HOW EVOLVING SOCIAL VALUES HAVE SHAPED (AND RESHAPED) CALIFORNIA CRIMINAL LAW

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INTRODUCTION

A student could learn much about cultural history by studying doctrines of criminal liability. As the United States Supreme Court has observed, the law mirrors evolving societal values. "The doctrines of actus reus, mens rea, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical and medical views of the nature of man."[1]

This adjustment has shifted not only individual doctrines, but their collective rationale as well. The California Supreme Court described this

[1] *Powell v. Texas*, 392 U.S. 514, 536 (1968).

conflict in the 1884 case of *People v. Blake*,[2] which addressed the responsibility of an intoxicated killer. Culpability considerations warranted mitigation: "In the forum of conscience, there is no doubt considerable difference between a murder deliberately planned and executed by a person of unclouded intellect, and the reckless taking of life by one infuriated by intoxication."[3] Public safety, however, demanded punishment, as "human laws are based upon considerations of policy, and look rather *to the maintenance of personal security and social order*, than to an accurate discrimination as to the moral qualities of individual conduct."[4] This doctrinal debate, and many others, concerned whether the law would measure crimes according to "the conscience of the individual" or "the social conscience."[5]

Nineteenth century law favored the social conscience. To deter presumably rational offenders from misconduct, legislatures prescribed punishment according to the objective gravity of the crime, with little regard for the offender's subjective characteristics. For example, an intoxicated killer could be convicted of murder, and sentenced to life imprisonment.

The law shifted course for most of the twentieth century. An increasingly deterministic understanding of human (mis)behavior generated greater solicitude toward criminal defendants. Criminal penalties sought less to deter wicked offenders than to rehabilitate weak ones.[6] Thus, even in the absence of statutory change, the California Supreme Court revised numerous doctrines to give greater weight to the offender's subjective characteristics in evaluating liability. By the late 1970s, the effective sentence for killing another human being due to a severe but self-induced intoxication was 16 to 32 months.

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2 65 Cal. 275, 277 (1884).

3 *Id.* at 277, quoting *People v. Rogers*, 18 N.Y. 9 (1858).

4 *Blake,* 65 Cal. at 277 (italics added).

5 *Keenan v. Commonwealth*, 44 Pa. 55, 59 (1863).

6 This trend was not limited to California, but was national, indeed transatlantic, in scope. *See* Martin J. Wiener, Reconstructing the Criminal: Culture, Law and Policy in England, 1830-1914 12, 338 (1990). This article will mostly, though not exclusively, cite California law, which has often set the pace for the nation. Jake Dear & Edward Jessen, *"Followed Rates" and Leading State Cases, 1940-2005*, 41 U.C. Davis L. Rev. 683 (2007).

The pendulum has swung back toward social protection over the past three decades.[7] The subjectivist trend shielded offenders from punishment in excess of their blameworthiness, but exposed the public to greater danger. The newest trend, implemented by both statute and case law, punishes and incapacitates offenders in accordance with their objective dangerousness as well as their subjective culpability.[8] An intoxicated killer is now subject to punishment of 15 years to life imprisonment.[9]

This article attempts to document the shift toward subjectivity (Part I), and the return to a more objective evaluation of liability (Part II). Each Part will address the underlying cultural backdrop (Subpart A), and then the attendant doctrinal developments (Subpart B). The doctrinal subparts will first address the mitigating defenses that distinguished murder from

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[7] Of course, not all the doctrines changed simultaneously.

[8] There are three main determinants of liability: culpability (mens rea), dangerousness, and harm. Arnold H. Loewy, *Culpability, Dangerousness and Harm: Balancing the Factors on Which Our Criminal Law is Based*, 66 N.C. L. Rev. 283 (1988); see also Mitchell Keiter, *With Malice Toward All: The Increased Lethality of Violence Reshapes Transferred Intent and Attempted Murder Law*, 38 U.S.F. L. Rev. 261, 263-268 (2004) (*With Malice Toward All*). Accordingly, an assault may be aggravated due to its (1) purpose of rape (culpability); (2) use of a deadly weapon (danger); or (3) infliction of serious injury (harm).

For the doctrines described herein, the shift toward a subjectivist emphasis on culpability reduced the offender's liability. For example, a homicide may be only manslaughter, or second degree murder, where the offender's culpability is reduced by intoxication or provocation, or the lack of express malice. Such offenders thus benefited from greater scrutiny of their mental state, rather than the objective harm inflicted. Some doctrines, however, are exceptions to this general rule. For example, an offender who attempts to commit an impossible crime, or who seeks to form a conspiracy with an undercover officer (a type of impossible crime), does not create an objective harm, yet manifests the same subjective culpability as a "successful" offender. Such offenders, therefore, would appear to benefit from a more objective analysis.

However, the objective determinant of danger would still favor liability in these cases. "[O]ne who intends to harm others and acts upon that intent poses sufficient present danger to warrant subjecting him to [criminal sanction]." Arnold Enker, *Mens Rea and Criminal Attempt*, 4 American Bar Foundation Res. Journal 845, 856 (1977). "A person who believes he is conspiring with another to commit a crime is a danger to the public regardless of whether the other person in fact has agreed to commit the crime." *Miller v. State,* 955 P.2d 892, 897 (Wyo. 1998).

[9] Cal. Penal Code §§ 22, 190(a).

manslaughter (intoxication, diminished capacity, provocation, unreasonable self-defense) as well as the requisite elements of malice itself. The doctrinal subparts will then address the grounds for first degree murder, including Penal Code section 189 (the felony-murder rule, special means, premeditation and deliberation), the doctrines of indirect causation and transferred intent, and the sentencing changes that imposed first degree murder sentences for crimes other than first degree murder.

I. THE SHIFT TO SUBJECTIVISM

A. The Shift in Philosophy

1. OBJECTIVIST ORIGINS

The classical theory of crime dominated nineteenth-century thinking. According to this Enlightenment-shaped doctrine, individuals were rational agents, motivated by self-interest. The central premise of classical criminology was the individual's freedom to choose, and consequent desert of punishment for choosing to do wrong. "The guiding vision of . . . criminal justice was that of the responsible individual."[10]

Punishment's purpose was the deterrence of crime. Sufficient sanctions could outweigh the perceived benefits of criminal activity, so even the most self-interested individual would desist.[11] These sanctions deterred most effectively where they clearly indicated the consequences of misconduct before its commission. Determinate punishment facilitated deterrence.[12]

The individual's moral freedom generated a corresponding duty to preserve such self-determination. "It is a duty which every one owes to his fellow-men and to society, to say nothing of more solemn obligations, to preserve, so far as it lies in his own power, the inestimable gift of reason."[13] Because the law perceived intoxication as voluntary, the offender deserved

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[10] Wiener, *supra* note 6, at 11.

[11] Daniel J. Currant & Claire M. Renzetti, Theories of Crime 11 (2001).

[12] Fixed sentences also protected the public from arbitrary enforcement. Wiener, *supra* note 6, at 11.

[13] *People v. Rogers*, 18 N.Y. 9, 18 (1858).

blame for his crimes, as he could have avoided such intoxication from the start. "He must be held to have purposely blinded his moral perceptions, and set his will free from the control of reason — to have suppressed the guards and invited the mutiny; and should therefore be held responsible as well for the vicious excesses of the will, thus set free, as for the acts done by its prompting."[14] Intoxicated offenders were thus responsible for all consequences, both intended and unintended, of their inebriation. Under the prevailing objectivist jurisprudence, the offender's "undeserved" punishment (liability for unintended harms) was less objectionable than society's suffering undeserved and unpunishable harm.

This philosophy shaped other criminal law doctrines besides intoxication. The law held offenders accountable when an intended wrong (e.g. a felony), produced a greater harm (e.g. a victim's death). Likewise, there was minimal inclination to consider the defendant's subjective mental state in evaluating liability, lest the law reward, and thus encourage, certain vices (e.g. temper, drunkenness).[15] The law hindered factually guilty defendants from asserting successful defenses based on their mental state. "It was the behavior that was dangerous and had to be stamped out; the state of the actor's mind was much less relevant."[16] It was easy for prosecutors to establish that homicides were murder, not manslaughter, and that those murders were in the first degree.

2. THE RISE OF THE SCIENTIFIC SCHOOL

In the late nineteenth century, the scientific school began to displace its classical forerunner, a trend that reached full maturation in the third quarter of the twentieth century. Owing as much to Darwin as the Enlightenment,[17] the scientific school attributed criminal behavior

14 *Roberts v. People*, 19 Mich. 401, 419 (1870).

15 See *Keenan v. Commonwealth*, 44 Pa. 55, 58 (1863): "If such were the rule, a defendant would be much more likely to injure than to benefit his case by showing a good character, and the law would present no inducement to men to try to rise to the standard of even ordinary social morality."

16 Lawrence Friedman, A History of American Law 593 (1985).

17 "Humans were beginning to appear to scientists merely as one type of creature, with no special links to divinity. . . . [as well as] creatures whose conduct was influenced, if not determined, by biological and cultural antecedents rather than self-determining beings who were free to do what they wanted." Currant & Renzetti,

to biological and environmental determinism: "The new view of crime and criminals is, that what a man does is a result of his heredity and his environment . . . ."[18] Criminals were thus neither selfish nor sinful, merely sick.

> "[T]he sciences of criminology" — challenged the assumptions which saw individuals as responsible for their own behavior. The sources of criminal activity were now traced to physical and biological factors, or social conditions beyond the control of each individual. This epistemological approach to "social problems" had the effect of undermining the responsibility of individuals, while simultaneously allowing the State to assume even greater powers in "correcting" problems now deemed beyond the individual's power to alter.[19]

The new understanding of why individuals offended reshaped how the law responded to them.

The purpose of punishment, according to the scientific school, was rehabilitation. The goal was less to deter rational actors than to heal dysfunctional ones. Indeterminate sentencing better fit the new model.

> It was popular to speak of crime in medical terms — crime was no more or less than a treatable disease, as the 1931 Wickersham Commission explained: "Physicians, upon discovering disease, cannot name the day upon which the patient will be healed. No

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supra note 11, at 15, quoting G.B. Vold & T.J. Bernard, Theoretical Criminology 36 (3d ed. 1986).

[18] Ernest Bryant Hoag and Edward Huntington Williams, Crime, Abnormal Minds and the Law xxi (1923).

[19] Mimi Ajzenstadt and Brian E. Burtch, *Medicalization and Regulation of Alcohol and Alcoholism: The Professions and Disciplinary Measures*, 13 Int'l J.L. & Psychiatry 127, 135 (1990); see also Wiener, *supra* note 6, at 338: "[A] diminished estimate of the capabilities of the unaided individual both contributed to a more expansive appreciation of the need for and possibilities of state action and was itself more deeply established by the very growth of the state." California exemplified the trend of relaxing personal responsibility while tightening state control; by the late 1970s, the state punished the possession of certain controlled substances more severely than killing under their influence. See Mitchell Keiter, *Just Say No Excuse: The Rise and Fall of the Intoxication Defense*, 87 J. of Crim L. & Criminology 482, 490 n.52 (1997) (*Just Say No Excuse*).

> more can judges intelligently set the day of release from prison at the time of trial."[20]

Consonant with the broader social trends,[21] crime control increasingly relied on medicine rather than morality.[22]

This new outlook had special salience for the intoxication defense. No longer was the inebriate culpable for having "set his will free from the control of reason;"[23] he was now the passive victim of an intoxication that could "completely paralyze the will of the defendant and . . . take from him the power to withstand evil impulses."[24] No longer did the community impose a duty of sobriety ("the inestimable gift of reason") on the individual; duty now lay with society, to protect the "individual subject to its control" "'against the misuse of the criminal law . . . by authorizing sentences reasonably related to the conduct and character of the convicted person . . . .'"[25] From the new perspective, misconduct committed while intoxicated did not necessarily establish a bad character: "So long as this release [of inhibitions] is traced to a drug rather than a quality inherent in the individual, it is more difficult to blame the individual for the ensuing behavior."[26] The fault lay not in their selves, but in their substances.

The new outlook increased sympathy for, and thus limited the potential liability of, intoxicated offenders. Intoxication was less a predicate wrong, like a felony, than an excusable symptom of illness. In 1956, the American Medical Association first recognized alcoholism as a "disease." Three years later, the California Supreme Court reversed a century of precedent and allowed defendants to introduce evidence of self-induced

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20 Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. Crim. L. & Criminology 883, 893 n.62 (1990).

21 See Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 Mich. L. Rev. 1803, 1852-1854 (1984).

22 Wiener, *supra* note 6, at 12.

23 *Roberts v. People*, 19 Mich. 401, 419 (1870).

24 *State v. McGehearty*, 394 A.2d 1348, 1351 n.5 (R.I. 1978).

25 Case Comment, *Criminal Law: Chronic Alcoholism as a Defense to Crime*, 61 Minn. L. Rev. 901, 917 (1977) (quoting Minn. Stat. 609.01(2) (1976)).

26 John Kaplan, *Alcohol, Law Enforcement, and Criminal Justice*, in Alcoholism and Related Problems: Issues for the American Public 78, 85 (Louis Jolyon West, ed., 1984).

intoxication in defending against charges of second degree murder — and voluntary manslaughter.[27,28]

The trend toward exculpation slowed, but did not cease, when the United States Supreme Court considered the question in 1968.[29] In examining whether the Eighth Amendment permitted public intoxication prohibitions, the high Court expressed the extant ambivalence about intoxication, which the California Supreme Court soon echoed.[30] Although a majority of justices recognized the inebriate's "uncontrollable compulsion to drink,"[31] Justice White's decisive concurrence concluded there was no comparable compulsion for the inebriate to appear in public, and therefore validated the challenged statutes.[32] Although Justice Fortas's dissent would have struck down public intoxication laws, he rejected such "compulsion" as a defense to more serious charges like assault or robbery.[33] Justice Marshall's plurality opinion rejected that distinction: "If Leroy Powell cannot

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27 *People v. Gorshen*, 51 Cal.2d 716 (1959).

28 Even reduced liability was objectionable to some "scientific" advocates.

> Since it is now judicially as well as medically and legislatively recognized that alcoholism is a "disease" which compels its victims to drink involuntarily, there is no logical reason why an alcoholic should be held responsible for *any* conduct performed while involuntarily intoxicated . . . . the traditional punishment of an alcoholic for conduct performed while involuntarily intoxicated as a result of alcoholism "is as archaic as the medieval outlook that the community once had with respect to insanity, tuberculosis and leprosy."

(Daniel R. Coburn, Note, Driver *to* Easter *to* Powell*: Recognition of the Defense of Involuntary Intoxication*, 22 Rutgers L. Rev. 103, 122-123, 125 (1967) (quoting Johns, A Practical Approach, in Report of Proceedings of the Rocky Mountain Conference of Municipal Judges 52 (Oct. 1959) italics added).

Two federal courts agreed, comparing the punishment of public intoxication with the punishment of insanity, infancy, or leprosy. *(Easter v. District of Columbia*, 361 F.2d 50, 52 (D.C. Cir. 1966) [insane person and infant]; *Driver v. Hinnant*, 356 F.2d 761, 764-765 (4th Cir. 1966) [leper].)

29 *Powell v. Texas*, 392 U.S. 514 (1968).

30 See *People v. Hood*, 1 Cal.3d 444, 456 (1969), describing the intoxication defense as a "compromise between the conflicting feelings of sympathy and reprobation for the intoxicated offender."

31 *Powell*, 392 U.S. at 557 (1968) (Fortas, J., dissenting).

32 *Id*. at 549-550 (White, J. concurring).

33 *Id*. at 559 n.2 (Fortas, J., dissenting).

be convicted of public intoxication, it is difficult to see how a State can convict an individual for murder, if that individual, while exhibiting normal behavior in all other respects, suffers from a 'compulsion' to kill . . . ."[34]

As the "scientific" community came to see alcohol consumption as involuntary for alcoholics, an emerging societal consensus saw consumption as legitimate, and not intrinsically culpable, for everyone else.[35] If drinking was not culpable per se, its unintended harms were not the natural and probable consequences of an intentional "mutiny," but "bare chance result[ing] in an unsought harm."[36] The offender might be responsible for the nuisance of intoxication, but not all its consequences. "To indulge was, of course, blameworthy; but people were also ready . . . to believe that the liquor [and] drugs . . . robbed you of your mind, your freedom, your very self."[37] Although the culture had long characterized drinking as a vice, in the post-Prohibition era, it, like other behaviors once thought to require public intervention, was perceived as just another private choice, from which malice could not be inferred.[38]

The broader acceptance of the intoxication defense paralleled other developments in the criminal law. Regarding many doctrines, the law increased its concern with the offender's subjective blameworthiness, and decreased its concern with public safety. Several causes generated this shift.

One was the biological and environmental determinism to which the scientific school attributed crime. It was seen as unfair to impose complete accountability on offenders who had incomplete control over their behavior.[39] Objections to full punishment continue to cite offenders' insufficient control over their conduct.[40]

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34 *Id*. at 534.

35 Lawrence Friedman, Crime and Punishment in American History 341 (1993) (Crime and Punishment).

36 Jerome Hall, *Intoxication and Criminal Responsibility*, 57 Harv. L. Rev. 1045, 1072 (1944).

37 Crime and Punishment, *supra* note , at 148.

38 James Q. Wilson & Richard Herrnstein, Crime and Human Nature 436 (1985).

39 H.L.A. Hart, Punishment and Responsibility 152 (1968).

40 *Roper v. Simmons*, 543 U.S. 551, 569-570 (2005).

Abuses of individual dignity also may have undermined support for the *Blake* imperative of emphasizing public safety over fairness to the individual offender. From forced sterilization[41] to the infamous Tuskegee experiment, from the internment of Japanese-Americans to the even worse atrocities of Hitler and Stalin, Americans in the twentieth century witnessed too many occasions where the rights of individuals were compromised for some "greater good." On constitutional issues (including criminal procedure), as well as substantive criminal law, American law after World War II increasingly favored the asserted rights of individuals when they conflicted with asserted communal interests.[42]

This championing of individual rights, even at the possible expense of a communal good, conformed to public preferences. The transformation produced by urbanization, technology and immigration shaped a new relationship between the individual and the community. Modern cities, with their anonymity, weakened traditional family, neighborhood and religious bonds, as did the successive developments of railroads, telephones, automobiles, radio, movies, jet airplanes and television.[43] Migration between states and countries further loosened the individual's connection to any community.[44] Individuals increasingly came to see their interests through their own perspectives, rather than those of a community to which their grandparents had owed loyalty and duty. The law responded by reallocating rights enjoyed by the community to the individual. Thus, the prior imperative of protecting the community against harm partially gave way to the imperative of protecting the individual offender from harm (in the form of liability for unintended consequences).

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41 *Buck v. Bell*, 274 U.S. 200 (1927).

42 *See* e.g. *Zablocki v. Redhail*, 434 U.S. 374 (1978) [state could not compel back payment of child support as condition of remarriage]; *Cohen v. California*, 403 U.S. 15 (1971) [prohibition of indecent language unconstitutional]; *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) [anti-loitering law unconstitutional]; *Katz v. United States*, 389 U.S. 347 (1967) [Fourth Amendment protects privacy of telephone communications]; *Danskin v. San Diego Unified Sch. Dist.*, 28 Cal.2d 536 (1946) [state could not condition provision of free meeting space on group's swearing it did not support the violent or unlawful overthrow of the government].

43 Wilson & Herrnstein, *supra* note 38, at 451.

44 Crime and Punishment, *supra* note 35, at 193.

The criminological goal of rehabilitation was perhaps most central to the new emphasis on subjective blameworthiness. Personal rehabilitation required an individualized approach to sentencing; the offender's reformation depended on addressing his moral blameworthiness. It was the extent of that blameworthiness, rather than the harm suffered by any victim, that determined the proper measure of punishment. Therefore, in determining whether a homicide was murder or manslaughter, and whether a murder was in the first degree, courts increasingly considered the offender's subjective mental state.

B. The Shift in Law

The California Supreme Court responded to the philosophical shift by modifying criminal law doctrines. The Court facilitated the characterization of homicides as manslaughter rather than murder, or, if the latter, as murder in the second degree.

1. MURDER VS. MANSLAUGHTER

The expansion of manslaughter (and the contraction of murder) liability occurred through the broadening of mitigating doctrines based on the offender's mental state. The California Supreme Court enhanced the mitigating effect of intoxication.[45] The Court further expanded the category of manslaughter by developing the doctrine of diminished capacity,[46] broadening the construction of provocation,[47] and requiring instruction on unreasonable ("imperfect") self-defense.[48] The result was a trade-off: The doctrines of intoxication, provocation, and unreasonable self-defense resembled diminished capacity, as they all "[brought] formal guilt more closely into line with moral blameworthiness but only at the cost of driving a wedge between dangerousness and social control."[49]

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45 See Subsection (a).

46 See Subsection (b).

47 See Subsection (c).

48 See Subsection (d).

49 Model Penal Code § 210.3, commentary at 72-73 (1962).

(a) Intoxication

Courts were not sympathetic to intoxicated offenders in California's early years, reflecting *Blake*'s priority of social protection.[50] Judges instructed juries that "when a crime is committed by a party while in a fit of intoxication, the law will not allow him to avail himself of his own gross vice and misconduct to shelter himself from the legal consequences of such crime."[51] Intoxication evidence was admissible to show a murder was in the second degree, but it could not reduce a murder to manslaughter.

Greater mitigation later occurred, due not to any statutory change, but to greater judicial solicitude for the intoxicated (and thus unintentional) offender.[52] The Court's 1959 *Gorshen* decision, which recognized voluntary intoxication as an available defense to not only first degree murder but also second degree murder and voluntary manslaughter,[53] was the culmination of three decades of increasingly sympathetic dicta.

The first case, *People v. Kelley*,[54] involved a woman's death during an illicit sexual affair, in which both parties were "probably more or less inflamed by the use of intoxicating drink,"[55] and there was no evidence of motive, or intent to kill.[56] The Court reduced the conviction from first degree murder to voluntary manslaughter based on the overall factual predicate, rather than any legally exculpatory effect of the defendant's intoxication.

The stronger evidence of intoxication in *People v. Chesser*,[57] (along with the defendant's lack of an intelligent waiver of counsel)[58] warranted reversal. The defendant's wife observed him choking their infant daughter, in accordance with his prior threats to do so.[59] The defendant then threatened to kill his wife if she told anyone about his conduct.[60] The

50 *People v. Blake*, 65 Cal. 275, 277 (1884).
51 *People v. Hower*, 151 Cal. 638, 641 (1907).
52 *People v. Hood*, 1 Cal.3d 444, 456 (1969).
53 *People v. Gorshen*, 51 Cal.2d 716, 732-734 (1959).
54 208 Cal. 387 (1929).
55 *Id*. at 390.
56 *Id*. at 391, 393.
57 29 Cal.2d 815 (1947).
58 *Id*. at 821-22.
59 *Id*. at 817-18.
60 *Id*. at 818.

Court nevertheless concluded, "there was evidence which would indicate that defendant may have been so deeply under the influence of intoxicating liquor that he was incapable of forming in his mind that malice aforethought which is an essential element of the crime of murder in either degree."[61]

The shift from *Kelley* (1929) to *Chesser* (1947) was sharp, even though the defense remained dicta for another twelve years. In the first case, two intoxicated adults engaged in sexual activity that apparently led to fatal injury, for which there was no witness, or evidence of motive or intent. By contrast, the later case involved the witnessed, purposeful choking of a helpless infant, preceded and followed by homicidal threats. The Court's extension of the defense to increasingly culpable conduct reflected the growing attribution to the intoxicant rather than the offender.[62]

The dicta became law in *People v. Gorshen*. After drinking one fifth of a gallon of gin, the defendant had an altercation, in which his foreman knocked him to the ground. The defendant threatened to "go home and get a gun and kill this fellow."[63] However, expert defense testimony challenged the traditional notion that the individual was "captain of his conduct." A published article by the expert had cited Freud for the theory that "voluntary choice is merely the conscious rationalization of a chain of unconsciously determined processes."[64] The *Gorshen* court applied the "mental impairment" defense, for which it declined to distinguish "intoxication" from "disease" as a legitimate basis. In other words, intoxication *was* a disease, no more or less culpable than tuberculosis or leprosy.[65] The Court disapproved many precedents in concluding "it appears only fair and reasonable that defendant should be allowed to show that in fact, *subjectively*, he did not possess the mental state or states in issue,"[66] regardless of *why* he did not.

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61 *Id*. at 824.

62 Kaplan, *supra* note 26, at 85.

63 *People v. Gorshen*, 51 Cal.2d 716, 720 (1959).

64 *Id*. at 724.

65 See *id*. at 731.

66 *Id*. at 733 (italics added).

(b) Diminished Capacity

Early common law likewise did not recognize defenses based on mental illness other than insanity. As Oliver Wendell Holmes observed, based on the premise "that every man is able as every other to behave as they command," legal standards "take no account of incapacities unless the weakness is so marked as to fall into well-known exceptions such as infancy or madness."[67] California thus recognized the defense of insanity, where the defendant did not know right from wrong, but excluded any evidentiary showings of "partial insanity."[68]

As with intoxication, the mid-century California Supreme Court expanded the exculpatory effect of mental illness short of insanity. The Court developed the defense of "diminished capacity" in the 1949 case of *People v. Wells*.[69] The trial court had excluded the defendant's evidence that showed he suffered from a condition causing him to fear for his safety based on even slight external stimuli.[70] The Supreme Court found the exclusion erroneous: "competent evidence, other than proof of . . . insanity, which tends to show that a . . . legally sane defendant either did or did not in fact possess the required specific intent . . . is admissible."[71] This "partial insanity" excuse could refute malice.[72] *Wells* established a (formerly rejected) middle ground between legal insanity (which would excuse the homicide altogether) and full responsibility for murder.

The Court further tightened the elements of malice in *People v. Conley*,[73] and *People v. Poddar*.[74] In *Conley*, the Court held the statutory elements of implied malice included "an awareness of the obligation to act within the general body of laws regulating society."[75] A defendant who intentionally killed, but lacked such awareness, was therefore guilty

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67 Oliver W. Holmes, The Common Law 43 (Mark DeWolfe Howe, ed., 1960).

68 *People v. Troche*, 206 Cal. 35, 47 (1928).

69 33 Cal.2d 330 (1949).

70 *Id*. at 345; see also *People v. Saille*, 54 Cal.3d 1103, 1109 (1991).

71 *Wells*, 33 Cal.2d at 351.

72 *Id*. at 356-57.

73 64 Cal.2d 310 (1966); see also *People v. Gorshen*, 51 Cal.2d 710, 731 (1959).

74 10 Cal.3d 750 (1974).

75 *Conley*, 64 Cal.2d at 322.

of only manslaughter. The *Poddar* court extended *Conley* to require not only an *awareness* of the duty to abide by society's laws, but also an *ability* to do so.[76] Although offenders unaware of or unable to conform to society's laws were likely to be *more dangerous* than other individuals, the Court found them insufficiently *culpable* to be guilty of murder.

The *Poddar* court thus summarized the state of the responsibility-reducing doctrine as of 1974. "If it is established that an accused, because he suffered a diminished capacity, was unaware of or unable to act in accordance with the law, malice could not properly be found and the maximum offense for which he could be convicted would be voluntary manslaughter."[77] The doctrine reflected the tension between individual culpability and public danger: "[T]he very forces that call for mitigation under this doctrine are the very aspects of an individual's personality that make us most fearful of his future conduct."[78]

(c) Provocation

Consistent with the common law, the early California Supreme Court recognized a partial defense of provocation, which could mitigate a homicide to voluntary manslaughter. The evaluation was objective: "[N]o defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man."[79] A defendant thus could not offer evidence showing he was especially prone to blinding passion due to a prior sunstroke.[80] Similarly, where the decedent did not produce the provocation, but was an innocent, intentionally targeted by the defendant, the homicide was murder, regardless of the defendant's subjective passion.[81] Thus, the killing of an adulterous spouse might be only manslaughter, but not the killing of an infant.

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76 *Poddar*, 10 Cal.3d at 758.

77 *Id.* at 758.

78 Model Penal Code § 210.3, commentary at 72 (1962).

79 *People v. Logan*, 173 Cal. 45, 49 (1917).

80 *People v. Golsh*, 63 Cal.App. 611, 613 (1923).

81 Dan M. Kahan and Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 Colum. L. Rev. 269, 306-307 (1996).

The philosophical shift also transformed provocation law. The Model Penal Code, developed in the late 1950s, abandoned the traditional, objective determination of passion. According to the Code's mitigating defense of "extreme medical or emotional disturbance" (EMED), "criminal homicide constitutes manslaughter when . . . a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance . . . .[82] The subjectivist EMED doctrine evaluated the crime according to the "conscience of the individual,"[83] rather than that of society. So long as the defendant subjectively was sufficiently disturbed, it did not matter whether he killed an adulterous spouse or a helpless infant.

The *Gorshen* court, without renaming the provocation doctrine, applied it as if California had adopted EMED. Due to the defendant's alleged mental illness, the victim's "statement that defendant was drunk and should leave his work was to defendant the psychological equivalent of the statement that `You're not a man, you're impotent, . . . you're a sexual pervert."[84] Under the new rule, it did not matter what the victim did or said; what mattered was how the defendant perceived it, reasonably or not. The Supreme Court thus construed provocation, like the other voluntary manslaughter doctrines of intoxication and diminished capacity, through a subjective lens.

(d) Unreasonable Self-Defense

In the 1979 case of *People v. Flannel*,[85] the Supreme Court formally recognized another basis for voluntary manslaughter beyond intoxication, diminished capacity and provocation: unreasonable or "imperfect" self-defense. Whereas only a defendant's *reasonable* belief in the need for deadly force exculpated completely, *Flannel* held that a defendant who actually but unreasonably harbored such belief was guilty of only voluntary manslaughter. The concept was not new; the Court quoted both

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82 Model Penal Code § 210.3, quoted in *People v. Spurlin*, 156 Cal.App.3d 119, 127 n.4 (1984).

83 *Keenan v. Commonwealth*, 44 Pa. 55, 59 (1863).

84 *People v. Gorshen,* 51 Cal.2d. 710, 722 (1959).

85 25 Cal.3d 668 (1979).

Wells and an earlier Court of Appeal case[86] that noted the doctrine's longstanding basis. *Flannel* broke new ground, however, in declaring the rule so well-established that future defendants would be entitled to such instruction *sua sponte*.[87]

Such unreasonable self-defenders underscored the subjectivist/objectivist debate. On the one hand, such defendants were not only less blameworthy than murderers, they were less blameworthy than those who committed voluntary manslaughter due to provocation, knowing their conduct was wrongful. Subjectivists could thus oppose even manslaughter liability for killing in unreasonable self-defense. On the other hand, defendants who perceived a lethal conflict where none existed were arguably more dangerous than those driven to kill only by objectively provocative conduct. Objectivists could thus oppose any mitigation. Voluntary manslaughter liability reflected a compromise between judging according to the "social conscience" and the "conscience of the individual."

The new cultural and philosophical perspectives thus helped change decisional law. The Supreme Court expanded the grounds that could mitigate murder to manslaughter to include intoxication, "partial insanity," and subjectively adequate provocation and self-defense. Similar developments reshaped the distinctions between first and second degree murder.

2. FIRST DEGREE VS. SECOND DEGREE MURDER

Second degree murder, like manslaughter, originally developed to limit the death penalty's reach.[88] From the state's beginning, California Penal Code section 189 provided three main categories of first degree (potentially capital) murder: homicides committed during an enumerated felony, homicides committed by special means such as poison, explosives or lying in wait, and homicides committed with premeditation and deliberation. (The doctrines of indirect causation and transferred intent also may support a first degree murder conviction, even where the offender

86 See *People v. Best*, 13 Cal.App.2d 606, 610 (1936).

87 *Flannel*, 25 Cal.3d at 681-682.

88 *People v. Whitfield*, 7 Cal.4th 437, 472 (1994) (Mosk J., dissenting).

does not directly or intentionally inflict the fatal injury on the decedent.) The California Supreme Court narrowed all these grounds for first degree murder liability during the subjectivist period.[89] Moreover, sentencing changes increased the significance of the first degree/second degree distinction by magnifying the sentencing disparity.[90]

(a) The Felony-Murder Rule

The felony-murder rule imputes malice to all killings, even if unintentional, committed in the course of felonies.[91] The rule holds offenders liable for murder due to their blameworthiness in intentionally committing the lesser wrong of the underlying felony, just as intoxication law held offenders liable for murder due to their blameworthiness in forfeiting their reason. Although these lesser wrongs may reflect less culpability than express malice, both felonies and intoxication potentially endanger more victims than premeditated murders.

As in *Blake*, the California Supreme Court initially emphasized the objective, social protection benefits of the felony-murder rule, and discounted the absence of full culpability. "The statute was adopted for *the protection of the community* and its residents, not for the *benefit of the lawbreaker*."[92] The court thus rejected the defendant's argument that the killing was incidental and not "in pursuance of" the underlying felonies of rape and/or burglary; it was enough that the felony and the homicide were both "parts of one continuous transaction."[93]

The developing emphasis on subjective intent constricted the felony-murder rule's scope, even without legislative modification. In *People v. Washington*,[94] Washington's accomplice Ball pointed a gun at a shopkeeper, who returned fire and killed Ball.[95] Because neither Washington

89 See Subsections (a) through (d).

90 See Subsection (e).

91 California law deems murders to be in the first degree when they occur during the felonies enumerated in section 189, or in the second degree where they occur during other "inherently dangerous" felonies. *People v. Patterson*, 49 Cal.3d 615, 620 (1989).

92 *People v. Chavez*, 37 Cal.2d 656, 669 (1951) (italics added).

93 *Id.* at 669-670.

94 62 Cal.2d 777 (1965).

95 *Id.* at 779.

nor his co-felon fired the fatal shot, the Court precluded operation of the felony-murder rule, which it criticized on "forum of conscience" grounds. "[The rule] has been criticized on the grounds that in almost all cases in which it is applied it is unnecessary and that it *erodes the relation between criminal liability and moral culpability*."[96]

The *Washington* majority and dissent disputed both the rule's purpose, and reach. The dissent justified felony-murder liability on social protection grounds, asserting that the "advance judicial absolution" of such victim-resistance killings "removes one of the most meaningful deterrents to the commission of armed felonies."[97] The majority, however, confined the purpose of the rule to deterring inadvertent killings during the felonies, not the commission of the felonies themselves, as felons received a fixed punishment for the commission of the felony.[98] Furthermore, the majority precluded felony-murder liability unless the killing was committed to further the felony, not, as in *Washington*, to thwart it.[99] The dissent perceived that this exception would swallow the rule, as few inadvertent killings further the underlying felony.[100]

The Court also narrowed the felony-murder rule by developing the "merger" doctrine, which precluded felony-murder liability where the felony was integral to, rather than independent of, the homicide. The defendant in *People v. Ireland*[101] shot and killed his wife from close range, although he asserted he suffered from diminished capacity.[102] The jury convicted the defendant of second degree murder, as the killing occurred during the (inherently dangerous) felony of assault with a deadly weapon. The Supreme Court rejected such felony-murder liability in assault cases, based on culpability concerns. "To allow such use of the felony-murder rule would effectively preclude the jury from considering the issue of malice aforethought in all cases wherein homicide has been committed as a result of a felonious assault — a category which includes the great

96 *Id*. at 783 (italics added).
97 *Id*. at 785.
98 *Id*. at 781.
99 *Id*.
100 *Id*. at 787 (Burke, J., dissenting).
101 70 Cal.2d 522 (1969).
102 *Id*. at 527-528, 539 n.13.

majority of all homicides."[103] In other words, imposing felony-murder liability for assaults would virtually abrogate the mitigating doctrines of provocation or diminished capacity, and prevent juries from considering the offender's mental state to distinguish murders from manslaughters.

Although some other states had developed the merger rule before *Ireland*, by the next year California had the nation's broadest merger bar.[104] In *People v. Wilson*,[105] the Court broke new ground in barring felony-murder liability based on a burglary that was committed for the purpose of assault.[106] This extension did not flow inexorably from *Ireland*, as applying the felony-murder rule to burglaries would not abrogate mitigating doctrines as in *Ireland*, but *Wilson* recharacterized *Ireland*'s rationale. "In *Ireland*, we reasoned that a man assaulting another with a deadly weapon could not be deterred by the second degree felony-murder rule, since the assault was an integral part of the homicide."[107] Actually, this reasoning, and even the very word "deterrence," was entirely absent from *Ireland*'s analysis.[108]

The Court then barred felony-murder liability in *People v. Sears*,[109] where the defendant committed a burglary to assault his estranged wife, but instead inadvertently killed his stepdaughter.[110] Although the assault

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103 *Id*. at 539.

104 Mitchell Keiter, Ireland *at Forty: How to Rescue the Felony-murder Rule's Merger Limitation From its Midlife Crisis*, 36 West. St. L. Rev. 1, 9 (2008) (Ireland *at Forty*).

105 1 Cal.3d 431 (1969).

106 Only Alaska expanded the rule this far. *Kirby v. State*, 649 P.2d 963, 970 (Alaska Ct. App. 1982). Fourteen states that have a merger bar do not apply it in burglary-assault cases. Ireland *at Forty*, *supra* note 105 at 9-10.

107 1 Cal.3d at 440.

108 70 Cal.2d at 538-540. Furthermore, the validity of this reasoning may have depended on *Ireland*'s exceptional facts. Because the defendant in *Ireland* shot his victim from close range, and his defense was diminished capacity, rather than the absence of an intent to kill, it appears that the assault was committed to kill, not merely injure or intimidate. Contrariwise, deterrence may well be possible where these lesser goals appear. See Robinson, Criminal Law 734 (1997): "Dangerous assaults . . . are instances where there is the greatest need to motivate an actor to be careful not to cause death."

109 2 Cal.3d 180 (1970).

110 *Id*. at 183-184.

(and homicide) of the stepdaughter was unintended, and thus the intended felony (the wife's assault) had a purpose independent from the homicide, *Sears* extended the merger rule to bar felony-murder liability for the killing of an unintended victim "in light of ordinary principles of culpability."[111]

> It would be anomalous to place the person who intends to attack one person and in the course of the assault kills another inadvertently or in the heat of battle in a worse position than the person who from the outset intended to attack both persons and killed one or both.[112]

This reasoning supported not only an expanded merger bar, but the abolition of the entire felony-murder rule, which routinely places inadvertent killers in a worse position than intentional ones. No other state extended the merger bar this far.[113]

Ireland expressly cited *Washington*'s policy of minimizing the reach of the felony-murder rule.[114] This policy derived from the Court's emphasis on offenders' subjective intent (or lack thereof), rather than the objective danger they posed.

(b) Indirect Causation and Transferred Intent

Prosecutors use the related doctrines of indirect causation and transferred intent to establish malice. Indirect causation occurs where, although the defendant is the proximate cause of death and thus legally responsible, a different person is the direct cause of death. Transferred intent supports liability where the victim is someone other than the intended victim. Both deviate from the standard homicide where the defendant directly kills the intended victim. The doctrines overlap where the defendant intends to kill A, whose reaction innocently causes B's death. For example, in *Wright v. State*,[115] the defendant shot at a driver, who consequently

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111 2 Cal.3d at 189.

112 *Id*.

113 Ireland *at Forty*, *supra* note 105 at 9.

114 *Ireland*, 70 Cal.2d at 539, citing *People v. Washington*, 62 Cal.2d 777, 783 (1965).

115 363 So.2d 617 (Fla. Dist. Ct. App. 1978), cited in *People v. Roberts*, 2 Cal.4th 271, 319 (1992).

lost control of his vehicle and killed a pedestrian. The case involved both doctrines, but either could have operated without the other.[116]

Early California law did not distinguish between direct and indirect proximate causation in imposing homicide liability. In *People v. Fowler*,[117] the defendant bludgeoned the victim and left him on a roadway, where a driver inadvertently ran him over.[118] Because the defendant was responsible for creating the conditions where death was the "natural and probable result," he could not evade liability by asserting he had no control over the driver's accident.[119] Likewise, in *People v. Harrison*,[120] a robber began shooting at a clerk, who fired in self-defense and inadvertently killed the store owner.[121] Although the robber did not fire the fatal shot, he was liable for the homicide as its proximate cause.[122] The felony-murder rule fixed the level of the homicide as first degree murder.[123]

Whereas indirect causation concerns an unexpected source of the fatal wound, transferred intent involves an unexpected destination. The transferred intent doctrine holds an offender, who intended to kill one victim but killed another, guilty of the same level of homicide, notwithstanding the variance of identity.[124] As even one first degree murder conviction formerly supported a death sentence,[125] early courts had no need to determine liability where the offender intended one homicide but committed two.

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116 If the defendant had shot and missed the driver and instead fatally hit the pedestrian, there would have been transferred intent but not indirect causation. If the defendant's shot caused the driver to crash his car and kill himself, there would have been indirect causation but not transferred intent. See *People v. Lewis*, 124 Cal. 551 (1899).

117 178 Cal. 659 (1918).

118 *Id*. at 669.

119 *Id*.

120 176 Cal.App.2d 330 (1959).

121 *Id*. at 331.

122 *Id*. at 345.

123 *Id*.

124 *People v. Suesser*, 142 Cal. 354, 367 (1904).

125 *Id*. at 356.

The felony-murder case of *People v. Washington*[126] shifted causation law in a subjectivist direction. Whereas *Fowler* and *Harrison* had imposed liability on the defendant for creating conditions that proximately caused death, *Washington* restricted the defendant's responsibility for the acts of others.

> In every robbery there is a possibility that the victim will resist and kill. The robber has little control over such a killing once the robbery is undertaken . . . . To impose an additional penalty for the killing would discriminate between robbers, not on the basis of any difference in their own conduct, but *solely on the basis of the response by others* that the robber's conduct happened to induce.[127]

Washington epitomized the new subjectivity. The law had formerly imposed liability for conduct the defendant "happened to induce" under an objective, proximate causation analysis.[128] *Washington*, however, barred "discrimination" based on harms not committed or intended by the defendants; an offender could be held liable for only his own acts and thoughts (and his accomplices'), not those of others.

This contrast resembled the intoxication debate; in each case the offender committed a dangerous act (the felony/excessive consumption) but did not specifically intend its harmful consequences. The traditional view had that held the dangerous act "set in motion a chain of events which were, or should have been, within [his] contemplation when the motion was initiated. . . . [and where the homicide] was the natural result of [the offender's] acts."[129] By contrast, the new view held that a felon/inebriate "has little control over . . . a killing once the [dangerous act] is undertaken."[130]

This same shift reshaped transferred intent law. It was well established that a defendant who intended to kill A would be guilty of the same charge of intentional murder if he unexpectedly killed B instead.

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126 62 Cal.2d 777 (1965).

127 *Id*. at 781 (italics added).

128 *Fowler*, 178 Cal. 657; see also *People v. Harrison*, 176 Cal.App.2d 330 (1959).

129 *Harrison*, 176 Cal.App.2d at 345.

130 *Washington*, 62 Cal.2d at 781.

People v. Birreuta,[131] however, raised a new question: What was the liability of a defendant who intended to kill one person, but killed *both* the intended victim and an unintended victim?

Like the Supreme Court, the Court of Appeal preferred to determine liability according to the offender's blameworthiness rather than public safety needs. According to the *Birreuta* defendant's account, he intended to kill his neighbor; however, his shots into the neighbor's darkened bedroom also killed his wife, who was unexpectedly present.[132] *Birreuta* held that a defendant who intended only one death deserved a lesser punishment.

> [T]he interests of justice are best served by differentiating between killers who premeditatedly and deliberately kill two people, and killers who only intend to kill one person, and accidentally kill another. . . . [T]he former type is clearly more culpable. . . . If the transferred intent doctrine is applicable when the intended victim is killed, this difference disappears.[133]

From the subjectivist perspective, the decision properly protected the offender from undeserved punishment. On the other hand, like *Washington*, *Birreuta* shielded defendants from full liability for the harms they inflicted, at the expense of public safety. After *Birreuta*, the law provided a version of what the *Washington* dissent described as "advance judicial absolution"; an offender could kill his target with the knowledge that he was safe from intentional murder liability for any bystander deaths.[134] This absolution from full liability for bystander deaths provided defendants with less incentive to avoid them. Conversely, it rendered especially attractive to offenders dangerous means like explosives or poison, which maximize the danger to bystanders, but minimize the probability of the offender's apprehension.[135]

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131 162 Cal.App.3d 454 (1984), *overruled by People v. Bland*, 28 Cal.4th 313 (2002).

132 *Birreuta*, 162 Cal.App.3d at 458.

133 *Id*. at 460.

134 *Birreuta* allowed for a lesser conviction of second degree murder or manslaughter for such unintended homicides. *Id*.

135 See *People v. Morse*, 2 Cal.App.4th 620, 646 (1992).

(c) Special Means and Special Circumstances

For much of California's history, the "special means" ground of first degree murder did not require a specific intent-to-kill, only implied malice.[136] The heightened danger objectively posed by such conduct warranted aggravated liability, even absent a subjective intent-to-kill.[137] Similarly, California authorized capital punishment for first degree murderers whose liability derived from the felony-murder rule: e.g., liability required no specific intent-to-kill, only the intentional performance of the felony that caused death.[138] Such punishment emphasized protecting society from harm, but discounted culpability considerations.

The increased focus on subjective blameworthiness produced a specific intent requirement for heightened punishment under sections 189 and 190.2. Whereas lying-in-wait liability had formerly required only malice, whether express or implied, by 1959, the required mens rea had subtly increased to an "intentional inflicting of bodily injury . . . under circumstances likely to cause [the victim's] death."[139] This effectively combined the specific intent requirement (albeit only for injury) of express malice, with the objective danger required for an implied malice finding.

The Supreme Court more dramatically emphasized a specific intent requirement in *Carlos v. Superior Court*.[140] After the California Supreme Court had abolished the death penalty in 1972,[141] voters passed an initiative that authorized a penalty of death, or life imprisonment without parole, for killing in the course of an enumerated felony.[142] Although the law had traditionally deemed implied malice sufficient for full liability where the killer used especially dangerous means, the *Carlos* court read into the initiative a specific intent-to-kill prerequisite for maximum

136 *People v. Thomas*, 41 Cal.2d 470, 475 (1953); see also *People v. Brown*, 59 Cal. 345, 353 (1881).

137 See *With Malice Toward All*, *supra* note 8, at 263-68.

138 *People v. Anderson*, 47 Cal.3d 1104, 1145 n.8 (1987).

139 *People v. Atchley*, 53 Cal.2d 160, 175 n.2 (1959).

140 35 Cal.3d 131 (1983).

141 *People v. Anderson*, 6 Cal.3d 628 (1972).

142 *Carlos*, 35 Cal.3d at 140-141.

punishment.[143] The Court found intolerable a result where "some defendants who did not intend to kill [received] a minimum sentence of life without possibility of parole, while . . . others who killed deliberately [received] a maximum sentence that permitted parole."[144] Intent was the *sine qua non* of liability; the dangerousness of the means did not matter.

(d) Premeditation and Deliberation

Unlike the other first degree murder grounds, the premeditation and deliberation ground derives from the offender's maximum culpability, rather than a special public danger. Here too, however, the Court narrowed the ground's application. The Court had formerly minimized the additional mental state necessary to support first degree liability. "There need be no appreciable space of time between the intention to kill and the act of killing; they may be as instantaneous as successive thoughts of the mind."[145] Therefore, it was "not essential that there should be any *appreciable* space of time between the intent to kill and the act of killing," — i.e., any interval "'capable of being appreciated or duly estimated.'"[146]

The subjectivist trend narrowed the premeditation and deliberation element. In *People v. Wolff*,[147] the Court held it encompassed a requirement that the "defendant could *maturely and meaningfully reflect* upon the gravity of the contemplated act."[148] *Wolff*'s requirement resembled *Conley*'s insistence upon an awareness of the obligation to abide by society's laws;[149] both facilitated mitigation due to incomplete mens rea.

People v. Anderson[150] further shifted the law. The *Anderson* defendant fatally stabbed his ten-year-old victim over sixty times, cutting her

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143 *Id*. at 135. Because only first degree murder convictions are punishable by death or life imprisonment without parole, the implied malice killer of even dozens of people was immune from either penalty.

144 *Id*. at 153.

145 *People v. Fleming*, 218 Cal. 300, 310 (1933), quoting *People v. Hunt*, 59 Cal. 430, 435 (1881).

146 *People v. Suesser*, 142 Cal. 354, 364 (1904).

147 61 Cal.2d 795 (1964).

148 *Id*. at 821.

149 *People v. Conley*, 64 Cal.2d 310, 322 (1966).

150 70 Cal.2d 15 (1968).

from her vagina to her tongue.[151] The Court relied upon the very magnitude and randomness of violence (which suggested a heightened public danger),[152] to preclude a first degree murder conviction.[153] *Anderson* became a staple of criminal law textbooks as an argument against exclusive reliance on premeditation in determining the degree of murder.

(e) Sentencing

The combined consequence of *Washington* and *Ireland* on the one hand, and *Wolff* and *Anderson* on the other, was the restriction of first degree murder liability to only the most subjectively culpable offenders. It was the nature of the offender's purpose and reflection, and not the danger presented or harm caused, which supported maximum punishment.

Sentencing changes magnified the effect of these tightened first degree murder requirements. Throughout the 1950s and 1960s, both first degree and second degree murderers could be imprisoned for life. After the enactment of the 1977 Determinate Sentencing Law, second degree murder was punishable by only five, six or seven years in prison,[154] which would be reduced by one-third for "good behavior."[155] In other words, had the *Anderson* defendant committed his crime a few years later, he could not have been imprisoned for even five years. A reaction was inevitable.

II. THE RETURN TO RESPONSIBILITY

A. The Shift in Philosophy

Starting in the late 1970s, the criminal law again recalibrated the balance between the individual conscience and social protection. From 1962 to 1974, the (national) murder rate more than doubled, the rape rate tripled,

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151 *Id*. at 19, 22.

152 See J.F. Stephen, History of the Criminal Law of England 94 (1883): "[A] disposition at least as dangerous to society, probably even more dangerous, is shown by sudden as by premeditated murders."

153 *Id*. at 33-34.

154 1977 Cal. Stat. ch. 316 § 5.

155 1976 Cal. Stat. ch. 1139 § 276. This could reduce the term to 40, 48, or 56 months.

and the robbery rate quadrupled.[156] These increasing crime rates produced new demands for social order, and reduced sympathy for defendants.[157] The trend toward attributing misconduct to external factors, and its consequent minimizing of offenders' liability, pushed too far, and met public resistance. When defendant Dan White successfully mitigated his homicides of San Francisco Mayor George Moscone and Supervisor Harvey Milk to manslaughter, due to emotional problems exacerbated by excessive sugar intake, public outrage ridiculed his "Twinkie defense."[158] Both the Legislature and the electorate soon restricted the basis for this defense.

Protecting the public, rather than rehabilitating the offender, became the new imperative. Increased fear of violent crime diminished public enthusiasm for individualized mitigation.[159] California voters passed Proposition 115, which declared the need "to restore balance . . . to our criminal justice system" so "society as a whole can be free from the fear of crimes in our homes, neighborhoods and schools." A Federal Sentencing Guidelines Committee Report likewise emphasized the need to "consider justice for the public as well as justice for the offender."[160]

Empirical evidence had discredited the subjectivist goal of rehabilitation.[161] Incapacitating rather than reforming offenders produced more reliable protection for the public. California thus introduced a new Determinate Sentencing Law, which largely abolished indeterminate punishment. The Legislature declared, "the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense . . . ."[162] Whereas rehabilitation demanded careful analysis of the offender's culpability, punishment warranted

156 Federal Bureau of Investigation, Uniform Crime Reports 11 (1974); Federal Bureau of Investigation, Uniform Crime Reports 3 (1963).

157 Crime and Punishment, *supra* note 35, at 305-306.

158 Jerome H. Skolnick, *In Memoriam, Dr. Bernard L. Diamond*, 78 Calif. L. Rev. 1433, 1435-36 (1990).

159 Crime and Punishment *supra* note 35, at 305-306.

160 Nagel, *supra* note 20, at 915.

161 Nagel, *supra* note 20, at 895-897; Currant & Renzetti, *supra* note 11, at 10.

162 1976 Cal. Stats. ch. 1139 § 273.

focus on the objective nature of the offense, and the danger/harm suffered by society.

Society's perception of intoxication also evolved; intoxication came to be seen as more voluntary, and dangerous, than it was a generation earlier. The United States Supreme Court recognized that alcoholics are not powerless to regulate their consumption,[163] and thus are not blameless when they fail to do so. Furthermore, the catastrophic consequences of excessive drug and alcohol use became so common, especially in traffic fatalities, that such harm could not be described as "bare chance." Courts thus re-emphasized the duty of sobriety.

> The effect of drunkenness on the mind and on men's actions . . . is a fact known to everyone, and it is as much the duty of men to abstain from placing themselves in a condition from which such danger to others is to be apprehended as it is to abstain from firing into a crowd, or doing any other act likely to be attended with dangerous or fatal consequences.[164]

The law again saw inebriated killers less as inebriates and more as killers.

The intoxicants themselves changed. For much of the century, many Americans enjoyed an occasional cocktail or glass of wine, and were thus loath to blame others who offended after doing so. Most Americans in the 1980s, however, did not indulge in crack cocaine, and thus found no hypocrisy in casting stones at its violent users.

The new cultural environment reshaped other criminal law doctrines. The law authorized full liability, not only for those who specifically intended the harms they inflicted, but also for those who intentionally engaged in dangerous conduct that produced unintended consequences. The priority of public safety reversed the "burden of injustice." It became preferable to hold an offender responsible for harms unintentionally but

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163 *Traynor v. Turnage*, 485 U.S. 535, 550-551, 564 (1988), citing Herbert Finagrette, *The Perils of* Powell: *In Search of a Factual Foundation for the Disease Concept of Alcoholism*, 83 Harv. L. Rev. 793, 802-808 (1970); see also Warren Lehman, *Alcohol, Freedom and Moral Responsibility*, 13 Int'l J.L. & Psychiatry 103, 111 (1990); Chester N. Mitchell, *The Intoxicated Offender — Refuting the Legal and Medical Myths*, 11 Int'l J.L. & Psychiatry 77, 96-97 (1988).

164 *State v. Vaughn*, 232 S.E.2d 328, 331 (S.C. 1977).

culpably inflicted, rather than to render the public vulnerable to offenders it could not deter or incapacitate.

This recalibration reflected the social cost of minimizing offenders' responsibility for harms imposed on others.

> The idea of individual responsibility has been submerged in individual rights — rights or demands to be guaranteed by Big Brother and delivered by public and private institutions. The cost of sloth, gluttony, alcoholic intemperance, reckless driving, sexual frenzy and smoking have now become a national, not an individual responsibility, and all justified as individual freedom. But one man's or woman's freedom in health is now another man's shackle in taxes and insurance premiums.[165]

An even worse product of alcoholic intemperance (and reckless driving) was the diminished physical safety and fear they produced.

Such fear helped generate focus on the "right to personal security and protection of crime."[166] A concurring opinion by Justice Elkington recalled that the federal Constitution guaranteed not only criminal defendants' rights, but also the "*right of the people* to governmental protection from crime and violence." Two decades later, in a gang injunction case, the California Supreme Court picked up the mantle of public safety. The Court emphasized the balance between the defendant's right to fair treatment and the community's right to safety, rejecting an exclusive focus on the rights of the defendant.

> Often the public interest in tranquility, security, and protection is invoked only to be blithely dismissed, subordinated to the paramount right of the individual.
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> . . . .
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> . . . [t]he community's right to security and protection must be reconciled with the individual's right[s] . . . . Reconciliation begins with the acknowledgment that the interests of the

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165 Ajzenstadt & Burtch, *supra* note 19, at 129 n.8 (quoting John Knowles, the late President of the Rockefeller Foundation).

166 *Craig v. Superior Court*, 54 Cal.App.3d 416, 428 (1976) (Elkington J., concurring).

> community are not invariably less important than the freedom of individuals. Indeed, the security and protection of the community is the bedrock on which the superstructure of individual liberty rests.
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> . . . .
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> . . . Preserving the peace is the first duty of government, and it is for the protection of the community from the predations of the . . . brutal that government was invented.[167]

The California Supreme Court thus recognized that an individual's rights cannot be safe when the person is not. This recognition coincided with a refinement of the above-described doctrines, which gave greater weight to social protection, and less to the "forum of conscience." On its own terms, the new focus succeeded; crime rates dropped significantly.[168] Increased punishment was one of several factors, including demographic trends and policing techniques, that contributed to the decline.[169]

B. The Shift in Law

The new focus led the Court and Legislature to narrow the mental state defenses that had rendered homicides as manslaughter rather than murder, and second degree rather than first degree murder. Greater objective danger was an adequate substitute for an intent to kill or other culpable mental state. The period also observed a renewed emphasis on deterrence, as offenders were deemed capable of making rational choices in response to threatened penalties.[170]

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167 *People ex rel. Gallo v. Acuna*, 14 Cal.4th 1090, 1102, 1126 (1997).

168 From 1991 to 2000, the rape rate dropped by 24 percent, the murder rate dropped by 43 percent, and the robbery rate dropped by 47 percent. Federal Bureau of Investigation, Uniform Crime Reports, 13, 23, 27 (1991); Federal Bureau of Investigation, Uniform Crime Reports, 14, 25, 29 (2000).

169 Gary Lafree, *Explaining the Crime Bust of the 1990s*, 91 J. OF CRIM. L. & CRIMINOLOGY 269, 302-303 (2001).

170 Currant & Renzetti, *supra* note 11, at 11. Just as the "diminished estimate of the capabilities of the unaided individual" contributed to the expansion of governmental power in the subjectivist period (see Wiener, *supra* note at 338) the "return to responsibility" coincided with a contraction, or at least a slowing of the growth, of government's scope. Thus, in 1978, the electorate passed initiatives that expanded

1. MURDER VS. MANSLAUGHTER

Over the past three decades, California law has narrowed the grounds that mitigate a homicide to manslaughter. The Legislature rejected intoxication as a defense to implied malice (second degree) murder,[171] the Legislature (and the electorate) abolished the diminished capacity defense,[172] the Supreme Court tightened the definition of adequate provocation,[173] and the Court of Appeal restricted the application of unreasonable self-defense.[174] Furthermore, the Supreme Court broadened the definition of malice,[175] thereby impeding mitigation to manslaughter.

(a) Intoxication

In *People v. Whitfield*,[176] the California Supreme Court considered whether a defendant could introduce intoxication evidence as a defense to implied malice murder. *Gorshen* and its progeny had held a defendant could present intoxication evidence to show he did not intend to kill, as required for express malice murder or voluntary manslaughter liability.[177] Implied malice murder, however, required only a conscious disregard for human life.[178] With a blood alcohol count of .27, more than triple the legal limit, the *Whitfield* defendant drove into the oncoming lane of traffic and fatally crashed into another driver.[179] Unlike most drunk driving prosecutions, the *Whitfield* defense presented evidence *magnifying* the extent of the defendant's intoxication, to show he lacked not only an intent to kill (never alleged) but also a subjective awareness of the danger.[180] The trial court denied the defendant's request for an

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the punishment and responsibility of murderers for their crimes (Proposition 7, see *People v. Anderson*, 43 Cal.4th 1142-1143 (1987)), and reduced the taxation rate, and consequently, the scope of governmental activity (Proposition 13).

171 See Subsection (a).

172 See Subsection (b).

173 See Subsection (c).

174 See Subsection (d).

175 See Subsection (e).

176 *People v. Whitfield*, 7 Cal.4th 437 (1994).

177 *People v. Gorshen*, 51 Cal.2d 710, 733 (1959).

178 *People v. Dellinger*, 49 Cal.3d 1212, 1221 (1989).

179 *Whitfield*, 7 Cal.4th at 442-443.

180 *Id*. at 443.

involuntary manslaughter conviction, and the jury returned a second degree murder conviction.[181]

A divided Supreme Court affirmed the admissibility of intoxication evidence in murder prosecutions, whether based on express or implied malice murder.[182] The majority cited the extant version of Penal Code section 22, which permitted consideration of voluntary intoxication to determine whether the defendant acted with "malice aforethought" in cases alleging a "specific intent crime."[183] The majority rejected the argument that implied malice murder was not a "specific intent" crime, and that the 1981 amendment therefore intended to preclude the introduction of intoxication evidence in implied malice murder prosecutions, by noting that the Legislature had declared the 1981 amendment was "declaratory of existing law."[184] Since the 1950s, the law had authorized the admissibility of intoxication evidence in prosecutions for second degree murder.

If the majority correctly described the law, however, Justice Mosk's dissent persuasively expressed the policy for excluding intoxication evidence in implied malice murder prosecutions. The dissent recalled, "The Model Penal Code states that voluntarily becoming drunk satisfies the requisite *mental state* (although not the requirement of a highly dangerous physical act) for conviction of implied-malice murder, with its essential mental state of recklessness, unless some other factor such as sufficient provocation operates to negate malice."[185]

> [A]wareness of the potential consequences of excessive drinking on the capacity of human beings to gauge risks incident to their conduct is by now so dispersed in our culture that we believe it fair to postulate a general equivalence between the risks created

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181 *Id*. at 445.

182 Consideration of the instructions as a whole, including the one for vehicular manslaughter, revealed that the jury found the defendant evinced implied malice. *Id*. at 456. The Court therefore affirmed the second degree murder conviction.

183 *Id*. at 448-449.

184 *Id*.

185 *Id*. at 475.

> by the conduct of the drunken actor and the risks created by his conduct in becoming drunk.[186]

One year after *Whitfield*, the Legislature amended section 22 to reflect the policy advocated by Justice Mosk.[187]

The following year, the intoxication debate came to the United States Supreme Court. It held that a state could exclude intoxication evidence as a defense to *express malice* murder (with "purpose" or "knowledge"), or any other crime.[188] Justice Scalia's plurality opinion noted that many states found a bar on intoxication evidence to be a deterrent, both to drunkenness, and irresponsible behavior when drunk.[189] Justice Ginsburg's concurring opinion likewise permitted a more objective analysis than one that required liability solely in relation to the offender's mental state.

> [T]he State need not prove that the defendant "purposely or knowingly caused the death of another," Mont. Code Ann. § 45-5-102(a) (1995), in a *purely subjective sense*. To obtain a conviction, the prosecution must prove only that (1) the defendant caused the death of another with actual knowledge or purpose, *or* (2) that the defendant killed "under circumstances that would otherwise establish knowledge or purpose 'but for' [the defendant's] voluntary intoxication."[190]

In other words, like the felony-murder rule, the law could impute malice from the culpable act of becoming severely intoxicated.

Since *Egelhoff*, several states have amended their law to exclude intoxication evidence in determining liability. They authorize the offender's

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186 Model Penal Code § 2.08, at 8-9 (Tentative Draft No. 9, 1959).

187 1995 Cal.Stat. ch. 793. The author of the *Whitfield* majority, then Associate Justice George, actually advised the Legislature on how to modify the statute: "[T]he Legislature did not state, as it easily could have done, that evidence of voluntary intoxication is admissible solely on the issue whether a defendant harbored express (but not implied) malice aforethought." *Id*. at 448-449.

188 *Montana v. Egelhoff*, 518 U.S. 37 (1996).

189 *Id*. at 49-50.

190 *Egelhoff*, 518 U.S. at 58 (Ginsburg, J. concurring), (italics added).

full responsibility for harms culpably inflicted, notwithstanding the absence of a specific intent to kill.[191]

(b) Diminished Capacity

The Legislature abolished the diminished capacity defense in 1981, in the aftermath of Dan White's manslaughter verdict. Penal Code section 28, subdivision (b), "abolishe[d] the defenses of diminished capacity, diminished responsibility, and irresistible impulse 'as a matter of public policy.'"[192] The public soon approved an initiative (Proposition 8), which confirmed this effect.[193] The 1981 revision also superseded *People v. Conley*[194]: "Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite such awareness is included within the definition of malice."[195]

(c) Provocation

These new enactments foreclosed a subjective evaluation of provocation. In *People v. Spurlin*,[196] the defendant received a provocation instruction where he killed his sexually promiscuous wife.[197] *Spurlin*, however, rejected comparable instruction for his killing his nine-year-old son as he slept.[198] The *Spurlin* court emphasized the new law in rejecting the defense, and strongly implied a different result would have obtained if the crime had occurred two years earlier.[199]

Spurlin's distinction between killing an adulterous spouse and killing a helpless child contrasted sharply from the earlier decisions of *Kelley*[200] and *Chesser*.[201] Those decisions had disregarded the different contexts,

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191 See *Barrett v. State*, 862 So.2d 44, 46 (Fla. 2003), citing Fla. Stat. Ann. § 775.051; *Sanchez v. State*,749 N.E.2d 509, 511 (Ind. 2001), citing Ind. Code § 35-41-3-5.

192 *People v. Saille*, 54 Cal.3d 1103, 1112 (1991).

193 Cal. Penal Code § 25(b).

194 64 Cal.2d 310 (1966).

195 1981 Cal. Stats. ch. 404 § 6.

196 *People v. Spurlin*, 156 Cal.App.3d 119 (1984).

197 *Id*. at 127-128.

198 *Id*.

199 *Id*.

200 208 Cal. 387 (1929).

201 29 Cal.2d 815 (1947).

because liability depended exclusively on the "conscience of the individual." By the 1980s, however, the "social conscience" produced a fuller perspective. Although an adulterous spouse could create legally adequate provocation, an innocent child could not. The law now considered both the offender's mental state, as well as its (partial) justifiability.[202]

The Supreme Court later endorsed *Spurlin*.[203] The Court further rejected the subjective standard of provocation applied in *Gorshen*. Although "[d]efendant's evidence that he was intoxicated, that he suffered various mental deficiencies, that he had a psychological dysfunction due to traumatic experiences in the Vietnam War . . . may have satisfied the subjective element," "it does not satisfy the objective, reasonable person requirement . . . ."[204] Insofar as the 1959 *Gorshen* court had inclined toward the subjectivist, Model Penal Code position in finding it "fair and reasonable that defendant should be allowed to show that in fact, *subjectively*, he did not possess the mental state or states in issue,"[205] the 2002 *Steele* Court unambiguously rejected that position.

(d) Unreasonable Self-Defense

The objective standard described in *Steele* precluded mitigation to manslaughter based on intoxication or diminished capacity. These grounds could not mitigate, either as independent doctrines, nor through a subjectivized provocation standard. The Court next considered how subjectively to apply the unreasonable self-defense claim: Could a defendant offer his intoxication or mental illness to establish that defense?[206]

Although the Court found it unnecessary to resolve the question, the concurring opinion of three justices quoted the *Blake* paragraph in denying any mitigating effect to such evidence.[207] The opinion inferred the requisite objective basis for the offender's fear from the *Best* case, cited

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202 Similarly, although self-induced intoxication is inadmissible in murder prosecutions, involuntary intoxication remains admissible. *People v. Chaffey*, 25 Cal. App.4th 852, 856 (1994).

203 *People v. Steele*, 27 Cal.4th 1230, 1253 (2002).

204 *Id*.

205 *People v. Gorshen*, 51 Cal.2d 710, 733 (1959) (italics added).

206 *People v. Wright*, 35 Cal.4th 964 (2005).

207 *Id*. at 975 (Brown, J., concurring).

by *Flannel*, which described as manslaughter, "an uncontrollable fear . . . *caused by the circumstances*."[208] The opinion also favored a logically consistent construction of the amended Penal Code section 22. Just as the non-perception of a real risk was murder, despite the defendant's intoxication, so too must be the defendant's perception of an unreal risk.[209] A Court of Appeal relied upon the concurrence in holding that an unreasonable self-defense claim could not derive solely from a delusion.[210]

(e) A Broader Definition of Malice

Over the past three decades, revised doctrines have facilitated the characterization of homicides as murder instead of manslaughter. Through case law, statute and initiative, California has abrogated or confined certain mental state defenses that had formerly mitigated homicides from murder to manslaughter.

It also became easier to prove malice. After the Legislature abrogated the "awareness of duty" element,[211] the Supreme Court construed malice more broadly than in past decisions. In *People v. Taylor*,[212] the Court held that a defendant who shot his ex-girlfriend could be guilty of implied malice murder against her fetus, even if he did not know about it. A defendant could evince malice by acting with a conscious disregard for life in general; no specific victim need be foreseen: "There is no requirement the defendant specifically know of the existence of each victim."[213] The Court has since applied the same standard for the express malice element of attempted murder: "The mental state required for attempted murder is the intent to kill *a* human being, not a *particular* human being."[214]

People v. Knoller[215] further broadened the malice element. *Knoller* clarified the subjective requirements for malice in two ways, to defendants' detriment. The Court favored an implied malice definition that

208 *People v. Best*, 13 Cal.App.2d 606, 610 (1936) (italics added).
209 *Wright*, 35 Cal.4th at 985 (Brown, J., concurring).
210 *People v. Mejia-Linares*, 135 Cal.App.4th 1437, 1444 (2006).
211 1981 Cal.Stats. ch. 404 § 6.
212 32 Cal.4th 863 (2004).
213 *Id*. at 868.
214 *People v. Stone*, 46 Cal.4th 131, 134 (2009).
215 41 Cal.4th 139 (2007).

required a mental state of "conscious disregard for life" over the former formulation, whose terminology ("a base, antisocial motive and wanton disregard for life") suggested a more serious level of culpability.[216] Furthermore, *Knoller* found that the "high probability" language of the former instruction applied only to the objective requirement of danger, not to the defendant's subjective awareness thereof. In other words, malice required perception of only the *existence* of danger, not its full *magnitude*.

The doctrinal changes reemphasized the imperative of public safety. Malice now involves a more objective determination. Similar reform has reshaped the determination of the degree of murder.

2. FIRST DEGREE VS. SECOND DEGREE MURDER

The bases for first degree murder liability have also expanded. The Court has broadened the felony-murder rule's rationale and scope,[217] increased the potential of liability through the indirect causation and transferred intent doctrines,[218] and loosened the special means and special circumstances liability requirements.[219] Furthermore, statutory changes both facilitated first degree murder convictions (by broadening the definition of premeditation and deliberation),[220] and rendered them superfluous, by expanding the kinds of homicides subject to a comparable sentence.[221] These changes have produced greater punishment for objectively dangerous conduct, notwithstanding any lack of intent to produce the harmful result.

(a) The Felony-Murder Rule

The recognition of culpable, dangerous conduct as sufficient to show malice has broadened the California Supreme Court's conception of the felony-murder rule. In recent years, the Court has endorsed the *Washington* dissent concerning both of its points of dispute with the majority opinion.

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216 *Id*. at 152, 157 n.5. The shift also eliminated instruction on the objective need for a "*high probability* of causing death." *Id*. at 157.

217 See Subsection (a).

218 See Subsection (b).

219 See Subsection (c).

220 See Subsection (d).

221 See Subsection (e).

One, no longer must the killing be in furtherance of the felony to qualify as felony-murder; there need be only a logical nexus between the felony and the killing.[222] Two, the Court now recognizes that the rule's legitimate purposes encompass deterring both inadvertent killings during felonies and the commission of the felonies themselves.[223]

The Supreme Court also extended the reach of the felony-murder rule by curtailing its merger limitation. In *People v. Farley*,[224] the Court disapproved *People v. Wilson*[225] and authorized the application of the felony-rule when burglaries committed for the purpose of assault result in a victim's death.[226] *Farley* distinguished the second degree felony-murder rule (subject to judicial interpretation due to its ambiguity) from its first degree version, which is statutory and unambiguous.[227] *Farley* also emphasized "the purpose of deterring assaults"[228] as a legitimate role of the felony-murder rule, reflecting the rule's broadened purpose.[229]

Policywise, *Farley* emphasized danger (and social protection) over *Wilson*'s culpability rationale. The *Farley* court observed,

> Individuals within any type of structure are in greater peril from those entering the structure with the intent to commit an assault, than are individuals in a public location who are the target of an assault. (Citation.) Victims attacked in seclusion have fewer means to escape, and there is a diminished likelihood that the crimes committed against them will be observed or discovered.[230]

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222 *People v. Dominguez*, 39 Cal.4th 1141, 1162 (2006). This essentially restores the pre-*Washington* standard: "The homicide is committed in the perpetration of the felony if the killing and felony are parts of one continuous transaction." *People v. Chavez*, 37 Cal.2d 656, 669 (1951).

223 *People v. Chun*, 45 Cal.4th 1172, 1198 (2009).

224 46 Cal.4th 1053 (2009).

225 1 Cal.3d 431 (1969).

226 46 Cal.4th at 1119-21.

227 *Id*. at 1119. See also Ireland *at Forty*, *supra* note 105 at 10. *Wilson* had noted but rejected this distinction. *Wilson*, 1 Cal.3d at 441-442.

228 *Id*. at 1120.

229 *Chun*, 45 Cal.4th at 1198.

230 46 Cal.4th at 1120, citing *People v. Miller*, 297 N.E.2d 85, 87 (N.Y. 1973).

Unlike some of the prior era's decisions,[231] *Farley* found culpability considerations unpersuasive. "Once a person perpetrates or attempts to perpetrate one of the enumerated felonies, then in the judgment of the Legislature, he is no longer entitled to such fine judicial calibration [based on his mental state], but will be deemed guilty of first degree murder for any homicide committed in the course thereof."[232]

Farley also truncated the holding of *People v. Sears*.[233] *Sears* had objected on culpability grounds to felony-murder liability for the killing of an unintended victim (the stepdaughter), because there could not be felony-murder liability for the killing of the intended victim (the wife): "Where a defendant assaults one or more persons killing one, his criminal responsibility for the homicide should not depend upon which of the victims died . . . ."[234] *Farley* rejected as dicta the position that the intent to assault *one victim* precluded felony-murder liability for the unintended death *of a different victim*, as only three *Sears* justices endorsed it.[235] Post-*Sears* case law has distinguished between the killings of intended and unintended victims for liability purposes,[236] a distinction justified by the extra danger created when bystanders are subject to harm.[237]

Although the Court invalidated *Wilson*, it strengthened *Ireland*. In *People v. Chun*,[238] the Court precluded the use of any assaultive crime as the predicate for felony-murder liability, and thus disapproved its precedents that applied the felony-murder rule to shooting at an inhabited

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231 See *People v. Sears*, 2 Cal.3d 180, 189 (1970); *People v. Washington*, 62 Cal.2d 777, 783 (1965).

232 46 Cal.4th at 1121, quoting *People v. Burton*, 6 Cal.3d 375, 388 (1971).

233 2 Cal.3d 180 (1970).

234 *Id*. at 189.

235 46 Cal.4th at 1114-1115.

236 See *People v. Scott*, 14 Cal.4th 544, 551 (1996) (defendant who killed unintended victim but missed intended victim could be convicted of both murder and attempted murder, although such dual conviction could not obtain if defendant killed only intended victim).

237 *Id*. "In their attempt to kill the intended victim, defendants committed crimes against two persons." See also Ireland *at Forty*, *supra* note 105 at 7-8; *With Malice Toward All*, *supra* note 9 at 275.

238 45 Cal.4th 1172 (2009).

dwelling,[239] and discharge of a firearm in a grossly negligent manner.[240] Justice Baxter's concurrence, shaped by *Ireland*'s concern with preserving consideration of the offender's mental state,[241] advocated a modified rule,[242] followed in Georgia[243] and Maryland,[244] whereby the felony's commission establishes malice, but the offender may still introduce mitigating evidence (e.g. provocation, imperfect self-defense).[245]

Chun showed not so much that the second degree felony-murder rule is too harsh, but that sentencing changes have rendered it superfluous. The prosecution did not really need a second degree felony-murder conviction (15 years to life imprisonment), because section 12022.53 ("10-20-Life")[246] now authorizes a 25-years-to-life enhancement (equivalent to *first* degree murder liability), on top of the 3, 5 or 7-year term imposed for the underlying section 246 offense. Moreover, section 12022.53, like the felony-murder rule, bars any mitigation due to provocation or imperfect self-defense.[247] Similarly, although the Court had formerly rejected second degree felony-murder liability based on a fatal child beating,[248] the subsequently enacted section 273ab also authorizes a 25-years-to-life sentence for anyone who fatally beats a child with "force that to a reasonable person would be likely to produce great bodily injury, resulting in the child's death . . . ." One defendant thus charged actually requested instruction on the *lesser included offense* of second degree felony-murder![249]

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239 *People v. Hansen*, 9 Cal.4th 300 (1994).

240 *People v. Randle*, 35 Cal.4th 987 (2005); *People v. Robertson*, 34 Cal.4th 156 (2004).

241 *People v. Ireland*, 70 Cal.2d 522, 539 (1969).

242 *Id*. at 1209-12 (Baxter, J. concurring).

243 *Edge v. State*, 414 S.E.2d 463, 465 (Ga. 1992).

244 *Christian v. State*, 951 A.2d 832, 847 (Md. 2008).

245 Ireland *at Forty*, *supra* note 105, at 26-32.

246 Section 12022.53 enhances a defendant's sentence by 10 years when he personally uses a gun during a predicate felony, by 20 years where he personally and intentional fires it, and by 25 years to life imprisonment where that firing proximately causes a victim's serious injury or death.

247 *People v. Watie*, 100 Cal.App.4th 866, 884-885 (2002).

248 *People v. Smith*, 35 Cal.3d 798 (1984).

249 *People v. Stewart*, 77 Cal.App.4th 785, 796-798 (2000).

The new sentencing law has emphasized public safety over subjective culpability. The felony-murder rule relies on the principle that certain predicate conduct is so dangerous that (1) neither intent to kill nor even conscious disregard is needed for (first degree) murder liability; and (2) no mitigating evidence should be admitted. This principle has met with mixed success in judicial decisions, but has prevailed in sentencing prescriptions.

(b) Indirect Causation and Transferred Intent

The return to objectivism reshaped the doctrines of indirect causation and transferred intent, too. The California Supreme Court broadened the capacity of each doctrine to support first degree murder convictions.

The Court facilitated convictions by declining to extend *Washington*'s direct causation requirement outside the felony-murder context. In *People v. Roberts*, the defendant fatally stabbed a fellow inmate, Gardner, who, after going into shock, himself fatally stabbed a prison guard, Patch.[250] To convict Roberts of two counts of intentional murder, the People needed to show that Roberts intended to kill Patch as well as Gardner, due to the *Birreuta* rule.[251] The subjectivist logic of *Washington* (and *Birreuta*) would have precluded two murder convictions where Roberts intended only one, as Roberts had no control over Gardner's reaction to the first stabbing. Double murder liability would thus "discriminate[] between killers, not on the basis of any difference in their own conduct, but solely on the basis of the response by others that the killer's conduct happened to induce."[252]

The *Roberts* court, however, considered the objective harm and danger, as well as the offender's subjective intent. The Court upheld both murder convictions because a reasonable jury could have convicted the defendant for Patch's murder, too, as it was reasonably foreseeable.[253] Without mentioning *Washington* (but citing many of the authorities

250 2 Cal.4th at 294-295.

251 *People v. Birreuta*, 162 Cal.App.3d 454 (1984), *overruled by People v. Bland*, 28 Cal.4th 313 (2002).

252 *People v. Washington*, 62 Cal.2d 777, 781 (1965).

253 *Roberts*, 2 Cal.4th at 321-322. Instructional error compelled reversal of the count.

cited in *People v. Harrison*), *Roberts* restored the *Fowler/Harrison* standard, whereby objective proximate causation (even if indirect) sufficed to support murder liability.[254]

People v. Sanchez[255] rejected *Washington*'s implicit characterization of indirect causation as a lesser basis for liability. A gang shootout killed a bystander, though it was uncertain which gunman fired the fatal shot.[256] *Sanchez* held it did not matter, because "it is proximate causation, not direct or actual causation, which, together with the requisite culpable mens rea (malice), determines defendant's liability for murder."[257] Both shooters could therefore be liable for first degree murder.[258]

The transferred intent case of *People v. Bland*[259] likewise emphasized public safety over subjective culpability. The Court considered the liability of an offender who intended to kill (only) the driver of a car, but unintentionally killed his passenger, too. The Court acknowledged the culpability reasoning of *Birreuta*: "There is some force to *Birreuta*'s argument that a person who intends to kill two persons and does so is more culpable than a person who only intends to kill one but kills two."[260] But *Bland* declined to consider the second death as merely bad luck. "When one intends to kill and does so, the killing is hardly an accident, even if the specific victim or victims are unintended."[261] In short, whereas "forum of conscience" reasoning would distinguish the two offenders, *Bland* emphasized that either's conduct was sufficiently culpable to justify full liability, which would better protect the public.[262]

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254 Subsequent Courts of Appeal followed *Roberts* in this regard: e.g. *People v. Brady*, 129 Cal.App.4th 1314, 1324 (2005); *People v. Schmies*, 44 Cal.App.4th 38, 47-48 (1996); *People v. Gardner*, 37 Cal.App.4th 481-483 (1995).

255 *People v. Sanchez*, 26 Cal.4th 834 (2001).

256 *Id*. at 838.

257 *Id*. at 845.

258 *Id*. at 854.

259 28 Cal.4th 313 (2002).

260 *Id*. at 322.

261 *Id*. at 322-323.

262 The Supreme Court has recognized that committing violent acts near bystanders enhances danger — and culpability.

> [A] person who engages in an urban gun battle is more *culpable* than one who fires a weapon at an isolated individual. The risk of injury to bystand-

Bland further analogized transferred intent law to the felony-murder rule. Both imposed murder liability[263] for additional, unintended victims, but could not support attempted murder liability.[264] (Some states reasonably consider murder to be one of the felonies that can generate felony-murder liability.)[265] The newly expanded purpose of the felony-murder rule supported the *Bland* conclusion. The extreme punishment generated by the felony-murder rule can deter not only unintentional killings during a felony, but also the (intended) felony itself. Likewise, imputing malice (and premeditation) from the intent to kill another victim can deter not only the unintentional killings of bystanders, but also the intentional killing itself.[266]

(c) Special Means and Special Circumstances

Bland, in imposing intentional murder liability for (additional) unintended killings, followed a trend that decreased the significance of the specific intent-to-kill requirement generally. The United States Supreme Court's description in *Tison v. Arizona*[267] of the danger (and depravity) of non-intentional killers provided the policy for loosening the intent requirements for severe punishment. In contrast to the *Carlos* court, the *Tison* court held an intent to kill was not an absolute prerequisite for full liability. Whereas some intentional killings may be justifiable, or mitigated due to provocation, "some non-intentional murderers may be among the most dangerous and inhumane of all."[268] Accordingly, a "reckless indifference to the value of human life may be every bit as shocking to

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> ers clearly is a risk arising from even one firing of the weapon. The more *culpable and dangerous* the behavior, the greater the need exists for effective deterrence. An increased sentence measured by the risk of harm to multiple victims reflects a rational effort to deter such reprehensible behavior.

In re Tameka C., 22 Cal.4th 190, 196 (2000) (italics added).

263 If the intent to kill the intended victim was premeditated, the defendant would be liable for first degree murder as to all victims. *Id*. at 324.

264 *Id*. at 328.

265 *State v. Jones*, 896 P.2d 1077 (Kan. 1995); *Millen v. State*, 988 S.W.2d 164 (Tenn. 1999).

266 Likewise, full liability for harms inflicted while intoxicated can deter both the harms and the predicate intoxication. *Just Say No Excuse*, *supra* note 19, at 509-510.

267 481 U.S. 137 (1987).

268 *Id*. at 157.

the moral sense as an "'intent to kill.'"[269] In several contexts, California courts responded by abandoning strict specific intent requirements.[270]

In 1987, the California Supreme Court disapproved *Carlos*'s requiring proof of a specific intent to kill to support a constitutional death sentence.[271] The Court noted that *Tison* itself had implicitly corrected *Carlos*'s misimpression that the federal Constitution mandated an intent-to-kill requirement.[272] The Court further explained that it was merely returning the law to the 1972 status quo ante.[273]

In 1993, the Court of Appeal dismissed as dicta the former intent-to-injure/kill requirement for lying-in-wait murder, described in the 1959 *Atchley* case.[274] All that was necessary was malice, implied or express.[275] An offender who perceived the natural and probable danger could be convicted of first degree murder.

Finally, this reasoning also led the Court to drop the specific intent-to-kill requirement for voluntary manslaughter. Just as *Tison* had observed that non-intentional (but depraved) killings could be as blameworthy as intentional ones, and just as Penal Code section 188 punished express malice and implied malice equally, the Supreme Court equated an intent-to-kill with such conscious disregard for human life where malice was absent, due to provocation[276] or imperfect self-defense.[277] The Court thus recognized that an objective danger, combined with a culpable disregard for life, warranted no less liability than an intent to kill.[278]

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269 *Id*.

270 These changes counteracted the prohibition against presuming an offender's subjective act from his objective conduct. *Sandstrom v. Montana*, 442 U.S. 510, 522 (1979). The *Sandstrom* rule may well have prompted the loosening of intent requirements, due to the added difficulty in proving them.

271 *People v. Anderson*, 43 Cal.3d 1104, 1138-1139 (1987).

272 *Tison*. 481 U.S. at 154, n.8

273 *Anderson*, 43 Cal.3d at 1145, n.8.

274 *People v. Laws*, 12 Cal.App.4th 786, 794-795 (1993).

275 *Id*. at 794.

276 *People v. Lasko*, 23 Cal.4th 101 (2000).

277 *People v. Blakely*, 23 Cal.4th 82 (2000).

278 See *With Malice Toward All*, *supra* note 8, at 263-268.

(d) Premeditation and Deliberation

California law has also moved away from the increased culpability requirements of *Wolff* and *Anderson*. A 1981 amendment to section 189 formally rejected *Wolff*: "To prove the killing was "deliberate and premeditated," it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act."[279] The Supreme Court also lessened the meaning of *Anderson*, explaining that its guidelines were "descriptive, not normative," and did not warrant any particular weight.[280]

(e) Sentencing

Although the Court did not radically alter the definition of first degree murder, statutory changes substantially expanded first degree murder liability or its equivalent. For example, a 1993 amendment created a new ground for first degree murder liability: drive-by shootings committed with an intent to kill.[281] The extra objective danger of such shootings waived the need to establish the extra subjective culpability of premeditation.

Other statutory changes imposed the *punishment* formerly reserved for first degree (or special circumstance) murder, even though defendants committed less subjectively culpable offenses. Section 190 now authorizes sentences of 25 years to life in prison, or even life imprisonment without parole, where the offender commits second degree murder against a peace officer, even without an intent to kill. Similarly, drive-by shootings committed with an intent to inflict serious injury are punishable by 20 years to life imprisonment.[282] Furthermore, section 273ab now proscribes a sentence equivalent to that for first degree murder where the offender assaults and kills a young child "by means of force that to a reasonable person would be likely to produce great bodily injury." Neither an intent to kill nor conscious disregard for life is necessary for severe punishment when such objectively dangerous conduct results in death.

Probably the most important new statute was section 12022.53, which added 10, 20 or 25 years to life imprisonment, for the use, discharge, or

279 1981 Cal. Stats. ch. 404 § 7.

280 *People v. Perez*, 2 Cal.4th 1117, 1125 (1992).

281 1993 Cal. Stats. ch. 611 § 4.5.

282 Cal. Penal Code, § 190, subd. (d).

infliction of death or serious injury, respectively, with a firearm.[283] The added danger created by firearms produced sentences longer than those available for more culpable mental states. For example, an unpremeditated murder with a firearm is now punishable by a sentence of 40 years to life, far longer than the ordinary sentence for premeditated murder. In fact, a shooting at a vehicle or inhabited dwelling[284] without malice (e.g., with provocation or in imperfect self-defense) could generate a sentence of 27, 29 or 31 years to life imprisonment. No longer is premeditation or even malice necessary for the imposition of a sentence of 25 years to life imprisonment.

In fact, section 12022.53 does not even require the harm of death to justify a sentence greater than that imposed for first degree murder; a serious injury is enough.[285] The *danger* created by firearms compensates for the lesser harm. A similar provision (Penal Code section 12310) enhances punishment when an explosive device inflicts death or serious injury.[286]

The judicial application of Section 12310 perfectly illustrates the restoration of objective factors in determining liability. In 1983, the *Carlos* court invalidated a punishment scheme because some unintentional murderers could be punished more severely than some intentional ones.[287] "If the initiative were construed to impose a penalty of death or life imprisonment without parole for unintended felony murder, *it would punish more severely a defendant who did not intend to kill than one who did*. Such a distinction would create problems under both the Eighth Amendment and the equal protection clause."[288] The offender's intent was the only relevant determinant.

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283 1997 Cal. Stats. ch. 503 § 3.

284 Cal. Penal Code § 246.3.

285 Cal. Penal Code § 12022.53. The sentence of 25 years to life imprisonment combines with the sentence for the predicate violent felony.

286 Cal. Penal Code § 12310. The law prescribes a sentence of life imprisonment without possibility of parole when the offender kills through the willful explosion of a destructive device, and a sentence of life imprisonment with possibility of parole when the explosion results in serious injury or mayhem.

287 *People v. Carlos*, 35 Cal.3d 131, 153 (1983).

288 *Id*. at 151 (italics added).

Only eleven years later, the Court of Appeal justified that very distinction, by reference to the objective dangerousness to the public of the fatal conduct. The defendant in *People v. Thompson*[289] killed a victim by igniting a Molotov cocktail. The defendant, sentenced to life imprisonment without parole, raised the *Carlos* objection: if he had been convicted of murder with express malice, and premeditation, he would have been eligible for parole. The Court of Appeal, however, justified the Legislature's determination that section 12310 was a "more serious crime than premeditated murder," due to its objective dangerousness. "The use of destructive devices . . . which can inflict indiscriminate and multiple deaths, marks defendant as a greater danger to society than a person who premeditates the murder of a single individual."[290] Although the latter was more culpable, the former was more dangerous, and thus warranted greater penalty.

By the last decade of the twentieth century, the criminal law's priority was no longer punishment in accordance with the forum of conscience, but was, once again, protecting the public.

CONCLUSION

The determination of criminal liability is a cultural and political choice. Courts and legislatures must decide, inter alia, on the penal law's goals. Initially, California emphasized the "maintenance of personal security" and constructed its criminal law accordingly. Mitigation was difficult; the law needed to punish objectively harmful or dangerous conduct to protect the public.

A growing acceptance of biological and environmental determinism reduced liability for purportedly less culpable offenders in the twentieth

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289 24 Cal.App.4th 299 (1994).

290 *Id*. at 307. See also *People v. Morse*, 2 Cal.App.4th 620, 646 (1992), which noted the uniquely dangerous characteristics of bombs:

> In the first place, the maker often loses control over the time of its detonation . . . . In the second place, it may wreak enormous havoc on persons and property. In the third place, its victims are often unintended sufferers. And finally, considering its vast destructive potentialities, it is susceptible of fairly easy concealment.

century. Increased mitigation may have reflected greater fairness toward offenders, but increased the danger to everyone else. Less tangibly but no less significantly, a reduced conception of personal responsibility eroded the premises underlying citizenship and self-government.[291]

California, like other states, has revived the "social conscience" perspective in recent decades. Although the Supreme Court has retained some limits on the felony-murder rule,[292] the state has restored former constructions of doctrines that produce a more objective evaluation of liability. One may dispute the moral fairness of this trend, but not its contribution to the goal of a safer society. ✯

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291 See Mitchell Keiter, *From* Apprendi *to* Blakely *to* Cunningham*: Popular Sovereignty Enters the Courtroom*, 34 West. St. U. L. Rev. 111, 138-140 (2007). See also C.S. Lewis, *The Humanitarian Theory of Punishment*, 6 Res Judicatae 224, 228 (1953):

> To be 'cured' against one's will and cured of states which we may not regard as disease is to be put on a level with those who have not yet reached the age of reason or those who never will; to be classed with infants, imbeciles, and domestic animals. But to be punished, however severely, because we have deserved it, because we 'ought to have known better', is to be treated as a human person made in God's image.

292 *People v. Chun*, 45 Cal.4th 1172, 1200-1201 (2009); *People v. Washington*, 62 Cal.2d 777 (1965).