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SOLVING THE DEPRAVED HEART MURDER PROBLEM IN  
MARYLAND: A SUGGESTION FOR SUCCESSFUL  
PROSECUTION OF POLICE OFFICERS

*Rachele Norfolk\**

I. INTRODUCTION

It is true that we have grown adroit at feigning astonishment at the episodic convulsions of violence in American cities, but that doesn't make them any less predictable or their roots any less apparent. With the exception of the riots that followed the assassination of Martin Luther King, Jr., every major riot by the black community of an American city since the Second World War has been ignited by a single issue: police tactics.<sup>1</sup>

After police officers arrested Freddie Gray and he died in their custody, riots erupted in Baltimore City, as people from across the world watched through their television screens.<sup>2</sup> Rioters outnumbered police officers as clashes between the two occurred; meanwhile, stores were being looted and buildings were either vandalized or burned to the ground.<sup>3</sup> Hundreds of people were involved in the riots; schools shut down, streets closed, and businesses sent workers home.<sup>4</sup> The city and the nation "unleashed a maelstrom of unrest" out of outrage and want for answers after

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\* J.D. Candidate, May 2017, University of Baltimore School of Law; B.S., Paralegal Studies, 2014, Stevenson University. Special thanks to my parents for always encouraging me to follow my dreams, and to Chris, for his endless love and support.

1. Jelani Cobb, *City Life*, NEW YORKER (May 11, 2015), <http://www.newyorker.com/magazine/2015/05/11/city-life-what-racism-has-done-to-baltimore>. Police argue that their aggressive tactics are to reduce high rates of crime and violence and are "a hallmark of civic concern," rather than a sign of callous disregard. *Id.*

2. Kevin Rector, Scott Dance & Luke Broadwater, *Riots Erupt: Baltimore Descends into Chaos, Violence, Looting*, BALT. SUN (Apr. 28, 2015, 9:01 AM), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-police-student-violence-20150427-story.html#page=1>.

3. *Id.*

4. *Id.*

Freddie Gray's death, leaving police officials to explain what happened, or failed to happen, in this case.<sup>5</sup>

As lawyer and protest planner Malik Shabazz indicated, there was a “burn behind the burn” in Baltimore due to ongoing police brutality nationally.<sup>6</sup> Two months prior to the Freddie Gray incident, FBI Director James Comey indicated in an address to students at Georgetown University that Americans had to face some “hard truths” about the killings of black men by police officers.<sup>7</sup> Director Comey explained that police officers of any race exhibit “‘mental shortcuts’ that become ‘almost irresistible’ when most of the suspects they arrest are black males.”<sup>8</sup> This can lead to the assumption that any black man is a potential criminal, and social science research indicates that even black officers are susceptible to reacting in such a manner.<sup>9</sup>

Former President Barack Obama, speaking at a press conference after the death of Freddie Gray, stated that there have been too many instances where officers’ interactions with individuals have raised some troubling questions.<sup>10</sup> He continued saying, “[I]t comes up . . .

5. Justin Fenton, *Gray Suffered Head Injury in Prisoner Van, Sources Familiar with Investigation Say*, BALT. SUN (Apr. 30, 2015, 11:01 PM), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-gray-investigation-completed-20150430-story.html>.
6. Jonathan Pitts, *Shabazz Plans Rally for Thousands Saturday*, BALT. SUN (Apr. 28, 2015, 8:37 PM), <http://www.baltimoresun.com/news/breaking/bs-md-shabazz-saturday-20150428-story.html>.
7. Editorial, *‘Everyone’s a Little Bit Racist,’* BALT. SUN (Feb. 17, 2015, 12:30 PM), <http://www.baltimoresun.com/news/opinion/editorial/bs-ed-comey-race-20150217-story.html>. While the focus of this Comment will not center on racial issues between arrestees and police officers, it is important to note the conscious or unconscious racial biases that exist and influence conduct toward African American men in arrestee situations.
8. *Id.*
9. *Id.* One journalist describes the criticism as not of the police per se, “but as a symbol of an entire web of failed social policies, on education, employment, health and housing.” Cobb, *supra* note 1. In 2014, there were 211 murders in Baltimore, and 189 of the victims were black males. *Id.* Cobb exclaims that “Baltimore doesn’t have a homicide problem; it has a black-male-death problem.” *Id.*
10. Cobb, *supra* note 1; see also Olevia Boykin et al., *A Better Standard for the Use of Deadly Force*, N.Y. TIMES (Jan. 1, 2016), [http://www.nytimes.com/2016/01/01/opinion/a-better-standard-for-the-use-of-deadly-force.html?\\_r=1](http://www.nytimes.com/2016/01/01/opinion/a-better-standard-for-the-use-of-deadly-force.html?_r=1).

American police officers killed 74 unarmed black people in 2015. From January through July, according to The Washington Post, unarmed black men were seven times more likely than unarmed white men to die by police gunfire. An analysis of F.B.I. data from 2010 to 2012 concluded that the police killed black men ages 15 to 19 at a rate 21 times greater than the statistic for white men the same age. Department of Justice numbers indicate that a

once a week now, or once every couple of weeks. . . . [T]his has been a slow-rolling crisis. This has been going on for a long time. This is not new, and we shouldn't pretend that it's new."<sup>11</sup>

Perhaps some justice for this not-so-new phenomenon may come in the form of charging police officers for misconduct, as was done in the Freddie Gray case.<sup>12</sup> However, this is only half of the battle. The other half comes from a successful prosecution.<sup>13</sup> One of the six officers charged in the death of Freddie Gray, Caesar Goodson, was charged with second-degree depraved heart murder,<sup>14</sup> but he was ultimately not convicted.<sup>15</sup>

Currently, there is no statutory framework for depraved heart murder in Maryland.<sup>16</sup> Additionally, there is a problem with prosecuting this specific kind of murder because Maryland's common law provides very vague and somewhat flimsy guidance.<sup>17</sup> While prosecuting police officers may prove to be a challenging feat itself, it may be even harder when an officer fails to follow certain procedures or act in certain ways through "acts of omission."<sup>18</sup>

This Comment will proceed in four parts following this introduction. Part II will provide background information on the Freddie Gray case<sup>19</sup> and the common law in Maryland on depraved

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black person is about four times as likely to die in custody or while being arrested than a white person is.

Boykin et al., *supra* note 10.

11. Cobb, *supra* note 1.

12. Jean Marbella, *Six Baltimore Police Officers Charged in Freddie Gray's Death*, BALT. SUN (May 2, 2015, 12:16 AM), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-freddie-gray-mainbar-20150501-story.html>.

13. See Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015), <http://www.washingtonpost.com/sf/investigative/2015/04/11/t-housands-dead-few-prosecuted/>.

14. Justin Fenton & Kevin Rector, *Officer Caesar Goodson, Facing the Most Serious Charges in Death of Freddie Gray, Heads to Trial*, BALT. SUN (June 5, 2016, 6:13 PM), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-caesar-goodson-freddie-gray-trial-preview-20160605-story.html>; see also Marbella, *supra* note 12.

15. See *infra* notes 67–68 and accompanying text.

16. *Robinson v. State*, 517 A.2d 94, 100 (Md. 1986).

17. See *infra* Section II.B.1.

18. Omission is defined as "[a] failure to do something: esp., a neglect of duty." *Omission*, BLACK'S LAW DICTIONARY (10th ed. 2014).

19. For purposes of this Comment, the facts used when discussing the Freddie Gray case come from information provided by the Baltimore Police Department, statements made by Baltimore City State's Attorney Marilyn Mosby, and in court testimony as chronicled in numerous newspaper articles and other sources. See, e.g., Brandon Longo, *Timeline: Freddie Gray's Arrest to His Final Spinal Cord Injury*, CBS BALT.

heart murder and the lesser-included offense of involuntary manslaughter.<sup>20</sup> The problematic ambiguities in the current law will be explored when applying the common law to the prosecution of Officer Caesar Goodson.<sup>21</sup> Part III will explore statutes that prove helpful and provide guidance for a possible statutory framework.<sup>22</sup> Part IV explores various tort concepts, such as common carrier liability and professionals' higher duty of care in certain circumstances, with the intention to borrow from these concepts for a successful prosecution of a police officer charged with depraved heart murder.<sup>23</sup>

Part V proposes a statute for depraved heart murder, using existing criminal statutory schemes as a guide.<sup>24</sup> The proposed statute uses a totality of the circumstances approach, combining the current common law on depraved heart murder with tort theories.<sup>25</sup> Essentially, this recommended framework will proffer that when an officer takes someone into care who can no longer take care of himself, the officer owes a higher duty.<sup>26</sup> More specifically, the standards and training to which police officers must adhere, the restraint on freedom of movement in police custody providing for a vulnerable victim, and evidence that one is suffering from a medical emergency and the failure to respond can be examined in this totality approach.<sup>27</sup> This Comment will analyze the Freddie Gray facts to demonstrate how the statute would operate in depraved heart murder prosecutions.<sup>28</sup>

## II. THE FREDDIE GRAY CASE AND THE DIFFICULTY OF A SUCCESSFUL PROSECUTION UNDER THE THEORY OF DEPRAVED HEART MURDER

Malice in the context of “depraved heart” murder is not entirely clear.<sup>29</sup> While the common law attempts to shed light on what

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(June 23, 2016, 2:28 PM), <http://baltimore.cbslocal.com/2016/06/23/timeline-freddie-grays-arrest-to-his-fatal-spinal-cord-injury/>. This Comment uses these facts to demonstrate how to apply the proposed theory of prosecution in a hypothetical situation.

20. *See infra* Sections II.A–B.

21. *See infra* Section II.C.

22. *See infra* Part III.

23. *See infra* Part IV.

24. *See infra* Section V.A.

25. *See infra* Section V.A.

26. *See infra* Sections V.A–B.

27. *See infra* Section V.B.

28. *See infra* Section V.B.

29. *See infra* notes 75–80, 88–92 and accompanying text.

circumstances elevate this type of unintentional murder to stand on parallel footing with an intentional killing, the use of vague terms and the interchanging of those terms to define the lesser-included offense of involuntary manslaughter add to the uncertainty.<sup>30</sup> The facts surrounding the death of Freddie Gray illustrate the problems with the existing law on depraved heart murder, specifically problems concerning the failures to act and what level of culpability should be attached to each of those omissions.<sup>31</sup>

#### A. *Facts of the Freddie Gray Case*

Freddie Gray was a 25-year-old African American who was apprehended and arrested after fleeing when encountering police officers.<sup>32</sup> According to Baltimore City State's Attorney Marilyn Mosby, "Mr. Gray suffered a severe and critical neck injury as a result of being handcuffed, shackled by his feet, and unrestrained inside [a Baltimore City Police Department] wagon," dying a week later.<sup>33</sup> The driver of the police van, Officer Caesar Goodson Jr., was charged with second-degree depraved heart murder, while the other officers were charged with lesser offenses.<sup>34</sup>

When Gray was arrested, he was handcuffed behind his back.<sup>35</sup> He indicated that he could not breathe and requested an inhaler but was denied medical care, placed into the van, and never secured by a seat belt.<sup>36</sup> While en route to central booking, the van stopped four

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30. See *infra* notes 75–77, 95 and accompanying text.

31. See discussion *infra* Sections II.A–B, Part V.

32. David A. Graham, *The 'Depraved-Heart Murder' of Freddie Gray*, ATLANTIC (May 1, 2015), <http://www.theatlantic.com/national/archive/2015/05/the-depraved-heart-murder-of-freddie-gray/392132/>.

33. *Id.*

34. *Id.*

Officer Caesar R. Goodson Jr., the driver of the van, was charged with second-degree murder, three counts of manslaughter and assault. Lt. Brian W. Rice was charged with manslaughter, assault and false imprisonment. Sgt. Alicia D. White and Officer William G. Porter were charged with manslaughter and assault. Officers Garrett E. Miller and Edward M. Nero were charged with assault and false imprisonment. All were charged with misconduct in office.

Marbella, *supra* note 12.

35. Justin Fenton, *Six Baltimore Police Officers Indicted in Death of Freddie Gray*, BALT. SUN (May 21, 2015, 9:29 PM), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-freddie-gray-officer-indictments-20150521-story.html>.

36. See *id.*

times.<sup>37</sup> During the first stop, Gray was removed from the van and flex cuffs were placed on his wrists and leg shackles on his ankles, after which he was placed into the van on the floor on his stomach.<sup>38</sup> Officer Goodson stopped the van a second time to “check on Gray”; he did not render medical assistance.<sup>39</sup>

The van stopped for a third time numerous blocks away so that Goodson could check on Gray’s status.<sup>40</sup> According to Marilyn Mosby, “Mr. Gray at that time requested help and indicated that he could not breathe.”<sup>41</sup> Furthermore, “Officer Porter asked Mr. Gray if he needed a medic, at which time Mr. Gray indicated at least twice that he was in need of a medic.”<sup>42</sup> Officer Porter had just arrived on the scene, but neither he nor Officer Goodson rendered or requested medical assistance.<sup>43</sup> According to testimony, “Porter . . . told Goodson that Central Booking wouldn’t accept Gray. . . . [and] that he wasn’t sure if Gray was faking it to avoid going to jail.”<sup>44</sup> Officer Goodson then proceeded to make a fourth stop after there had been a request “over departmental dispatch to pick up an additional suspect”,<sup>45</sup> he then picked up an arrestee from that location.<sup>46</sup> At the fourth stop, Officers White, Porter, and Goodson opened the doors of the van and found Gray unresponsive,<sup>47</sup> and still, no medical assistance was rendered or summoned.<sup>48</sup> Upon arrival at the police station, and after the other prisoner was secured inside, Gray was

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37. See Graham, *supra* note 32. The stop at central booking was considered the fifth and final stop. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. Michael E. Ruane, *Excerpts from Baltimore State’s Attorney Marilyn J. Mosby’s Statement*, WASH. POST (May 1, 2015), [https://www.washingtonpost.com/local/excerpts-from-baltimore-states-attorney-marilyn-j-mosbys-statement/2015/05/01/5faf08fe-f027-11e4-8abc-d6aa3bad79dd\\_story.html?utm\\_term=.39c107681807](https://www.washingtonpost.com/local/excerpts-from-baltimore-states-attorney-marilyn-j-mosbys-statement/2015/05/01/5faf08fe-f027-11e4-8abc-d6aa3bad79dd_story.html?utm_term=.39c107681807).

42. *Id.*; see also Application for Statement of Charges at 3, State v. Goodson, No. 6B02294452 (Md. Dist. Ct. Balt. City May 1, 2015).

43. Graham, *supra* note 32.

44. Longo, *supra* note 19.

45. *Id.*

46. *Id.*

47. *Id.* While the State claimed Gray was found unresponsive at this time, Officer Porter denied it, but did admit that Gray indicated that “he still needed help at this stop. Porter says [he] told Sgt. White that Gray needed medical help. No medic was called.” *Id.*

48. *Id.*

found not breathing.<sup>49</sup> On April 19, 2015, Gray was pronounced dead.<sup>50</sup>

Freddie Gray's autopsy report surmised that Gray suffered from neck and spinal injuries.<sup>51</sup> During the stop to pick up the additional prisoner,<sup>52</sup> Gray was found "slumped over" and could only make "minimal responses to direct questions."<sup>53</sup> The injury to his spinal cord would have had "direct effects" on Gray's ability to breathe.<sup>54</sup> According to Dr. Morris Marc Soriano, Gray's "'brain would have likely survived' had he been given a breathing tube sooner . . . . Instead, Gray suffered a 'hunger for air' as his condition deteriorated . . . ."<sup>55</sup>

According to the autopsy, the police van's sudden deceleration most likely caused this "high-energy injury."<sup>56</sup> Gray's death was ruled a homicide because of the failure of the officers "to follow safety procedures 'through acts of omission.'"<sup>57</sup> According to a Baltimore Police Department policy directive, officers "shall ensure the safety of a detainee when a person is taken into custody, including obtaining medical treatment when necessary, at the nearest emergency medical facility," and "all passengers, regardless of age and seat location, shall be restrained by seat belts or other authorized restraining devices."<sup>58</sup>

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49. Application for Statement of Charges, *supra* note 42, at 5.

50. *Id.*

51. Justin Fenton, *Autopsy of Freddie Gray Shows 'High-Energy' Impact*, BALT. SUN (June 24, 2015, 10:25 AM) [hereinafter Fenton I], <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-freddie-gray-autopsy-20150623-story.html>.

52. *Id.* This article considers the stop where Gray was placed in leg restraints as a second stop, indicating that the first stop is when Gray was placed in the van initially. However, this Comment and other sources do not consider the initial pick up of Gray as a "stop." See Graham, *supra* note 32.

53. Fenton I, *supra* note 51. *But see* Longo, *supra* note 19 (indicating that Gray's exact condition at this time was in dispute).

54. Fenton I, *supra* note 51.

55. Kevin Rector & Justin Fenton, *Prior Back Injury Alleged as Officer's Trial in Freddie Gray Case Moves Forward*, BALT. SUN (Dec. 7, 2015, 9:45 PM), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-porter-trial-monday-20151207-story.html>.

56. Fenton I, *supra* note 51.

57. *Id.* Allan, Assistant Medical Examiner, testified during Officer Porter's trial that she would not have ruled the death a homicide had medical care been sought for Mr. Gray during the fourth stop of the van. Rector & Fenton, *supra* note 55.

58. Editorial, *Baltimore Police, Seat Belts, & Freddie Gray*, BALT. SUN (Oct. 19, 2015, 2:32 PM), <http://www.baltimoresun.com/news/opinion/editorial/bs-ed-gray-van-seat-belt-20151019-story.html>. The "policy [i.e., internal regulation] had only taken effect nine days before Gray's arrest and had been emailed to officers as part of a

From the autopsy result, it appears as if there may have been abrupt changes in the direction of the van.<sup>59</sup> Because of the wrist and ankle restraints, Gray was at risk for unsupported falls when the van would accelerate or decelerate.<sup>60</sup> According to the report, there were not any previous injuries to Gray's spine.<sup>61</sup> A video of Gray's arrest shows that Gray was able to bear weight on his legs and speak while police officers loaded him into the van, suggesting the arrest itself was not the cause of the injuries sustained.<sup>62</sup>

Importantly, Assistant Medical Examiner Carol Allan noted that it was "not an unforeseen event that a vulnerable individual was injured during operation of the vehicle, and that without prompt medical attention, the injury would prove fatal."<sup>63</sup> Following the Freddie Gray incident, FOX31, a Denver television station, conducted an investigation using a van and mimicking a sheriff's department vehicle.<sup>64</sup> It used a certified crash test dummy and took a video.<sup>65</sup> The video shows, at various speeds, that the dummy slid across the bench seat and hit its skull, denting a steel barrier.<sup>66</sup>

Despite the charges the officers faced, none of them was convicted of even a single crime.<sup>67</sup> Judge Williams "questioned the legal theories put forth by prosecutors."<sup>68</sup> While the defense offered conflicting testimony by its own expert about the timeline of Gray's injuries, Judge Williams found there to be "equally plausible

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package of directives six days after that." *Id.* However, "cutting down on such injuries through the use of seat belts has been a departmental priority since 2012. . . . [T]he department stressed the need to seat belt detainees in communications with commanders, conducted training on the issue and performed spot checks for compliance." *Id.*

59. Fenton I, *supra* note 51.

60. *Id.*

61. *Id.*

62. *See id.*

63. *Id.*

64. Mark Puente, 'Rough Rides' a Problem in Denver, *Television Investigation Finds*, BALT. SUN (Nov. 14, 2015, 2:18 PM), <http://www.baltimoresun.com/news/maryland/sun-investigates/bs-md-sun-investigates-denver-roughrides1115-20151113-story.html>.

65. *Id.*

66. *Id.*

67. Kevin Rector, *Charges Dropped, Freddie Gray Case Concludes with Zero Convictions Against Officers*, BALT. SUN (July 27, 2016, 8:57 PM), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-miller-pretrial-motions-20160727-story.html>. After the acquittal of three of the officers, the prosecutors dropped the cases against Officer Miller and Sgt. White. *Id.* The second case against Porter was also dropped, after his first case ended with a hung jury. *Id.*

68. *Id.*

scenarios” and determined that because the injuries were internal, it would have been difficult to determine if Gray was in fact injured.<sup>69</sup>

## B. *Depraved Heart Murder Background*

### 1. What is Depraved Heart Murder?

In Maryland, murder is a single crime that is divided into two degrees by statute,<sup>70</sup> of which second-degree murder has multiple alternative *mentes reae*.<sup>71</sup> According to Maryland case law, there are four types of second-degree murder:

[F]irst, the killing of another person, other than by poison or lying in wait, with the intent to kill but without the deliberation and premeditation required for first-degree murder; second, the killing of another person with the intent to inflict such serious bodily harm that death would be the likely result; third, “depraved heart murder,” . . . and fourth, “murder committed in the perpetration of a felony other than those enumerated in the first-degree murder statutes.”<sup>72</sup>

There is no depraved heart murder statute in Maryland.<sup>73</sup> In fact, 1975 marked the first time that the Court of Appeals of Maryland identified depraved heart murder by its name, with a fuller analysis not developed until 1981.<sup>74</sup>

“[D]epraved heart murder is a category of homicide that has consistently resisted descriptive definition, and the vague standards

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69. Justin Fenton & Kevin Rector, *Freddie Gray Case: Officer Caesar Goodson Jr. Not Guilty on All Charges*, BALTIMORE SUN (June 23, 2016, 9:01 PM) [hereinafter Fenton & Rector I], <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-goodson-verdict-20160623-story.html>.

70. *Owens v. State*, 906 A.2d 989, 1027 (Md. Ct. Spec. App. 2006) (quoting *Burch v. State*, 696 A.2d 433, 454 (Md. 1997)), *aff'd*, 924 A.2d 1072 (Md. 2007). By virtue of the Maryland Criminal Code, all murders that are not in the first degree, as defined under Section 2-201, are deemed murder in the second degree. MD. CODE ANN., CRIM. LAW § 2-204 (LexisNexis 2012 & Supp. 2016).

71. *Owens*, 906 A.2d at 1027.

72. *Jones v. State*, 114 A.3d 256, 261–62 (Md. Ct. Spec. App. 2015) (quoting *Thornton v. State*, 919 A.2d 678, 688 (Md. 2007)), *cert. granted*, 120 A.3d 766 (2015).

73. *Robinson v. State*, 517 A.2d 94, 100 (Md. 1986).

74. Dan Rodricks, *Dan Rodricks: From Gang Killing to Gray Case, the Book on Depraved-Heart Murder*, BALTIMORE SUN (July 13, 2015, 6:25 PM), <http://www.baltimoresun.com/news/maryland/bs-md-rodricks-0714-20150713-column.html>.

employed have caused persistent problems.”<sup>75</sup> The *Maryland Law Encyclopedia* defines depraved heart murder as “a killing resulting from the deliberate perpetration of a knowingly dangerous act with reckless and wanton unconcern and indifference as to whether anyone is harmed. It is the killing of another person while acting with an extreme disregard for human life.”<sup>76</sup> Depraved heart murder has also been defined as “extremely negligent conduct,” creating both an “unjustifiable” and “very high degree of risk,” which causes the death of another.<sup>77</sup>

Maryland case law mirrors these treatises using essentially the same descriptions, noting that the critical feature is the manifestation of an extreme indifference to the value of human life.<sup>78</sup> The descriptions of willful and wanton are used, with “willful” meaning the perpetrator should have reasonably realized the risk his behavior created,<sup>79</sup> and “wanton” being conceptualized as evincing “an element of viciousness or contemptuous disregard for the value of human life.”<sup>80</sup>

Depraved heart murder is included on a “matrix of blameworthy states of mind that will support a verdict of either civil liability or criminal guilt.”<sup>81</sup> On this matrix, there are three degrees of fault involved in negligent conduct: non-criminal negligence, “involuntary manslaughter of the gross negligence variety,” and “second-degree murder of the depraved heart variety.”<sup>82</sup> Depraved heart murder manifests the highest level of blameworthiness on this “culpability ladder.”<sup>83</sup> For a depraved heart murder conviction, there is no requirement of express malice, or an intent to kill; rather, it is an implied and variant form of malice that the common law treats as equally blameworthy as specific intent because of the high level of indifference to human life.<sup>84</sup>

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75. Alan C. Michaels, “Rationales” of Criminal Law Then and Now: For a Judgmental Descriptivism, 100 COLUM. L. REV. 54, 85 (2000).

76. 12 M.L.E. *Homicide* § 22 (2016) (footnote omitted).

77. 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 14.4 (2d ed. 2016).

78. *Robinson*, 517 A.2d at 101.

79. *Id.* at 98 (quoting RICHARD P. GILBERT & CHARLES E. MOYLAN, JR., MARYLAND CRIMINAL LAW: PRACTICE AND PROCEDURE § 1.6-3 (1983)).

80. *Id.* (quoting GILBERT & MOYLAN, *supra* note 79).

81. *Pagotto v. State*, 732 A.2d 920, 923 (Md. Ct. Spec. App. 1999), *aff'd*, 762 A.2d 97 (2000).

82. *Id.*

83. *Id.*

84. *Alston v. State*, 643 A.2d 468, 472–73 (Md. Ct. Spec. App. 1994) (quoting *DeBettencourt v. State*, 428 A.2d 479, 484 (Md. Ct. Spec. App. 1981)), *aff'd*, 662 A.2d 247 (1995).

## 2. The Blurry Line Between Depraved Heart Murder and Involuntary Manslaughter in Maryland

While the definitions of depraved heart murder are sufficiently vague on their own, one's understanding becomes even more complicated when examining the definition of involuntary manslaughter. By definition, involuntary manslaughter involves "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."<sup>85</sup> While there is a difference between murder and manslaughter,<sup>86</sup> as evident from the two different crimes, Maryland case law has yet to draw a meaningful distinction.<sup>87</sup> The Court of Special Appeals of Maryland stated that judges and jurors can either sense or feel the difference between the two "relatively easily on a case-by-case basis."<sup>88</sup>

However, the reality is that "[t]he borderline between [depraved heart murder and involuntary manslaughter] is, in the present state of [Maryland] case law, a very blurred line."<sup>89</sup> The distinctions are based upon degrees of risk, and there is "no exact boundary line between each category; they shade gradually like a spectrum from one group to another."<sup>90</sup> Maryland Criminal Pattern Jury Instructions attempt to differentiate between second-degree depraved heart murder and involuntary manslaughter.<sup>91</sup> However, the instruction for depraved heart murder indicates that the "defendant's conduct [created] a very high degree of risk . . . and the defendant, [conscious of that risk], acted with extreme disregard of the life-endangering consequences," while involuntary manslaughter requires that the State prove "the defendant, conscious of the risk, acted in a grossly negligent manner . . . that created a high degree of risk to human life."<sup>92</sup>

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85. *Pagotto*, 732 A.2d at 923 (first quoting *Dishman v. State*, 721 A.2d 699, 704 (Md. 1998); and then quoting *State v. Albrecht*, 649 A.2d 336, 348 (Md. 1994)).

86. *See id.* at 923–24.

87. *Id.*; *see also Dishman*, 721 A.2d at 708 ("[O]ur cases have not drawn a precise line between depraved heart murder and involuntary manslaughter.").

88. *Pagotto*, 732 A.2d at 925 n.2 (suggesting that the court's members adopt Justice Stewart's words in his concurring opinion in *Jacobellis v. Ohio*, 378 U.S. 184 (1964): "I know it when I see it.").

89. *Williams v. State*, 641 A.2d 990, 997 (Md. Ct. Spec. App. 1994).

90. *Id.* (quoting WAYNE R. LAFAVE & AUSTIN W. SCOTT, *SUBSTANTIVE CRIMINAL LAW* § 7.4 (2d ed. 1986) (current version at LAFAVE, *supra* note 77)).

91. *See* MARYLAND CRIMINAL PATTERN JURY INSTRUCTIONS 4:17.8 (2d ed. Supp. 2016).

92. *Id.*

Essentially, the two crimes are almost identical to one another, the difference lying in the heightened *mens rea* for depraved heart murder.<sup>93</sup> Adding to the overall confusion, Maryland courts have defined both crimes by using the terms “reckless”<sup>94</sup> and “wanton.”<sup>95</sup> Additionally, depraved heart murder does not require a specific intent to kill another person, and there is no requirement that more than one life be placed in danger.<sup>96</sup> Essentially, judges and jurors must then determine what acts manifest a high degree of risk from a very high degree of risk.<sup>97</sup> The language of manifesting an extreme indifference or disregard to human life has been used to try to help jurors, “in ordinary language,” understand the task that is before them.<sup>98</sup> Some examples of conduct that rose to the level needed for depraved heart murder range from shooting into a moving automobile, playing Russian roulette, selling “pure” heroin, and firing a bullet into an occupied room.<sup>99</sup> Juries had to walk a blurry line and decide under which degree of risk these actions fell.<sup>100</sup> Thus, not only are the terms used to define each crime vague, but the courts’ use of the same exact terms to define each crime adds an extra layer of uncertainty for jurors.

### C. *Problems in Relation to the Gray Case*

One of the main issues in the Freddie Gray case, as Officer Porter’s attorney recognized, was whether the failure of a police officer to seatbelt someone in custody rises to the level of recklessness and is such a gross departure from the standard of conduct of a reasonable police officer that it can rise to the charge of second-degree

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93. *Ashe v. State*, 726 A.2d 786, 790–91 (Md. Ct. Spec. App. 1999) (noting that a defendant must act with extreme disregard as opposed to a grossly negligent manner).

94. *Dishman v. State*, 721 A.2d 699, 708 (Md. 1998); *see also* *Robinson v. State*, 517 A.2d 94, 97 (Md. 1986) (stating that depraved heart murder involves “the willful doing of a dangerous and reckless act”); *Duren v. State*, 102 A.2d 277, 280 (Md. 1954) (stating that involuntary manslaughter requires “reckless disregard for human life”).

95. *Robinson*, 517 A.2d at 97 (“[Depraved heart murder] involves the deliberate perpetration of a knowingly dangerous act with reckless and wanton unconcern and indifference as to whether anyone is harmed or not.” (quoting *DeBettencourt v. State*, 428 A.2d 479, 484 (Md. Ct. Spec. App. 1981))); *State v. Albrecht*, 649 A.2d 336, 348 (Md. 1994) (“[I]nvoluntary manslaughter must be gross or criminal, *viz.*, such as manifests a wanton or reckless disregard of human life.” (quoting *Mills v. State*, 282 A.2d 147, 149 (Md. Ct. Spec. App. 1971))).

96. 12 M.L.E. *Homicide* § 22, *supra* note 76.

97. *LAFAVE*, *supra* note 77.

98. *Id.*

99. *Id.*

100. *See id.*

murder.<sup>101</sup> This goes hand-in-hand with two of State's Attorney Marilyn Mosby's repeated themes in the charging of the officers involved: "that the handcuffed and leg-shackled Gray was never secured by a seatbelt in the police wagon against police policy, and that officers ignored repeated appeals for medical help from Gray."<sup>102</sup> Additionally, the timing of the injury proved to be an issue, as it was difficult for the judge to tell if there was adequate notice for Goodson to understand the severity of Gray's injuries.<sup>103</sup>

The challenge is that it seems impossible to properly determine whether Officer Goodson's conduct exhibited the requisite high level of disregard required by Maryland common law.<sup>104</sup> It seems difficult to assess whether the actions manifest a willful and wanton disregard for human life, when examples of depraved heart murder seem so egregious, such as firing a bullet into an occupied room.<sup>105</sup> More so, how does one determine whether this conduct exhibits a very high degree of risk, or merely a high degree of risk resulting in the lesser charge of involuntary manslaughter?<sup>106</sup> A look to civil law may provide some guidance.<sup>107</sup>

### III. MODELS OF EXISTING STATUTORY FRAMEWORK FOR DETERMINING *MENS REA*

Currently, there are criminal statutory schemes that are used to help distinguish between similar states of mind.<sup>108</sup> There is a need for a similar framework for second-degree depraved heart murder in order to show various levels of culpability that are per se conduct evincing a depraved heart, or that can be combined to ratchet up from an

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101. Justin Fenton, *Freddie Gray Officers Renew Challenge to Seatbelt-Related Charges*, BALT. SUN (Oct. 21, 2015, 8:54 PM),

<http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-gray-motion-seatbelt-charges-20151021-story.html> (noting further that this is not a matter of a simple ride in the back of a police cruiser, but "involves the risk to a prisoner created by transporting him in a police vehicle resembling a steel cage without a seatbelt — while his hands and legs are physically restrained from movement").

102. Marbella, *supra* note 12. Former Police Commissioner Anthony Batts even acknowledged that Gray should have been buckled into the transportation vehicle and that there are no excuses for this failure to act. Luke Broadwater, *Baltimore Police Acknowledge Mistakes in Freddie Gray's Death*, BALT. SUN (Apr. 24, 2015, 10:31 PM), <http://www.baltimoresun.com/news/maryland/bs-md-freddie-gray-protest-prepare-20150424-story.html>.

103. Fenton & Rector I, *supra* note 69.

104. *See supra* Section II.B.1.

105. *See supra* note 99 and accompanying text.

106. *See supra* note 92 and accompanying text.

107. *See infra* Part IV.

108. *See infra* Section III.A.

involuntary manslaughter conviction to a depraved heart murder conviction.<sup>109</sup>

A. *Helpful Statutory Formulations*

As mentioned, *supra*, there is no depraved heart murder statute in Maryland.<sup>110</sup> However, there are statutory schemes in place where legislatures have imported negligence theories to hold someone accountable for the unintentional death of another person (i.e., drunk driving that causes the death of another) and have inserted higher penalties for conduct that is seen as more egregious.<sup>111</sup>

Section 2-503 of the Maryland Code is the criminal statute for homicide by motor vehicle while *under the influence* of alcohol or *under the influence* of alcohol per se.<sup>112</sup> Under this statute, if a person causes the death of another “as a result of the person’s negligently driving, operating, or controlling a motor vehicle or vessel while: (1) under the influence of alcohol; or (2) under the influence of alcohol per se,” the person is guilty of a felony and is subject to imprisonment not exceeding five years, or a fine not exceeding five thousand dollars, or both.<sup>113</sup> Section 2-504, however, is a statute for homicide by motor vehicle or vessel while *impaired* by alcohol.<sup>114</sup> If a person causes the death of another as “a result of the person’s negligently driving, operating, or controlling a motor vehicle or vessel while impaired by alcohol,” he is guilty of a felony and is subject to up to three years in prison, a fine of up to five thousand dollars, or both.<sup>115</sup> The difference between the two statutes is the amount of alcohol that the person who caused the death consumed.<sup>116</sup> Influence per se, in Section 2-503, is defined as a blood alcohol concentration of 0.08 or more.<sup>117</sup> The legislature drew a line with this number as to what level of alcohol is sufficient for a higher penalty.<sup>118</sup>

Similarly, Section 2-210 is a statute for when a person causes the death of another by operation of a vehicle or vessel in a criminally negligent manner.<sup>119</sup> For purposes of this statute, a person acts in a

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109. *See infra* Part V.

110. *See supra* notes 16, 73 and accompanying text.

111. *See* MD. CODE ANN., CRIM. LAW §§ 2-503–2-504 (LexisNexis 2012 & Supp. 2016).

112. *Id.* § 2-503 (emphasis added).

113. *Id.*

114. *Id.* § 2-504 (emphasis added).

115. *Id.*

116. *See id.* §§ 2-503–2-504.

117. *Id.* § 2-501 (LexisNexis 2012).

118. *See supra* notes 112–15, 117 and accompanying text.

119. CRIM. LAW § 2-210 (LexisNexis 2012 & Supp. 2016).

criminally negligent manner when he should be aware that his conduct is causing a substantial and unjustifiable risk and the person's failure to perceive that risk "constitutes a gross deviation from the standard of care that would be exercised by a reasonable person."<sup>120</sup> A violation of this statute, however, is classified as a misdemeanor, with the penalty being "imprisonment not exceeding 3 years or a fine not exceeding \$5,000 or both."<sup>121</sup>

Accordingly, it appears that a person who drinks alcohol while operating a vehicle is more culpable than a person who merely acts in a criminally negligent manner when no alcohol consumption is involved and the death of a person results.<sup>122</sup> However, if a person operates or controls a vehicle in a grossly negligent manner, as opposed to a criminally negligent manner, the person commits manslaughter by vehicle, and the resulting penalty is a felony with "imprisonment not exceeding 10 years or a fine not exceeding \$5,000 or both."<sup>123</sup>

These statutes and the resulting penalties depend on the various levels of culpability (i.e., impairment) versus being at the "DUI" level of 0.08 blood alcohol concentration, or being criminally negligent versus grossly negligent.<sup>124</sup> These statutes serve as models and show that there is a method for distinguishing between degrees of criminal negligence. The difference in conduct in each of these statutes goes to how much a person knew or should have known he was a risk to another human. Likewise, it seems viable that there could be a statutory presumption of misconduct for depraved heart murder.

#### IV. POSSIBLE RESOLUTION WITH THE IMPORTATION OF TORT THEORIES

In formulating a similar statute for depraved heart murder, tort theories should be applied because they illustrate the policy rationale behind the proposal.<sup>125</sup> Tort law recognizes certain circumstances where a higher duty of care is owed; specifically, these circumstances

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120. *Id.* § 2-210(c).

121. *Id.* § 2-210(f).

122. *See supra* notes 111–17 and accompanying text.

123. CRIM. LAW § 2-209 (LexisNexis 2012 & Supp. 2016).

124. *See supra* notes 111–17, 119–21 and accompanying text.

125. It is not necessarily that they fall within these torts categories, but that these specific relationships give rise to liability in a tort context and are thus why police officers in this very specific context should be charged.

involve common carriers and certain professionals.<sup>126</sup> This Comment argues that certain tort theories are not only helpful for understanding when a police officer's conduct rises to the level to be found criminally negligent, but should also be implemented in drafting a depraved heart murder statute.<sup>127</sup> Borrowing from these concepts provides a standard of care presumption for when a police officer takes a citizen into custody because the citizen essentially loses the ability to care for himself.<sup>128</sup> These concepts can help identify what the duty owed should be, and a totality of the circumstances approach can help to establish the culpability of the police officer and whether there was a high degree of risk involved in his behavior versus a very high degree of risk involved when a person dies in his custody.<sup>129</sup>

#### A. *Common Carrier*

Common carriers transport persons and must serve the public on an equal basis.<sup>130</sup> As statutorily defined by Section 1-101(e)(1) of the Public Utilities Article, common carriers include car and taxicab companies, transit companies, motor boat companies, etc.<sup>131</sup> Common carriers owe passengers "a duty to deliver them to their destination as expeditiously as possible, consistent with safety."<sup>132</sup> This duty is more than ordinary care.<sup>133</sup> Because common carriers have passengers, and the passengers' safety of their "lives and limbs" is at stake, a carrier must "exercise the highest degree of care which is consistent with the nature of its undertaking. . . . [and] is bound to employ the utmost care and diligence which human foresight can use."<sup>134</sup> The higher degree of care is sound from a public policy standpoint "where the security of a person is frequently involved under circumstances in which the carrier controls movement or equipment."<sup>135</sup> While the vehicle is in motion, there may be negligence if passengers are imperiled by the jerking or jarring of the

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126. *See infra* Sections IV.A–B.

127. *See infra* Part V.

128. *See infra* Part V.

129. *See infra* Part V.

130. 4 M.L.E. *Carriers* § 1 (2016).

131. *Id.* at *Carriers* § 2.

132. *Id.* at *Carriers* § 33.

133. *Id.* at *Carriers* § 45.

134. *Id.*; *see also* Wash. Metro. Area Transit Auth. v. Seymour, 847 A.2d 973, 997 (Md. 2005) ("A common carrier owes its passengers *the highest degree of care* to provide safe means and methods of transportation for them." (quoting Todd v. Mass Transit Admin., 816 A.2d 930, 934 (Md. 2003))).

135. 4 M.L.E. *Carriers* § 45, *supra* note 130.

vehicle, including sudden starts or stops, if they are deemed extraordinary.<sup>136</sup>

### B. *Professionals and Their Duties*

If a defendant is of a professional status, the defendant's duty of care may not be merely that of ordinary or reasonable care.<sup>137</sup> Lawyers, doctors, and other professionals "owe their clients the care provided or generally accepted as the standard by qualified practitioners in the same profession."<sup>138</sup> A leading treatise on tort law recognizes that courts speak of duties within a certain list of formal relationships, including the carrier-passenger relationship, but notes that a relationship need not fit into a certain formalized category *per se*.<sup>139</sup> Duty, according to Dobbs, "is a question of justice and policy, [and] some less formal or describable relationships may work in the same way."<sup>140</sup>

#### 1. Custodians and Duties

A person who is in custody of another is owed a duty of reasonable care from foreseeable harms that may arise,<sup>141</sup> which includes any self-destructive behavior.<sup>142</sup> Jailers as custodians, for instance, exercise control over inmates by virtue of legal authority.<sup>143</sup> Dobbs specifically mentions that this also applies to an officer who has a person in his custody.<sup>144</sup> The same principle extends to hospitals and patients, parents and children, and schools and students.<sup>145</sup> Even more importantly to the discussion at hand, custody has taken on the definition of the deprivation of a person's liberty "so that he could no longer protect himself or obtain aid from others."<sup>146</sup>

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136. *See id.* at Carriers § 67.

137. DAN B. DOBBS ET AL., *THE LAW OF TORTS* § 284 (2d ed. 2016).

138. *Id.* ("Given a recognized risk, all reasonable persons should use the knowledge and skill at their disposal.").

139. *Id.* § 415.

140. *Id.*

141. *Id.* § 418.

142. *Id.*

143. *Id.* (noting that the jailer has a duty to prevent suicide, for instance).

144. *Id.* In fact, Officer Novak testified during Officer Porter's trial that "van drivers are understood to have 'primary custody' of detainees in their vehicles." Kevin Rector & Justin Fenton, *Officer Porter Takes the Stand in Trial in Freddie Gray's Death*, *BALT. SUN* (Dec. 9, 2015, 9:47 PM), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-porter-trial-wednesday-20151209-story.html>.

145. DOBBS ET AL., *supra* note 137, § 418.

146. *Id.* § 419.

## V. APPLICATION OF TORT THEORIES TO EXISTING COMMON LAW FOR DEPRAVED HEART MURDER

The only way to resolve the problem of depraved heart murder is for the Maryland Legislature to pass a new criminal statute. The formulation of a statute that provides for conduct that is per se the level of *mens rea* needed to convict a police officer of depraved heart murder will be helpful for a successful prosecution when a citizen dies in his custody.<sup>147</sup> Common law does not adequately address what conduct exactly satisfies the malice needed for depraved heart murder.<sup>148</sup> The Freddie Gray case is a prime example: how is a factfinder to decide whether the defendant possessed the *mens rea* for depraved heart murder when the law provides nothing to help distinguish it from involuntary manslaughter?<sup>149</sup> The Legislature should draft a depraved heart murder statute that describes specific conduct that rises to the needed level.<sup>150</sup> The above mentioned tort theories provide the policy rationale for drafting the statute; the police officer has a special relationship to someone in his custody, and someone in custody cannot readily take care of himself.<sup>151</sup>

### A. Proposed Statute

#### Second-Degree Depraved Heart Murder:

A person may not cause the death of another while acting with an extreme disregard for human life. Conduct creating a very high degree of risk, evincing an extreme disregard of the life endangering consequences is presumed if the death occurs:

- (1) While failing to comply with an internal regulation, coupled with:
  - (a) Failing to provide adequate care in rendering aid to an individual in custody; and
  - (b) Having an opportunity to provide aid.

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147. See *infra* Sections V.A–B.

148. See *supra* Section II.B.

149. See *supra* Section II.C.

150. See *infra* Sections V.A–B.

151. See generally Jeremy Daniel Kernodle, *Policing the Police: Clarifying the Test for Holding the Government Liable Under 42 U.S.C. § 1983 and the State-Created Danger Theory*, 54 VAND. L. REV. 165, 184–85 (2001) (justifying state-created danger cases under a “special relationship” theory, in which an individual loses his self-protection when placed in police custody and is essentially helpless).

This proposed statute helps to solve the problem of vague depraved heart common law standards. This concept is not new in criminal law (e.g., the statutes regarding DUIs resulting in death).<sup>152</sup> Importantly, the statute is not necessarily specific to police officers because it may be useful in other situations where a death results involving similar professionals with responsibility.<sup>153</sup> There needs to be better police policy, and a statute such as this one will help to ensure that the policy is followed.

B. *Application to the Gray Facts*

The prosecutor can begin by tallying the acts of omission by Officer Caesar Goodson. When first placed in the van, Gray asked for and was denied medical assistance.<sup>154</sup> Additionally, he was placed into the van on the floor and was not buckled into a seat, per a Baltimore City internal regulation requiring the use of seatbelts on people in custody.<sup>155</sup> During the third stop, Officer Goodson failed to render aid or request medical assistance after Gray explicitly indicated to Officer Porter that he was in need.<sup>156</sup> During the fourth stop, Officer Goodson found Gray in an unresponsive state but headed toward the police station rather than the hospital.<sup>157</sup> First, after violating the regulation, Officer Goodson had an opportunity with each stop to correct his mistake.<sup>158</sup> Additionally, despite whether Goodson was aware of the severity of Gray's injuries, it was brought to his attention several times that Mr. Gray may have been in need of medical assistance.<sup>159</sup> Still, Officer Goodson failed to render aid even a single time.<sup>160</sup>

Additionally, Officer Goodson was acting in his professional capacity as a police officer.<sup>161</sup> What would have been generally accepted in his profession would have been adherence to the regulation to seat belt detainees.<sup>162</sup> Officer Goodson, regardless of

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152. *See supra* Part III.

153. For example, the statute could perhaps be applicable to jailers.

154. *See supra* note 36 and accompanying text.

155. *See supra* note 58 and accompanying text.

156. *See supra* notes 40–43 and accompanying text.

157. *See supra* notes 47–49 and accompanying text.

158. *See supra* notes 37–48 and accompanying text.

159. *See supra* notes 36, 39–42, 47–48 and accompanying text.

160. *See supra* notes 36–48 and accompanying text.

161. *See supra* note 34 and accompanying text.

162. *See supra* note 58 and accompanying text.

this mandate, would have been apprised of the expectation to use seatbelts.<sup>163</sup>

## VI. CONCLUSION

Successful prosecution under the theory of depraved heart murder is challenging, due to ambiguities in the law. The challenge is amplified when a police officer is charged with failure to act.<sup>164</sup> The proposed depraved heart murder statute, *supra*, shows conduct that per se evinces an extreme indifference to human life.<sup>165</sup> Legislatures have distinguished between varying degrees of culpability when someone causes a death while consuming alcohol at a certain level.<sup>166</sup> The proposed statute, too, shows conduct that rises to a level above involuntary manslaughter.<sup>167</sup>

Tort theories provide rationales for holding certain people more responsible than others because of their profession and their relationship to citizens in their care and custody.<sup>168</sup> This is mirrored in the police officer context because of the relationship and power differential when one is in custody and the officer's professional duty to comply with regulations and act as other officers would act in similar circumstances.<sup>169</sup> This, combined with a second egregious act, such as failure to provide aid to someone in need when there is an opportunity to provide that aid, is enough to hold someone of this standing guilty of depraved heart murder. The proposed statute should be implemented to ensure successful prosecutions when a citizen dies in a professional's custody, regulations were not adhered to, and medical aid was not given when needed.

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163. See *Baltimore Police, Seat Belts and Freddie Gray*, *supra* note 58.

164. See *supra* Section II.C.

165. See *supra* Section V.A.

166. See *supra* Section III.A.

167. See *supra* Section V.A.

168. See *supra* Part IV.

169. See *supra* notes 127–29 and accompanying text.