

Michigan Law Review First Impressions

Volume 114

2015

Mens Rea, Criminal Responsibility, and the Death of Freddie Gray

Michael Serota

University of California, Berkeley, School of Law

Follow this and additional works at: http://repository.law.umich.edu/mlr_fi



Part of the [Criminal Law Commons](#), [Law and Race Commons](#), [Law Enforcement and Corrections Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Michael Serota, *Mens Rea, Criminal Responsibility, and the Death of Freddie Gray*, 114 MICH. L. REV. FIRST IMPRESSIONS 31 (2015).

Available at: http://repository.law.umich.edu/mlr_fi/vol114/iss1/9

This Commentary is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review First Impressions by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

MENS REA, CRIMINAL RESPONSIBILITY, AND THE DEATH OF FREDDIE GRAY

*Michael Serota**

Who (if anyone) is criminally responsible for the death of Freddie Gray, the 25-year-old African-American man who died from injuries suffered while in the custody of Baltimore police? This question has been at the forefront of the extensive coverage of Gray's death, which has inspired a national discussion about law enforcement's relationship with black communities. But it is also a question that may never be fairly resolved for reasons wholly unrelated to the topic of community policing, with which Gray's death has become synonymous. What may ultimately hamper the administration of justice in the prosecution of the police officers involved in the events surrounding Gray's death is a textbook problem of substantive criminal law: Maryland's law of homicide suffers from, as Justice Jackson famously phrased it, "variety, disparity and confusion" surrounding "definitions of the requisite but elusive mental element."¹

As this Essay explains, Maryland law on the mens rea governing the two most significant homicide charges alleged in the indictment, second degree depraved heart murder and involuntary manslaughter, is stunningly vague. The statutes from which these charges originate are silent on the culpability requirement applicable to each offense, and the interstitial policies the Maryland courts have created to fill in the resulting gaps are a case study in opacity, having been variously described by the state's own judges as "treacherously ambiguous," "perplexing," and akin to "pornography" in that they defy clear definition.² But the lack of clarity in this area of law is no mere juridical infelicity; it has the potential to negatively affect the proceedings against the officers by substantially increasing the risk that arbitrary and discriminatory factors influence judicial and jury deliberations over the homicide charges.

This Essay addresses the significance of the problem in two parts. Part I discusses the important role that the mens rea governing the offenses of

* J.D., University of California, Berkeley, School of Law. The author would like to thank Michelle Singer, David Gray, Ethan Leib, Richard Schmechel, Andrea Roth, and Adam Harris for their comments and feedback. Special thanks to Donovan McCarty, Megan DeMarco, and the rest of the *Michigan Law Review* for their hard work and careful editing.

1. *Morrisette v. United States*, 342 U.S. 246, 252 (1952).
2. *Pagotto v. State*, 127 Md. App. 271, 280, 280 n.2 (1999), *aff'd*, 361 Md. 528 (2000).

depraved heart murder and involuntary manslaughter may play in the prosecution of the police officers involved in the events surrounding Gray's death. Part II explores the substantial vagueness of the mens rea of depraved heart murder and involuntary manslaughter under Maryland law and considers its potential consequences for the legal proceedings.

I. MURDER, MANSLAUGHTER, AND MENS REA
IN THE STATE'S ATTORNEY'S CASE

In May 2015, Baltimore State's Attorney Marilyn Mosby filed an indictment against six police officers involved in the arrest and subsequent transport of Gray, during which she alleges that Gray suffered fatal injuries to his spinal cord while unrestrained in the back of a police wagon.³ For their roles in the events surrounding Gray's death, all six officers have been charged with a variety of crimes, ranging from second degree assault to reckless endangerment.⁴ But the State's Attorney has only charged four of the officers with homicide, and three out of the four have been charged with just a single homicide offense, involuntary manslaughter.⁵ The fourth officer, who drove the vehicle transporting Gray, has been charged with various forms of homicide, including second degree depraved heart murder and involuntary manslaughter.⁶

3. Alan Blinder & Richard Pérez-Peña, *6 Baltimore Police Officers Charged in Freddie Gray Death*, N.Y. TIMES (May 1, 2015), <http://www.nytimes.com/2015/05/02/us/freddie-gray-autopsy-report-given-to-baltimore-prosecutors.html> [http://perma.cc/GJ75-XZS3].

4. Jenée Desmond-Harris, *The Grand Jury Has Indicted All 6 Officers in Freddie Gray's Death*, VOX (May 21, 2015), <http://www.vox.com/2015/5/21/8640305/charges-officers-freddie-gray> [http://perma.cc/BL4R-TZ5P].

5. Blinder & Pérez-Peña, *supra* note 3.

6. *Id.* One of these additional homicide charges, "manslaughter by vehicle or vessel" (vehicular manslaughter), substantially overlaps with the involuntary manslaughter charge in that both offenses apply a ten-year statutory maximum to killings caused by "gross negligence." MD. CRIM. LAW CODE ANN. §§ 2-2-207(a)(1), 2-209(d) (LexisNexis 2015); *State v. Gibson*, 4 Md. App. 236, 242-43 (1968), *aff'd*, 254 Md. 399 (1969) (statutory requirement of gross negligence for vehicular manslaughter identical to common law gross negligence standard governing involuntary manslaughter). The primary difference between the two offenses is simply the means of commission: vehicular manslaughter, but not involuntary manslaughter, applies to the individual who "unintentionally causes a death as a result of the grossly negligent operation of a motor vehicle." *Forbes v. State*, 324 Md. 335, 336 (1991) (emphasis added). While there is one type of involuntary manslaughter—unlawful act involuntary manslaughter—that is more clearly distinguishable from vehicular manslaughter, *see Gibson*, 4 Md. App. at 241-48, the focus of this Essay is gross negligence involuntary manslaughter. *See infra* note 31. Therefore, all references in this Essay to the involuntary manslaughter charge brought against the driver should be understood to include the vehicular manslaughter charge as well, both of which collectively cover the government's allegations that

The depraved heart murder and involuntary manslaughter charges have thus far garnered the greatest amount of attention⁷—predictably so, since they entail some of the stiffest penalties implicated by the indictment.⁸ And the charges are also symbolically important: their resolution will pass final judgment on whether law enforcement is ultimately to blame for Gray’s death.⁹ What may be surprising, however, is that these two homicide charges may also be a significant source of injustice in the proceedings against the officers. The reason? Vagueness in the Maryland law governing depraved heart murder and involuntary manslaughter. To appreciate why this vagueness matters, though, it is necessary to understand the particular area of Maryland law that it affects—the law of mens rea—as well as the role this issue is likely to play in the State’s Attorney’s case.

“Crime” is, as the U.S. Supreme Court has explained, a “compound concept,” which typically requires the “concurrence of an evil-meaning mind with an evil-doing hand.”¹⁰ Mens rea is the first variable in this oft-recited formulation; it refers to the kinds of blameworthy mental states that the government must prove accompanied prohibited conduct in order to secure a criminal conviction. This requirement of mens rea reflects the commonly held view that merely causing harm is an insufficient justification for punishment; both retributive and utilitarian theory require the accused to have been responsible for the harm in a personal way, by virtue of her culpable state of mind at the critical moment(s) of action (or omission).¹¹

Proof of a criminal “intent”—traditionally defined as either a conscious desire to cause harm or a belief that one’s conduct is practically certain to

the officer’s grossly negligent conduct—whether behind the wheel or otherwise—caused Gray’s death.

7. See, e.g., Jenée Desmond-Harris, “Depraved Heart Murder” Could Put One Baltimore Cop in Prison for 30 Years. Here’s What It Means., VOX (May 21, 2015), <http://www.vox.com/2015/5/1/8529761/freddie-gray-depraved-murder> [<http://perma.cc/UN8F-92QF>].

8. The felonies of depraved heart murder and involuntary manslaughter are respectively subject to thirty-year and ten-year statutory maximums. MD. CRIM. LAW CODE ANN. §§ 2-204(b), 2-207(a)(1) (LexisNexis 2015). There is one nonhomicide offense alleged in the indictment that is also subject to a ten-year statutory maximum: second degree assault. MD. CRIM. LAW CODE ANN. § 3-203 (LexisNexis 2015). However, second degree assault is legislatively classified as a “misdemeanor,” *id.*, while the state’s sentencing guidelines rank it below—and thus punish it less severely than—involuntary manslaughter, see MARYLAND SENTENCING GUIDELINES MANUAL app. A, at 3, 30 (MD. STATE COMM’N ON CRIM. SENTENCING POL’Y 2015).

9. That is, in conjunction with the two additional vehicular homicide charges brought solely against the driver of the vehicle transporting Gray. See Desmond-Harris, *supra* note 4.

10. *Morrisette v. United States*, 342 U.S. 246, 251 (1952).

11. See generally Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463 (1992).

result in harm—will, generally speaking, suffice to secure a conviction for any criminal offense.¹² However, there are many other highly blameworthy forms of mens rea—which implicate reasons for action beyond one’s conscious desire to cause harm, as well as degrees of cognitive awareness regarding the creation of a given risk of harm below actual belief—that also provide the basis for the imposition of serious criminal liability.¹³

The respective mens rea governing depraved heart murder and involuntary manslaughter both fall into the latter category in that they provide the government with a means of holding an actor criminally responsible for causing the death of another notwithstanding the absence of an intent to kill (or cause some lesser harm) both in Maryland and elsewhere.¹⁴ However, the precise nature of the nonintentional mental states distinguishing depraved heart murder from involuntary manslaughter and involuntary manslaughter from an excusable—or at least substantially less culpable¹⁵—killing varies from jurisdiction to jurisdiction.¹⁶

The specific lines of demarcation drawn in Maryland are likely—assuming that media reports of the circumstances surrounding Gray’s death are accurate—to take center stage in the proceedings against the four officers charged with homicide.¹⁷ The State’s Attorney may argue, for example, that Gray’s death was the result of injuries he incurred from erratic driving—a so-called rough ride—that were compounded by various omissions, including the failure to appropriately secure Gray in the transport vehicle and to provide medical assistance to Gray in a timely manner.¹⁸ But even

12. See, e.g., *Tison v. Arizona*, 481 U.S. 137, 150 (1987); see also MODEL PENAL CODE §§ 2.02(2)(a)–(b) (respectively labeling as “purpose” and “knowledge” the desire and belief dimensions of “intent”).

13. See, e.g., MODEL PENAL CODE § 2.02(2)(c) (definition of “recklessly”); see also LARRY ALEXANDER & KIMBERLY FERZAN, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* ch. 2 (2009) (deconstructing various forms of mens rea through a risk–reasons matrix, which highlights how reckless conduct can be more culpable than intentional conduct).

14. See generally Alan C. Michaels, *Defining Unintended Murder*, 85 COLUM. L. REV. 786 (1985); see also *infra* notes 27–40 and accompanying text (discussing unintended homicide in Maryland).

15. Some criminal codes contain homicide offenses subject to a culpability requirement below that of their involuntary manslaughter offense(s). See, e.g., MODEL PENAL CODE § 210.4 (negligent homicide). Maryland has such an offense; however, it only applies to “criminally negligent” homicides caused by “vehicle or vessel.” MD. CODE ANN., CRIM. LAW § 2-210 (LexisNexis 2015); compare MD. CODE ANN., CRIM. LAW § 2-209 (prohibiting “grossly negligent” homicides caused by “vehicle or vessel” (emphasis added)).

16. See generally WAYNE R. LAFAVE, 2 SUBST. CRIM. L. §§ 14.4, 15.4 (2d ed. 2014).

17. See, e.g., Blinder & Pérez-Peña, *supra* note 3.

18. See, e.g., Ian Duncan & Justin George, *Freddie Gray Autopsy Likely to be Hotly Debated in Criminal Cases Against Officers*, BALTIMORE SUN (June 23, 2015),

assuming the government can prove that one or more of these culpable acts and omissions occurred—and that they were the legal cause of Gray’s death¹⁹—there remains a question as to whether they were accompanied by a level of blameworthiness sufficient to support convictions for either depraved heart murder or for involuntary manslaughter in Maryland.

II. VAGUENESS IN MARYLAND’S JUDGE-MADE LAW OF MENS REA AND ITS CONSEQUENCES FOR THE STATE’S ATTORNEY’S CASE

So, then, what *is* the respective mens rea governing depraved heart murder and involuntary manslaughter under Maryland law? This straightforward question seems like one for which somebody in the Maryland criminal justice system should have a straightforward answer. And yet, none of the relevant actors—neither the legislature nor the courts—has ever provided one.

The root of the problem originates in the Maryland criminal code, which is silent on the mens rea for both offenses. Indeed, the Maryland criminal code does not even *mention* the crimes of depraved heart murder or involuntary manslaughter. Rather, all the code explicitly offers is two terse statutes, which respectively recognize that the general categories of second degree murder and manslaughter exist: (1) “A murder that is not in the first degree under § 2-201 of this subtitle is in the second degree”;²⁰ and (2) “A person who commits manslaughter is guilty of a felony.”²¹ By generally prohibiting “murder” and “manslaughter” without defining either, the legislature has delegated to the courts the responsibility of identifying the state’s homicide laws.²²

The Maryland judiciary has not, however, been tasked with creating the state’s law of homicide out of whole cloth. Article V of the Maryland Declaration of Rights explicitly recognizes that “the inhabitants of Maryland are entitled to the Common Law of England,”²³ an entitlement that applies to

<http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-gray-autopsy-legal-analysis-20150623-story.html> [<http://perma.cc/L7U6-97V4>].

19. The case may also raise difficult problems of causation, since the conduct of multiple officers occurring at different points during the incident in question—as well as the conduct of Gray himself in the back of the police van—may have materially contributed to his death. *See generally* *Craig v. State*, 220 Md. 590 (1959).

20. MD. CRIM. LAW CODE ANN. § 2-204 (LexisNexis 2015).

21. *Id.* at § 2-207. It is worth noting that Maryland is not the only state to employ a homicide statute of this nature. *See, e.g.*, 18 PA. CONS. STAT. ANN. § 2502(c) (“All other kinds of murder shall be murder of the third degree.”).

22. *See generally* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345 (1994).

23. MD. CONST. declaration of rights, art. 5(a)(1).

Maryland's substantive criminal laws, including its law of homicide.²⁴ And a host of centuries-old British legal authority exists on the offenses of depraved heart murder and involuntary manslaughter that the Maryland legislature, in enacting the state's homicide statutes, intended to leave "unimpaired."²⁵ The problem, however, is that the common law understanding of the mens rea governing each of these offenses is notoriously vague,²⁶ while the Maryland courts, exercising their legislature-like capacity "to adapt and modify the common law to meet modern day demands and needs,"²⁷ have arguably only exacerbated the problem.

Relying on a mix of English common law, contemporary American legal authority, and judicial policy discretion, Maryland's appellate judges have offered a dizzying array of vague formulations of the mens rea governing each offense. Here, for example, are just a few of the state judiciary's descriptions of the mens rea of involuntary manslaughter: engaging in "acts so heedless and incautious as necessarily to be deemed unlawful and wanton,"²⁸ performing "'gross deviations' from the standard of care used by an ordinary person where the negligent conduct can reasonably be said to manifest 'a wanton or reckless disregard of human life,'"²⁹ exhibiting a "disregard of the consequences which might ensue and indifference to the rights of others [so that one's conduct constitutes] a wanton and reckless disregard for human life,"³⁰ and exercising a "recklessness of justice."³¹

The judicial descriptions of the requisite mens rea for depraved heart murder under Maryland law not only reflect a similar lack of clarity, but they

24. Jackson v. State, 286 Md. 430, 435 (1979).

25. Robinson v. State, 307 Md. 738, 749 (1986).

26. See generally MODEL PENAL CODE § 210 cmt. at 1-79.

27. Robinson, 307 Md. at 750-51 (exercising this capacity in light of the fact that "[w]hat the common law of England understands [the mens rea of homicide to be] is not [entirely clear]").

28. State v. Albrecht, 336 Md. 475, 500 (1994) (quoting Ins. Co. v. Proctic, 169 Md. 535, 539 (1936)).

29. Pagotto v. State, 127 Md. App. 271, 277 (1999), *aff'd*, 361 Md. 528 (2000) (quoting Dishman v. State, 352 Md. 279, 291 (1998); then quoting Albrecht, 336 Md. at 499).

30. *Id.* at 303 (citations omitted).

31. Palmer v. State, 223 Md. 341, 351 (1960). These varied definitions describe involuntary manslaughter by a "grossly negligent" act or omission; however, Maryland law also recognizes an "unlawful act" theory of liability—also referred to as the misdemeanor manslaughter rule—as a means of establishing the offense. *E.g.*, State v. Gibson, 4 Md. App. 236, 241-48 (1968), *aff'd*, 254 Md. 399 (1969); see also *id.* (discussing overlap between vehicular manslaughter and gross negligence theory, but not unlawful act theory, of involuntary manslaughter). Due to space limitations, and because it is unclear whether the state will elect to proceed under the unlawful act theory of liability, the analysis in this Essay focuses only on the gross negligence theory of liability.

look almost identical: “the willful doing of a dangerous and reckless act with wanton indifference to the consequences and perils,”³² displaying “an element of viciousness or contemptuous disregard for the value of human life which conduct characterizes that behavior as wanton,”³³ “the deliberate perpetration of a knowingly dangerous act with reckless and wanton unconcern and indifference as to whether anyone is harmed or not,”³⁴ and performing “an act imminently dangerous to others and evincing a depraved and malignant heart regardless of human life and fatally bent on mischief.”³⁵

The vagueness of the foregoing formulations—similarly reflected in the Maryland Criminal Pattern Jury Instructions³⁶—not only makes it difficult to understand the government’s burden of proof with respect to the mens rea applicable to each offense, but, as the state’s judiciary has acknowledged, makes it seemingly impossible to clearly demarcate murder from involuntary manslaughter and involuntary manslaughter from an excusable killing. For example, Maryland courts have admitted that there is no “meaningful distinction”³⁷ between the respective mens rea governing depraved heart murder and involuntary manslaughter under Maryland law.³⁸ And they have

32. Cook v. State, 118 Md. App. 404, 412–13 (1997) (quoting *Robinson*, 307 Md. at 745).

33. *Robinson v. State*, 307 Md. 738, 745 (1986) (quoting R. Gilbert & C. Moylan, MARYLAND CRIMINAL LAW: PRACTICE AND PROCEDURE § 1.6-3 (1983)).

34. *DeBettencourt v. State*, 48 Md. App. 522, 530 (1981).

35. *Smith v. State*, 196 Md. App. 494, 534–35 (2010).

36. See MD-JICRIM 4:17.8 (2d. 2013). For example, the instruction on involuntary manslaughter describes the requisite mens rea as “defendant, while aware of the risk, acted in a manner that created a high degree of risk to, and showed a reckless disregard for, human life.” *Id.* The meaning of the term “reckless” is critical to understanding the instruction; however, it is never defined. The standard definition of the term is the “conscious[] disregard[] [of] a substantial . . . risk,” MODEL PENAL CODE § 2.02(c)—but with this definition in mind, it is difficult to distinguish the second component of the instruction from the first. See *infra* note 38 (discussing additional problems with the jury instructions).

37. *Pagotto v. State*, 127 Md. App. 271, 277 (1999), *aff’d*, 361 Md. 528 (2000).

38. Maryland’s jury instructions attempt to solve the problem by drawing the following distinction between the two offenses: consciously disregarding a “very high . . . risk” (for depraved heart murder) and consciously disregarding “a high risk” (for involuntary manslaughter). MD-JICRIM 4:17.8. Unfortunately, this distinction seems unlikely—if recent empirical work on mens rea and lay decision making is any guide—to carry any traction with juries. See Francis X. Shen et al., *Sorting Guilty Minds*, 86 N.Y.U. L. REV. 1306, 1353 (2011) (noting the difficulty that lay decision makers have in distinguishing between a “substantial” risk and a “practically certain” risk of harm). Perhaps more importantly, the emphasis placed by the jury instructions on the level of risk “fails to account for cases where a conviction for unintended murder is clearly in order regardless of the probability that death will occur.” Michaels, *supra* note 14, at 798; see also Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 931, 934–35 (2000) (“Even very tiny risk-impositions can be reckless if imposed for insufficient or misanthropic reasons, just as very large risk-impositions can be nonculpable if supported by weighty reasons.”).

similarly recognized that the line between the “mere negligence” that would constitute an excusable killing³⁹ and the “gross negligence” implicated by involuntary manslaughter is “elusive.”⁴⁰

To be sure, Maryland is not the only jurisdiction that has struggled to clearly articulate the requisite distinctions in culpability. The law of homicide in every state reflects a significant amount of vagueness on these issues, including those jurisdictions that have adopted depraved heart murder and involuntary manslaughter statutes based on the paragon of clarity in offense definition, the Model Penal Code (MPC).⁴¹ However, Maryland appears to have done a comparatively poor job of working through them given both the sheer variety of ways its courts have articulated the mens rea governing each offense and the failure of these multifarious judicial formulations to communicate that a culpability distinction between the two offenses exists in the first place.⁴²

How, then, do the Maryland courts recommend that judges and juries make the requisite mens rea determinations when asked to do so? By relying on—in the words of one Maryland court—their ability to “feel” the relevant distinctions in culpability, and by having “faith” that this intuitive moral “sense” will be sufficient to “surmount the linguistic hurdle” imposed by prior case law.⁴³ These frank admissions, while laudable for their transparency, do not bode well for the interests of justice in the State’s Attorney’s case against the officers involved in Gray’s death, in which the

39. *But see supra* note 15 (discussing criminally negligent vehicular homicide in Maryland).

40. *Pagotto*, 127 Md. App. at 300.

41. *See, e.g., Michaels, supra* note 14 (critique of state implementation of MPC approach to depraved heart murder); *see also* Kenneth W. Simons, *Should the Model Penal Code’s Mens Rea Provisions Be Amended?*, 1 OHIO ST. J. CRIM. L. 179, 188–95 (2003) (critique of the MPC definition of “recklessly” that serves as the basis of manslaughter statutes in various states).

42. *See supra* notes 27–40 and accompanying text. In contrast, those jurisdictions that legislatively adopt something like the MPC approach to depraved heart murder and involuntary manslaughter at the very least uniformly communicate that a distinction in culpability between the two offenses—whatever its precise contours—actually exists. *Compare* MODEL PENAL CODE § 210.3(1)(a) (manslaughter is criminal homicide committed “recklessly”) *with* MODEL PENAL CODE § 210.2(1)(b) (depraved heart murder is criminal homicide “committed recklessly *under circumstances manifesting extreme indifference to the value of human life*”) (emphasis added). And some state courts in the relevant MPC jurisdictions have made meaningful headway in fleshing out the contours of this distinction in a coherent fashion. *See, e.g., Jeffries v. State*, 169 P.3d 913, 916 (Alaska 2007) (discussing four “factors [that] have been in use in Alaska since 1982 and provide a proper framework to distinguish extreme-indifference murder from manslaughter”). For a good scholarly discussion of the “correct interpretation” of the phrase “extreme indifference,” *see* Kimberly Kessler Ferzan, *Plotting Premeditation’s Demise*, 2012 LAW & CONTEMP. PROBS. 83, 103–07.

43. *Pagotto*, 127 Md. App. at 280, 280 n.2.

distinctions in mens rea between depraved heart murder, involuntary manslaughter, and an otherwise excusable killing may loom large—not only at trial but also in the context of potential appeals.⁴⁴

In the absence of a coherent legal framework that provides an intelligible basis for making the critical distinctions in mens rea, it seems highly likely that arbitrary and discriminatory factors could be used by decisionmakers—whether consciously or unconsciously—to fill in the gap.⁴⁵ For example, it is not difficult to see how implicit attitudes toward race, gender, or class might affect a judge or juror’s culpability assessments of police officers implicated in the death of a young black man arrested in a poverty-stricken neighborhood.⁴⁶ Nor would it be surprising if, during this period of intense polarization on the issue of law enforcement’s treatment of black communities, political affiliations with either side of the debate further colored the requisite mens rea determinations.⁴⁷ Of course, the risk of such biases influencing culpability judgments is likely to be present, at least to some degree, in any case of this nature, regardless of the clarity of the laws implicated.⁴⁸ Still, exceptionally vague liability rules that explicitly leave fine-grained yet hugely consequential distinctions in culpability to “faith” and “feel” would seem to amplify that risk precipitously.⁴⁹

44. See, e.g., *id.* at 303–57 (Maryland intermediary appellate court reversing jury’s guilty verdict on involuntary manslaughter charge against Baltimore police sergeant based on absence of legally sufficient evidence to support proof of requisite mens rea); *State v. Pagotto*, 361 Md. 528, 538–56 (2000) (Maryland high court affirming reversal for similar reasons).

45. See Michaels, *supra* note 14, at 794 (“A jury faced with [vague mens rea terms] may be led to decide by instinct, or worse, prejudice.”); John C. Duffy, *Reality Check: How Practical Circumstances Affect the Interpretation of Depraved Indifference Murder*, 57 DUKE L.J. 425, 444 (2007) (noting that an “I know it when I see it” approach [to mens rea] is subject to the prejudices of the trier of fact”); see also John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 214 (1985) (“There is . . . every reason to fear the intrusion of haphazard or illegitimate criteria” into the jury’s decision making process when the law is comprised of vague terms); *Smith v. Goguen*, 415 U.S. 566, 575 (1974) (“Statutory language of . . . a standardless sweep allows . . . juries to pursue their personal predilections.”).

46. See generally Sherri Lee Keene, *Victim or Thug? Examining the Relevance of Stories in Cases Involving Shootings of Unarmed Black Males*, 58 HOWARD L.J. (forthcoming 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2633647 [<http://perma.cc/QNE2-MUDL>].

47. See generally Donald Braman, *Cultural Cognition and the Reasonable Person*, 14 LEWIS & CLARK L. REV. 1455 (2010).

48. See Kevin Jon Heller, *The Cognitive Psychology of Mens Rea*, 99 J. CRIM. L. & CRIMINOLOGY 317, 349–75 (2009) (exploring the various ways in which cognitive bias influences the culpability judgments made by jurors).

49. See JOHN MIKHAIL, *Moral Grammar and Intuitive Jurisprudence: A Formal Model of Unconscious Moral and Legal Knowledge*, in 50 THE PSYCHOLOGY OF LEARNING AND MOTIVATION: MORAL COGNITION AND DECISION MAKING 31 (Daniel M. Bartels et al. eds., 2009) (noting “the importance of jury instructions, rules of evidence, and other familiar

Whether this vagueness will, in the final analysis, inure to the benefit or detriment of the four officers charged with homicide is yet to be seen, since it depends on the proclivities of those asked to pass judgment. Whichever direction it cuts, though, one thing is clear: vagueness in Maryland's law of mens rea is likely to inject a great deal of uncertainty and a substantial risk of arbitrariness into the proceedings. And that is a problem for everyone: Freddie Gray's family, the officers, and the nation of onlookers seeking justice in the wake of this tragedy.

methods of directing attention to precisely formulated questions and preventing irrelevant or prejudicial information from having a distorting effect on one's judgments"); *see also* Matthew R. Ginther et al., *The Language of Mens Rea*, 67 VAND. L. REV. 1327, 1358–59 (2014) (conducting studies on lay judgments of mens rea and finding that “[s]mall differences in wording . . . can produce significant changes in perception of the mental state”).