Jensen did show regard when he called 911—it just was not enough regard, and it occurred too late.[132] The court of appeals reached the same conclusion in *Edmunds*.[133] Thus, if the question is not whether there is "any" regard, then it must be how much regard is enough. The court of appeals in *Miller* concluded that Miller certainly showed "some regard" for human life under the totality of the circumstances, but did not clarify how much regard was necessary to reach this finding.[134]

Second, how much weight should a jury give a defendant's actions after the fact? If—as set forth in *Miller*[135]—after-the-fact regard should be given equal consideration to regard before or during, but—as set forth in *Jensen*[136]—after-the-fact regard cannot ever negate "utter disregard" before or during, then how much consideration should a jury give a defendant's actions afterwards? And do these cases imply that a jury must divide the analysis into three separate examinations of each time period to search for regard and then weigh their findings accordingly?

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127. Dickey, Schultz & Fullin, *supra* note 28, at 1358.

128. Webster defines utter as "carried to the utmost point or highest degree: absolute . . . total." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2526 (unabr. ed. 2002).

129. *See, e.g.*, *Jensen*, 2000 WI 84, ¶ 24; *State v. Weso*, 60 Wis. 2d 404, 411, 210 N.W.2d 442 (1973).

130. *Weso*, 60 Wis. 2d at 411.

131. *Jensen*, 2000 WI 84, ¶ 24.

132. *Id.* ¶ 32.

133. *State v. Edmunds*, 229 Wis. 2d 67, 78, 598 N.W.2d 290 (Ct. App. 1999).

134. *State v. Miller*, 2009 WI App 111, ¶ 42, 320 Wis. 2d 724, 772 N.W.2d 188.

135. *Id.* ¶ 35 n.12.

136. *Jensen*, 2000 WI 84, ¶ 32.

Another question never directly addressed is whether or not regard shown for the lives of persons other than the victim can or should be considered as part of the "totality of the circumstances" analysis. In his brief to the court of appeals, Miller argued that even if the court concluded that he did not demonstrate regard for Nakai's life, the regard he showed for the lives of his roommate and friends by trying to defend them should be sufficient to preclude a finding of "utter disregard."[137] The court of appeals agreed that "a reason, if not *the* reason, for Miller's conduct was to protect himself and his friends," which seems to indicate that consideration for the lives of others should be a part of the analysis.[138] However, the court of appeals did not explicitly reach this conclusion, and the Supreme Court has never addressed this question.

A hypothetical fact pattern illustrates the problems inherent in these unanswered questions and reveals just how arbitrary the distinctions in the law have become. Altering the facts of *Wagner*, suppose that a defendant stands trial for first-degree reckless homicide after speeding down a busy street as part of a drag race. The defendant saw a pedestrian walking but failed to swerve before hitting him. However, immediately after hitting the pedestrian, the defendant stopped his car, got out, and ran to the victim's aid. He pulled the defendant out of the road, called 911, and attempted to comfort the victim while crying, "I'm so sorry, I'm so sorry." The victim lost consciousness and the defendant attempted mouth-to-mouth resuscitation, but the victim still died.

In terms of weighing moral culpability, compare this to the actual case of *Wagner*, where the defendant swerved immediately before hitting the pedestrian but then fled the scene and made no attempt to help the victim.[139] The Supreme Court determined that Wagner was not guilty of first-degree reckless homicide because his swerve indicated regard for the victim.[140] However, under binding Wisconsin law, the defendant in the hypothetical likely would be guilty of first-degree reckless homicide. Applying the *Jensen* analysis, the hypothetical defendant did not show regard for the victim's life before or during the act. And though he showed regard after, under *Jensen*, that regard could not as a matter of law negate the disregard found before and during. Under the *Miller* analysis set forth by the court of appeals, however, the defendant may or may not be guilty of first-degree

137. Brief of Defendant-Respondent at 11, *State v. Miller*, 2009 WI App 111, ¶ 2–3, 320 Wis. 2d 724, 772 N.W.2d 188.

138. *Miller*, 2009 WI App 111, ¶ 40.

139. *Wagner v. State*, 76 Wis. 2d 30, 47, 250 N.W.2d 331 (1977).

140. *Id.*

reckless homicide. The defendant demonstrated an enormous amount of regard for the victim after the fact. A jury instructed to weigh the defendant's actions before, during, and after may equally find his conduct afterwards to be so clearly demonstrative of concern for human life that it would not find the defendant guilty of first-degree reckless homicide.

Beyond the potential *Jensen* and *Miller* conflict remains the more basic question of whether weighing regard—how much and when it occurs—really accomplishes what the legislature intended by creating the aggravating factor in the first place. The legislature meant to reserve first-degree reckless convictions for those defendants whose behavior was so callous and cruel—so lacking in the moral consideration that any reasonable person would show towards others—that they should receive a more serious punishment.[141] But in *Wagner*, the defendant did not remember the drag race because he was drunk and had taken pain pills.[142] Though he swerved immediately before hitting the victim, afterward he continued driving and hid at his parent's house, only to later learn that the victim died.[143] The Supreme Court concluded that the evidence was insufficient to show a depraved mind because he swerved.[144] Did the hypothetical defendant who failed to swerve but made every attempt to save the victim's life afterwards really display more indifference to human life than the defendant in *Wagner*?

Despite its recognition that reckless crimes vary in nature and degree, the Wisconsin Supreme Court in *Jensen* expressed confidence that the legal community could determine what should and should not be considered "utter disregard" without bright-line rules: "[W]e think prosecutors, defense attorneys, trial judges and juries can appropriately sort out and deal with such differences without categorical rules being laid down by appellate courts on sufficiency of the evidence challenges."[145] Unfortunately, the Supreme Court was wrong.

B. The Vagueness of "Utter Disregard" Creates Unacceptable Ramifications for the Wisconsin Criminal Justice System

Wisconsin appellate courts' inability—and in some cases refusal—to clarify the meaning of "utter disregard" leaves defendants and defense attorneys, prosecutors, trial judges, and juries to play an

141. *See* Dickey, Schultz & Fullin, *supra* note 28, at 1351.
142. *Wagner*, 76 Wis. 2d at 32.
143. *Id.* at 34.
144. *Id.* at 47.
145. *State v. Jensen*, 2000 WI 84, ¶ 29, 236 Wis. 2d 521, 613 N.W.2d 170.

unacceptable and unjust guessing game. The result has been a haphazard overuse of "utter disregard," which undermines confidence in our system of justice and ultimately defeats the very purpose of an aggravating factor.

1. "UTTER DISREGARD" AND THE DEFENSE

First, the vagueness of "utter disregard" presents a problem of notice for the defendant. Notice requirements demand both that the State inform the defendant that it has brought charges against him and that the law define what those charges are.[146] The U.S. Supreme Court held that "a statute which either forbids or requires doing an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."[147] Ignorance of the law is of course no defense to a crime, and criminal statutes cannot be written in such detail that they apply to only one or two specific fact scenarios.[148] Legislators must decide the appropriate level of indeterminacy based on the particular context of the statute.[149] Nevertheless, the statute must satisfy due process requirements that, at a minimum, demand that the law not be "meaninglessly indefinite."[150]

A criminal defendant charged with a first-degree reckless offense in Wisconsin does not have adequate notice of the charge against him to be able to prepare a defense. The Wisconsin Supreme Court rejected vagueness arguments in the past only to have the state legislature amend the aggravating factor because of vague language.[151] The defendant in *State v. Weso* attempted to argue on appeal that the phrase "depraved mind" was so vague that it violated his due process rights to reasonable notice, but the Court did not address the argument because he failed to raise it with the trial court.[152] In *Balistreri v. State*, the Wisconsin

146. Peter W. Poulos, *Chicago's Ban on Gang Loitering: Making Sense of Vagueness and Overbreadth in Loitering Laws*, 83 CALIF. L. REV. 379, 390 (1995).

147. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

148. John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 208 (1985).

149. *Id.* at 196.

150. *Id.*

151. *See Balistreri v. State*, 83 Wis. 2d 440, 449–51, 265 N.W.2d 290 (1978); *State v. Weso*, 60 Wis. 2d 404, 412–13, 210 N.W.2d 442 (1973); Dickey, Schultz & Fullin, *supra* note 28, at 1326–28.

152. *Weso*, 60 Wis. 2d at 413. The Wisconsin Supreme Court noted that it is a general rule in Wisconsin that a defendant cannot challenge the constitutionality of a statute before an appellate court if the defendant did not first make that argument with the trial court. *Id.*

Supreme Court addressed, but rejected, the defendant's vagueness challenge.[153] Balistreri argued both that the "depraved mind" statute itself was vague and further that the Court's interpretation of the language made the law even more confusing.[154] In rejecting these arguments, the Court cited Wisconsin's long history with this type of language, other states' use of similar language, and the language's "clear" meaning.[155] That "depraved" commonly means perverse did not pose a serious problem in the Court's eyes: "a technical meaning different from the ordinary meaning does not make the phrase vague."[156] Ten years later, however, the legislature replaced depraved mind with "utter disregard" because juries continued to wrongly apply the common definition of the word "depraved."[157]

Second, the use of "utter disregard" causes de facto burden-shifting onto the defendant. The burden to prove each and every element of the offense beyond a reasonable doubt lies with the State.[158] In *Mullaney v. Wilbur*,[159] the U.S. Supreme Court declared unconstitutional a Maine criminal statute that required a defendant charged with murder to prove that he acted in the "heat of passion" to reduce the conviction to manslaughter.[160] Under Maine law, "heat of passion" served to distinguish degrees of culpability within the single broad offense of felonious homicide.[161] The Supreme Court held that under *In re Winship*, the State had to prove the absence of "heat of passion"—the State could not shift its burden to the defendant.[162]

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153. *Balistreri*, 83 Wis. 2d at 450–51.

154. Balistreri argued that the Court contradicted itself in the early case of *State v. Dolan* when it held that conduct "evincing a depraved mind" may be found where a defendant has a "general intention to do harm" but at the same time held that there need not "be an intent to endanger . . . another." *Balistreri*, 83 Wis. 2d at 448. The Court rejected this claim, holding that no particular state of mind was required; rather, the State simply needed to show that the conduct was imminently dangerous. *Id.* Balistreri also argued that the Court violated the constitutional doctrine of separation of powers, usurping the legislature's function when it continued to supply new standards for depraved mind where the legislature did not. *Id.* at 449. The Court rejected this claim as well, noting that the legislature had provided the standard—the law itself. *Id.*

155. The Court noted that "depraved mind" meant that the defendant's conduct was "devoid of regard for the life of another." *Id.* at 450 (quoting *Weso*, 60 Wis. 2d at 411).

156. *Id.* at 450.

157. Dickey, Schultz & Fullin, *supra* note 28, at 1327, 1351–52.

158. *In re Winship*, 397 U.S. 358, 361 (1970). Under *Winship*, every element of the offense must be proven beyond a reasonable doubt. *Id.* at 361–62.

159. 421 U.S. 684 (1975).

160. *Id.* at 701–02.

161. John Calvin Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in Criminal Law*, 88 YALE L.J. 1325, 1338–39 (1979).

162. *Mullaney*, 421 U.S. at 703–04.

Though the Maine statute as written required the defendant to show "heat of passion" to disprove first-degree charges, the same has become true in practice in Wisconsin reckless cases. Because "utter disregard" is such a vague concept, the State can easily charge first-degree by default, leaving the defendant with the burden then of disproving "utter disregard." Clearly defined criminal statutes are the primary means to check the otherwise broad discretion that prosecutors have when deciding who and what to charge.[163] Eliminating unnecessarily vague statutes reduces the likelihood of both arbitrary and discriminatory charging decisions.[164] The vagueness of the statute enables the State to apply "utter disregard" inconsistently, as the State does not, in practice, have to prove anything beyond what it already has to prove to show criminal recklessness. Of course the defendant acted with disregard—he was behaving recklessly.

2. "UTTER DISREGARD" AND THE PROSECUTION

Prosecutors, therefore, benefit in certain ways from the vague language. The ambiguity of "utter disregard" heightens their already enormous discretion in deciding what to charge.[165] Prosecutors can obtain higher-level convictions at trial and can also have greater power in plea-bargaining.[166] Plea bargains are a powerful tool for prosecutors that are used to both lighten heavy caseloads and gain convictions in hard-to-prove cases.[167] Prosecutors in Wisconsin can charge first-degree reckless offenses, then offer second-degree to the defendant as a "discount."[168] Agreeing to the prosecutor's offer to plead to second-degree reckless homicide and face up to twenty-five years in prison becomes much more appealing when the alternative is to risk going to trial for first-degree reckless homicide with the prosecutor's promise to recommend the maximum of sixty years upon conviction.

Though not addressing reckless offenses, legal scholar Alan C. Michaels argues that the use of "depraved" heart or mind as an

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163. Jeffries, *supra* note 148, at 197.

164. Robert Batey, *Vagueness and the Construction of Criminal Statutes: Balancing Acts*, 5 VA. J. SOC. POL'Y & L. 1, 4 (1997).

165. *See* BETTY R. BROWN, THE WISCONSIN DISTRICT ATTORNEY AND THE CRIMINAL CASE 41–43 (2d ed. 1977). "The district attorney and his exercise of charging discretion . . . are subject to very little control, except that he is 'periodically answerable to the people' of his country." *Id.* at 43 (quoting *Thompson v. State*, 61 Wis. 2d 325, 332, 212 N.W.2d. 109 (1973).

166. James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1532–35 (1981).

167. *Id.*

168. *See id.*

aggravating factor to elevate manslaughter to murder, as Wisconsin used to do, unfairly empowers the State to easily charge the higher offense.[169] Such a distinction is unjust for the criminal defendant because the concept is so vague that it allows for "murder convictions without any proof beyond well-packaged manslaughter" and offers no real means to distinguish what does and does not warrant the higher punishment.[170] Michaels asserts that the state must use more than a vague concept to create an effective aggravating factor and limit prosecutorial overuse of the heightened offense.[171]

Despite the advantages provided to the prosecutor, the confusing language does indeed put the prosecutor in the uneasy position of having to prove something without a clear understanding of what that something is. At the end of the trial, the prosecutor has the responsibility of explaining to the jury how the facts meet the statutory requirements to warrant a finding of guilt.[172] This task becomes more challenging when the prosecutor does not have a full understanding of what facts are necessary to prove the elements of the crime. This uncertainty hampers the prosecutor's ability to effectively perform his duties to the public.[173]

3. "UTTER DISREGARD" AND THE TRIAL JUDGE

The confusion surrounding "utter disregard" also leaves the trial judge in a precarious position. He has the responsibility of explaining to the jury what "utter disregard" means if asked.[174] Erroneous instruction to the jury is a common ground for appeal in criminal cases, and an appellate court will reverse a trial verdict if the court finds that the judge mis-stated the law or misled the jury.[175] Trial judges therefore hesitate to offer any explanation beyond pattern instructions and

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169. Alan C. Michaels, *"Rationales" of Criminal Law Then and Now: For a Judgmental Descriptivism*, 100 COLUM. L. REV. 54, 78–79 (2000).

170. *Id.* at 79.

171. *Id.* at 76.

172. BROWN, *supra* note 165, at 215.

173. The State has to prove each element beyond a reasonable doubt and can do so through the presentation of either direct or circumstantial evidence. *Id.* at 181. At the end of the trial, the State presents closing arguments to demonstrate how the facts meet the statutory requirements for a finding of guilty. *Id.* at 215. These tasks likely become more challenging when the prosecutor does not have a full understanding what facts are necessary to prove the elements of the crime.

174. *See* Lawrence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 LAW & SOC'Y REV. 153, 154 (1982) (describing the trial judge's role in explaining charges to the jury).

175. *Id.*

language from appellate cases.[176] But these resources provide little insight to the jury, as pattern instructions are written generally so as to apply to every case under the statute, and appellate cases use legalese that jurors struggle to understand.[177]

Another case, *State v. Burris*,[178] provides an apt illustration of the problems trial judges face when asked to address the meaning of "utter disregard."[179] Burris and his former girlfriend started arguing in her mother's home.[180] Burris held a gun in his hand as they argued.[181] Her brother approached Burris to stop the argument, and, though accounts differed as to how the shooting occurred, ultimately Burris's gun fired a shot that struck her brother in the neck and paralyzed him.[182] Immediately after the victim was shot, Burris started yelling that he did not mean for it to happen, asked her mother to shoot him out of guilt, and then fled.[183]

Burris stood trial for first-degree reckless injury.[184] During deliberations, the jury returned and asked the judge whether they could consider Burris's actions after the fact when assessing "utter disregard."[185] In response, the judge read language from the *Jensen* case.[186] On appeal, Burris argued that the trial judge's answer from *Jensen*—couched in negative, legalistic language and addressing the question of how much weight should be given to after-the-fact regard as

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176. *Id.*

177. *Id.* at 154, 157.

178. No. 2009AP956-CR, 2010 Wisc. App. LEXIS 59 (Ct. App. Jan. 26, 2010).

179. *Id.* The author co-wrote the Brief and Reply Brief in this case on behalf of the Legal Assistance to Institutionalized Persons Program at the Remington Center of the University of Wisconsin Law School. The Wisconsin Supreme Court has since granted the State's Petition for Review and the case is now pending. The Court may choose to address the apparent tension between *Jensen* and *Miller* in its decision.

180. *Id.* ¶¶ 5–6, 15–16.

181. *Id.* ¶¶ 6, 15–16.

182. *Id.* ¶¶ 6–16. Burris testified that his former girlfriend's brother grabbed his arm and pulled, causing the gun to fire. *Id.* ¶ 16. His former girlfriend, her mother, and her brother gave similar accounts to the police immediately after the event, but at trial all of the State's witnesses testified that the brother merely touched Burris's arm and then Burris shot him. *Id.* ¶¶ 8–15.

183. *Id.* ¶ 16.

184. *Id.* ¶ 3.

185. *Id.* ¶ 18.

186. *Id.* The trial court judge read the following passage from *Jensen*: "After-the-fact regard for human life does not negate 'utter disregard' otherwise established by the circumstances before and during the crime. It may be considered by the factfinder as a part of the total factual picture, but it does not operate to preclude a finding of utter disregard for human life." *Id.* ¶ 18 (quoting *State v. Jensen*, 2000 WI 84, ¶ 32, 236 Wis. 2d 521, 613 N.W.2d 170).

opposed to whether the jury should consider those actions at all—misled the jurors to believe that they could not consider his actions after the fact.[187] The court of appeals agreed, reversed Burris's conviction, and remanded for a new trial.[188] The case is now pending before the Wisconsin Supreme Court.[189]

As Burris argued, the trial judge should have simply answered the jury's question in the affirmative, with a simple "yes."[190] This would have been legally correct. The precedent set forth by both *Jensen* and *Miller* makes clear that after-the-fact regard can and should be considered;[191] the tension occurs when discerning how much weight should be given to that regard. The trial judge, however, may have questioned whether that answer indeed would have been correct in light of the conflicting messages from *Jensen* and *Miller*, or may have felt that a simple "yes" would not provide enough insight to the jury's question. The trial judge likely selected the *Jensen* passage to prevent both jury confusion and reversal on appeal. In so doing, he nevertheless accomplished just the opposite.

4. "UTTER DISREGARD" AND THE JURY

After hearing the evidence and receiving the instructions, a Wisconsin jury then has the task of applying a vague, "totality of the circumstances" analysis to an already vague concept.[192] As confusing as "utter disregard" is for judges, prosecutors, and defense attorneys, they are at least experts in Wisconsin criminal law. Whether or not they can agree on how to apply "utter disregard," if nothing else, they can all probably appreciate what the legislature hoped to accomplish through the use of such an aggravating factor. Jurors, on the other hand, have not been trained in the law to know how to discern the correct and often complex meaning behind seemingly simple language. How can the Wisconsin legal system expect consistent jury verdicts in first-degree reckless cases when both judge and jury struggle to understand and apply "utter disregard"?

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187. *Id.* ¶ 31.

188. *Id.*

189. Review granted by *State v. Burris*, 2010 WI 125, 2010 Wisc. LEXIS 525 (2010).

190. *Burris*, 2010 Wisc. App. LEXIS 59, ¶ 29.

191. *Jensen*, 2000 WI 84, ¶ 32; *State v. Miller*, 2009 WI App 111, ¶ 35 n.12, 320 Wis. 2d 724, 772 N.W.2d 188.

192. *See Jensen*, 2000 WI 84, ¶ 24 (discussing the "totality of the circumstances" analysis for "utter disregard").

In *State v. Miller*, the trial court judge read the jury the standard Wisconsin instruction on "utter disregard":

> [d]etermining whether the conduct showed utter disregard for human life, you should consider all the factors relating to the conduct. These include the following: what the defendant was doing; why he was doing it; how dangerous the conduct was; how obvious the danger was; and whether the conduct showed any regard for human life.[193]

The only insight that this instruction—which uses language almost verbatim from *Jensen*—offers is that the jury should consider whether the defendant showed any regard for human life. This insight, however, does not accurately reflect existing precedent. According to case law, the defendant can show regard for human life and still be guilty of the first-degree offense.[194] The instruction does nothing to explain how much regard the defendant needs to show so that he is no longer guilty of the first-degree offense, when the defendant must show that regard, whether the jury can consider regard the defendant shows to the lives of people other than the victim, and most importantly, what "regard for life" actually means.

In his article *Legality, Vagueness, and the Construction of Penal Statutes*, John Calvin Jeffries, Jr. warns, "[w]hen juries are invited to . . . define the law . . . [t]here is no reason to expect such power to be exercised in any systematic way and every reason to fear the intrusion of haphazard or illegitimate criteria for decision."[195] Aggravating factors are designed to separate out a specific group of offenders.[196] Without guidance as to who should belong in that group, the aggravating factor becomes nothing more than an arbitrary and often costly label.[197] Since, under current Wisconsin law, the State has free reign to charge almost any defendant with first-degree reckless crimes and juries are left to guess at what "utter disregard" means, the Wisconsin legal community simply cannot be confident that those

193. *Miller,* 2009 WI App ¶ 98 (citing Wis. J.I.–Criminal 1250 (2002)).

194. *See, e.g.*, *Jensen*, 2000 WI 84, ¶ 32 (noting that the regard Jensen showed after the fact by calling 911 alone was insufficient to negate the disregard he showed before and during the act); *State v. Edmunds*, 229 Wis. 2d 67, 78, 598 N.W.2d 290 (1999) ("[W]hile it was a positive act on Edmunds's part to call 911 when she found Natalie was having trouble breathing, that act, in and of itself, when combined with the violence perpetrated against so fragile a victim, did not require the jury to find that Edmunds's conduct had not demonstrated an utter disregard for Natalie's life.").

195. Jeffries, *supra* note 148, at 214.

196. *See* Dickey, Schultz & Fullin, *supra* note 28, at 1355.

197. *See* Michaels, *supra* note 169, at 72–73.

convicted of acting "under circumstances that show utter disregard" all rightfully belong in that group.

5. "NONSENSE UPON STILTS": A PARALLEL PROBLEM IN DEATH PENALTY STATUTES

A parallel problem emerges in many states that—unlike Wisconsin—use capital punishment.[198] As is true with first-degree reckless crimes in Wisconsin, those states that use the death penalty proclaim to reserve this punishment for defendants whose behavior was particularly reprehensible—"worse than most."[199] To do this, states often ask the sentencer to consider whether the murder or murderer was more "heinous," "cruel," or "depraved" than most.[200] In the 1987 case of *Tison v. Arizona*,[201] the U.S. Supreme Court expanded the application of the death penalty by ruling that a defendant convicted of felony murder can be sentenced to death even if he did not pull the trigger, so long as he was a major participant in the crime and "exhibited a reckless disregard for human life."[202] In this case, the U.S. Supreme Court asked states to clarify what exactly it means for a murderer to be more "depraved" than most, and this task has largely fallen on state supreme courts.[203] Richard Garnett argues that state supreme courts have failed in this task: "It is not clear, however, that tautological rephrasings of unavoidably subjective and evocative concepts do anything to make these terms any more objective or rationally reviewable."[204] For an aggravating factor to be applied to a narrow set of cases, that aggravating factor has to actually mean something.[205] Using language like "heinous" or "depraved," he finds, accomplishes the opposite—it broadens the spectrum, since most murders are "heinous" or "depraved" to the average person.[206]

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198. Wisconsin has not used the death penalty for over one hundred fifty years. Alexander T. Pendleton & Blaine R. Renfert, *A Brief History of Wisconsin's Death Penalty*, WIS. LAW., Aug. 2003, at 26, 26.

199. Richard W. Garnett, *Depravity Thrice Removed: Using the "Heinous, Cruel, or Depraved" Factor to Aggravate Convictions of Nontriggerman Accomplices in Capital Cases*, 103 YALE L.J. 2471, 2472 (1994).

200. *Id.*

201. 481 U.S. 137 (1987).

202. Garnett, *supra* note 199, at 2472.

203. *Id.* at 2485.

204. *Id.* at 2480.

205. *Id.* at 2481.

206. *Id.* at 2482.

In the 1993 U.S. Supreme Court case of *Arave v. Creech*,[207] a criminal defendant sentenced to death in Idaho challenged the use of "utter disregard for human life" as an aggravating factor for capital punishment on the grounds that the statute was unconstitutionally vague.[208] The Ninth Circuit concluded that "utter disregard" is unconstitutionally vague, because it provides no guidance to the sentencer.[209] The Supreme Court, however, reversed on the grounds that the Idaho Supreme Court had previously explained that "utter disregard for human life" referred to "the cold-blooded, pitiless slayer."[210] In an opinion written by Justice Sandra Day O'Connor, the U.S. Supreme Court declined to address the constitutionality of "utter disregard" alone and instead found that the additional description provided by the Idaho Supreme Court sufficiently narrowed the language.[211] Justice Harry Blackmun dissented and described Idaho's attempt to clarify an already vague statute with more vague language as "'nonsense upon stilts.'"[212] Blackmun furthermore reasoned that "utter disregard" provides nothing beyond what will be true of every defendant who commits the crime: "Every first-degree murder will demonstrate a lack of regard for human life, and there is no cause to believe that some murders somehow demonstrate only partial, rather than 'utter' disregard."[213]

First-degree reckless convictions in Wisconsin, like capital convictions, are supposed to be the exception, not the rule. Because the law uses such vague language, however, most defendants charged with reckless crimes could be found guilty of first-degree offenses. Wisconsin appellate courts have not provided the clarity that the U.S. Supreme Court found in Idaho. Any insight the Wisconsin Supreme Court provided by describing the phrase to mean "devoid of regard"[214] for another was negated by that same court recognizing that a defendant can show some regard and still be guilty of first-degree reckless

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207. 507 U.S. 463 (1993).

208. *Id.* at 468.

209. *Id.* at 469. The U.S. Supreme Court previously held that a capital sentencing scheme must properly focus and limit the sentencer's discretion to comply with the Eighth and Fourteenth Amendments. *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990) (quoting *Gregg v. Georgia*, 428 U.S. 153, 188–89 (1976)).

210. *Arave*, 507 U.S. at 468 (quoting *State v. Osborn*, 631 P.2d 187, 200–01 (Idaho 1981)).

211. *Id.* at 471.

212. *Id.* at 479 (Blackmun, J., dissenting) (quoting Jeremy Bentham, *Anarchical Fallacies*, *in* 2 THE WORKS OF JEREMY BENTHAM 501 (John Bowring ed., Edinburgh, Simpkin, Marshall & Co. 1843)).

213. *Id.* at 480–81 (Blackmun, J., dissenting).

214. *State v. Weso*, 60 Wis. 2d 404, 411, 210 N.W.2d 442 (1973).

offenses.[215] And, just like all murderers, all defendants guilty of reckless crimes act with disregard for others.[216]

III. THE LEGISLATURE SHOULD ADOPT THE OBJECTIVE ACTIVITY TEST

If there were ever a case in Wisconsin where the defendant, though perhaps reckless, clearly did not satisfy the aggravating factor, that case was *State v. Miller*. Miller repeatedly refrained from fighting back against his assailant despite multiple attacks, acted only to defend himself and others, and took steps afterwards to ensure that the victim was all right.[217] And a Wisconsin jury still convicted him of first-degree reckless injury for acting "under circumstances which show utter disregard for human life." Though the trial court and court of appeals ultimately remedied this error, who knows how many similar verdicts have been handed down and gone unchallenged.

The Wisconsin legislature must remove "utter disregard" and adopt the proposed Objective Activity Test. Whereas now first-degree reckless statutes require that the defendant recklessly caused the requisite level of harm "under circumstances which show utter disregard for human life," under the new test the defendant must recklessly cause that harm *while engaged in an activity that, viewed objectively under the circumstances, has no purpose other than threatening or causing harm to others*.[218]

Further clarification from the Supreme Court, though helpful, would still be insufficient. Codification is the best means to achieve clarity in criminal law.[219] "Utter disregard" has been the law for over twenty years; "depraved mind" preceded it for over one hundred years; and neither phrase has ever been effectively understood or applied.[220] Though the legislature ultimately adopted "utter disregard" in 1988, it also considered removing such language entirely and codifying an

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215. *See, e.g.*, *State v. Jensen*, 2000 WI 84, ¶ 32, 236 Wis. 2d 521, 613 N.W.2d 170 (noting that the regard Jensen showed after the fact by calling 911 alone was insufficient to negate the disregard he showed before and during the act); *State v. Edmunds,* 229 Wis. 2d 67, 78, 598 N.W.2d 290 (1999) ("[W]hile it was a positive act on Edmunds's part to call 911 when she found Natalie was having trouble breathing, that act, in and of itself, when combined with the violence perpetrated against so fragile a victim, did not require the jury to find that Edmunds's conduct had not demonstrated an utter disregard for Natalie's life.").

216. *Arave,* 507 U.S. at 480–81 (Blackmun, J., dissenting).

217. *State v. Miller*, 2009 WI App 111, ¶ 40, 320 Wis. 2d 724, 772 N.W.2d 188.

218. WIS. STAT. § 940.23(1) (2009–10).

219. Dickey, Schultz & Fullin, *supra* note 28, at 1325.

220. *Balistreri v. State*, 83 Wis. 2d 440, 447, 265 N.W.2d 290 (1978).

analysis of whether the defendant's reckless behavior had any social value.[221] The legislature considered defining first-degree reckless homicide, for example, "by doing an act which he realizes creates a strong probability of causing death or great bodily harm to another and which under the circumstances has no social utility."[222] If the defendant chose to engage in an activity that exposed others to risk of serious injury without any good reason for doing so, he would be more culpable than a defendant who engaged in a dangerous activity for some socially acceptable reason.[223] The criminal recklessness statute in Wisconsin, which requires that the risk be unreasonable, already demands that jurors consider whether the defendant's actions had any social value.[224] Therefore, under the "social utility" test, those offenders whose actions were the most unreasonable (had the least social value) would warrant heightened punishment.[225]

The Objective Activity Test is a modified version of the "social utility" test. To codify the "social utility" test as originally proposed would cause more offenses to fall under the umbrella of first degree than have under the "utter disregard" analysis. For example, drag racing has no social utility, neither does fleeing from the police. Under the "depraved mind" and "utter disregard" analysis, though, the Supreme Court found that the defendants in both *Wagner* and *Balistreri* showed some regard by swerving to avoid the victim and therefore did not deserve the heightened punishment.[226] Few reckless crimes involve activities that have any real social value, with James Miller's actions being a notable exception.

The Objective Activity Test shifts the focus away from an investigation of whether the defendant's actions demonstrated any consideration for others to an analysis of the type of activity that the defendant chose to engage in. This is appropriate because reckless crimes focus on the defendant's choice to engage in risky behavior rather than on the resulting harm. This analysis provides the jurors with more guidance than they have under the current law, and in so doing leads to more consistent results. Michaels argues that when the jury must make normative judgments, statutes which are as descriptive as possible are best: "To the extent that juries do unavoidably move from a 'fact-finding' to a judgmental role, pointing them in the right

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221. Dickey, Schultz & Fullin, *supra* note 28, at 1356–57.

222. *Id.* at 1356 (quoting S.B. 784, 1951–52 Leg. (Wis. 1951)).

223. *Id.* at 1356–57.

224. *See* WIS. STAT. § 939.24(1) (2009–10).

225. Dickey, Schultz & Fullin, *supra* note 28, 1357–58.

226. *Balistreri v. State*, 83 Wis. 2d 440, 458, 265 N.W.2d 290 (1978); *Wagner v. State*, 76 Wis. 2d 30, 46–47, 250 N.W.2d 331 (1977).

direction with a legal standard composed of the determinants of culpability is the best hope for achieving appropriate judgments."[227] The proposed test provides Wisconsin juries with a clearer standard to distinguish which defendants should be found guilty of first-degree reckless crimes and which should not.

The focus is properly on the design of the defendant's activity. As Jonathan Dressler explains, criminal statutes often separate degrees of recklessness by the extent of the defendant's "desire-state."[228] How willing was the defendant to engage in risky behaviors and how little did he care about the risk his actions posed to others? "Utter disregard" ultimately attempts to address this question by separating out those defendants who cared the least about other people. The language, however, is too vague to effectively communicate this idea. Furthermore, the language is counterintuitive and confusing, as it asks jurors to search for the mindset of complete disregard for others, but then holds that the defendant's actual mindset does not matter in this determination.

An examination of the nature of the defendant's activity provides a more plausible solution. The type of activity a defendant chooses to engage in reflects his callousness toward others and is far easier to analyze objectively. For example, firing a gun randomly into an office building during the day demonstrates more callousness towards others than speeding down a highway at night. The Objective Activity Test simply takes the focus away from the state of indifference the defendant's actions demonstrates and puts the focus on the action itself.

Requiring an objective analysis of the action itself is both necessary and appropriate to achieve clarity while remaining consistent with both the legislature's goals and existing case law. Legal scholar Alan Norrie argues that criminal statutes should require either an objective or subjective evaluation for individual elements of reckless crimes, but not both.[229] "One can judge conduct either as it appears to an individual, or as it appears to a general standard of reasonableness," but to combine them, he argues, "presents the possibility of contradiction and incoherence within doctrine."[230] Wisconsin appellate courts have blurred the lines between subjective and objective when

227. Michaels, *supra* note 169, at 84.

228. Dressler, *supra* note 48, at 957.

229. Alan Norrie, *Subjectivism, Objectivism and the Limits of Criminal Recklessness*, 12 OXFORD J. LEGAL STUD. 45, 47 (1992).

230. *Id.*

interpreting the "depraved mind" and "utter disregard" standards, and the proposed test will remedy this confusion.[231]

In *Jensen*, for example, the Wisconsin Supreme Court held that evidence of the defendant's subjective mental state can be used to support a finding of "utter disregard" but cannot be used to disprove such a finding.[232] As a practical question, how can someone act with "utter disregard for human life" if that person does not know that their action poses a serious threat to human life? If Jensen truly did not know that shaking a baby could prove fatal, then his actions were not truly reflective of "utter disregard" for his son's life. Norrie argues that while a subjective analysis best evaluates the facts, an objective analysis best evaluates the value—or moral culpability—of the defendant's actions.[233]

In the proposed test, the aggravating factor is solely an objective analysis. The subjective analysis comes first, as it is necessary to prove criminal recklessness.[234] The jury has to consider whether the defendant was subjectively aware of the unreasonable and substantial risk he created by engaging in the activity.[235] If the State fails to prove criminal recklessness, then the jury will not need to conduct the objective analysis for the aggravating factor as the defendant must be found not guilty. If the State does prove criminal recklessness, though, and the defendant is charged with the first-degree crime, then the jury must conduct the Objective Activity Test.

The jury does not consider whether that particular defendant intended to threaten or cause harm, but whether a reasonable person under those circumstances would engage in that behavior for any reason other than to threaten or harm another. This aggravating factor is therefore a reflection of the moral values of the community. The purpose for such an activity, though, does not necessarily have to be a socially appropriate one (neither fleeing from the police nor drag racing

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231. *Compare State v. Weso*, 60 Wis. 2d 404, 410, 210 N.W.2d 442 (1973) ("A depraved mind must be indifferent to the life of others. Such negative attitude is not found in the mind of a normal, reasonable person. The desire to live and the recognition [that] [sic] others desire to live and have a right to life is innate in the mind of a normal person."), *with State v. Edmunds*, 229 Wis. 2d 67, 76, 598 N.W.2d 290 (Ct. App. 1999) ("In determining whether utter disregard for human life was proven, we note that the State does not have to prove utter disregard 'in fact'; rather, the State satisfies its burden when it proves that the conduct of the defendant and the surrounding circumstances, as generally considered by mankind, are sufficient to evince utter disregard for human life.").

232. *State v. Jensen*, 2000 WI 84, ¶ 17, 236 Wis. 2d 521, 613 N.W.2d 170.

233. Norrie, *supra* note 229, at 47.

234. Subjective awareness of the substantial and unreasonable risk is a requisite element of criminal recklessness. WIS. STAT. § 939.24 (2009–10).

235. *Id.* note (1988) (Judicial Council).

have real social value); instead, the activity just has to be one that, to a reasonable person, has no purpose outside of threatening or causing harm. The jury may on occasion disagree about whether an activity has a purpose outside of threatening or causing harm. This is to be expected and welcomed. The jury system rests on the notion that a person should not be convicted of a crime unless twelve jurors agree. If the State demonstrates, and the jury accepts, that there are no such objective purposes, then—and only then—will the defendant be guilty of the first-degree offense.

In an amicus brief in the *Jensen* case, Wisconsin Law School professors suggested that the Court interpret "utter disregard" in a manner that would have provided for this type of analysis; specifically, they asked the Court to require that a jury determine whether the defendant engaged in an activity that was "worse than unreasonable."[236] Such an analysis, they argued, "is supported in the case law, which often emphasized the presence of a socially disapproved reason for the conduct, and seems to be a good fit for typical situations that raise questions about the degree of recklessness."[237] If a defendant engaged in an activity that is not only reckless but has no objective purpose whatsoever outside of harming other people, then that defendant will be more culpable and worthy of heightened punishment.

Though the jury's analysis focuses on the nature of the activity itself rather than on the nature of the defendant's behaviors while engaged in that activity, the proposed test is consistent with existing precedent. The defendants in *Balistreri* and *Wagner* were both driving recklessly.[238] In both cases, the Supreme Court found that the defendants were not guilty of first-degree homicide because they swerved immediately before striking the pedestrians, whom they hit, thereby showing regard for human life.[239] These defendants would also not be guilty of the first-degree offense under the new test. Though reckless, drag racing and fleeing from the police are both activities that, viewed objectively, have purposes outside of threatening or causing harm to others.

The defendants in the baby-shaking cases of *Jensen* and *Edmunds*, however, would likely be guilty of first-degree reckless offenses under the new test as they were under the "utter disregard" analysis.[240] The

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236. Dickey Brief, *supra* note 104, at 8.

237. *Id.*

238. *Balistreri v. State*, 83 Wis. 2d 440, 444, 265 N.W.2d 290 (1978); *Wagner v. State*, 76 Wis. 2d 30, 31, 250 N.W.2d 331 (1977).

239. *Balistreri*, 83 Wis. 2d at 457–58; *Wagner*, 76 Wis. 2d at 46–47.

240. *State v. Jensen*, 2000 WI 84, ¶ 33, 236 Wis. 2d 521, 613 N.W.2d 170; *State v. Edmunds*, 229 Wis. 2d 67, 76–77, 598 N.W.2d 290 (Ct. App. 1999).

State would have the burden of proving that the defendants recklessly caused harm while engaging in an activity that objectively had no purpose outside of threatening or causing harm. The jury would then be instructed to consider whether violently shaking a baby objectively had any purpose other than threatening or harming the baby. As was true under the "utter disregard" analysis, the jury would be told that the question is not what the defendant subjectively believed, but rather, whether a reasonable person would engage in the activity of shaking a baby for any reason other than threatening or harming that baby. A jury would likely conclude that there is no reason other than to threaten or harm the baby, and the defendants would likely be guilty of first-degree reckless offenses.

Certain other states, such as New Hampshire, differentiate first- and second-degree reckless offenses based on whether or not the defendant used a dangerous weapon.[241] This is effective in so far as it evaluates the defendant's culpability based on the nature of the activity, but it fails to consider the acts of defendants like James Miller. Most would agree that Miller's actions were not as morally reprehensible as a defendant who, for example, started firing a gun randomly into an occupied building. The proposed test recognizes this distinction. The jury would examine Miller's actions objectively under the circumstances, and would likely conclude that Miller did have a purpose outside of threatening or causing harm to Nakai—specifically, to defend himself and the others. The activity of shooting a gun aimlessly into a building, however, has no such purpose, and that defendant would be guilty of the first-degree offense.

Furthermore, the new test explicitly instructs jurors to consider all of the circumstances surrounding the act, not simply the act itself. This remedies the time-frame confusion demonstrated in *Miller*, where the State asserted that the jury should have only considered Miller's actions during the act of shooting Nakai, but both Miller and the court of appeals disagreed.[242] The same problem would emerge under the proposed test if the language did not instruct jurors to consider the circumstances. A jury examining the simple act of Miller shooting Nakai would likely find that such action has no purpose outside of causing or threatening harm. But such a narrow lens undermines the

241. N.H. REV. STAT. ANN. § 631:3(I)-(II) (2010) ("I. A person is guilty of reckless conduct if he recklessly engages in conduct which places or may place another in danger of serious bodily injury. II. Reckless conduct is a class B felony if the person uses a deadly weapon as defined in RSA 625:11, V. All other reckless conduct is a misdemeanor.").

242. Reply Brief of Plaintiff-Appellant at 4–5, *State v. Miller*, 2009 WI App 111, 320 Wis. 2d 724, 772 N.W.2d 188; *see Miller*, 2009 WI App 111, ¶ 43.

very essence of criminal recklessness. An activity, such as speeding down a highway, may be deemed criminally reckless in one circumstance and not in another—the circumstances are therefore essential for the jury to consider.

Nevertheless, juries may struggle initially with cases involving guns. A gun's very purpose is to threaten or cause harm to another person. Juries may therefore think that any defendant charged with a reckless crime that involves a gun should be guilty of the first-degree offense. However, not all gun offenses should warrant first-degree convictions. Compare two Wisconsin court of appeals cases involving guns: the *Barksdale* case, where the defendant pointed a loaded machine gun at the victim to try and scare him into paying a drug debt,[243] and of course the *Miller* case.[244] Though both of the defendants carried guns, the nature of their activities varied: Barksdale used his gun to threaten another person to give him money;[245] Miller used the gun to deter Nakai from hurting himself and the others.[246]

A jury would likely find Barksdale guilty of the first-degree offense, as he used the gun in such a way that reasonably has no purpose outside of threatening or causing harm. A jury would likely find Miller not guilty of the first-degree offense, as he used the gun in such a way that objectively—in light of the totality of the circumstances—does have a defensive purpose. A defendant in Barksdale's position may argue that he did have a purpose: getting back the money that the victim owed. But under the Objective Activity Test, the question would not be whether the defendant had a subjective purpose; the question would be whether that purpose is objectively reasonable. As an essential element of first-degree reckless offenses, the burden would fall on the state to prove that such an activity did not have an objectively reasonable purpose outside of threatening or causing harm.

This test still leaves the State in the odd position of having to prove a negative. However, this is only problematic under the "utter disregard" analysis because no one knows how much of a negative the State has to prove. Under the proposed analysis, the State has to show that the defendant was engaged in an activity that, viewed objectively under the circumstances, has no purpose outside of threatening or causing harm. Here, "no" really does mean zero. If the jury finds that, viewed objectively, the activity has any purpose outside of threatening or causing harm, then the defendant would not be guilty of the first-

243. 160 Wis. 2d 284, 290, 466 N.W.2d 198 (Ct. App. 1990).
244. 2009 WI App 111, ¶¶ 40–43.
245. *Barksdale*, 160 Wis. 2d at 290.
246. *Miller*, 2009 WI App 111, ¶¶ 40–43.

degree offense. This narrows the group of defendants who may be found guilty of first-degree reckless offenses, and that is exactly what should happen.

This proposal does not, as is so often the fear, result in a policy of leniency toward crime; rather, it accomplishes what the current law has failed to do in a way that upholds the integrity of the Wisconsin criminal justice system. Consider, for example, an elementary school teacher who explains to her students that if they misbehave, they will have their name written on the board. If they hit another student, though, they will have to sit in the time-out chair. At this point, the students understand that to be in the time-out chair means that you behaved really badly. But as the school year progresses, the teacher becomes impatient and starts forcing more students to sit in the chair for reasons other than hitting fellow students. As the punishment becomes increasingly common, and the reason for that punishment increasingly unclear, the students will no longer view the chair as such a serious punishment. They will not judge those forced to sit in it as harshly and will perhaps even question the teacher's effectiveness as a disciplinarian. The same has become true with the use of "utter disregard" as an aggravating factor for reckless crimes. Because "utter disregard" is overused and haphazardly applied, it does not effectively distinguish offenders based on culpability.

Defendants who engage in behaviors that are reckless, though not objectively designed solely to harm others (such as drag racing), will still face punishment. They can be charged with second-degree reckless offenses. First-degree reckless crimes will be reserved for those defendants whose behavior was particularly reprehensible, based on the nature of their activity.

CONCLUSION: THE LEGISLATURE MUST ABANDON "UTTER DISREGARD"

The Wisconsin Supreme Court may offer some clarification as to the weight of after-the-fact regard in its pending decision in *State v. Burris*.[247] However, as proved true with *Jensen*, further explanation from the Supreme Court, though helpful, cannot remedy the depths of confusion surrounding the use of "utter disregard." New cases will arise, and new questions will follow. The time has come for the

247. The Wisconsin Supreme Court heard oral arguments in the case on February 2, 2011. *See* State v. Burris *Case History*, WISCONSIN COURT SYSTEMS, http://wscca.wicourts.gov/ (search "Appeal Number" for "09AP956," then click on "Case History") (last visited Mar. 12, 2011). The Supreme Court's decision is now pending. *Id.*

Wisconsin legislature to abandon "utter disregard" and adopt the proposed Objective Activity Test. The Wisconsin legislature and appellate courts have been understandably hesitant to make this type of change, since such language has been a part of Wisconsin criminal law for over one hundred fifty years. But a desire to maintain consistency in the law serves little purpose when that law causes nothing but confusion and inconsistency in application.

The proposed Objective Activity Test accomplishes what "utter disregard" fails to do and does so in a manner that upholds the rights of criminal defendants. "Utter disregard" has become an utter failure, and the Wisconsin legislature must take action.