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People v. Campbell

Winston Richmond Brownlow
New York Law School Class of 2008

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WINSTON RICHMOND BROWNLOW

People v. Campbell

ABOUT THE AUTHOR: Winston Richmond Brownlow is a 2008 J.D. candidate at New York Law School.

The technical definitions of certain crimes are often confusing to the general public. Take, for example, New York State's crime of "depraved indifference murder." In one of these cases, a *New York Times* headline declared that the "Jury Picked Wrong Crime in Murder Case."¹ That case, the first murder in the recorded history of the town of Shelter Island, Suffolk County, read like every citizen's worst nightmare—a murder conviction reversed, and the criminal released from his prison cell "despite—indeed, in part because of—strong evidence that [the defendant] intended to kill [his] victims."² Isn't that exactly what *should* lead to a conviction for murder, the average New Yorker might justifiably wonder? Had the defendant been convicted of murder, the answer would be "yes." Depraved indifference, however, is another story.

In *People v. Campbell*, the Supreme Court Appellate Division, Second Department, affirmed the depraved indifference murder conviction of Jarvis Campbell.³ The case arose out of Campbell's role in the shooting death of Demetrius Wright in Brownsville, Brooklyn.⁴ This comment contends that because the evidence at trial revealed that the defendant *intended* to cause Wright's death, the evidence was legally insufficient to sustain the defendant's conviction for depraved indifference murder. More importantly, this comment argues that in affirming Campbell's conviction, the appellate division relied on a case, *People v. Fenner*,⁵ which had been overruled *sub silentio*. The appellate division's reliance on *Fenner* is particularly troublesome because it represents the resurrection of a defunct conceptual framework for analyzing the crime of depraved indifference murder embodied by the case of *People v. Sanchez*.⁶ The *Sanchez* framework erroneously focused on the degree of risk created by the defendant's conduct rather than the defendant's mental state at the time the crime was committed.

In *Campbell*, defendant Jarvis Campbell was seeking information about a man named "Born." Born had allegedly stabbed Campbell's brother the night before. Campbell approached Demetrius Wright, Kareem Durham, and Jamel Bascomb in broad daylight.⁷ After a brief exchange, Campbell reached into his waistband and pulled out a gun.⁸ As the men were running away, Campbell aimed his weapon in their direction and fired five rounds.⁹ According to an

1. Leslie Eaton, *Jury Picked Wrong Crime in Murder Case*, N.Y. TIMES, Oct. 20, 2004, at B1.

2. *People v. Suarez*, 6 N.Y.3d 202, 217 (2005) (G. B. Smith, Rosenblatt & R. S. Smith, JJ., concurring).

3. 826 N.Y.S.2d 267 (2d Dep't 2006).

4. *Id.* at 268.

5. 61 N.Y.2d 971 (1984).

6. 98 N.Y.2d 373 (2002).

7. *Campbell*, 826 N.Y.S.2d at 268.

8. *Id.* at 269.

9. *Id.*

eyewitness, Campbell smiled while shooting at the men.¹⁰ One of the bullets hit Wright in the back of the head and he died shortly thereafter.¹¹

Campbell was indicted on charges of intentional murder in the second degree and depraved indifference murder in the second degree.¹² As alleged in the indictment, a defendant is guilty of intentional murder when he causes the death of another person with intent to cause the death of such person.¹³ In the alternative, a person is guilty of depraved indifference murder when he recklessly causes the death of another person under circumstances evincing depraved indifference to the value of human life.¹⁴ The trial court held that there was a reasonable view of the evidence which could have supported a finding of recklessness, and therefore denied the defendant's motion to dismiss the depraved indifference count.¹⁵ After closing arguments, both counts were submitted to the jury.¹⁶ The jury acquitted Campbell of intentional murder, but convicted him of depraved indifference murder.¹⁷

Campbell appealed to the Supreme Court Appellate Division, Second Department.¹⁸ He argued that the evidence at trial was only consistent with an intentional killing and that the evidence of depraved indifference murder was both legally and factually insufficient.¹⁹ The appellate division unanimously affirmed his conviction.²⁰ In its decision, the court summarized the path of New York's modern depraved indifference jurisprudence and concluded that this case fell within the narrow band of conduct properly considered depravedly indifferent.²¹ The court analogized Campbell's conduct to the defendant in *People v. Fenner*.²² The court reasoned that because Wright was "simply" accompanied by two other men at the time of his death, and because "there was no evidence of any dispute between the defendant and the decedent, that the defendant even knew the decedent, or was provoked before he shot and killed the decedent," the jury's verdict of guilt on the depraved indifference murder count was legally sufficient

10. *Id.*

11. *Id.*

12. *Id.*

13. N.Y. PENAL § 125.25(1) (McKinney 2004).

14. *Id.* § 125.25(2).

15. *Campbell*, 826 N.Y.S.2d at 269.

16. *Id.*

17. *Id.*

18. *Id.* at 268.

19. *See id.* at 269.

20. *Id.* at 268.

21. *See id.* at 269–71.

22. *Id.* at 270.

and not contrary to the weight of the evidence.²³ Campbell was sentenced to a term of twenty-one years to life imprisonment.²⁴

In New York, a person is guilty of murder in the second degree when, among other things, he causes the death of another person either intentionally²⁵ or by recklessly engaging in conduct which creates a grave risk of death to another person under circumstances evincing a depraved indifference to human life.²⁶ A person acts “intentionally” when his conscious objective is to cause that result.²⁷ Conversely, a person acts “recklessly” when he is aware of, and yet consciously disregards, a grave risk that such result will occur.²⁸ Furthermore, the risk must be of such nature and degree that disregarding it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.²⁹

Originally, the state of depraved indifference jurisprudence in New York was governed by the 1983 case of *People v. Register*.³⁰ Giving additional guidance in interpreting the text of the statute, this controversial³¹ decision emphasized that the core mens rea of depraved indifference was simple recklessness.³² Furthermore, “circumstances evincing a depraved indifference to human life” were satisfied by an objective determination that the degree of risk created by the defendant’s reckless conduct “convert[ed] the substantial risk present in manslaughter into a *very* substantial risk of death.”³³ Thus, under *Register*, this additional element of depraved indifference murder formed neither part of the mens rea nor the actus reus of the crime of second degree murder; rather, it served to define the factual setting necessary to elevate manslaughter (a merely reckless killing) to murder (a reckless killing committed under circumstances evincing a

23. *Id.* at 270. See generally *People v. Romero*, 7 N.Y.3d 633, 642–44 (2006) (restating standard of review for conducting weight-of-evidence, as opposed to legal sufficiency, analysis).

24. N.Y.S. Dep’t of Corrections, Inmate Population Information Search, <http://nysdocslookup.docs.state.ny.us/GCA00P00/WIQ3/WINQ130> (enter Jarvis Campbell, or his department identification number, 03-A-3421).

25. N.Y. PENAL § 125.25(1) (McKinney 2004).

26. *Id.* § 125.25(2).

27. *Id.* § 15.05(1).

28. *Id.* § 15.05(3).

29. *Id.* Note that while disregarding a merely “substantial and unjustifiable” risk is sufficient to establish default recklessness under Section 15.05(3), liability for depraved indifference murder attaches only upon the disregard of a “grave” risk of death under Section 125.25(2).

30. 60 N.Y.2d 270 (1983).

31. See Abraham Abramovsky & Jonathan I. Edelman, *Depraved Indifference Murder Prosecutions in New York: Time for Substantive and Procedural Clarification*, 55 SYRACUSE L. REV. 455 (2005); see also Bernard E. Gegan, *More Cases of Depraved Mind Murder: The Problem of Mens Rea*, 64 ST. JOHN’S L. REV. 429 (1990).

32. *Register*, 60 N.Y.2d at 274.

33. *Id.* at 276–77.

depraved indifference the value of human life).³⁴ It was also generally acknowledged that evidence establishing a defendant's guilt of an intentional shooting could not support a conviction for depraved indifference murder,³⁵ because an act "is either intended or not intended; it cannot simultaneously be both."³⁶ Thus, it remained a hallmark of *Register's* jurisprudence that "the question of the defendant's state of mind [was] a classic matter for the jury."³⁷

As noted, however, *Register* was a controversial decision.³⁸ By emphasizing an objective inquiry into the circumstances that evinced a depraved indifference to human life, the court invited juries to engage in an impermissible retrospective analysis which elevated the fact that the victim actually did die over the indicia that this particular risk was "very substantial." Furthermore, by emphasizing the distinction between a "grave" risk and a merely "substantial" risk, the court flirted with a vague line that was often difficult for juries to consistently distinguish. In fact, this terminology was characterized by a federal court as a distinction without a difference.³⁹

The first sign of *Register's* impending demise occurred when a deeply divided New York Court of Appeals split four-to-three in affirming the depraved indifference murder conviction of Oswald Sanchez.⁴⁰ It was evident in the dissent of Judge Rosenblatt that a new force had emerged on the court that was eager to rectify *Register's* perceived flaws.⁴¹ Subsequently, in two separate lines of cases, the Court of Appeals began to alter the way that it approached depraved indifference murder cases.⁴² The first thread, which arose under *Policano v. Herbert*, did not change settled precedent but rather reaffirmed the rule set forth in *People v. Wall*, which held that evidence of "an intentional shooting" could not, as a matter of law, support a conviction for depraved indifference murder.⁴³ Thus, the first line of cases held that "evidence of a manifestly intentional killing cannot sustain a conviction for depraved indifference murder and is based . . . on the well-established rule . . . that intentional murder and depraved indifference murder are inconsistent crimes."⁴⁴ In accord with this reasoning, the depraved indifference murder convictions of several defendants were reversed "despite—

34. *Id.* at 276.

35. *People v. Wall*, 29 N.Y.2d 863, 864 (1971).

36. *People v. Gallagher*, 69 N.Y.2d 525, 529 (1987).

37. *Policano v. Herbert*, 7 N.Y.3d 588, 599 (2006).

38. *See* sources cited *supra* note 31.

39. *See Jones v. Keane*, 329 F.3d 290, 294 (2nd Cir. 2003) (*quoting Jones v. Keane*, 2002 WL 33985141, at *5).

40. *People v. Sanchez*, 98 N.Y.2d 373, 417 (2002).

41. *See id.* at 394–416 (Rosenblatt, J., dissenting).

42. *See Policano v. Herbert*, 7 N.Y.3d 588, 605 (2006) (Kaye, C.J., dissenting).

43. *Id.* (citing *People v. Wall*, 29 N.Y.2d 863 (1971)).

44. *Id.*

indeed, in part because of—strong evidence that they intended to kill their victims.”⁴⁵

In the second thread, which arose, among other cases, under *People v. Feingold*⁴⁶ and *People v. Suarez*, and which actually did change settled precedent, the court rejected *Register*'s core holding that the existence of circumstances evincing a depraved indifference to human life turned on an objective assessment of the degree of risk created by the defendant's conduct.⁴⁷ In its place, the court held that “depraved indifference” constituted a separate mens rea, distinct from the original mens rea of simple recklessness.⁴⁸ Accordingly, a defendant's conduct would need to be found “so wanton, so deficient in a moral sense of concern, so devoid of regard of the life or lives of others, and so blameworthy,” as to morally equate their behavior with that of a defendant who intentionally causes the death of another person.⁴⁹ These buzzwords became the new standard for defining the heretofore non-existent mens rea of “depravity.”

It is axiomatic that the existence of the intent to kill another person conclusively defeats the inference that the defendant also acted with a reckless disregard of a grave risk of death; the two mental states are mutually exclusive.⁵⁰ As such, it is now clear that a person who intentionally causes the death of another person may not be convicted of depraved indifference murder in the death of that person, even if the jury acquits the defendant on the intentional murder count.⁵¹ A review of the evidence in *Campbell*, even when viewed in the light most favorable to the people,⁵² reveals that Campbell's conduct could not have “as a matter of law, constitute[d] depraved indifference murder”⁵³

The defendant's conduct possessed all the hallmarks of an intentional homicide: the chronology of the transaction, the number of shots fired, the defendant's facial expressions, the fact that one of the bullets hit the victim in the back of the head, the lack of threat posed to the defendant by the victims, and the motive involving the defendant's brother all support the finding that this was an intentional killing.⁵⁴ Had the jury convicted Campbell of intentional murder instead

45. *People v. Suarez*, 6 N.Y.3d 202, 217 (2005) (G. B. Smith, Rosenblatt & R. S. Smith, JJ., concurring).

46. 7 N.Y.3d 288, 296 (2006).

47. *See Policano*, 7 N.Y.3d at 606 (Kaye, C.J., dissenting).

48. *See Feingold*, 7 N.Y.3d at 296; *Suarez*, 6 N.Y.3d at 214.

49. *Suarez*, 6 N.Y.3d at 211 (citing *People v. Russell*, 91 N.Y.2d 280, 287–88 (1998)).

50. *See, e.g.*, *People v. Gonzalez*, 1 N.Y.3d 464, 468 (2004); *People v. Gallagher*, 69 N.Y.2d 525, 529–30 (1987). *Cf.* *People v. Wall*, 29 N.Y.2d 863, 864 (1971) (considering the possibility of simultaneously acting both intentionally and negligently).

51. *People v. Payne*, 3 N.Y.3d 266, 270 (2004).

52. *See generally* *People v. Contes*, 60 N.Y.2d 620, 621 (1983) (explaining the standard of review for the legal sufficiency of evidence in a criminal trial) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

53. *Suarez*, 6 N.Y.3d at 216.

54. As examples of very similar fact patterns resulting in affirmed convictions for intentional murder or attempted murder. *See, e.g.*, *People v. Smith*, 768 N.Y.S.2d 211, 211 (1st Dep't. 2003) (“Defendant's

of depraved indifference murder, it is likely that the conviction would have been summarily affirmed on appeal. However, Campbell was acquitted of intentional murder and convicted of depraved indifference murder.⁵⁵ Thus, the appellate division was left to determine whether “a correct interpretation of the depraved indifference murder statute [permitted] his conviction of that crime to stand.”⁵⁶

The appellate division relied upon several factors in affirming the jury’s verdict that the defendant possessed the culpable mental “state”⁵⁷ to convict him of depraved indifference murder: the lack of an identifiable plan in carrying out the shooting spree, the number of shots fired, the lack of evidence of a dispute between the defendant and the victim, and most importantly, the fact that the victim’s companions were endangered during the course of the shooting spree.⁵⁸ With the exception of the last factor, none of these remaining facts satisfy the Court of Appeals’s narrowing definition of depraved indifference murder.⁵⁹ Under its framework, the facts of *Campbell* are consistent only with an intentional shooting.

The fact that a shooting was committed spontaneously, rather than pursuant to a scheme or plan, does not necessarily support an inference of recklessness as opposed to intentionality. It was recognized in *People v. Payne* that “intentional murder does not require planning or contrivance.”⁶⁰ New York’s requirement of premeditation in an intentional murder prosecution was abandoned with the adoption of the 1967 Penal Law.⁶¹ Moreover, the fact that Campbell fired multiple shots is not probative of recklessness; “firing more rounds . . . does not

homicidal intent could be *readily inferred* from the fact that he fired numerous shots at the fleeing victim.”) (emphasis added); *People v. Campbell*, 617 N.Y.S.2d 195, 196 (2d Dep’t. 1994) (detailing a case where the defendant shot at fleeing persons with whom he had previously had an altercation).

55. See *People v. Campbell*, 826 N.Y.S.2d 267, 269 (2d Dep’t 2006).
56. *People v. Suarez*, 6 N.Y.3d 202, 217 (2005) (G. B. Smith, Rosenblatt & R. S. Smith, JJ., concurring.).
57. The appellate division’s use of the term ‘mental state’ in its singular tense is technically incorrect. The Court of Appeals “depart[ed] slightly from the *Register* formulation . . . [to] make clear that the additional requirement of depraved indifference had meaning independent of the gravity of the risk.” *Suarez*, 6 N.Y.3d at 215. By doing so, the Court of Appeals created an additional culpable mental state of “depraved indifference to human life” which exists co-extant with recklessness, the traditional culpable mental state necessary for depraved indifference murder. *People v. Feingold*, 7 N.Y.3d 288, 296 (2006). As such, the appellate division failed to clearly identify which of the requisite culpable mental states it was then analyzing. For purposes of this comment, however, I am contesting only the appellate division’s conclusion that Campbell’s conduct was reckless, as opposed to intentional.
58. See *Campbell*, 826 N.Y.S.2d at 270–71 (citing *People v. Fenner*, 61 N.Y.2d 971 (1984)).
59. *Policano v. Herbert*, 7 N.Y.3d 588, 599 (2006) (noting its quasi-recognition that it no longer, post-*Sanchez*, adhered to *Register*’s paradigm with respect to “the question of the defendant’s state of mind [being] a classic matter for the jury”).
60. *People v. Payne*, 3 N.Y.3d 266, 270 (2004).
61. *People v. Patterson*, 39 N.Y.2d 288, 299 (1976).

make the act more depravedly *indifferent*, but more intentional.”⁶² Indeed, the *Payne* majority rejected the attempt to create a per se rule permitting dual-count submissions of depraved and intentional murder whenever the defendant’s conduct was not “overtly intentional.”⁶³ Thus, the appellate division incorrectly focused on Campbell’s lack of planning and multiple shots as an indication of recklessness. In fact, this was the very argument rejected by the Court of Appeals in *Payne*.⁶⁴ As such, it should have been rejected by the appellate division.

The appellate division also relied on the lack of motive evidence as a basis for sustaining the legal sufficiency of the depraved indifference murder verdict.⁶⁵ However, the Court of Appeals has never held motive to be an indispensable component of intentional murder.⁶⁶ Even if motive were necessary to establish intentionality, the record substantially showed that the defendant’s brother was stabbed the night before the shooting, allegedly by the very same man Campbell was seeking information about on the night he committed murder.⁶⁷ Moreover, the confrontation between Campbell and his victims prior to the shooting is similar to the encounter in *People v. Gonzalez*, where the court overturned a depraved indifference conviction.⁶⁸ In that case, the defendant entered a Rochester barbershop, secretly conferred with a person present therein, left and then later returned to the barbershop.⁶⁹ Upon his return, he proceeded to shoot the victim multiple times without evidence of provocation or motive.⁷⁰ Notwithstanding the lack of obvious motive, the Court of Appeals unanimously concluded that Gonzalez’s homicidal actions were “specifically designed to cause the death of the victim” and therefore reversed his conviction for depraved indifference even though the jury had acquitted the defendant of intentional murder.⁷¹ Thus, the post-*Sanchez* depraved indifference jurisprudence leaves no room for the speculation engaged in by the appellate division in *Campbell* (i.e., “a rational jury

62. *Payne*, 3 N.Y.3d at 272 (“[I]t should be obvious that the more the defendant shoots . . . the victim, the more clearly intentional is the homicide.”). This means that what was self-evident to the Court of Appeals in 2004 was apparently not clear to the appellate division in 2006.

63. *Id.* at 270.

64. *Id.*

65. *People v. Campbell*, 826 N.Y.S.2d 267, 270 (2d Dep’t 2006).

66. *E.g.*, *People v. Sangamino*, 258 N.Y. 85, 87 (1932) (“[M]otive is not an essential ingredient of the crimes of murder in the first and second degrees. Murder in either of these degrees may be committed without a motive, but never without intent.”) (citing *People v. Dinsler*, 192 N.Y. 80, 85 (1908)); *People v. Ryan*, 658 N.Y.S.2d 527, 529 (3d Dep’t. 1997); *People v. Walton*, 621 N.Y.S.2d 872, 873 (1st Dep’t. 1995).

67. *See Campbell*, 826 N.Y.2d at 270; Brief for Defendant-Appellant at 15–16, *People v. Campbell*, 826 N.Y.2d 267 (2d Dep’t. 2006) (No. 2003-04039) 2004 WL 5042320; Respondent’s Brief at 3, *People v. Campbell*, 826 N.Y.2d 267 (2d Dep’t. 2006) (No. 2003-04039), 2005 WL 4909106.

68. 1 N.Y.3d 464 (2004).

69. *Id.* at 465.

70. *Id.* at 465–66.

71. *Id.* at 467, 469.

could reasonably conclude that. . .”) with respect to the sufficiency of the evidence of recklessness.⁷²

Further, in *Policano v. Herbert*, the defendant shot and killed the victim at a bus stop in Fort Greene, Brooklyn, in an act of violence which was characterized by the court as having “erupted spontaneously after a chance encounter on the street.”⁷³ As in *Campbell*, Policano was convicted of depraved indifference murder on a dual-count submission.⁷⁴ Also as in *Campbell*, there was “considerable doubt that [Policano] acted with premeditation or sought out [the victim] to seek revenge” when he fired multiple shots at close range.⁷⁵ Further, the people’s argument in *Policano* focused on the spontaneous nature of the act, coupled with the evident lack of premeditation, to argue that a rational jury could find that the defendant’s conduct demonstrated depraved recklessness, as opposed to intentionality.⁷⁶ Unlike the appellate division in *Campbell*, however, the Court of Appeals unanimously, and emphatically, rejected the people’s argument in *Policano* stating that “there is *no doubt* that under the law of New York today, a jury would *not* be permitted to find defendant guilty of depraved indifference murder on the evidence in this record.”⁷⁷ As such, the defendant’s depraved indifference conviction was overturned.

The one fact that complicates the *Campbell* analysis was the presence of endangered bystanders during Campbell’s “shooting spree.” The thrust of the Court of Appeals’s recent depraved indifference jurisprudence has focused on “one-on-one encounters.”⁷⁸ While the case of *People v. Gonzalez* stands for the proposition that the mere presence of a bystander is insufficient, on its own, to support a depraved indifference murder conviction,⁷⁹ it remains that the court has, on several occasions, “differentiated cases [presenting a one-on-one encounter] from homicides in which a defendant *lacking the intent to kill*⁸⁰ (but oblivious to the consequences and with depraved indifference to human life) shoots into a crowd or otherwise endangers innocent bystanders.”⁸¹ In *Campbell*, the appel-

72. *Campbell*, 826 N.Y.S.2d at 271 (emphasis added).

73. 7 N.Y.3d 588, 601 (2006). After his conviction was affirmed on appeal, 725 N.Y.S.2d 651 (2001), Policano sought collateral relief from the federal courts wherein he was awarded a writ of habeas corpus *sub nom.* *Policano v. Herbert*, No. 02-CV-1462, 2004 WL 1960203 (E.D.N.Y. Sept. 7, 2004), *aff’d* 430 F.3d 82 (2d Cir. 2005). Thereafter, the Second Circuit recalled its mandate and certified questions of state law for resolution by the Court of Appeals in *Policano v. Herbert*, 453 F.3d 75 (2d Cir. 2006), prompting this most recent discussion of the subject.

74. *See Policano*, 7 N.Y.3d at 592.

75. *Id.* at 601.

76. *Id.* at 592.

77. *Id.* at 601 (emphasis added).

78. *See People v. Payne*, 3 N.Y.3d 266, 272 (2004); *People v. Suarez*, 6 N.Y.3d 202, 218 (2005).

79. *Suarez*, 6 N.Y.3d at 213 n.7.

80. *See supra* notes 10–13 and accompanying text.

81. *Payne*, 3 N.Y.3d at 271 (emphasis added).

late division held that the presence of bystanders transformed the case from an intentional, execution-style murder, into one eligible for “the narrow category of cases where depraved indifference murder properly applies.”⁸²

The appellate division erred in relying on *People v. Fenner* to hold that the presence of bystanders was sufficient to support a depraved indifference murder conviction, especially where, as in *Campbell*, the shooter intended to kill. This is because the Court of Appeals has explicitly repudiated this reasoning in the second thread of post-*Sanchez* cases, highlighted by *Feingold* and *Suarez*.⁸³

In order to hold that *Fenner* was still good law, and thus be able to apply *Fenner*'s reasoning to the facts of *Campbell*, the court pointed to *Payne*'s approval of *Fenner*—despite arguments that the post-*Sanchez* cases had overruled *Fenner* sub silentio. This is important because *Fenner* is factually similar to *Campbell*, and the people cited *Fenner* as a basis to affirm in *Campbell*.⁸⁴ *Fenner*, however, was merely cited by *Payne* as an example of the proposition that the presence of endangered bystanders does not necessarily connote depraved recklessness⁸⁵—a proposition that was firmly established by *Register* and *Sanchez*; cases that remained good law at the time *Payne* was decided, but not when *Campbell* was decided. *Fenner* broke no new ground, and because the *Payne* majority did not carry sufficient votes to overrule *Register* and its progeny, it properly relied on cases that were still good law at the time of *Payne*.⁸⁶

Fenner's continued viability turns largely on the courts' continued adherence to the conceptual framework of *Register* and *Sanchez*.⁸⁷ In fact, a comparison of the facts and reasoning in *Sanchez* and the opinion in *Campbell* reveals the extent to which the latter tracks the former. In *Sanchez*, the defendant shot and killed his girlfriend's sister's boyfriend, with whom he had previously been friends.⁸⁸ Despite the powerful evidence of intentionality,⁸⁹ a divided court affirmed the depraved indifference murder conviction, reasoning, in part, that the defendant's “sudden shooting of the victim . . . [from]. . . behind a door and fir[ing] into an area where children were playing . . . presented[ed] a heightened risk of unintended injury.”⁹⁰ Thus, the majority found that a “rational jury

82. *People v. Campbell*, 826 N.Y.S.2d 267, 270 (2d Dep't. 2006).

83. *See supra* notes 46–49 and accompanying text.

84. *Payne*, 3 N.Y.3d at 271.

85. *See id.* at 271.

86. Indeed, *Fenner* was decided summarily by memorandum. Of its two paragraph discussion, half is devoted to the defendant's unrelated Fourth Amendment challenges to his conviction. *See People v. Fenner*, 61 N.Y.2d 971, 973 (1984).

87. *Fenner*, insofar as relevant, rests exclusively on *Register*. *See id.* at 971–73.

88. *People v. Sanchez*, 98 N.Y.2d 373, 375–76 (2002).

89. *Id.* at 384 (“[Sanchez's] conduct involved such a high risk of death that it could also lead to the conclusion that it was intentional. . .”).

90. *People v. Hafeez*, 100 N.Y.2d 253, 259 (2003) (describing the factual setting found in *Sanchez*).

could have harbor[ed] a reasonable doubt that the homicide of [the victim] was intentional.”⁹¹

The same refrains were repeated by the appellate division in *Campbell*.⁹² The court panel emphasized, for example, that by viewing the evidence in the light most favorable to the prosecution a “rational jury *could* reasonably conclude that the defendant did not care whether harm would result when he commenced his shooting spree in the direction of the fleeing men.”⁹³ As can be seen, the *Campbell* court’s extreme deference to the jury’s verdict, and the inferences and speculation necessary to accomplish that goal, is really an application of *Sanchez*’s deference to the jury disguised as an application of *Payne*’s consideration of innocent bystanders.⁹⁴

The rule of *Sanchez*, however, was decisively abandoned by a majority of the Court of Appeals in *Feingold*, which was decided over four months before *Campbell*.⁹⁵ Furthermore, in “conclud[ing] that the law has changed to such an extent that *People v. Register* and *People v. Sanchez* should no longer be followed”⁹⁶ the court abandoned *Sanchez*, in toto, including the part that relied on the presence of endangered children as the basis for upholding the depraved indifference murder conviction.⁹⁷ Subsequently, the court indicated its intention to abrogate that part of *Sanchez* that relied on the presence of the endangered children: “That a large number of people were endangered does not mean that defendant was depravedly indifferent.”⁹⁸ Given this strong statement, and its unanimous reaffirmation by the *Policano* court,⁹⁹ surely the appellate division

91. *Sanchez*, 98 N.Y.2d at 377 (emphasis added).

92. *People v. Campbell*, 826 N.Y.S.2d 267, 270 (2d Dep’t. 2006) (“The determination of the trier of fact should be accorded great weight on appeal and should not be disturbed unless clearly unsupported by the record.”).

93. *Id.* at 271 (emphasis added).

94. *Campbell* is actually inconsistent with *Payne*, despite its reliance thereon, because it fails to apply the “perceptible, evolving departure from the underpinnings of depraved indifference murder as expressed in *Register* and *Sanchez*.” *Policano v. Herbert*, 7 N.Y.3d 588, 603 (2006). Principally, it fails to apply the court’s newfound willingness to aggressively police the boundary between recklessness and intent. *See id.* at 605 (Kaye, C.J., dissenting). That Judge Rosenblatt’s opinion in *Payne* is the vehicle employed by the *Campbell* panel to conduct a *Sanchez*-style analysis is ironic given Judge Rosenblatt’s dissent from *Sanchez*. *Compare People v. Payne*, 3 N.Y.3d 266, 269–280 (2004), *with Sanchez*, 98 N.Y.2d at 394 (Rosenblatt, J., dissenting).

95. *See People v. Feingold*, 7 N.Y.3d 288, 294 (2006).

96. *Id.*

97. *See id.*

98. *Id.* at 295.

99. In *Policano v. Herbert*, 7 N.Y.3d 588 (2006), the people argued that by shooting the victim in a “public place, an urban bus stop,” *Policano* had endangered the victim’s friend, and thus, that “a reasonable trier of fact could easily find that [a] defendant [who] fired his gun in a bus stop on a public street with other people present demonstrated” the necessary mental states to sustain a depraved indifference murder conviction. *Id.* at 593, 601. Such an argument is indistinguishable from that made by the appellate division in *Campbell*. *Compare Policano*, 7 N.Y.3d 588 *with People v. Campbell*, 826 N.Y.S.2d 267, 270 (2d

in *Campbell* was wrong when it held that “[u]nder these circumstances [that] the decedent was simply in the company of two other men [at the time of his murder] this case fits into the narrow category of cases where depraved indifference murder properly applies.”¹⁰⁰ Therefore, in relying upon *Fenner*, which depended on the continued validity of *Register* and *Sanchez*, this comment contends that this jurisprudence has been swept up with the remaining vestiges of the pre-*Feingold* era, and it follows that the appellate division erred in relying thereon.¹⁰¹

In conclusion, the theory adopted by the appellate division in *Campbell* “is flawed and reveals a fundamental misunderstanding of the concepts underlying depraved indifference murder.”¹⁰² In this case, the defendant accosted a group of men to inquire about the location of a man who might have been involved in the stabbing of his brother the night before.¹⁰³ After receiving an obviously unsatisfactory response, he proceeded, for no apparent reason, to shoot at the group with sufficient aim to hit a fleeing man in the back of the head while smiling in delight.¹⁰⁴ These actions do not establish that the defendant was “indifferent” to the victim’s plight in any sense of the word. On the contrary, the cowardly act of shooting at a group of fleeing men did not “recklessly creat[e] a grave risk of death,” but rather “creat[ed] a virtual certainty of death born of an intent to kill.”¹⁰⁵ The appellate division erred in holding that a rational jury could infer otherwise. Rather than affirming the conviction, the appellate division should have reversed the judgment of the supreme court.¹⁰⁶

Dep’t. 2006). While “[t]hese arguments carried the day” in *Policano* at the appellate division in 2000, *Policano*, 7 N.Y. 3d at 593, the Court of Appeals went on to unanimously hold that “there is *no doubt* that under the law of New York today, a jury would not be permitted to find defendant guilty of depraved indifference murder on the evidence on this record.” *Id.* at 601 (emphasis added). Such reasoning applies with equal force to *Campbell*.

100. *Campbell*, 826 N.Y.S.2d at 270.

101. Indeed, Judge Graffeo, in her dissent from *Feingold*, insisted that the court was not only overruling *Register* and *Sanchez*, but was also adopting a substantially more strident position than that adopted even by *Suarez*, and by implication, *Payne*’s reliance on *Fenner*. *People v. Feingold*, 7 N.Y.3d 288, 305 (2006) (Graffeo, J., dissenting).

102. *People v. Payne*, 3 N.Y.3d 266, 270 (2004).

103. *Campbell*, 826 N.Y.S.2d at 270.

104. *Id.* at 269.

105. *People v. Gonzalez*, 1 N.Y.3d 464, 468 (2004).

106. *See generally* *People v. Sanchez*, 98 N.Y.2d 373, 416 (2002) (Ciparick, J., dissenting) (“[When] no reasonable view of the evidence supports a finding of recklessness, on any level . . . [t]his Court’s only recourse is to reverse defendant’s conviction of depraved indifference murder and dismiss that count of the indictment.”).