CALIFORNIA'S IMPLAUSIBLE CRIME OF ASSAULT

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I. INTRODUCTION: *PEOPLE V. WILLIAMS*

Williams and King were competing for the affections of King's former wife. King drove to his former wife's home to persuade her to accompany him and his two sons on an outing. When King knocked on the door, Williams opened it and told King to stay away from his former wife.

> [Williams] then walked to his own truck and removed a shotgun, which he loaded with two 12 gauge shotgun rounds. [Williams] walked back toward the house and fired, in his words, a "warning shot" directly into the rear passenger side wheel well of King's truck. [Williams] testified that, at the time he fired the shot, King's truck was parked between him and King, and that he saw King crouched approximately a foot and a

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> half away from the rear fender well of the truck. [Williams] further testified that he never saw King's sons before he fired and only noticed them afterwards standing on a curb outside the immediate vicinity of King's truck. King, however, testified that both of his sons were getting into the truck when [Williams] fired.
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> Although [Williams] did not hit King or King's sons, he did hit the rear tire of King's truck. The shotgun pellets also left marks on the truck's rear wheel well, its undercarriage, and its gas tank.[1]

Williams was charged with one count of shooting at an occupied motor vehicle and three counts of assault with a firearm, one count each for King and his two sons.[2] The trial judge instructed the jury that the crime of assault requires proof of the following elements:

> 1. A person willfully and unlawfully committed an act that by its nature would probably and directly result in the application of physical force on another person; and 2. At the time the act was committed, such person had the present ability to apply physical force to the person of another.[3]

The jury convicted Williams of assaulting King with a firearm, but deadlocked on the remaining counts.[4] Williams appealed on the ground that the instruction failed to correctly define the mental state of assault. The Court of Appeal agreed and reversed his conviction, holding that the instruction was erroneous because it described the mental state as negligence instead of requiring the jury to find that at the time Williams fired the shotgun either his goal was to apply physical force or he was substantially certain that firing the gun could result in applying physical force.[5]

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[1] People v. Williams, 26 Cal. 4th 779, 782–83, 29 P.3d 197, 199, 111 Cal. Rptr. 2d 114, 116–17 (2001).

[2] *Id.* at 783, 29 P.3d at 199, 111 Cal. Rptr. 2d at 117.

[3] *Id.*

[4] *Id.* California law also punishes a "person who, except in self-defense, in the presence of any other person, draws or exhibits any firearm, whether loaded or unloaded, in a rude, angry, or threatening manner, or who in any manner, unlawfully uses a firearm in any fight or quarrel." Cal. Penal Code § 417(a)(2) (Deering 2008 & Supp. 2013). If the firearm is not capable of being concealed, the offense is a misdemeanor punishable in the county jail for not less than three months. *Id.* § 417(a)(2)(B). Williams used a shotgun.

[5] *Williams*, 29 Cal. 4th at 783–84, 29 P.3d at 200, 111 Cal. Rptr. 2d at 117.

The California Supreme Court granted review to clarify the mental state of assault. It reinstated Williams' conviction.

Attempt is an "inchoate" offense in that it seeks to punish harms that have not and may not materialize.[6] A person who shoots at the victim with the goal of killing her cannot be prosecuted for murder if he misses her because no homicide has taken place. But by taking concrete steps that evince his desire to take human life, that person has demonstrated his dangerousness. The fact that he missed is but a fortuity that is immaterial to his dangerousness. Society is still justified in punishing his attempt to kill as a crime, for the need to stop, deter, and reform such a person is just as great as when he succeeds in achieving his goal.[7] Society, moreover, should not have to wait until he succeeds in his criminal enterprise before noticing him.[8]

Attempt is also a relatively modern crime. Its conception did not crystallize in England and the United States until the early 1800s.[9] Its crystallization, however, occurred before California became a state in 1850. Attempt's most modern formulation has been available since 1962, when the American Law Institute promulgated the Model Penal Code.[10]

Attempt is a crime of purpose. As Perkins and Boyce explain, "A criminal attempt is a step towards a criminal offense with specific intent to commit that particular crime."[11] The crime, according to LaFave, consists of "(1) an intent to do an act or bring about a certain consequence that in law would amount to a crime; and (2) an act in furtherance of that intent."[12] Like most crimes, attempt is composed of an actus reus (the conduct undertaken to attain the goal) and a mens rea (the desire to attain that goal). As the definition of attempt formulated in Model Penal Code Section 5.01 emphasizes, the mens rea is the purpose to attain a criminal goal:

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6 *See* Model Penal Code § 5.01 (Official Draft 1962).

7 *See* Wayne R. LaFave, Criminal Law § 11.3 (West 5th ed. 2010).

8 An ancillary goal of the crime of attempt is that affords law enforcement an opportunity to take preventive action before the defendant achieves his goal. *See id.* § 11.2(b).

9 *See id.* § 11.2.

10 *See* 2 Am. Law Inst., Model Penal Code and Commentaries: Part I (1985) (providing the text of and commentaries the Model Penal Code, sections 3.01–5.07, as enacted in 1962).

11 Rollin M. Perkins & Ronald N. Boyce, Criminal Law 611 (3d ed. 1982).

12 *See* LaFave, *supra* note 7, § 11.2(b).

> (1) Definition of Attempt. A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for the commission of the crime, he:
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> (a) *purposely* engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be; or
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> (b) when causing a particular result is an element of the crime, does or omits to do anything with the *purpose* of causing or with the belief that it will cause such result without further conduct on his part; or
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> (c) *purposely* does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.[13]

An assault is the common law name for an attempt to inflict a battery.[14] But contrary to established criminal law doctrine, in *Williams* the Court defined assault as a negligence offense. It defined the mental state as follows:

> [A] defendant guilty of assault must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct. He may not be convicted based on facts he did not know but should have known. He, however, need not be subjectively aware of the risk that a battery might occur.
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> . . . [W]e hold that assault does not require a specific intent to cause injury or subjective awareness of the risk that an injury might occur. Rather, assault only requires an intentional act and actual

[13] Model Penal Code § 5.01(1) (Official Draft 1962) (emphasis added).

[14] *See In re* James M., 9 Cal. 3d 517, 521, 510 P.2d 33, 35, 108 Cal. Rptr. 89, 91 (1973) (noting that "at common law an assault was defined as an attempted battery"); *see also* Perkins & Boyce, *supra* note 11, at 159 (noting that in the early law, assault "was an attempt to commit a battery"); 1 Am. Law Inst., Model Penal Code and Commentaries: Part II § 211.1, at 176 (1980) ("Originally, common-law assault was simply an attempt to commit a battery.").

> knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another.[15]

Although the Court did clarify the mental state of assault, its specification of negligence as the mental state is at odds with established criminal law doctrine. To the extent that the Court's definition departs from the mental state that, as a statutory matter, should accompany the actus reus of an assault, the Court risks undermining the Legislature's goal in enacting the crime of assault and other attempted batteries. That goal is to single out for punishment only those whose purpose is to inflict some kind of criminal battery.

An examination of how the Court arrived at its definition of the mental state of assault discloses why the Court got it wrong. In defining assault as a crime of negligence, the Court undertook a three-step analysis:

(1) The Court first reviewed three key decisions in which the Court had attempted to define the mental state of assault.

(2) Having concluded that the two later decisions might not have "fully" described the mental state, the Court then examined the legislative history of section 240 to determine the Legislature's intent in enacting the section.

(3) Finally, the Court cited both legislative action and inaction as evidence that the Legislature had implicitly approved the Court's earlier definition of the mental state of assault. The legislative action consisted of the enactment of section 21a in 1986 and of an amendment to section 22(b) in 1981. The inaction consisted of the Legislature's failure to overturn the Court's earlier construction of the mental state of section 240 and to replace the mental state of assault in section 240 with that of section 21a.

Each of these steps will be examined. In addition, this article describes how the California Legislature can overturn *Williams* if the Court continues to decline to do so. The article also explores how the Court's construction of section 240 creates unanticipated conflicts with California's second degree felony murder doctrine. But before examining the Court's holding in *Williams,* it is important to understand California's approach to criminalizing

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[15] People v. Williams, 26 Cal. 4th 779, 788–90, 29 P.3d 197, 203–04, 111 Cal. Rptr. 2d 114, 122–23 (2001).

the crimes of assaults, batteries, and attempts to commit a crime other than a battery. Had the Court understood this framework, it might have avoided some of the errors that led it to the mistaken conclusion that assault is a crime of negligence.

II. CALIFORNIA'S STATUTORY FRAMEWORK

A state can punish attempts and batteries in one of two ways. The more efficient is for the state to enact (1) statutes defining the batteries it wishes to punish and (2) a separate statute defining an attempt and criminalizing an attempt to commit those batteries. This is the approach taken by the Model Penal Code[16] and those states that have used the Code as the model for their penal codes.

A less efficient way is for the state to enact two sets of statutes. One set would define a battery and then provide different punishments for different kinds of batteries. A second set of statutes would define an assault and then provide different punishments for different kinds of assaults.

California follows the latter model. For example, Penal Code section 242 defines a battery as "any willful and unlawful use of force or violence upon the person of another."[17] Section 243(a) punishes the commission of a battery by a fine or by imprisonment in a county jail not exceeding six months, or by both a fine and imprisonment.[18] Other sections impose a greater punishment for aggravated batteries. For example, section 243(c)(2) raises the punishment to include the option of felony incarceration for up to three years if the battery is committed against a peace officer in the performance of his or her duties.[19] Under this formulation, the actus reus of a battery is provided by section 242 which defines the actus reus as the "use of force or violence upon the person of another."[20] The mens rea is also supplied by section 242

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16 *See* Model Penal Code § 5.01(1)–(2). The MPC approach also embraces an attempt to commit other crimes, not just batteries. *See id.* Because of grading considerations, however, the MPC includes a separate section defining various assaults and batteries. *See* Model Penal Code § 211.1.

17 Cal. Penal Code § 242 (Deering 2008).

18 *See id.* § 243(a) (Deering 2008 & Supp. 2013).

19 *Id.* §§ 243(c)(2), 1170(h).

20 *Id.* § 242 (Deering 2008).

which defines it as the "willful and unlawful" use of that force.[21] If the state charges the defendant with committing an aggravated battery under section 243, it must prove an additional actus reus element — that the victim was a peace officer who was performing his or her duties.

If the perpetrator does not succeed in inflicting the battery on a peace officer, he can be prosecuted for attempting to commit the aggravated battery if his conduct qualifies as an attempt under section 240. Section 240 defines the mens rea and actus reus of a simple assault as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another."[22] Section 241 punishes the commission of a simple assault with a fine or by imprisonment in a county jail not exceeding six months, or by both a fine and imprisonment.[23] Section 241.4 raises the punishment to include the option of felony incarceration for up to three years if the assault is committed against a peace officer who was performing his or her duties.[24]

Under section 240, the mens rea of a simple assault is the "attempt" to inflict a "violent injury."[25] The actus reus consists of the conduct the perpetrator undertakes to inflict the violent injury. Determining whether the defendant's conduct satisfies the actus reus of an assault has been the subject of many appellate court opinions that have statutes similar to California's. Merely thinking about inflicting a battery or some other crime does not constitute an attempt. The law wisely requires that to be guilty of attempting to commit a crime, the perpetrator must manifest his firm intention to do so through concrete action. In an attempt prosecution, the concrete action takes the form of evidence of the steps he takes in pursuit of his goal. In California, a person is not guilty of an attempt to commit a crime, including a battery, unless the steps he takes toward the commission of the crime go beyond merely preparing to commit the crime.[26] Under section 240, this requirement takes the form of the "present ability" language. A defendant is

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[21] *Id.* The term "unlawful" adds little, if anything, to the mental state. Most likely it was used to distinguish criminal batteries from batteries allowed in the exercise of self-defense. Those batteries are lawful.

[22] *Id.* § 240.

[23] *Id.* § 241 (Deering 2008 & Supp. 2013).

[24] *Id.* §§ 241.4, 1170(h).

[25] *Id.* § 240 (Deering 2008).

[26] *See, e.g.*, People v. Kipp, 18 Cal. 4th 349, 376, 956 P.2d 1169, 1186, 75 Cal. Rptr. 2d 716, 733 (1998) ("The act must go beyond mere preparation, and it must show that the

not guilty of an attempt to commit a violent injury unless the steps he takes toward inflicting that injury include a present ability to inflict the injury.[27] If the state charges the defendant with the aggravated assault under section 241.4, the state would have to prove an additional actus reus element — that the intended victim was a peace officer performing his or her duties.

In addition to punishing attempts to commit various batteries through its assault statutes, California also punishes an attempt to commit other crimes. When the Legislature enacted section 240 in 1872, it also enacted section 664.[28] This section punishes "[e]very person who attempts to commit any crime."[29] Although the terms "any crime" would embrace the various batteries in the Penal Code, California courts apply section 664 only to an attempt to commit a crime other than a battery. Under section 240, an assault and its aggravated derivatives require proof that the defendant had "a present ability" to inflict the battery contemplated by section 240 and, in the case of aggravated assaults, the batteries contemplated by the statutes defining those assaults. Section 664 does not contain the present ability requirement. This additional element in the actus reus of an assault accounts for why only section 240 may be used to punish an attempt to commit a battery. As *In re James M.* explains:

> Section 6 of the Penal Code declares that "No act or omission . . . is criminal or punishable, except as prescribed or authorized by this Code" or by other statutes or ordinances. Since its first session, our Legislature has defined criminal assault as an attempt to commit a battery by one *having present ability* to do so and no offense known as attempt to assault was recognized in California at the time that statutory definition of assault was adopted. Under the doctrine of manifested legislative intent, an omission from a penal provision evinces a legislative purpose not to punish the omitted act. Hence, there is a clear manifestation of legislative intent under this doctrine for an attempt to commit a battery without present ability to go unpunished.

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perpetrator is putting his or her plan into action, but the act need not be the last proximate or ultimate step toward commission of the substantive crime.").

[27] *See* Cal. Penal Code § 240.

[28] *See id.* § 664 (Deering 2008 & Supp. 2013).

[29] *Id.*

> It is also an established rule of statutory construction that particular provisions will prevail over general provisions. Therefore, the legislative intent not to punish batteries attempted without present ability prevails over the general criminal attempt provisions of section 664. It follows that to judicially find a crime in California in an attempt to commit a battery where the actor lacks the present ability to consummate the battery would be to invade the province of the Legislature by redefining the elements of the underlying crime.[30]

To understand more fully California's approach to punishing assaults and batteries, an additional statutory aspect needs to be considered. Like section 241.4, many other aggravated assaults also leave the definition of the mens rea and actus reus of an assault to section 240. These aggravated assaults include assaults with specific means, such as machine guns,[31] as well as assaults against specific victims, such as firefighters.[32] This is why in *Williams* the Court looked to section 240 to determine the mental state of an assault with a firearm.[33] This is also why the Court's construction of section 240 as a crime of negligence converted into crimes of negligence all criminal assaults specified merely as an "assault" with some kind of an instrumentality (e.g., a deadly weapon) or upon some category of victim (e.g., a peace officer) and leaving the definition of the mens rea and actus reus of the assault to section 240.

III. CONFUSING APPLES AND ORANGES: *PEOPLE V. HOOD*

In reaching the conclusion that assault under section 240 is a crime of negligence, the Court first reviewed three prior decisions — *People v. Hood*,[34] *People v. Rocha*,[35] and *People v. Colantuono*[36] — in which the Court had

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30 *In re* James M., 9 Cal. 3d 517, 522, 510 P.2d 33, 35–36, 108 Cal. Rptr. 89, 91–92 (1973) (footnote omitted) (citations omitted) (emphasis in original).

31 Cal. Penal Code § 245(d)(3).

32 *Id.* § 245(c).

33 *See* People v. Williams, 26 Cal. 4th 779, 784, 29 P.3d 197, 200, 111 Cal. Rptr. 2d 114, 118 (2001).

34 1 Cal. 3d 444, 462 P.2d 370, 82 Cal. Rptr. 618 (1969).

35 3 Cal. 3d 893, 479 P.2d 372, 92 Cal. Rptr. 172 (1971).

36 7 Cal. 4th 206, 865 P.2d 704, 26 Cal. Rptr. 2d 908 (1994).

attempted to define the mental state of an assault. The Court committed its first error by considering *People v. Hood*,[37] California's seminal case on the use of intoxication to disprove the mental state of the crime charged.

At the time the Court decided *Hood* in 1969, the Penal Code had two provisions on the admissibility of intoxication to disprove the mental state of a crime. The first sentence of section 22, as enacted in the 1872 Penal Code, provided that "[n]o act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition."[38] Obviously, the purpose of this provision was to prevent defendants from offering evidence of their intoxication to disprove the mental state of the crime charged. Although the Legislature was free to make this policy choice,[39] the next sentence of section 22 provided that "whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act."[40] Read together, the two provisions would appear to prevent a defendant from offering evidence of his voluntary intoxication unless the evidence helps disprove the mental state of the offense charged.

Concerned that this relevance-based approach would undermine the general prohibition on the use of intoxication by allowing its use in all offenses requiring a mens rea higher than negligence, the Court sought to place limitations on the use of intoxication to disprove the mental state of the crime charged.[41] The Court achieved this goal by construing the second sentence of section 22 as permitting the use of intoxication only when offered to disprove the mental state of "specific intent" offenses.[42] The Court

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[37] 1 Cal. 3d 444, 462 P.2d 370, 82 Cal. Rptr. 618 (1969).

[38] Cal. Penal Code § 22 (1872) (current version at Cal. Penal Code § 29.4 (Deering Supp. 2013)).

[39] *See* Montana v. Egelhoff, 518 U.S. 37, 56 (1996) (holding that substantive due process does not prohibit a state from barring the use of intoxication to disprove the mens rea of the offense charged).

[40] Cal. Penal Code § 22 (1872).

[41] *Hood*, 1 Cal. 3d at 455–56, 462 P.2d at 377, 82 Cal. Rptr. at 625.

[42] *Id.* at 457–58, 462 P.2d at 378–79, 82 Cal. Rptr. at 626–27. The Court said that allowing the use of intoxication would have undermined the rule barring the use of intoxication in all but strict liability offenses. *Id.* at 456, 462 P.2d at 377, 82 Cal. Rptr.

acknowledged that the distinction between "specific" and "general" intent offenses had evolved as a judicial response to the problem of the intoxicated offender.[43] In adopting the distinction as the proper way to construe section 22, the Court conceded that specific and general intent were terms "notoriously" difficult to define and that commentators had urged their abandonment.[44] Nonetheless, the Court accepted the formulation as follows:

> When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent. There is no real difference, however, only a linguistic one, between an intent to do an act already performed and an intent to do that same act in the future.[45]

Although this aspect of *Hood* is the one most often cited by the California appellate courts, the Court did not intend the definitions to be controlling in all cases. Sound criminal law policy as interpreted by the courts, not just parsing of statutes, should also be taken into account. Convincing proof of a second approach were the crimes before the Court. The defendant had been convicted of assault with a deadly weapon as well as assault with the intent to commit murder.[46] Both charges stemmed from evidence that the defendant, after drinking for several hours,[47] had wounded a police officer who was attempting to arrest him.[48] The Court reversed his conviction for assault with a deadly weapon because the trial judge incorrectly refused to instruct the jury on the lesser included offense of simple assault.[49] The Court

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at 625. However, when a defendant is charged with a crime of negligence, the fact that he was voluntarily intoxicated is irrelevant if he offers his intoxication to disprove his negligence.

43 *Hood*, 1 Cal. 3d at 455, 462 P.2d at 377, 82 Cal. Rptr. at 625.

44 *Id.* at 456, 462 P.2d at 377, 82 Cal. Rptr. at 625.

45 *Id.* at 456–57, 462 P.2d at 378, 82 Cal. Rptr. at 626.

46 *Id.* at 447, 462 P.2d at 370, 82 Cal. Rptr. at 618.

47 *Id.*

48 *Id.* at 448, 462 P.2d at 371, 682 Cal. Rptr. at 619.

49 *Id.* at 450–51, 462 P.2d at 373, 682 Cal. Rptr. at 621.

reversed his conviction for assault with the intent to commit murder because the judge gave conflicting instructions on whether the defendant could offer his intoxication to disprove the mental state of this offense.[50] The Court held that the defendant was entitled to offer evidence of his intoxication to disprove the mental state of this assault.[51] To guide the trial Court on retrial on the question whether the defendant could offer his intoxication on the other assault, the Court considered whether assault with a deadly weapon was a specific or general intent crime. The Court declined to define it as a specific intent offense, observing that it would be unsound criminal law policy to allow intoxication to disprove the mental state of this offense as well as of other lesser assaults:

> Alcohol apparently has less effect on the ability to engage in simple goal-directed behavior, although it may impair the efficiency of that behavior. In other words, a drunk man is capable of forming an intent to do something simple, such as strike another, unless he is so drunk that he has reached the stage of unconsciousness. What he is not as capable as a sober man of doing is exercising judgment about the social consequences of his acts or controlling his impulses toward antisocial acts. He is more likely to act rashly and impulsively and to be susceptible to passion and anger. It would therefore be anomalous to allow evidence of intoxication to relieve a man of responsibility for the crimes of assault with a deadly weapon or simple assault, which are so frequently committed in just such a manner.[52]

One may or may not agree with the Court's assessment that allowing intoxication to disprove the mental state of assault with a deadly weapon or other lesser assaults would be unsound criminal law policy. The point, though, is that if as a matter of parsing, assault with the intent to commit murder is a specific intent offense, so too are assault with a deadly weapon and even simple assault. Assault is the common law name for an unsuccessful attempt to inflict a battery. Accordingly, a simple assault is an unsuccessful attempt to inflict a battery. An assault with a deadly weapon is an

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50 *Id.* at 451–52, 462 P.2d at 373–74, 682 Cal. Rptr. at 621–22.

51 *Id.*

52 *Id.* at 458, 462 P.2d at 379, 82 Cal. Rptr. at 627.

unsuccessful attempt to inflict a battery with a deadly weapon. An assault with intent to commit murder is an unsuccessful attempt to inflict a fatal battery. All three are different forms of an attempt, and share a common mental state — the desire to inflict some kind of battery.

That all three offenses have this commonality is central to understanding why the *Williams* Court erred in citing *Hood*. *Hood* adopted the specific–general intent classification in an effort to put restraints on the use of intoxication when offered to disprove the mental states of offenses higher than those predicated on negligence. *Hood* did not employ the classification to determine the mental state of the offense charged. That determination depends on the language defining the mental state of the offense. *Hood* simply calls for deploying the dichotomy when determining whether the defendant should be permitted to offer his voluntary intoxication to disprove the mental state of the offense. Accordingly, whether a crime qualifies as a specific or general intent offense under *Hood*'s parsing or policy prongs is immaterial in determining how a judge should instruct a jury on the mental elements of the offense charged.

This aspect becomes clearer when we recall that Williams never offered evidence of intoxication. Therefore, *Hood* did not apply. His complaint was that a proper construction of the provision defining assault with a firearm under Penal Code section 245(a)(2) required the judge to instruct the jurors that to convict they had to find that when he fired the shotgun his purpose was to inflict a battery upon the victim. Assuming Williams had been drinking, he still could have raised the same complaint even if *Hood* barred him from offering intoxication evidence to disprove the mental state of assault with a firearm. In *Williams*, the Court erred by opening its discussion with a case — *Hood* — that had no bearing on the question of the mental state of assault under section 240.

IV. BEWARE OF DICTUM: *PEOPLE V. ROCHA*

Following its discussion of *Hood*, the *Williams* Court next focused on *People v. Rocha*.[53] The Court began its discussion by noting that "[a]pproximately one year [after *Hood*], we confronted the issue of the mental state

[53] 3 Cal. 3d 893, 479 P.2d 372, 92 Cal. Rptr. 172 (1971).

for assault head-on [in *Rocha*]."[54] In the next two sentences, the Court concluded the discussion by quoting from *Rocha*:

> In *Rocha*, we held that assault does not require the specific "intent to cause any particular injury [citation], to severely injure another, or to injure in the sense of inflicting bodily harm . . . . [Fns. omitted.]" Rather, assault required "the general intent to willfully commit an act the direct, natural and probable consequences of which if successfully completed would be the injury to another." (*Ibid.*)[55]

The Court, however, overlooked other language in *Rocha* that makes clear that the mental state of section 240 is the intent to inflict an injury on another. Rocha appealed his conviction of assault with a deadly weapon on two grounds that required the Court to consider the mental state of an assault with a deadly weapon. One was the judge's refusal to instruct the jurors that they could consider his intoxication in determining whether he was guilty of the offense.[56] The Court found no error;[57] it refused to reconsider its position in *Hood* that the crime of assault with a deadly weapon was a general intent offense.[58]

Rocha also claimed that the trial judge had erred in failing to instruct the jurors that to convict him of assault with a deadly weapon they had to find that he had "the specific intent to injure."[59] The judge instructed the jurors that:

> An assault with a deadly weapon is an unlawful attempt, coupled with a present ability, to commit a violent injury upon the person of another with a deadly weapon. Any object, instrument or weapon, when used in a manner capable of producing and likely to produce death or great bodily injury, is then a deadly weapon.
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> To constitute an assault with a deadly weapon, actual injury need not be caused. The characteristic and necessary elements of the offense are the unlawful attempt, with criminal intent, to

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54 People v. Williams, 26 Cal. 4th 779, 784, 29 P.3d 197, 200, 111 Cal. Rptr. 2d 114, 118 (2001).

55 *Id.* (alterations in original) (citations omitted).

56 *Rocha*, 3 Cal. 3d at 896, 479 P.2d at 374, 92 Cal. Rptr. at 174.

57 *Id.* at 896–97, 479 P.2d at 374–75, 92 Cal. Rptr. at 174–75.

58 *Id.* at 898–99, 479 P.2d at 376–77, 92 Cal. Rptr. at 176–77.

59 *Id.* at 896, 479 P.2d at 374, 192 Cal. Rptr. at 174.

> commit a violent injury upon the person of another, the use of a deadly weapon in that attempt, and the then present ability to accomplish the injury. If an injury is inflicted, that fact may be considered by the jury, in connection with all the evidence, in determining the means used, manner in which the injury was inflicted, and the type of offense committed.[60]

In assessing the legal adequacy of the judge's charge, the Court first determined the mental state of the offense. It held that:

> An assault is an unlawful attempt, coupled with the present ability, to commit a violent injury on the person of another, or in other words, it is an attempt to commit a battery. (1 Witkin, Cal. Crimes (1969) § 255, p. 241; *People v. McCaffrey*, 118 Cal. App. 2d 611, 258 P.2d 557.) Accordingly the intent for an assault with a deadly weapon is the intent to attempt to commit a battery, a battery being "any willful and unlawful use of force or violence upon the person of another." (Pen. Code, § 242)[61]

In light of this definition, the Court approved the instruction the judge had given to the jury, noting that in "the case at bench there was ample evidence from which the jury could infer that the defendant had the intent to commit a battery upon the victim, Piceno, and the instructions given clearly informed the jury of the elements of assault with a deadly weapon."[62]

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[60] *Id*. at 900 n.13, 479 P.2d at 377 n.13, 92 Cal. Rptr. at 177 n.13 (citation omitted).

[61] *Id*. at 899, 479 P.2d at 376, 92 Cal. Rptr. at 176. Such a construction of § 245 was consistent with § 245 as originally enacted in 1872. It punished "[e]very person who, with intent to do bodily harm . . . commits an assault upon the person of another with a deadly weapon." *See* Cal. Penal Code § 245 (1872).

[62] *Rocha*, 3 Cal. 3d at 900, 427 P.2d at 377, 92 Cal. Rptr. at 177. In charging the jury, the judge used CALJIC No. 605, which had been in effect since 1958. *See* CALJIC No. 605 (West rev. ed. 1958). Interestingly, at the time the Court decided *Rocha* in 1971, CALJIC 9.03 instructed the jurors that "[a]n assault is an unlawful attempt, coupled with a present ability *and with the specific intent*, to commit a violent injury upon the person of another with a deadly weapon." *See* CALJIC No. 9.03 (West 3d ed. 1970) (emphasis added). The crime in *Rocha* occurred in 1968, and the case may have been tried before the 1970 version of CALJIC No. 9.03 went into effect. The italicized language was no longer included in the fourth edition which was published in 1979. *See* CALJIC Nos. 9.00, 9.03 (West 4th rev. ed. 1979).

However, in holding that assault with a deadly weapon requires proof that the defendant attempted to inflict a battery, the Court made a crucial error when, by way of summary, it added the following sentence:

> We conclude that the criminal intent which is required for assault with a deadly weapon and set forth in the instructions in the case at bench, is the general intent to willfully commit an act the direct, natural and probable consequences of which if successfully completed would be the injury to another.[63]

This language was unnecessary and has been described by Justice Mosk as "dictum."[64] Its inclusion has proven to be most unfortunate, since it is precisely the language which the *Williams* Court chose to quote as *Rocha*'s holding. Although the explicit reference to the jury instructions makes clear that assault with a deadly weapon requires proof that the defendant intended to inflict a battery, divorced both from the jury instructions and the Court's preceding sentence, the language lends itself to a totally contradictory interpretation. It can be construed as requiring the prosecution to prove merely that the defendant volitionally performed an "act" that, if completed successfully, would likely result in injury to another. The actus reus would be performing an act that, if completed successfully, would likely result in injury to another. The mens rea would be limited to proving that the defendant volitionally performed the act (such as firing a weapon) and that he was aware that he was performing that act (firing the weapon). But the prosecution would not have to prove that the defendant committed the act (firing the weapon) for the purpose of inflicting a battery. Such a construction, of course, would be inconsistent with *Rocha*'s preceding sentence in which the Court explicitly held that "the intent for an assault with a deadly weapon is the intent to attempt to commit a battery, a battery being 'any willful and unlawful use of force or violence upon the person of another.' "[65]

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63 *Id*. at 899, 479 P.2d at 376–77, 92 Cal. Rptr. at 176–77 (footnote omitted).

64 People v. Colantuono, 7 Cal. 4th 206, 224, 865 P.2d 704, 716, 26 Cal. Rptr. 2d 908, 920 (1994) (Mosk, J., concurring) ("*Rocha* was by and large soundly decided, and the dictum quoted above constituted a minor flaw. But so is a pinhole in a dike, and alas, the dictum gave rise to mischief.").

65 *Rocha*, 3 Cal. 3d at 899, 479 P.2d at 376, 92 Cal. Rptr. at 176.

The *Rocha* Court erred by including the last, unnecessary sentence. The *Williams* Court compounded the error by singling out this sentence as the one defining the mental state of an assault.

V. THE MYSTERY OF THE MISSING INSTRUCTIONS

The last of the three cases the *Williams* Court chose to review was *People v. Colantuono*.[66] The Court opened its discussion of *Colantuono* by noting that twenty-three years after *Rocha* it "once again attempted to decipher 'the requisite intent for assault and assault with a deadly weapon,' " because of concerns that *Rocha* might "have left a 'measure of understandable analytical uncertainty.' "[67] In fact, in *Colantuono* the Court expressly said that it agreed to review the defendant's claims in order to "eliminate the confusion . . . which [had] developed throughout the courts of this state" on the elements of assault.[68] As will be explained, however, the *Colantuono* Court fell short of its goal and, worse, added one more layer to the uncertainty.

Colantuono was convicted of assault with a deadly weapon.[69] He appealed on the ground that the trial judge had failed to properly instruct the jury on the mens rea of assault and compounded this error by inviting the jury to presume the existence of the mens rea of assault with a deadly weapon.[70]

The evidence offered in *Colantuono*, while conflicting, was not complicated. The victim and his friends testified that the accused aimed and

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66 7 Cal. 4th 206, 865 P.2d 704, 26 Cal. Rptr. 2d 908 (1994).

67 People v. Williams, 26 Cal. 4th 779, 784–85, 29 P.3d 197, 200, 111 Cal. Rptr. 2d 114, 118 (2001) (quoting *Colantuono*, 7 Cal. 4th at 213, 215, 865 P.2d at 708–09, 26 Cal. Rptr. 2d at 911, 913).

68 *Colantuono*, 7 Cal. 4th at 210, 865 P.2d at 706, 26 Cal. Rptr. 2d at 910 (citation omitted).

69 *Id.* at 212, 865 P.2d at 707, 26 Cal. Rptr. 2d at 911. Although the Court refers to the conviction of the aggravated assault as one for assault with a deadly weapon, the Court cites Penal Code § 245(a)(2), which punishes an assault with a firearm. *Compare* Cal. Penal Code § 245(a)(1) (Deering 2008 & Supp. 2013) (assault with a deadly weapon other than a firearm), *with id.* § 245(a)(2) (assault with a firearm). The evidence at the trial showed that Colantuono used a firearm. *See Colantuono*, 7 Cal. 4th at 211, 865 P.2d at 706, 26 Cal. Rptr. 2d at 910.

70 *Colantuono*, 7 Cal. 4th at 212, 865 P.2d at 707, 26 Cal. Rptr. 2d at 911.

shot the victim with a revolver when the victim attempted to engage the accused in a "play fight."[71] The accused conceded that he aimed the gun at the victim but claimed that he did not intend to shoot him. He thought that the gun was unloaded and testified that it fired when the victim tried to push it away.[72]

With respect to the assault charge, the judge instructed the jurors that to convict the accused they would have to find that:

> The person making the attempt had a general criminal intent, which, in this case, means that such person intended to commit an act, the direct[,] natural and probable consequences of which if successfully completed would be the application of physical force upon the person of another.[73]

On the charge of assaulting the victim with a deadly weapon, the judge instructed the jury, "The requisite intent for the commission of an assault with a deadly weapon is the intent to commit a battery. Reckless conduct alone, does not constitute a sufficient basis for assault or for battery even if the assault results in an injury to another."[74] Though this language makes clear that to be guilty of an assault with a deadly weapon Colantuono had to have the intent to commit a battery, the Court then added the following language: "However, when an act inherently dangerous to others is committed with a conscious disregard of human life and safety, the act transcends recklessness, and the intent to commit a battery is presumed."[75]

Colantuono objected to these instructions on the ground that they unconstitutionally relieved the prosecution from having to prove that at the time he fired the gun it was his purpose to commit the battery contemplated in the assault statute.[76]

In evaluating Colantuono's claims the Court began by quoting that part of *Rocha* in which the Court held that the mental state of assault must

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[71] *Id.* at 211, 865 P.2d at 706, 26 Cal. Rptr. 2d at 910.

[72] *Id.* at 211, 865 P.2d at 707, 26 Cal. Rptr. 2d at 910.

[73] *Id.* at 211–12 n.1, 865 P.2d at 707 n.1, 26 Cal. Rptr. 2d at 911 n.1. The judge's instruction was based on CALJIC No. 9.00 (5th ed. 1988).

[74] *Colantuono*, 7 Cal. 4th at 211–12, 865 P.2d at 707, 26 Cal. Rptr. 2d at 911.

[75] *Id.*

[76] Due process requires the prosecution to prove every fact essential to conviction beyond a reasonable doubt. *In re* Winship, 397 U.S. 358, 364 (1970).

be "the intent to commit a battery."[77] Rather than stop at that point, the Court went on to quote the next sentence in *Rocha* as follows:

> We conclude that the criminal intent which is required for assault with a deadly weapon . . . is the general intent to willfully commit an act the direct, natural and probable consequences of which if successfully completed would be the injury to another.[78]

The Court, however, omitted from the quotation the crucial language the *Rocha* Court had used in this sentence. What the *Rocha* Court said was:

> We conclude that the criminal intent which is required for assault with a deadly weapon *and set forth in the instructions in the case at bench,* is the general intent to willfully commit an act the direct, natural and probable consequences of which if successfully completed would be the injury to another.[79]

The reference to the jury instructions was critical, for in the instructions the judge charged the jurors that to convict a defendant of the crime of assault with a deadly weapon, they had to find that the defendant engaged in "unlawful attempt, coupled with a present ability, to commit a violent injury upon the person of another with a deadly weapon."[80]

Having omitted the reference to the jury instructions, the Court then defined the mental state of an assault as follows:

> From the foregoing [language in *Rocha*] we can distill the following principles concerning the mental state for assault: The mens rea is established upon proof the defendant willfully committed an act that by its nature will probably and directly result in injury to another, i.e., a battery. Although the defendant must intentionally engage in conduct that will likely produce injurious consequences, the prosecution need not prove a specific intent to inflict a particular harm. (Cf. Pen. Code § 7, subd. 1 ["'willfully' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission

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77 *Colantuono*, 7 Cal. 4th at 214, 865 P.2d at 708–09, 26 Cal. Rptr. 2d at 912.

78 *Id.*

79 People v. Rocha, 3 Cal. 3d 893, 899, 479 P.2d 372, 376–77, 92 Cal. Rptr. at 172, 176–77 (1971) (footnote omitted).

80 *Id.* at 900 n.13, 479 P.2d at 377 n.13, 92 Cal. Rptr. at 177 n.13.

> referred to"]). The evidence must only demonstrate that the defendant willfully or purposefully attempted a "violent injury" or the "least touching," i.e., "any wrongful act committed by means of physical force against the person of another." [citations omitted] In other words, "[t]he use of the described force is what counts, not the intent with which same is employed." [citations omitted][81]

As a matter of criminal law doctrine, the exact opposite is true. What matters is whether or not the defendant's purpose was to commit the battery defined in the assault provision (a violent injury on the person of another). Under the Court's formulation, however, all that the prosecution has to prove is (1) that the defendant performed an act that by its nature will probably and directly result in a battery and (2) that the defendant willingly performed that act. Under this formulation, the prosecution would not have to prove that the defendant was aware that performing the act would probably result in a battery, much less that in performing the act the defendant intended to commit a battery. Indeed, the actus reus — performing an act that by its nature will probably and directly result in a battery — does not appear to require any mental state. If bereft of any, it would be a strict liability element.[82]

Having concluded that the prosecution did not have to prove that Colantuono was aware that committing the act could result in a battery (recklessness), much less that in committing the act the Colantuono intended to commit a battery (purpose), the Court held that the jury instructions did not improperly define the mens rea of an assault and affirmed the convictions.[83] No unconstitutional presumption was involved because assault, as construed by the Court, did not require the prosecution to prove

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[81] *Colantuono*, 7 Cal. 4th at 214–15, 865 P.2d at 709, 26 Cal. Rptr. 2d at 913 (citations omitted).

[82] Under the common law rules of statutory interpretation, it is very difficult for courts to determine exactly to which elements the mental state attaches. *See generally* Miguel Angel Méndez, *A Sisyphean Task: The Common Law Approach to Mens Rea*, 28 U.C. Davis L. Rev. 407 (1995) (discussing the problems California and federal courts have faced in defining and applying mens rea terms). The Model Penal Code solves this problem by providing that the mental states attach to all material elements of the offense. *See* Model Penal Code § 2.02(1) (Official Draft 1962). A material element is one that does not relate exclusively to such matters as the statute of limitations, venue, or jurisdiction. *Id.* § 1.13(10).

[83] *Colantuono*, 7 Cal. 4th at 220–21, 865 P.2d at 713–14, 26 Cal. Rptr. 2d at 917–18.

recklessness, much less purpose, with respect to the battery contemplated in the simple or aggravated assault provisions.[84]

Dictum, we have been taught, has little or no precedential value because it is not essential to the Court's holding. *Colantuono* turns this rule of interpretation on its head. Dictum, as it turned out, can bite.

The *Colantuono* Court erred by omitting the *Rocha* Court's crucial reference to the jury instructions when it summed up its holding. In fairness to the *Williams* Court, the Court did not approve or disapprove *Colantuono*'s construction of section 240. Instead, the Court conceded that *Colantuono* might have contributed to the "apparent confusion" concerning the mental state of section 240 and "[w]ith this in mind" decided to "revisit the mental state for assault."[85]

VI. ACTUS REUS IS NOT MENS REA

The Court began its inquiry by examining the legislative history of the assault provision to ascertain the Legislature's intent when it enacted section 240. The Court first consulted a legal dictionary that was available at the time the Legislature enacted the assault provision.

> In 1872, attempt apparently had three possible definitions: (1) "[a]n endeavor to accomplish a crime carried beyond mere preparation, but falling short of execution of the ultimate design in any part of

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[84] *Id.* Justice Mosk concluded that the instructions violated the defendant's due process rights because they authorized the jury to convict the defendant of assault without finding beyond a reasonable doubt that he had a purpose to commit a battery. *Id.* at 224, 865 P.2d at 716, 26 Cal. Rptr. 2d at 920, (Mosk, J., concurring). In his view, assault and its derivatives are necessarily crimes of purpose. But he concurred on the ground that the instructional errors were harmless. *Id.* Justice Kennard agreed that the instructions were defective; in her view, assault is a crime of purpose because it is a "specific intent" offense. *Id.* at 225, 865 P.2d at 716–17, 26 Cal. Rptr. 2d at 921, (Kennard, J., concurring & dissenting). She would have overruled the case holding that assault is a general intent offense because of her belief that it has misled some of the lower courts (as well as the *Colantuono* majority) into concluding that the mens rea of assault is something less than purpose. *Id.* But like Justice Mosk, she concurred in the affirmance of the convictions on the ground that the error was harmless. *Id.* at 227–28, 865 P.2d at 718, 26 Cal. Rptr. 2d at 922.

[85] People v. Williams, 26 Cal. 4th 779, 785, 29 P.3d 197, 201, 111 Cal. Rptr. 2d 114, 119 (2001).

> it" (1 Bouvier's Law Dict. (1872) p. 166) ; (2) "[a]n intent to do a thing combined with an act which falls short of the thing intended" (*ibid.*); and (3) "an intent to commit some act which would be indictable, if done, either from its own character or that of its natural and probable consequences" (*ibid.*). With respect to mental states, the third definition requires only an intent to commit the act — and not a specific intent to obtain some further objective — and focuses on the objective nature of that act. The first definition is ambiguous. It focuses on the nature of the act but may or may not require an intent to "accomplish a crime." (*Ibid.*) The second definition appears to describe the traditional formulation of criminal attempt later codified in section 21a, which requires a specific intent.[86]

Bouvier's first two definitions clearly accord with the traditional formulation of an attempt as in codified Penal Code section 21a: "a specific intent to commit the crime, and a direct but ineffectual act done toward its commission."[87] The Court's claims of ambiguity notwithstanding, an "endeavor to accomplish a crime" is in the words of section 21a an attempt "to commit the crime." An "intent to do a thing," as the Court concedes, also connotes a purpose to do that thing, but the goal is not attained because the "act" undertaken to accomplish the goal proved to be "ineffectual." The third definition is eerily reminiscent of *Rocha*'s dictum. It would require proof (1) that the defendant performed an act that would be indictable, if done, either from its own character or that of its natural and probable consequences and (2) that the defendant willingly performed that act. With respect to the first element — the actus reus — no evidence would be required that the defendant was aware that performing the act would have the results described, much less that his purpose was to achieve those results.

Because the Court did not consult any other legal treatises of the time, the question the Court considered was which of Bouvier's three definitions the Legislature had in mind when it enacted section 240. To answer this question, the Court turned first to the historical development of assault and attempt and concluded that the crime of assault crystallized

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86 *Id.* at 785–86, 29 P.3d at 201, 111 Cal. Rptr. 2d at 119.

87 *Compare* Cal. Penal Code § 21a (Deering 2008), *with* LaFave, *supra* note 7, § 11.3.

before the general concept of attempt.[88] Citing *Colantuono*, the Court then noted that assault is not "simply an adjunct" of an attempt, but "an independent crime."[89] The Court emphasized that unlike attempt, "where the 'act constituting an attempt to commit a felony may be more remote,'[90] '[a]n assault is an act done toward the commission of a battery' and must 'immediately precede the battery.' "[91] The Court then concluded that as a result of this difference in the proximity requirement, "criminal attempt and assault require different mental states."[92] It cited two well-known criminal law commentators — Rollin Perkins and Ronald Boyce — for the proposition that less proximity to completing the crime is required for an attempt than an assault.[93]

But citing Perkins and Boyce was error. They were not discussing the mental states of attempts generally or assaults in particular. Perkins and Boyce were focusing on the *actus reus* of the crime of attempt. They were simply pointing out that courts appeared to insist that the perpetrator come closer to inflicting the harm proscribed by the substantive criminal law in the case of assaults than in the case of other attempts.[94] Accordingly, the Court's conclusion that assault and attempt "require the different mental states" is based on having confused the actus reus of assault with its mens rea. But oblivious to its error, the Court then specified the difference between the mental states of attempt and assault:

> Because the act constituting a criminal attempt "need not be the last proximate or ultimate step toward commission of the substantive crime," criminal attempt has always required "a specific intent to commit the crime." (*People v. Kipp* (1998) 18 Cal. 4th 349, 376, 75 Cal. Rptr. 2d 716, 956 P.2d 1169.) In contrast, the crime of assault has always focused on the nature of the act and not on the perpetrator's specific intent. An assault occurs whenever " '[t]he next movement would, *at least to all appearances,* complete

[88] *See Williams*, 26 Cal. 4th at 786, 29 P.3d at 201, 111 Cal. Rptr. 2d at 119.
[89] *Id.* (quoting *Colantuono*, 7 Cal. 4th at 216, 865 P.2d at 710, 26 Cal. Rptr. 2d. at 914).
[90] *Id.* (quoting Perkins & Boyce, *supra* note 11, at 164).
[91] *Id.; see also* Fox v. State, 34 Ohio St. 377, 380 (1878).
[92] *Williams*, 26 Cal. 4th at 786, 29 P.3d at 202, 111 Cal. Rptr. 2d at 120.
[93] *Id.* at 786, 29 P.3d at 201–02, 111 Cal. Rptr. 2d at 119.
[94] *See* Perkins & Boyce, *supra* note 11, at 164.

> the battery.' " (Perkins, *supra*, at p. 164, italics added.) Thus, assault "lies on a definitional . . . *continuum of conduct* that describes its essential relation to battery: An assault is an incipient or inchoate battery; a battery is a consummated assault." (*Colantuono*, *supra*, 7 Cal. 4th at p. 216, 26 Cal. Rptr. 2d 908, 865 P.2d 704, italics added.) As a result, a specific intent to injure is not an element of assault because the assaultive act, by its nature, subsumes such an intent.[95]

Having started with a flawed premise — that the core mental states for assault and other attempts are different — the Court reached the equally flawed conclusion that "as a result, a specific intent to injure is not an element of assault because the assaultive act, by its nature, subsumes such an intent." But even this conclusion is based on a faulty premise. The Court's claim that "the crime of assault has always focused on the nature of the act and not on the perpetrator's specific intent" is mistaken. Although most cases focus on whether the conduct undertaken by the defendant qualifies as the actus reus of an assault,[96] the issue of the mental state of the offense has also been the subject of appellate opinions.[97] Ample proof is provided by the number of cases, including *Williams*, the Court has selected for review on this very question.[98] Moreover, the issue of the mental state has also attracted appellate attention when defendants claim that "impossibility" should result in the dismissal or acquittal of the attempt charges,[99] as

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[95] *Williams*, 26 Cal. 4th at 786, 29 P.3d at 202, 111 Cal. Rptr. 2d at 120.

[96] *See, e.g.*, Am. Law Inst., *supra* note 10, at 329–54 (discussing cases that examine the Model Penal Code's "substantial step" requirement for the actus reus of attempt).

[97] *See, e.g.*, People v. Harris, 377 N.E.2d 28 (Ill. 1978).

[98] *See, e.g.*, People v. Colantuono, 7 Cal. 4th 206, 865 P.2d 704, 26 Cal. Rptr. 2d 908 (1994); People v. Rocha, 3 Cal. 3d 893, 479 P.2d 372, 92 Cal. Rptr. 172 (1971). Moreover, the Court has also considered the mental state of an assault in other contexts. *See, e.g.*, People v. Carmen, 36 Cal. 2d 768, 775, 228 P.2d 281, 286 (1951), *abrogated on other grounds by* People v. Flannel, 25 Cal. 3d 668, 603 P.2d 1, 160 Cal. Rptr. 84 (1979).

[99] *See, e.g.*, United States v. Everett, 700 F.2d 900, 908 (3d Cir. 1983) (holding that a jury could convict for attempted distribution of a controlled substance where the defendant "[distributed] a noncontrolled substance [he] believed to be a controlled substance"); State v. Smith, 621 A.2d 493 (N.J. Super. Ct. App. Div. 1993) (examining the relationship between the defendant's mental state and the defense of impossibility); Commonwealth v. Henley, 474 A.2d 1115, 1119 (Pa. 1984) ("[I]f one forms intent to commit a substantive crime, and it is shown that the completion of the substantive crime is impossible, the actor can still be culpable of attempt to commit the substantive crime.").

well as when judges must select the proper mens rea of the crime attempted when that crime has more than one mental state.[100]

Finally, the Court's reliance on Perkins and Boyce is again misplaced. They were focusing on the actus reus of assault, especially on the present ability requirement, and not on its mental state.[101] With respect to the mens rea of an assault, Perkins and Boyce make their views unmistakably known. In their introduction to the crime of assault, they state in bold letters that an assault is "an attempt to commit a battery. . . ."[102]

Having erroneously concluded that "the crime of assault has always focused on the nature of the act and not on the perpetrator's specific intent," the Court took the final step. If this has always been true, then when enacting section 240 the Legislature "presumably intended to adopt the third 1872 definition of attempt: 'an intent to commit some act which would be indictable, if done, either from its own character or that of its natural and probable consequences . . . .' "[103]

VII. FROM A CRIME OF PURPOSE TO A CRIME OF NEGLIGENT ENDANGERMENT

The Court's conclusion about the Legislature's intent may be mistaken, however. Bypassing for the moment why the Court chose to consult only Bouvier, an examination of the four cases he cites in support of his third definition reveals that he was wrong either in his analysis of the cases or in his summary of their holdings. In *Davidson v. State*,[104] the defendant was convicted of assaulting and shooting the victim with intent to kill. The appellate court upheld the conviction, ruling that the trial judge had correctly instructed the jury that to convict the defendant of assault, they

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100 *See, e.g.*, *Harris*, 377 N.E.2d at 33 (holding that "criminal intent to kill must be shown" to convict for attempted murder even though recklessness may be sufficient for a murder conviction).

101 *See* Perkins & Boyce, *supra* note 11, at 164.

102 *Id.* at 159. They exempt from this definition intentionally placing others in apprehension of receiving an immediate battery as the perpetrator's goal is instilling fear, not a battery. *Id.*

103 People v. Williams, 26 Cal. 4th 779, 787, 29 P.3d 197, 202, 111 Cal. Rptr. 2d 114, 120 (2001).

104 28 Tenn. (9 Hum.) 455 (1848).

had to find that he intended "to take the life of the [victim] at the time the assault and battery was made."[105]

In *Moore v. State,*[106] the defendant was convicted of assault with intent to commit murder. The appellate court reversed the conviction, holding that the trial judge erred in instructing the jurors that they could convict if they found that death would have ensued.[107] To convict they had to find that the defendant intended to kill at the time of the assault.[108]

In *State v. Jefferson,*[109] the defendant was indicted for assault with the intent to commit murder. Though the court said that the prosecution could rely on circumstantial evidence, it held that to convict, the prosecution was required to prove that the defendant's intent was to kill the victim at the time of the assault.[110]

In *People v. Shaw,*[111] the defendant was convicted of committing an assault and battery "with an axe, with the intent to kill."[112] The trial judge instructed the jurors that they could convict of the assault "if the assault and battery were made under such circumstances that, had the person been killed, the offence would have been either murder or manslaughter in any of the various degrees of manslaughter, and that the prisoner could not be convicted on the main charge, if he had no intent to kill . . . ."[113] The defendant appealed on the ground that the judge had refused to instruct the jurors that they would have to acquit if he would have been guilty only of manslaughter if the victim had died.[114] The court affirmed the conviction summarily without giving a reason.

Despite the affirmance, *Shaw* does not provide unqualified support for Bouvier's third definition. First, the trial judge instructed the jurors that they could not convict unless they found that the defendant intended to kill the victim. Second, the common element of the manslaughter and murder

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105 *Id.* at 457.
106 18 Ala. 532 (1851).
107 *Id.* at 534.
108 *See id.*
109 3 Del. (3 Harr.) 571 (1842).
110 *Id.*
111 1 Park. 327 (1852).
112 *Id.*
113 *Id.* at 328.
114 *Id.* at 327–28.

statutes is the death of a human being. If the jurors understood the judge's instruction as requiring them to find that the defendant intended to bring about the death of the victim, the trial judge's reference to the manslaughter statutes would not have been erroneous. In any event, the judge did not instruct the jurors that they could convict the defendant of assault if they found that if the assault materialized, he would have been guilty of committing a homicide. The judge made it clear that to convict they had to find that the defendant intended to kill.

Tellingly, in support of his third definition, Bouvier cites Bishop's criminal law treatise as a secondary authority.[115] In his Commentaries, Bishop also cites the four cases cited by Bouvier, but Bishop cites them in support of the *opposite* proposition: that the "clear preponderance of judicial authority, English and American[,]" is that the evidentiary value of the circumstances attending an attempt to commit a crime is in determining whether the defendant intended to inflict the criminal harm.[116] Like Bouvier, Bishop also makes reference to an "act" as well as to "the natural and probable consequences" of the act, but he makes clear that the jury is to consider the act and its natural and probable consequences only in determining whether the defendant undertook the attempt for the purpose of inflicting a criminal wrong.[117] If this is also what Bouvier meant by his third definition, then the Court misconstrued Bouvier. Although not free of all doubt, the fact that Bouvier and Bishop cite the same cases and that, in addition, Bouvier cites Bishop suggests that Bouvier is in agreement with Bishop.

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[115] *See* 1 Bouvier's Law Dictionary 166 (Philadelphia, J. B. Lippincott & Co. 14th ed. 1872).

[116] *See* 1 Joel Prentiss Bishop, Commentaries on the Criminal Law § 514, at 538 (Boston, Little, Brown & Co. 2d ed. 1858) [hereinafter Bishop, Commentaries 2d ed.]. Bishop includes the same language and cites the four cases in his 1872 edition. 1 Joel Prentiss Bishop, Commentaries on the Criminal Law § 735, at 430 n.5 (Boston, Little, Brown & Co. 5th ed. 1872) [hereinafter Bishop, Commentaries 5th ed.]. That is the year that Bouvier published the edition of the dictionary the Court used in *Williams*.

[117] *See* Bishop, Commentaries 2d ed., *supra* note 116, § 514, at 538. Bishop includes the same language in his 1872 edition. *See* Bishop, Commentaries 5th ed., § 735, at 430.

Of course, we do not know whether the Legislature consulted Bouvier and, if so, whether it had his third definition in mind when it enacted section 240. Nor do we know whether the Legislature discarded the third definition if its own research disclosed that at least three and perhaps all four cases cited by Bouvier did not support the third definition and that Bishop cited the four cases as authority for the opposite proposition. But by relying exclusively on Bouvier's legal dictionary, the Court ignored some of the criminal law commentators of the early nineteenth century the Legislature might have consulted in enacting section 240. In the 1858 and 1872 editions of his treatise, Bishop observes that:

> An attempt always implies a specific intent, not merely a general culpability. When we say, that a man attempted to do a thing, we mean, that he intended to do, specifically, it; and proceeded a certain way in the doing.[118]

Similarly, in the 1846 edition of his criminal law treatise, Wharton begins his chapter on assaults by stating:

> An assault is an intentional attempt, by violence, to do an injury to another. (*a*) The attempt must be intentional; for, if it can be collected, notwithstanding appearances to the contrary, that there is not a present *purpose* to do an injury, there is no assault.[119]

In *Williams* the Court erred by relying exclusively on Bouvier and ignoring other legal commentators in determining the Legislature's intent. The Court compounded its error by failing to distinguish between the actus reus and the mens rea of an assault. These errors, as well as others, misled the Court into reaching a startling conclusion, one at odds with established criminal law doctrine. Contrary to what generations of law

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[118] *See* Bishop, Commentaries 2d ed., *supra* note 116, § 510, at 535. Bishop includes the same language in his 1872 edition. *See* Bishop, Commentaries 5th ed., *supra* note 116, § 729, at 426.

[119] Francis Wharton, A Treatise on the Criminal Law of the United States 311 (Philadelphia, James Kay, Jun. & Brother 1846) (footnotes omitted) (emphasis added). Wharton is perhaps best known to this day for originating a limitation on the crime of conspiracy. If the crime punished by the Legislature necessarily contemplates a two-party crime (prostitution, for example), the prosecution should not in addition punish the perpetrators for conspiring to commit that crime. *See* 1 Ronald A. Anderson, Wharton's Criminal Law and Procedure § 89, at 191–92 (1957).

students have been taught, assault in California is not a crime of purpose. It is a crime of negligence. As the Court explained:

> Recognizing that *Colantuono*'s language may have been confusing, we now clarify the mental state for assault. Based on the 1872 definition of attempt, a defendant is only guilty of assault if he intends to commit an act "which would be indictable [as a battery], if done, either from its own character or that of its natural and probable consequences." (1 Bouvier's Law Dict., *supra*, at p. 166.) Logically, a defendant cannot have such an intent unless he actually knows those facts sufficient to establish that his act by its nature will probably and directly result in physical force being applied to another, i.e., a battery. (Cf. § 7, subd. 5 [actual knowledge means "a knowledge that the facts exist which bring the act or omission within the provisions of this code"].) In other words, a defendant guilty of assault must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct. He may not be convicted based on facts he did not know but should have known. He, however, need not be subjectively aware of the risk that a battery might occur.[120]

Even in defining assault as a crime of negligence, the Court's reasoning was faulty. Conditioning negligence on the defendant's awareness of "facts" that would lead a reasonable person to realize that a battery would probably result from the defendant's conduct does not accord with negligence principles. Negligence in criminal law is the failure to appreciate a risk that would have been apparent to reasonable people in similar circumstances.[121] The focus is on what the defendant should have known, not necessarily on what he knew. For example, if Williams had been prosecuted for negligent homicide (involuntary manslaughter), his ignorance that the gun he fired had the capacity to kill people would have been immaterial

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[120] *See* People v. Williams, 26 Cal. 4th 779, 787–88, 29 P.3d 197, 202–03, 111 Cal. Rptr. 2d 114, 121 (2001) (footnote omitted).

[121] *See* Model Penal Code § 2.02(2)(d) (Official Draft 1962); *see also* Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 3 cmt. k (2010) ("Negligence, as defined by the law of crimes, generally concerns problems of inadvertence, and relates to the defendant whose negligence consists in failing to appreciate the risk that the defendant's conduct entails.").

to his liability.[122] Still, despite the Court's flawed analysis, the Court left no doubt about its view that an assault under section 240 is a negligence offense.

By declaring assault a negligence offense, the Court converted the crime from an attempt to inflict a battery into a type of negligent endangerment. Under some circumstances the creation of serious bodily or fatal risks can be the basis of criminal liability. Under the Model Penal Code, for example, "[a] person commits a misdemeanor if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury."[123] Under the Code, the prosecution must prove that the defendant consciously disregarded a substantial and unjustifiable risk that his conduct might place another person in that dangerous situation.[124] Under the Court's construction of section 240, however, the prosecution needs to prove only that the defendant should have been aware of the risk that his conduct might result in the infliction of a battery.

VIII. IMPLICIT RATIFICATION — LEGISLATIVE ACTIONS AND INACTIONS

In defense of its newly minted rule, the Court cited the Legislature's failure to overturn *Rocha* and *Colantuono*. "[If] we erred 30 years ago in *Rocha* and compounded this error seven years ago in *Colantuono*, the Legislature's subsequent conduct strongly militates against any belated correction of this 'error' today."[125] The Court then cited three instances of legislative inaction.

First, the Court noted that when the Legislature enacted section 21a in 1986, it intended merely to codify the definition of an attempt as reflected in then-current jury instructions used for criminal attempt under section

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[122] If in the example Williams was aware that the gun had the capacity to kill, he clearly would have been negligent. But this outcome is simply a reflection of the principle that a higher mental state (recklessness in the example) can always be offered as proof of a lower mental state (negligence). *See* Model Penal Code § 2.02(5); *see also* Cal. Evid. Code § 210 (Deering 2004) (defining relevant evidence).

[123] *See* Model Penal Code § 211.2.

[124] *See id.* § 2.02(2)(c).

[125] *See Williams*, 26 Cal. 4th at 788, 29 P.3d at 203, 111 Cal. Rptr. 2d at 121.

664.[126] In support of this construction, the Court cited the Assembly Committee on Public Safety's report that states the purpose behind the legislation proposing section 21a was to codify "the attempt definition now used in jury instructions."[127] If the intent of the Legislature was to codify the definition of an attempt only when the defendant was charged under section 664 but not under section 240, then the Legislature did not intend section 21a to affect the jury instructions given when the defendant was charged with assault.[128] Since these instructions were based on *Rocha*, the Court concluded that by enacting section 21a, the Legislature must have "implicitly recognized that assault and criminal attempt were two statutorily independent offenses with different requisite mental states."[129]

But, as has been explained, California has two separate sets of statutes that punish attempts.[130] Section 240 punishes simple assaults and related statutes punish its aggravated derivatives.[131] Section 664 punishes attempts to commit crimes *other* than assaults.[132] Section 240 differs from section 664 in that the actus reus of an assault includes the present ability requirement.[133] It is the presence of this element in section 240 that precludes prosecutors from using section 664 to punish attempts to commit batteries.[134] In enacting section 21a, as the Court points out, the Legislature was merely codifying the language used in jury instructions to instruct juries when a defendant was charged with committing an attempt under section 664. Otherwise, one would have expected the Legislature to replace section 240's definition of the actus reus and mens rea of an assault with those of section 21a. Therefore, the enactment of section 21a cannot be construed as an

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126 *See id.* at 788–89, 29 P.3d at 203, 111 Cal. Rptr. 2d at 121–22. Prior to the enactment of § 21a, CALJIC No. 6.00 instructed jurors that "[a]n attempt to commit a crime consists of two elements, namely, a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." *See* CALJIC No. 6.00 (4th rev. ed. 1979).

127 *See Williams,* 26 Cal. 4th at 789, 29 P.3d at 203, 111 Cal. Rptr. 2d at 122 (quoting Assemb. Comm. on Pub. Safety, Rep. on S. Bill No. 1668 as Amended May 28, 1986, 1985–86 Reg. Sess., at 5 (Ca. 1986)).

128 *Id.*

129 *Id.*

130 *See supra* text accompanying note 28.

131 *See supra* text accompanying note 32.

132 *See supra* text accompanying note 28.

133 *See supra* text accompanying note 28.

134 *See supra* text accompanying note 28.

implicit recognition by the Legislature "that assault and criminal attempt were two statutorily independent offenses with different requisite mental states."[135] On the contrary, the Legislature's decision to retain section 240 when it enacted section 21a signals the Legislature's appreciation that it is the actus reus — not the mens rea — of an assault that differs from the actus reus of attempts punishable under section 664, and that it is the presence of this element that gives rise to California's approach to using two separate sets of statutes to punish attempts.

Second, the Court noted that in response to its decision in *People v. Whitfield*,[136] the Legislature in 1995 amended section 22(b) of the intoxication statute to provide that when murder is charged, a defendant may offer his intoxication to disprove only express malice (purpose) but not implied malice (recklessness).[137] At the time the Court decided *Whitfield* in 1994, section 22(b) provided that intoxication was admissible to disprove only the mental state of specific intent offenses.[138] Section 22(b) had included the "specific intent" language since the Legislature amended original section 22 in 1982.[139] In *Whitfield*, the Court held that murder was a specific intent offense.[140] Accordingly, a defendant was entitled to offer his intoxication to disprove the mental state of murder, irrespective of whether the prosecution was relying on express or implied malice.[141] But since under the parsing provisions of *Hood* implied malice, as a form of recklessness, would not qualify as a specific intent offense, the Legislature in 1995 reversed this aspect of *Whitfield*. It limited intoxication to disprove only express malice when a defendant is charged with murder.[142] As the Court explained in *Williams*:

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135 *See* People v. Williams, 25 Cal. 4th 779, 789, 29 P.3d 197, 203, 111 Cal. Rptr. 2d 114, 122 (2001).

136 7 Cal. 4th 437, 868 P.2d 272, 27 Cal. Rptr. 2d 858 (1994).

137 *See* Cal. Penal Code § 22(b) (1995) (current version at Cal. Penal Code § 29.4(b) (Deering Supp. 2013)).

138 *See* Cal. Penal Code § 22(b) (1994) (amended 1995).

139 *See* Cal. Penal Code § 22(b) (Deering 1985) (amended 1995).

140 *See Whitfield*, 7 Cal. 4th at 449, 868 P.2d at 277, 27 Cal. Rptr. 2d at 863.

141 *See id.* at 441, 868 P.2d at 273, 27 Cal. Rptr. 2d at 859.

142 *See* Cal. Penal Code § 22(b) (1995) (current version at Cal. Penal Code § 29.4(b) (Deering Supp. 2013)).

> In making [the 1982] amendment, the Legislature intended to preserve existing law, including *Hood*, which held that voluntary intoxication is not a defense to assault. Thus, under the plain language of section 22, assault could not require a specific intent to cause injury. Otherwise, evidence of voluntary intoxication would be admissible to negate the requisite mental state for assault in contravention of *Hood*.[143]

But this justification is misplaced. Again, the question of whether an offense entitles a defendant to offer his intoxication to disprove the mental state of the offense charged is distinct from the question of what constitutes the mental state of that offense. To be sure, by using the term "specific intent" in the 1982 amendment, the Legislature acted to preserve the parsing aspects of *Hood* when a court determines whether the offense entitles the defendant to offer his intoxication. But as has been explained, a ruling that an offense is or is not a specific intent offense for purposes of applying the intoxication rule is immaterial when a court is faced with defining the mental state of an offense.[144] Williams never claimed that he had been intoxicated.

As a third justification for its new rule the Court cited the fact that in enacting section 21a in 1986, the Legislature took the precaution of using the term "specific intent."[145] To the Court, this signaled the Legislature's intent to allow a defendant to offer his intoxication to disprove the mental state when charged with committing an attempt.[146] If the Legislature

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[143] People v. Williams, 26 Cal. 4th 779, 789, 29 P.3d 197, 204, 111 Cal. Rptr. 2d 114, 122 (2001) (citation omitted).

[144] *See supra* text accompanying note 52.

[145] *See Williams*, 26 Cal. 4th at 789, 29 P.3d at 204, 111 Cal. Rptr. 2d at 122.

[146] *Id.* Moreover, it is not clear that the use in the jury instructions of the term "specific intent" authorized defendants charged with attempts under Section 664 to use their voluntary intoxication to disprove the mental element of the attempt. CALJIC No. 6.00 (4th rev. ed. 1979) reads as follows: "An attempt to commit a crime consists of two elements, namely, a specific intent to commit the crime, and a direct but ineffectual act done toward its commission . . . . Mere preparation, which may consist of planning the offense or of devising, obtaining or arranging the means for its commission, is not sufficient to constitute an attempt; but acts of a person who intends to commit a crime will constitute an attempt where they themselves clearly indicate a certain, unambiguous intent to commit that specific crime, and, in themselves, are an immediate step in the present execution of the criminal design, the progress of which would be completed

intended section 21a to replace the mental state of assault as defined in section 240, a defendant charged with assault could now offer his intoxication to disprove the mental state. But, in the Court's view, this is not what the Legislature intended by enacting section 21a in 1986. When the Legislature amended section 22(b) in 1982 to allow a defendant to offer his intoxication to disprove only the mental state of a specific intent offense, the Legislature did not intend to affect existing law.[147] Existing law in 1982 included *Rocha*, which since 1971 had held that a defendant charged with assault could not offer his intoxication to disprove the mental state of the crime because assault is a general intent offense.[148] To the *Williams* Court, this meant that section 21a was not intended to replace section 240's definition of the mental state of an assault with section 21a's definition. Such a construction, the Court maintained, bolstered its conclusion that by enacting section 21a the Legislature implicitly recognized that the mental states of attempts and assaults were different.[149]

But, as has been explained, by enacting section 21a in 1986, the Legislature was merely codifying the language judges had used in instructing juries about the mens rea and actus reus of an attempt when a defendant was charged with committing an attempt under section 664.[150] The key difference between an assault under section 240 and an attempt under section 664 is in their respective actus reus. Only section 240 includes the present ability requirement, the very element that precludes prosecutors from using section 664 when charging an attempt to commit a battery.[151] Accordingly, the fact that the Legislature retained section 240 when it enacted section 21a evidences the Legislature's unwillingness to replace the

unless interrupted by some circumstance not intended in the original design." As is apparent, the instruction may have used "specific intent" to refer merely to the particular crime or criminal harm the defendant is attempting to commit.

147 *See Williams*, 26 Cal. 4th at 789, 29 P.3d at 204, 111 Cal. Rptr. 2d at 122.

148 *See id.* The *Williams* Court refers to *Hood*, not *Rocha*, but this reference seems inadvertent. It is not entirely misplaced, however, since in *Hood* the Court held that upon retrial Hood could offer his intoxication to disprove the mental state of assault to commit murder but not assault with a deadly weapon. *See supra* text accompanying note 52. If under *Hood* the aggravated assault (assault with a deadly weapon) did not entitle Hood to offer his intoxication, neither would the simple assault defined in § 240.

149 *See Williams*, 26 Cal. 4th at 789, 29 P.3d at 204, 111 Cal. Rptr. 2d at 122.

150 *See supra* text accompanying note 28.

151 *See supra* text accompanying note 28.

present ability requirement with the "direct but ineffectual act" language of section 21a.[152] Equally important, it signals the Legislature's intent, since the enactment of the 1872 Penal Code, to limit the use of section 664 to punish attempts other than attempts to commit a battery.[153]

As a final justification for its new rule, the Court emphasized once more the Legislature's failure to amend section 240:

> [T]he Legislature has had 30 years to amend section 240 and overturn *Rocha*, but has not done so. While legislative inaction is not necessarily conclusive, the longevity of our holding in *Rocha*, our subsequent reaffirmation of *Rocha* seven years ago in *Colantuono*, and the existence of other legislative enactments implicitly approving *Rocha* indicate that the Legislature has acquiesced in our conclusion that assault does not require a specific intent. (See *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal. 4th 163, 178, 83 Cal. Rptr. 2d 548, 973 P.2d 527 [declining to overrule a judicial interpretation after decades of legislative inaction and the unanimity of our decisions restating that interpretation].) Under these circumstances, we "believe it is up to the Legislature to change it if it is to be changed."[154]

Since in the same time period the Court has declined to disapprove the *Rocha* language that has been at the core of the controversy over the mental state of assault, the question now is whether the Legislature should act and, if so, what form its action should take.

IX. LEGISLATIVE REFORM

Whether the Legislature should act to overturn *Williams* depends on whether converting the crime of assault from a crime of purpose to one of negligence undermines the Legislature's goal in enacting the assault statute. Because assault is simply an attempted battery,[155] that goal is to single out for punishment only those whose purpose is to inflict some kind of

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[152] *See* CAL. PENAL CODE § 21a (Deering 2008).

[153] *See supra* text accompanying note 28.

[154] *Williams*, 26 Cal. 4th at 789–90, 29 P.3d at 204, 111 Cal. Rptr. 2d at 122.

[155] *See In re* James M., 9 Cal. 3d 517, 521, 510 P.2d 33, 35, 108 Cal. Rptr. 89, 91 (1973) (noting that "at common law an assault was defined as an attempted battery").

criminal battery. By extending the definition of assault to include those who act negligently, the Court equated negligence with purpose.

Negligence, however, is considered a much less blameworthy mental state than purpose. This is why purposeful homicides, such as express malice murder, are punished much more heavily than negligent homicides, such as involuntary manslaughter. Under the Penal Code, the punishment for second degree murder can range from fifteen years to life,[156] and the punishment for first degree murder from twenty-five years to life and can include death.[157] In contrast, the punishment for involuntary manslaughter is two, three, or four years.[158] By grading homicide into different categories of homicide and prescribing a penalty that is dependent on the mental state of the offender, the Legislature has made it clear that punishment should be proportionate with blameworthiness. Likewise, by prescribing a particular punishment for those who commit various forms of attempted batteries (i.e., assaults), the Legislature has reserved a specific punishment for those whose goal is to inflict these batteries. But by including negligent offenders in the definition of assault, the Court has extended the punishment to those who have a much less blameworthy state of mind. To prevent the imposition of excess punishment on negligent offenders, the Legislature should exclude them from the definition of assault by overturning *Williams*.[159]

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156 *See* Cal. Penal Code § 190(a) (Deering 2008).

157 *Id.*

158 *Id.* § 193(b) (Deering 2008 & Supp. 2013).

159 California, of course, can punish negligent as well as reckless and purposeful batteries. Section 242 of the Penal Code defines a battery as "any willful and unlawful use of force or violence upon the person of another." *See* Cal. Penal Code § 242 (Deering 2008). While the actus reus is the infliction of force or violence, the mens rea is not entirely clear. Penal Code § 7(1) provides that "[t]he word 'willfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to." *See id.* § 7(1). Under this definition, "willful" in § 242 requires proof that the perpetrator chose to engage in the conduct that constitutes the actus reus. But the term does not appear to require proof that the perpetrator was aware that his conduct would result in the infliction of force or violence, much less that his purpose was to inflict force or violence. If this is the correct construction of § 242, a battery in California can be committed negligently.

Citing *Williams*, the California Court of Appeal construed § 242 as defining a crime of negligence. *See* People v. Hayes, 142 Cal. App. 4th 175, 180, 47 Cal. Rptr. 3d 695, 699 (2006). The court reached this conclusion on the questionable assumption that the "mental state required for battery is the same as that required for assault." *Id.* The

The most efficient way for the Legislature to punish batteries and the attempt to commit those batteries is by enacting statutes defining those batteries and a separate general statute defining an attempt and criminalizing an attempt to commit those batteries. This is the approach taken by the Model Penal Code[160] and those states that have used the Code as the model for their penal codes.

A less efficient way is for the Legislature to retain its present system. One set of laws punishes simple battery and its aggravated forms.[161] Another set of laws punishes simple assault and its aggravated forms.[162] One problem with this approach is that not all punishable batteries are identical with the batteries contemplated in the assault sections and not all of the batteries contemplated in the assault sections are punished independently as batteries.

For example, under section 245(a)(2), it is a felony to "assault" a person with a firearm.[163] Because section 245(a)(2) does not define an "assault," recourse must be made to section 240. Under section 240, the mens rea is the attempt to commit the actus reus as defined in section 240.[164] That actus reus is the conduct the defendant undertakes to commit a violent injury and must include a present ability to do so.[165] But since the felony is charged, the actus reus would also require proof that the defendant used

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fact that a battery can be committed negligently, however, does not affect the mental state of an attempt to commit the battery. For example, under the Model Penal Code, a battery can be committed negligently, recklessly, knowingly, or purposely. *See* Model Penal Code § 211.0(1)(a)–(b) (Official Draft 1962). Unlike purposeful, knowing, or reckless batteries, however, a negligent battery requires the use of a deadly weapon. *See id.* § 211.0(b). However, one is guilty of attempting to commit a battery only if one's purpose is to inflict the battery. *See id.* § 5.01(1). Accordingly, one is guilty of attempting to commit a battery with a deadly weapon only if one's purpose was to inflict a battery with a deadly weapon.

The punishment for a simple battery in California is a fine not exceeding $2000 or by incarceration in the county jail not exceeding six months or by both. *See* Cal. Penal Code § 243(a).

160 *See* Model Penal Code §§ 5.01(1)–(2), 211.1.

161 *See* Cal. Penal Code §§ 242, 243 (Deering 2008 & Supp. 2013) (defining simple battery and diverse aggravated batteries, respectively).

162 *See id.* §§ 240, 245 (defining simple assault and diverse aggravated assaults, respectively).

163 *See id.* § 245(a)(2).

164 *See id.* § 240.

165 *See id.*

a firearm. California, however, does not independently punish as a felony inflicting a battery with a firearm. Only if the battery results in serious bodily injury can the perpetrator be punished as a felon.[166] Otherwise, he can be punished only as a misdemeanant.[167]

California also punishes some batteries that are not independently punished as an attempt by a separate assault statute when the defendant fails to inflict the battery. For example, under section 243.25, inflicting a battery as defined by section 242 is punished as a separate aggravated battery if the victim is a dependent adult as defined in section 368.[168] Under section 242, the actus reus of a battery is inflicting "force or violence upon the person of another."[169] The mens rea is the "willful" infliction of that force or violence.[170] When a violation of section 243.25 is charged, the prosecution must prove an additional actus reus element — that the victim was a dependent adult as defined in section 368. The Penal Code, however, does not have a separate provision explicitly punishing the attempt to inflict a battery on a dependent adult.

The lack of symmetry means that if the Legislature wants to overturn *Williams* it has to do one of two things. It can adopt the Model Penal Code's approach, but before doing so it needs to amend the battery provisions of the Penal Code to ensure that they capture all of the batteries contemplated in the assault provisions. Once the Legislature has enacted these statutes, it can repeal both section 240 and the remaining assault provisions. Assaults would then be punished under section 664 and section 21a would supply the mens rea and actus reus of the attempt. This would ensure overruling *Williams*, as the California Supreme Court has conceded that section 21a requires the prosecution to prove that the defendant's purpose is to commit a battery.[171] It would also eliminate the cumbersome relationship between the various assaults and batteries by repealing the statutes defining the assaults, including simple assault. If the Legislature, however, chooses

166 *See id.* § 243(d).

167 *Id.* § 243(a).

168 *Id.* § 243.25 (Deering 2008).

169 *Id.* § 242.

170 *Id.*

171 *See* People v. Williams, 26 Cal. 4th 779, 789, 29 P.3d 197, 203–04, 111 Cal. Rptr. 2d 114, 122 (2001) ("Section 21a unequivocally states that criminal attempt requires a specific intent.").

this option, it would have to decide whether to retain or eliminate the term "specific" from section 21a. Retaining the term would be a signal that voluntary intoxication should be admitted in all attempt cases to disprove the mental state of the attempt. The Legislature would also have to decide whether to incorporate section 240's present ability requirement into section 21a's definition of the actus reus of an attempt when the attempt is to commit a battery.

The other alternative is for the Legislature to retain the present, less efficient system. Section 240 would continue to make it a crime to attempt to commit a battery. But to overturn *Williams*, the Legislature would have to amend section 240 to clarify that the mental state of assault is the defendant's purpose to inflict a battery. It could achieve this goal by incorporating into section 240, section 21a's definition of the mens rea of attempt.[172] If the Legislature chooses this option, it will have to consider whether to exclude the term "specific" used in section 21a if it wants to preserve the current intoxication rule.

X. STATUTORY INTERPRETATION REVISITED

The *Williams* majority found that the weight of legislative history favored construing assault as a negligence offense. Suppose that the Court had also found that such a construction squares neither with accepted contemporary criminal law doctrine (which it does not) nor with the evolution of legislative thinking as reflected in the enactment of section 21a (which it does not). Would such a finding entitle the Court to construe assault as a crime of purpose? If the Court had done so it would have risked criticism that it was substituting its view of what it thinks the Legislature would have done had it done its job properly. Is the Court empowered to rewrite a statute on this basis?

The Court has confronted this question in two important criminal law areas — felony murder and insanity. The Court has been quite critical of the felony murder rule because convicting a defendant of murder without

172 To achieve some symmetry with the battery provisions, the Legislature should also define a battery in sections 240 and 242 identically. The battery contemplated in § 240 is defined as a "violent injury" whereas the battery in § 242 is defined as "the use of force or violence." *Compare* CAL. PENAL CODE § 240, *with id.* § 242.

proving that he has the mens rea for that crime divorces punishment from blameworthiness and undercuts the policy of requiring prosecutors to prove malice when they seek to punish offenders for committing murder.[173] Yet, despite its stinging criticism of the felony murder rule, the Court has gone to great lengths to preserve it because, as the Court stated in *People v. Dillon*,[174] its abolition is a legislative, not a judicial, prerogative.[175]

From a statutory construction perspective, the Court's reluctance is surprising. The Penal Code defines murder as the killing of a human being with malice aforethought.[176] Malice is either "express" (a desire to bring about the death) or "implied" (conscious disregard of a substantial homicidal risk).[177] Section 189 provides that all murder that is committed during the commission of enumerated felonies is murder of the first degree.[178] As a matter of statutory construction, it is clear that to obtain a first degree felony murder conviction, the prosecutor must prove that the killing was malicious and that it occurred during the commission of one of the enumerated felonies. Section 189 is merely a degree fixing statute. Yet, despite the clarity of this language, the Court in *Dillon* refused to strike down California's first degree felony rule.

If the felony is not enumerated in section 189, prosecutors can charge a defendant with second degree felony murder. Because the murder provisions do not mention second degree felony murder, some justices have questioned whether this offense exists in California.[179] The Court resolved the controversy when it held in *People v. Chun*[180] that the term "malice aforethought" in section 188 encompassed the second degree murder doctrine.[181] But as a matter of statutory interpretation, giving implied malice

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173 *See, e.g.*, People v. Phillips, 64 Cal. 2d 574, 582–83, 414 P.2d 353, 360, 51 Cal. Rptr. 225, 232 (1966) (holding that "the felony-murder doctrine expresses a highly artificial concept that deserves no extension beyond its required application" and that the rule "has been subjected to severe and sweeping criticism").

174 34 Cal. 3d 441, 668 P.2d 697, 194 Cal. Rptr. 390 (1983).

175 *See id.* at 472 n.19, 668 P.2d at 715 n.19, 194 Cal. Rptr. at 408 n.19.

176 *See* CAL. PENAL CODE § 187 (Deering 2008).

177 *Id.* § 188.

178 *Id.* § 189 (Deering 2008 & Supp. 2013).

179 *See, e.g.*, People v. Patterson, 49 Cal. 3d 615, 641, 778 P.2d 549, 568, 262 Cal. Rptr. 195, 214 (1989) (Panelli, J., dissenting).

180 People v. Chun, 45 Cal. 4th 1172, 203 P.3d 425, 91 Cal. Rptr. 3d 106 (2009).

181 *See id.* at 1184, 203 P.3d at 431, 91 Cal. Rptr. 3d at 113–14.

this construction is surprising because section 189 — the only provision addressing a death occurring during the commission of a felony — plainly is only a degree fixing statute.

There is an inescapable irony here. If the Legislature had included the terms "second degree felony murder" in the provision defining implied malice and "first degree felony murder" in the provision enumerating the felonies, the Legislature could have eliminated the second and first degree felony murder rules simply by rewriting these two provisions to read *exactly* as they do today.

The Court, however, did not evince the same restraint when determining whether in codifying the *M'Naghten* insanity test the drafters erred when making the test conjunctive rather than disjunctive. Under the *M'Naghten* test, a defendant can be acquitted on the grounds of insanity if at the time he committed the offense he was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of his act, or if did know it, as to not know that his act was wrong.[182] Under this formulation, a defendant is not guilty by reason of insanity if as a result of a mental disease he believes he is squeezing lemons when in fact he is squeezing necks. Moreover, even if he was aware that he was squeezing necks, he would be not guilty by reason of insanity if as a result of a mental disease he believes that there is nothing wrong with squeezing necks. However, Penal Code section 25(b) uses "and" instead of "or" in stating the two prongs.[183] The use of the conjunctive would require the defendant to prove that by reason of a mental disease he not only thought that he was squeezing lemons but also that he believed that there was nothing wrong with squeezing necks. Such a test has been described as the "wild beast" test on the assumption that such extreme cognitive dysfunctions would reduce a human to the cognitive level of a wild beast.[184] Confronted with the question whether the use of the conjunctive instead of the disjunctive was a drafting error, the Court in *People v. Skinner*[185] held that it was.[186]

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182 *See* Wayne R. LaFave, Criminal Law § 7.1 (West 4th ed. 2003).

183 *See* Cal. Penal Code § 25(b) (Deering 2008).

184 *See* People v. Skinner, 39 Cal. 3d 765, 776–77, 704 P.2d 752, 759, 217 Cal. Rptr. 685, 692 (1985). Wild beasts might object to this comparison.

185 39 Cal. 3d at 765, 704 P.2d at 752, 217 Cal. Rptr. at 685.

186 *Id.* at 777, 704 P.2d at 759, 217 Cal. Rptr. at 692.

Prior to the codification of the insanity test, California had no statutory definition of insanity, and the Courts had employed the *M'Naghten* test as a result of judicial decision.[187] In *People v. Drew,*[188] the California Supreme Court replaced the *M'Naghten* test with the more liberal test formulated by the American Law Institute.[189] Because the subsequent codification of the definition of insanity was effected through an initiative, the Court reviewed the ballot summaries and arguments and found that they were not helpful.[190] So the Court turned to the history of the insanity defense and found that the use of the *M'Naghten* test since 1850 had been accepted "as the rule by which the minimum cognitive function which constitutes wrongful intent will be measured in this state."[191]

> As such it is itself among the fundamental principles of our criminal law. Had it been the intent of the drafters of Proposition 8 or of the electorate which adopted it both to abrogate the more expansive ALI-*Drew* test and to abandon that prior fundamental principle of culpability for crime, we would anticipate that this intent would be expressed in some more obvious manner than the substitution of a single conjunctive in a lengthy initiative provision.[192]

Having thus framed the issue, the Court concluded that the drafters of the initiative had inadvertently erred when they used "and" instead of "or" in defining the two prongs of the insanity test. In giving the initiative this construction, the Court was not constrained by one of its own rules of statutory construction: "the basic principle of statutory and constitutional construction which mandates that courts, in construing a measure, not undertake to rewrite its unambiguous language."[193] But, plainly, "and" does not mean "or." The Court, however, did not as in *Dillon* defer to the prerogative of those who had drafted the initiative in language that was

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187 *See* People v. Drew, 22 Cal. 3d 333, 340–41, 583 P.2d 1318, 1321, 149 Cal. Rptr. 275, 278 (1978).

188 22 Cal. 3d 333, 583 P.2d 1318, 149 Cal. Rptr. 275 (1978).

189 *Id.* at 348, 583 P.2d at 1326, 149 Cal. Rptr. at 283.

190 *See Skinner*, 39 Cal. 3d at 776, 704 P.2d at 758–59, 217 Cal. Rptr. at 691–92.

191 *Id.*

192 *Id.*

193 *Id.* at 775, 704 P.2d at 758, 217 Cal. Rptr. at 691, (citing *In re* Waters of Long Valley Creek Sys., 25 Cal. 3d 339, 348, 599 P.2d 658, 661, 158 Cal. Rptr. 350, 355 (1979)).

not the least ambiguous or to the prerogative of the voters who presumably read the initiative before voting to approve it.

Had the *Williams* Court found that the Legislature had erred in failing to define the mental state of assault as purpose, would the Court have followed *Dillon* or *Skinner*? It would likely depend on whether the Court viewed extending assault liability to negligent offenders as implicating fundamental principles of culpability as deeply as does insanity. But because of its mistaken interpretation of the legislative history of section 240, the Court did not have to confront this difficult question.

XI. UNANTICIPATED CONSEQUENCES: WILLIAMS AND THE SECOND DEGREE FELONY MURDER RULE

California recognizes both first degree and second degree felony murder. First degree felony murder is limited to deaths that occur in the commission of those felonies enumerated in Penal Code section 189.[194] If the felony is not among those enumerated, then the second degree felony murder doctrine applies.

Under the common law felony murder rule, a defendant is guilty of murder if he kills negligently or even accidentally in the course of committing a felony.[195] To obtain a murder conviction, the prosecution does not need to prove the mental state of murder (malice). Instead, the prosecution needs to prove only the actus reus and mens rea of the felony and a causal connection between the death and the commission of the felony.[196] Causation does not pose unusual difficulties, as all that is required is causation in fact: the prosecution needs to prove only that but for the commission of the felony the death would not have occurred.[197]

The felony murder rule is disfavored because it divorces the harm (death) from what otherwise would be the blameworthy mental state (malice) that justifies punishment for murder. No mental state is associated

194 *See* Cal. Penal Code § 189 (Deering 2008 & Supp. 2013).

195 *See* People v. Stamp, 2 Cal. App. 3d 203, 82 Cal. Rptr. 598 (1969).

196 *Id.* at 209–10, 82 Cal. Rptr. at 602–03.

197 *Id.*

with the death, only with the felony.[198] The death element in felony murder is a strict liability element.[199] Yet, the defendant is punished for murder, a crime requiring proof of malice in a non-felony murder setting.

Not surprisingly, state courts have responded by imposing limitations on the felony murder rule. One is to elevate the death element from strict liability to negligence.[200] In these jurisdictions, prosecutors must convince the jurors that the accused either foresaw or should have foreseen the death. The California courts, however, have never imposed this limitation in their construction of the state's felony murder rule. Instead, in the case of second degree felony murder, the California courts impose a limitation first announced by the California Supreme Court in *People v. Ireland*.[201]

Ireland was prosecuted for murdering his wife. Although he testified that he had no recollection of shooting his wife, his six-year-old daughter testified that she saw him retrieve a gun and use it to shoot the victim. The trial judge instructed the jury on second degree felony murder, using the felony of assault with a deadly weapon as the predicate felony.[202] Ireland objected to the use of this felony and appealed his conviction. The Court agreed with Ireland, holding that it was error for the judge to have used assault with a deadly weapon to instruct on second degree felony murder.

> We have concluded that the utilization of the felony-murder rule in circumstances such as those before us extends the operation of that rule "beyond any rational function that it is designed to serve." (*People v. Washington* (1965) 62 Cal. 2d 777, 783, 22 Cal. Rptr. 442, 446, 402 P.2d 130, 134.) 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 majority of all homicides. This kind of bootstrapping finds support neither in logic nor in law. We

198 *Id.*

199 *Id.*

200 *See, e.g.,* State v. Hoang, 755 P.2d 7, 9 (1988) ("A requirement of the felony murder rule is the fact the participants in the felony could reasonably foresee or expect that a life might be taken in the perpetration of such felony.").

201 70 Cal. 2d 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969).

202 *Id.* at 539, 450 P.2d at 589–90, 75 Cal. Rptr. at 197–98.

> therefore hold that a second degree felony-murder instruction may not properly be given when it is based upon a felony which is an integral part of the homicide and which the evidence produced by the prosecution shows to be an offense included in fact within the offense charged.[203]

As the Court emphasized, allowing the use of a felonious assault to serve as the predicate battery would undermine the Legislature's determination that only those who kill with malice deserve to be condemned and punished as murderers. Since in the Court's view most homicides are the result of a felonious assault, permitting the state to use the felonious assault would eliminate the state's burden to prove malice in most cases. Equally important, allowing the state to use a felonious assault which requires proof that the perpetrator intended to inflict a battery would be irrational for an additional reason:

> Where a person enters a building with an intent to assault his victim with a deadly weapon, he is not deterred by the felony-murder rule. That doctrine can serve its purpose only when applied to a felony independent of the homicide.[204]

That the Court intended the term "intent" to mean the perpetrator's purpose to inflict a battery was made clear in *People v. Burton*.[205] The Court summed up *Ireland* and its progeny as prohibiting the use of a felony where "the *purpose* of the conduct which eventually resulted in a homicide was

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203 *Id.* (footnotes omitted).

204 People v. Wilson, 1 Cal. 3d 431, 440, 462 P.2d 22, 28, 82 Cal. Rptr. 494, 499–500 (1969), *abrogated on other grounds by* People v. Farley, 46 Cal. 4th 1053, 210 P.3d 361, 96 Cal. Rptr. 3d 191 (2009). *Wilson* was a first degree felony murder case, but this aspect of its reasoning would apply equally to a second degree murder prosecution. In *Wilson* the predicate felony was burglary, one of the felonies enumerated in § 189. *See* Cal. Penal Code § 189 (Deering 2008 & Supp. 2013).

205 6 Cal. 3d 375, 491 P.2d 793, 99 Cal. Rptr. 1 (1971), *abrogated on other grounds by* People v. Leslie, 47 Cal. 4th 1152, 223 P.3d 3, 104 Cal. Rptr. 3d 131 (2010). *Burton*, like *Wilson*, was also a first degree felony murder case, but this aspect of its reasoning, as the Court made clear, would apply equally to a second degree felony murder prosecution. In *Burton* the predicate felony was robbery, one of the felonies enumerated in § 189. *See* Cal. Penal Code § 189.

assault with a deadly weapon, namely the infliction of bodily injury upon the person of another."[206]

It was uncertain, however, whether judges could take into account the evidence produced at the trial in determining whether the felony qualified as a predicate felony, or whether judges were limited to a facial analysis of the statute. *Ireland* favors letting the judge consider the evidence offered by the prosecution at the trial. Otherwise, how is the judge to determine whether the felony was an "integral part of the homicide" and whether the felony was included in "fact" within the offense charged?[207] On the other hand, allowing the judge to consider the evidence could invite extended hearings on whether the felony as committed was barred by *Ireland*. In *People v. Chun*[208] the Court clarified the role of the judge:

> When the underlying felony is assaultive in nature, such as a violation of section 246 or 246.3, we now conclude that the felony merges with the homicide and cannot be the basis of a felony-murder instruction. An "assaultive" felony is one that involves a threat of immediate violent injury. (See *People v. Chance* (2008) 44 Cal. 4th 1164, 1167–1168, 81 Cal. Rptr. 3d 723, 189 P.3d 971.) In determining whether a crime merges, the court looks to its elements and not the facts of the case. Accordingly, if the elements of the crime have an assaultive aspect, the crime merges with the underlying homicide even if the elements also include conduct that is not assaultive.[209]

The Court, however, left for another day the question of which "felonies are assaultive in nature, and hence may not form the basis of a felony-murder instruction, and which are inherently collateral to the resulting homicide and do not merge."[210] Until the Court defines what it means by "assaultive in nature," judges will have to make the determination of whether the felony qualifies as the predicate felony solely on their facial analysis of the statute defining the felony. So long as this procedure remains in place, *Williams* threatens to undermine *Ireland*. Judges examining felony

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206 *Burton*, 6 Cal. 3d at 387, 491 P.2d at 801, 99 Cal. Rptr. at 9 (emphasis added).

207 *See Ireland*, 70 Cal. 2d at 539 n.14, 450 P.2d at 590 n.14, 75 Cal. Rptr. at 198 n.14.

208 45 Cal. 4th 1172, 203 P.3d 425, 91 Cal. Rptr. 3d 106 (2009).

209 *See id.* at 1200, 203 P.3d at 443, 91 Cal. Rptr. 3d at 127.

210 *See id.* at 1200, 203 P.3d at 443, 91 Cal. Rptr. 3d at 128.

assaults that derive their mens rea from section 240 will have to read the section as defining a negligence offense.

Since *Ireland* and its progeny target felony assaults that require proof that the perpetrator's purpose was to inflict life-threatening batteries, *Ireland* should no longer bar the use of a felony assault whose mental state is negligence. A judge doing a facial analysis of the felony would have difficulty concluding that the perpetrator of a negligent assault would not be deterred by the felony murder rule. A person who commits a battery negligently is negligent precisely because he does not foresee the risk that he might commit such a battery. He cannot form a firm purpose to inflict a battery he does not contemplate. This analysis would require judges to allow the use of most, if not all, of the felony assaults defined in the Penal Code sections following section 240. They would include "assault" committed against a custodial officer,[211] a peace officer,[212] or a juror,[213] as well as "assault" with a stun gun,[214] "assault" of a peace officer or firefighter with a stun gun,[215] "assault" with a deadly weapon,[216] with a firearm,[217] with a machine gun, assault weapon, or BMG rifle,[218] with a semiautomatic firearm,[219] with a deadly weapon upon a peace officer or firefighter engaged in the performance of his or her duties,[220] with a firearm upon a peace officer or firefighter engaged in the performance of his or her duties,[221] with a semiautomatic firearm upon a peace officer or firefighter engaged in the performance of his or her duties,[222] with a machine gun, assault weapon, or BMG rifle upon a peace officer or firefighter engaged in the performance of his or her duties,[223] with a deadly weapon or means likely to produce great bodily injury upon a custodial officer engaged in the performance of

211 *See* Cal. Penal Code § 241.1 (Deering 2008 & Supp. 2013).
212 *Id.* § 241.4.
213 *Id.* § 241.7.
214 *Id.* § 244.5(b).
215 *Id.* § 244.5(c).
216 *Id.* § 245(a)(1).
217 *Id.* § 245(a)(2).
218 *Id.* § 245(a)(3).
219 *Id.* § 245(b).
220 *Id.* § 245(c).
221 *Id.* § 245(d)(1).
222 *Id.* § 245(d)(2).
223 *Id.* § 245(d)(3).

his or her duties,[224] with a deadly weapon or means likely to produce great bodily injury upon a school employee engaged in the performance of his or her duties,[225] with a firearm upon a school employee engaged in the performance of his or her duties,[226] and with a stun gun or taser upon a school employee engaged in the performance of his or her duties.[227]

Persuasive evidence that *Ireland* would no longer bar the use of negligent felonies is provided by the felonies under consideration in *Ireland* and *Williams*. In both cases the felonies were analytically the same. Ireland used a gun that under section 245 qualified as a "deadly weapon" at the time of his conviction. Williams used a shotgun that under section 245 qualified as a "firearm."[228] If King (Williams' victim) had died and the prosecution charged Williams with second degree felony murder, would *Ireland* have barred the use of the felony? When *Ireland* was decided, the answer would have been "yes." *Ireland* and its progeny considered assault with a deadly weapon as a felony that required proof that the perpetrator intended to inflict a serious battery. Applying the felony murder rule in such a circumstance would be irrational because a perpetrator committed to inflicting a serious battery would not be deterred by the rule. After *Williams*, however, the answer to the question whether *Ireland* would bar the use of the felony would likely be "no." The judge reviewing assault with a firearm in the abstract would have to give the offense the construction the California Supreme Court gave it in *Williams*. A judge, construing the felony as a negligence offense, would have difficulty concluding that the perpetrator of a negligent assault would not be deterred by the felony murder rule.

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224 *Id.* § 245.3.

225 *Id.* § 245.5(a) (Deering 2008).

226 *Id.* § 245.5(b).

227 *Id.* § 245.5(c).

228 Today, § 245 punishes assaults with a deadly weapon, other than a firearm, under § 245(a)(1) and assaults with a firearm under § 245(a)(2). The fines and state prison terms that a judge can impose are the same, but if the judge chooses to impose a county jail term, in the case of assault with a firearm the judge may sentence the defendant to a term of not less than six months or more than one year, whereas in the case of assault with a deadly weapon the judge may sentence the defendant to a county jail term not exceeding one year. *See* Cal. Penal Code § 245(a)(1)–(2) (Deering 2008 & Supp. 2013).

In *People v. Ford*,[229] the California Supreme Court further restricted the scope of the second degree felony murder rule by requiring that the felony be "inherently dangerous to human life" in the abstract.[230] "If the felony is not inherently dangerous it is improbable that a potential felon will be deterred; he will not anticipate that any injury or death might arise solely from the fact that he will commit the felony."[231] In *People v. Patterson*[232] the Court held that a facial analysis of the statute defining the felony must disclose that it carries "a high probability" of death.[233]

An example of a felony barred by *Ford* is that provision of the Penal Code making it an offense for "[a]ny person who willfully, under circumstances or conditions which cause or create risk of great bodily harm, serious physical or mental illness, or death," to practice medicine without a license.[234] In *People v. Burroughs*[235] the Court held that a prosecutor could not use this felony as the predicate felony in a murder prosecution. The felony was not inherently dangerous to human life in the abstract because the felony could be committed in nonhazardous ways; for example, treating someone suffering from delusions, while creating a risk of mental illness, would not necessarily place the victim's life in jeopardy.[236] As the Court stressed, in applying *Ford*, a judge has to view "the statutory definition of the offense as a whole, taking into account even nonhazardous ways of

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229 People v. Ford, 60 Cal. 2d 772, 388 P.2d 892, 36 Cal. Rptr. 620 (1964), *overruled in part by* People v. Satchell, 6 Cal. 3d 28, 489 P.2d 1361, 98 Cal. Rptr. 33 (1971).

230 *Id.* at 795, 388 P.2d at 907, 36 Cal. Rptr. at 635.

231 *See* People v. Williams, 63 Cal. 2d 452, 457 n.4, 406 P.2d 647, 650 n.4, 47 Cal. Rptr. 7, 10 n.4 (1965).

232 *See* People v. Patterson, 49 Cal. 3d 615, 778 P.2d 549, 262 Cal. Rptr. 195 (1989).

233 *Id.* at 627, 778 P.2d at 558, 262 Cal. Rptr. at 204. Although the analysis must be facial, the judge may hear from experts in determining whether the commission of the felony as contemplated in the statute poses a high probability of death. *See, e.g.,* People v. James, 62 Cal. App. 4th 244, 259, 74 Cal. Rptr. 2d 7, 15 (1998). Moreover, in making the determination, the judge can consider whether the felony can be committed in dangerous as well and in non-dangerous ways. If the judge concludes that the felony can be committed in non-dangerous ways, the judge should disqualify the felony. *See Patterson*, 49 Cal. 3d at 623–24, 778 P.2d at 555–56, 262 Cal. Rptr. at 201–02 (examining three cases where the Court disqualified an underlying felony because it could be committed in a manner not inherently dangerous to human life).

234 *See* Cal. Bus. & Prof. Code § 2053 (Deering 1998) (repealed 2002).

235 People v. Burroughs, 35 Cal. 3d 824, 678 P.2d 894, 201 Cal. Rptr. 319 (1984).

236 *See id.* at 832, 678 P.2d at 899, 201 Cal. Rptr. at 324.

violating the provisions of the law which do not necessarily pose a threat to human life."[237]

Ford plays an important role in constraining the use of the second degree felony rule whenever *Ireland* does not disqualify the felony. This would have been the case in *Burroughs*, as the felony did not contemplate the kind of determined assault condemned in *Ireland*. *Williams*, however, threatens to undermine the interplay between the *Ireland* and *Ford* prophylactic rules. If assaults are no longer disqualified as the predicate felony under *Ireland*, can a prosecutor still use them under *Ford* because they are dangerous to human life in the abstract? If the answer is "yes," *Williams* will undermine the Court's efforts to constrain the second degree felony murder rule.

The question, then, is whether a judge can exclude the felony of an assault with a firearm under *Ford*. Prior to *Williams*, the answer most likely would be "no." A judge applying *Ford* could find that assault with a firearm qualifies as the predicate felony. In the abstract, the commission of such a felony would be dangerous to human life. Allowing the use of the felony murder rule under *Ford* would not be irrational. Potential perpetrators contemplating using a firearm might be deterred by the rule because committing such a dangerous felony should put them on notice that injury or death might arise solely from committing the felony.

After *Williams*, however, a judge could conclude that committing an assault with a firearm is *not* dangerous to human life in the abstract and thus bar the prosecution from using the felony. A judge might conclude that the assault is not dangerous to human life because it would be irrational to apply the felony murder rule to negligent offenders. They cannot be deterred by the rule for committing a felony they do not contemplate committing. If that is the proper construction of the felony under *Ford*, the judge should bar the prosecution from using assault with a firearm as the predicate felony. That construction would preserve the constraints on the use of the felony murder rule.

A judge, on the other hand, could conclude that committing an assault with a firearm *is* dangerous to human life in the abstract and allow the prosecution to use the felony. A judge might conclude that the assault is

[237] *See id.* at 830, 678 P.2d at 898, 201 Cal. Rptr. at 323.

dangerous to human life because of the dangers to human life if the assault materializes, irrespective of whether the perpetrator was determined to inflict the battery or it was merely inadvertent. If that is the proper construction of the felony under *Ford*, the judge should allow the prosecution to use assault with a firearm as the predicate felony. That construction would undermine the constraints on the use of the felony murder rule.

Determining the interest the Court had in mind in *Ford* is crucial. If *Ford* is concerned with identifying felonies dangerous to human life by considering only the commission of the actus reus, then felony assaults no longer barred by *Ireland* should be allowed by *Ford* to serve as the predicate felony. That construction, however, would undermine the constraints on the use of the felony murder rule. But if *Ford* is concerned with the actus reus of the felony because of what it discloses about the mental state of potential felons, then *Ford* should bar use of the assault as the predicate felony. That construction would preserve the constraints on the use of the felony murder rule. According to *Ford* and its progeny, applying the felony murder rule to offenders who commit dangerous felonies is rational because the nature of the felony puts them on notice that death or injury might arise and such knowledge might dissuade them from committing the felony. But offenders who commit negligent assaults cannot be deterred by the rule; they cannot be aware of the risk of injury or death posed by committing an assault they do not contemplate committing in the first place.

If under *Williams* a judge may no longer use *Ireland* and *Ford* to bar the use of felonious assaults as the predicate felony, then the danger the Court warned against in *Ireland* can materialize: in most murder cases the prosecution will be able to avoid having to prove malice by relying on the felonious assault giving rise to the homicide. To prevent *Williams* from undermining rules designed to prevent the irrational application of the second degree felony murder rule, either the Court should disapprove of *Williams* and hold that under section 240 the prosecution must prove that it was the defendant's purpose to commit the battery, or the Legislature should amend the assault and battery provisions along the lines that have been suggested.

The Court, however, has an obligation to act, for the Court, not the Legislature, has created the conflict between *Williams* and *Ireland*. In its 1989 *Patterson* opinion, the Court defended its "judicially created" second

degree felony murder rule on the ground that the Legislature had failed to accept the Court's invitation to reconsider retaining the rule.[238] By this logic, the Legislature has accepted not just the existence of the rule but also the *Ireland* limitation the Court imposed in 1969. In its 2001 *Williams* opinion, the Court defended its construction of section 240 by underscoring the Legislature's failure to overturn *Rocha* by amending section 240.[239] However, it is unlikely that by failing to act the Legislature is signaling its approval of two conflicting principles — one that prevents the irrational application of the second degree felony murder rule and another that undermines that limiting principle. To resolve this *judicially* created conflict, the Court, not the Legislature, should choose between retaining a construction of the mental state of an assault that is at odds with conventional doctrine and preserving a limitation on a doctrine that would otherwise result in the irrational application of the second degree felony rule. The choice seems clear.[240]

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238 *See Patterson*, 49 Cal. 3d at 621, 778 P.2d at 554, 262 Cal. Rptr. at 200.

239 *See* People v. Williams, 26 Cal. 4th 779, 789–90, 29 P.3d 197, 204, 111 Cal. Rptr. 2d 114, 122 (2001).

240 *Williams*' unanticipated consequences are not limited to California cases. Under the federal sentencing guidelines, a federal district court can impose an enhanced sentence if previously the defendant had been convicted of a crime of violence. *See* United States v. Grajeda, 581 F.3d 1186, 1187 (9th Cir. 2009). Grajeda appealed a sentence enhancement based on having been convicted of violating California Penal Code section 245(a)(1), assault with a deadly weapon or by means likely to produce great bodily injury. *Id.* Under the guidelines, to qualify as a predicate offense the conviction requires proof of the "use, attempted use, or threatened use of physical force." *Id.* at 1190. Grajeda argued that his California conviction did not qualify because the aggravated assault, as a crime of negligence after *Williams*, did not require proof that he was attempting to use force. *Id.* at 1192.

The Ninth Circuit rejected the defendant's claim. In doing so, the court seized on the *Williams* language requiring the prosecution to prove that the defendant was aware that he was performing acts that would lead a reasonable person to conclude that those acts would "probably and directly result in physical force being applied to another, i.e., a battery" even if the defendant was unaware "of the risk that a battery might occur." *Id.* at 1194. In defense of its construction of the California aggravated assault offense, the Ninth Circuit observed, "While this formulation of the necessary mens rea does not fit neatly with the standard articulated in *Fernandez-Ruiz*, it satisfies the concerns animating *Leocal* and *Fernandez-Ruiz* that the proscribed conduct be "violent" and "active," and the use of force not merely accidental, as in an automobile accident stemming

XII. CONCLUSION

By converting the crime of assault into a form of negligent endangerment, *Williams* unjustly extends criminal liability for assault to those who commit assaults negligently. The crime of assault, as a form of attempt, is designed to punish only those whose purpose is to inflict a criminal battery. Extending the punishment to those who do not entertain this blameworthy mental state is unjust because it punishes those the Legislature did not have in mind when it enacted the assault statutes and prescribed their punishments.

Williams' adverse consequences, however, are not limited to the crime of assault. By defining assaults as crimes of negligence, *Williams* threatens to undermine important limitations on the use of felony assaults as the predicate felony in second degree felony murder prosecutions. Without these restraints, prosecutors can circumvent the requirement of having to prove the mental state of murder by relying on the second degree felony murder doctrine. Since most homicides result from some kind of felonious assault, judges would find it much more difficult to use *Ireland* and *Ford* to bar the use of these assaults when their mental state is supplied by section 240 as construed by the Court.

In addition, *Williams*' flawed analysis of treatises, inappropriate appeals to intoxication doctrines, and failure to distinguish assault's actus reus from its mens rea all contravene established criminal law doctrine. *Williams* is bad law doctrinally and even worse law normatively. If the Court continues to decline to overturn it,[241] then the Legislature should do so by enacting the kind of legislation that has been described.

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from drunk or reckless driving." *Id.* at 1195. Despite its protestations, however, the court permitted a negligence offense to serve as the predicate offense.

An important federal question is whether crimes of negligence, such as assaults after *Williams*, can be the basis of removal in Immigration and Naturalization Service proceedings on the ground the offenses constitute crimes of moral turpitude. In Partyka v. Attorney General of U.S., 417 F.3d 408 (3d Cir. 2005), the Third Circuit held that crimes of negligence do not qualify as removable offenses; to qualify, the offense must require the prosecution to prove that the accused inflicted the proscribed harm purposely or recklessly. *Id.* at 414. Under this construction of the federal removal statute, convictions under *Williams* would not qualify as crimes of moral turpitude.

[241] Not all justices agree that assault is a negligence offense. Justices Kennard, People v. Colantuono, 7 Cal. 4th 206, 226, 865 P.2d 704, 717, 26 Cal. Rptr. 2d 908, 921–22

POSTSCRIPT: A NOMENCLATURE PROBLEM

One of the reasons that the Court may have gotten in trouble in *Williams* and *Colantuono* is the imprecise meaning of the terms, "general" and "specific" intent. Although used mainly to signal whether a defendant can offer his voluntary intoxication to disprove the mental state of the crime charged, the terms have migrated to other areas of the law, taking with them their imprecision.

Section 21a is an example. Prior to the enactment of the section, trial judges used "specific" to denote the mental state of an attempt under section 664. Section 664 punishes every person "who attempts to commit any crime, but fails . . . ."[242] To help jurors understand the mental state of the attempt, the standard CALJIC instruction instructed them as follows:

> An attempt to commit a crime consists of two elements, namely, a specific intent to commit the crime, and a direct but ineffectual act done toward its commission . . . . Mere preparation, which may consist of planning the offense or of devising, obtaining or arranging the means for its commission, is not sufficient to constitute an attempt; but acts of a person who intends to commit a crime will constitute an attempt where they themselves clearly indicate a certain, unambiguous intent to commit that specific crime, and, in themselves, are an immediate step in the present execution of the criminal design, the progress of which would be

(1994) (Kennard, J., concurring & dissenting), and Mosk, *id.* at 224, 865 P.2d at 716, 26 Cal. Rptr. 2d at 920, each disagreed with the Court's construction of § 240, arguing instead that assault requires an intent to injure. Justice Kennard reiterated this position in her dissent in *Williams*, which Justice Werdegar joined. *Williams*, 26 Cal. 4th at 791, 29 P.3d at 206, 111 Cal. Rptr. 2d at 124 (Kennard, J., dissenting). They believe that the mental state of § 240 is purpose. *See id.*

The issue of the proper construction of § 240 continues to recur. *See*, *e.g.*, People v. Chance, 44 Cal.4th 1164, 1178, 189 P.3d 971, 981, 81 Cal. Rptr. 3d 723, 734 (2008) (Kennard, J., dissenting) ("The way out of this legal morass is easy. Simply recognize that assault is a specific intent crime . . . ."). To avoid the intoxication controversy, Justice Kennard should drop the term "specific intent" and simply insist that § 240 require the prosecution to prove that the defendant's purpose is to inflict the harm defined by the crime the defendant is attempting to commit.

[242] *See* Cal. Penal Code § 664 (Deering 2008 & Supp. 2013).

> completed unless interrupted by some circumstance not intended in the original design.[243]

As is apparent, the instruction may have used "specific intent" to refer merely to the particular crime or criminal harm the defendant is attempting to commit. Jurors should not convict the defendant of an attempt to commit a crime unless they find that it was his purpose to commit *that* crime. The instruction would have attained that goal if instead it had used this language or even if it had omitted "specific." But as we have seen, because of *Hood*'s use of the same term to denote when a defendant may offer his voluntary intoxication to disprove the mental element of the crime charged, the inclusion of the term in a statute can have the effect of misleading judges into concluding that that is the purpose of the term.

It is difficult to believe that when the instruction first surfaced in connection with attempts prosecuted under section 664, those who framed the instruction intended the term to denote the admissibility of intoxication evidence to disprove the mental state of *any* attempt charged under the statute. Had that been the Legislature's intent in 1872 when it enacted section 664, the Legislature would have used some language to signal that intention. The Legislature, however, would not have used "specific" or "general" intent since those terms were not used for that purpose until a later time.[244] Moreover, as we have seen, in *Hood* the Court reserved for the judiciary the prerogative of designating an offense as a "general intent" offense even if its definition lent itself to being designated as a "specific intent" crime.[245] This prerogative makes it even more difficult to believe that the framers of the instruction intended the term "specific" intent to indicate the admissibility of voluntary intoxication to disprove the mental state of any attempt charged under section 664.

When writing the Court's opinion in *Hood*, Chief Justice Traynor conceded that the terms "specific" and "general" intent were notoriously

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[243] CALJIC No. 6.00 (4th rev. ed. 1979).

[244] *See* People v. Hood, 1 Cal. 3d 444, 457, 462 P.2d 370, 378, 82 Cal. Rptr. 618, 626 (1969) (noting that the terms "specific intent" and "general intent" came into use after the enactment of the Penal Code in 1872 to determine whether intoxication should be admitted to disprove the mental state of the crime charged).

[245] *See supra* text accompanying note 46.

difficult to define and commentators had urged their abandonment.[246] As we have seen, the mischief these terms have unleashed has not been limited to the intoxication area. When the Legislature enacted section 21a to codify the words used in the jury instruction to define the mens rea and actus reus of an attempt under section 664, it included the term "specific." The Assembly Committee's report states that no change in jury instructions was intended by the enactment of section 21a.[247] So if those who framed the CALJIC instruction did not intend for the term to signal the admissibility of voluntary intoxication to disprove the mental state of any attempt prosecution brought under section 664, then its inclusion in section 21a would not indicate that intention. The problem is that this matter is not entirely free of doubt. We may never know what the framers of the instruction had in mind. They cite no case for the proposition that the term was intended to denote the admissibility of intoxication; so it is likely that they meant to emphasize to the jurors only that to convict a defendant of attempting to commit a crime, they had to find that his purpose was to commit the crime identified in the charging instrument and in the instructions. But because the term has now acquired another meaning, its inclusion in section 21a is not free of ambiguity. That is why the Legislature has to think about the term's intoxication implications if it chooses to replace the mental state of an attempt under section 240 with that of section 21a.

The Model Penal Code avoids the pitfalls of the term by not using it. Its intoxication rule is encased in a different concept. As a general rule, a defendant may offer his voluntary intoxication to disprove the mental state of any crime that under the Code is committed purposely, knowingly, or recklessly.[248] But when the mental state of the offense is recklessness, the jurors must be told to disregard the evidence if they find that the defendant would have been aware of the risk if sober.[249] Since jurors are likely to find this to be the case, the effect of the Code's approach is to discourage defendants from offering their intoxication when charged with reckless offenses.

The Model Penal Code's approach solves two problems facing the California Legislature and courts. By omitting the term "specific" intent, it

246 *See supra* text accompanying note 43.

247 *See supra* text accompanying note 127.

248 *See* Model Penal Code § 2.08(1) (Official Draft 1962).

249 *See id.* § 2.08(2).

avoids uncertainty about whether the term is used to denote the use of intoxication or merely a particular mental state. The Code's approach also allows the use of an easy test to determine the admissibility of intoxication when offered to disprove the mental state of the crime. Had the Legislature adopted the Code's intoxication rule, it would have enabled the courts to avoid the recurring problems posed by the specific–general intent dichotomy in making the same call.

To be sure, the Code's intoxication rule has been criticized. Most serious crimes under the Code require purpose, knowledge, or recklessness. Problems with the Code's intoxication rule arise when a crime can be committed with any of the three mental states. Murder is such a crime.[250] Those charged with purposeful or knowing murder can offer their intoxication to disprove that they killed purposely or knowingly without any limiting jury instructions, but those charged with reckless murder may not. Since those who kill purposely or knowingly have less regard for the value of human life than those who merely disregard a substantial homicidal risk, it is hard to justify why the most blameworthy murderers should be able to use their intoxication to escape conviction of murder but not the least blameworthy murderers. It has been suggested that the solution is to allow the use of voluntary intoxication whenever, as an evidentiary matter, it helps disprove the mental state of the offense charged. A state could then punish the intoxicated offender by enacting statutes punishing the commission of harms while intoxicated. If the jury finds a particular defendant not guilty by reason of intoxication, it could still find the defendant guilty of the crime of committing the harm while intoxicated.[251] Whether this is a sound solution to the problem of the intoxicated offender is not the central point. The concern is finding an approach that is not susceptible to the confusion the California courts have encountered in determining (1) the mental state of an offense and (2) when voluntary intoxication should be admissible to disprove that mental state.

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250 *See id*. § 2.10.2(1).

251 *See* Miguel A. Méndez, *Solving California's Intoxication Riddle,* 13 Stan. L. & Pol'y Rev. 211, 229 (2002).