ARTICLES

BUILDING THE NEW SUPREMACY:

California's "Chinese Question" and the Fate of Reconstruction

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The so-called "Chinese question" was one of the most important and consequential political and constitutional issues facing California in its first half-century as a state.[1] The Chinese were one of the fastest growing populations in the state in the second half of the nineteenth century. Their presence and status within California drove most of the bedrock political issues of the day: capital versus labor, race and gender, citizenship and nation, and the nature of local, state, and federal power, not to mention international relations. The Chinese worked in the most important economic industries in the state, including mining, railroads, and agriculture. Their willingness to work for low wages for large, often corporate, employers was viewed as a threat to the political, economic, and cultural status of white laborers.

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[1] I treat the "Chinese" people here as a singular people because this is how they were treated by the legal and political actors who are the focus of this paper. It is not to suggest, however, that they were in fact a singular people. Eve Armentrout-Ma, "Urban Chinese at the Sinitic Frontier: Social Organizations in United States' Chinatowns, 1849–1898," *Modern Asian Studies* 17 (1983): 107.

Ultimately, they became an "indispensable enemy" in the formation and consolidation of California's labor movement. Their inscrutable foreignness also made them appear to be a threat to the public at large, especially their "opium dens" and brothels. Ultimately, the Chinese became an indispensable outlet for the economic frustrations of communities throughout the West. Massacres and "roundups" of Chinese people became a regular occurrence in the late nineteenth century in California and the West.[2]

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[2] There is a substantial and ever-growing literature on the Chinese experience in California and the United States in the nineteenth and early twentieth centuries. On legal history, see Lucy E. Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (Chapel Hill: University of North Carolina Press, 1995); Charles J. McClain, *In Search of Equality: The Chinese Struggle Against Discrimination in Nineteenth-Century America* (Berkeley: University of California Press, 1994); David C. Frederick, *Rugged Justice: The Ninth Circuit Court of Appeals and the American West, 1891–1941* (Berkeley: University of California Press, 1994): ch. 3; Christian G. Fritz, *Federal Justice in California: The Court of Ogden Hoffman, 1851–1891* (University of Nebraska Press, 1991); Gordon Morris Bakken, "Constitutional Convention Debates in the West: Racism, Religion, and Gender," *Western Legal History: The Journal of the Ninth Judicial Circuit Historical Society* 3 (1990): 213; Harry N. Scheiber, "Race, Radicalism, and Reform: Historical Perspective on the 1879 California Constitution," *Hastings Constitutional Law Quarterly* 17 (1989): 35; Christian G. Fritz, "A Nineteenth Century 'Habeas Corpus Mill': The Chinese Before the Federal Courts in California," *The American Journal of Legal History* 32 (1988): 347.

On labor history, see Stacey L. Smith, *Freedom's Frontier: California and the Struggle over Unfree Labor, Emancipation, and Reconstruction* (Chapel Hill: The University of North Carolina Press, 2013); Moon-Ho Jung, *Coolies and Cane: Race, Labor, and Sugar in the Age of Emancipation* (Baltimore: Johns Hopkins University Press, 2006); Peter Kwong, *Forbidden Workers: Illegal Chinese Immigrants and American Labor* (New York: New Press: distributed by W.W. Norton, 1997); Alexander Saxton, *The Indispensable Enemy: Labor and the Anti-Chinese Movement in California* (Berkeley: University of California Press, 1995); Chris Friday, *Organizing Asian American Labor: The Pacific Coast Canned-Salmon Industry, 1870–1942* (Philadelphia: Temple University Press, 1994); Sucheng Chan, *This Bittersweet Soil: The Chinese in California Agriculture, 1860–1910* (Berkeley: University of California Press, 1986).

On local and urban history, see Benson Tong, *Unsubmissive Women: Chinese Prostitutes in Nineteenth-Century San Francisco* (Norman: University of Oklahoma Press, 1994); Natalia Molina, *Fit to be Citizens?: Public Health and Race in Los Angeles, 1879–1939* (Berkeley: University of California Press, 2006); Nayan Shah, *Contagious Divides: Epidemics and Race in San Francisco's Chinatown* (Berkeley: University of California Press, 2001); Yong Chen, *Chinese San Francisco, 1850–1943: A Trans-Pacific Community* (Stanford: Stanford University Press, 2000). On immigration history, see Sucheng Chan, *Entry Denied: Exclusion and the Chinese Community in America, 1882–1943*

The "Chinese question" was not, however, solely a question about economic competition. It was also a discursive device through which Californians worked out their ideas about slavery, freedom, law, constitutionalism, and the state. As Moon-Ho Jung has shown, for example, the Chinese question helped Americans navigate the transition from a slave to a post-emancipation society. In California, the degraded Chinese "coolie" laborer became a symbol of slavery, and exclusion the means by which Californians could remain a "free" state. Even though Chinese laborers entered into contracts to work, the hallmark of free labor ideology, the contracts were often seen as a form of indentured servitude. "Chinese" and "coolie" were often used synonymously in political and constitutional discourse to emphasize the foreignness of the Chinese and their threat, as a race, to new American ideas about freedom and free labor.[3]

The Chinese were also seen as a threat to the welfare of local, state, and eventually to the national communities and governments. As a threat, they came under intense scrutiny and regulation by state and local governments. They were often blamed for the social and moral ills of the community. As Nayan Shah has explained, "The medical knowledge of Chinese deviance and danger emerged in the context of a fervent anti-Chinese political culture and escalating class confrontations generated by the social tumult of industrialization, rapid urbanization, and tremendous migration into San Francisco."[4]

(Philadelphia: Temple University Press, 1991); Grace Delgado, *Making the Chinese Mexican: Global Migration, Localism, and Exclusion in the U.S.–Mexico Borderlands* (Stanford, California: Stanford University Press, 2012); Erika Lee, *At America's Gates: Chinese Immigration During the Exclusion Era, 1882–1943* (Chapel Hill: University of North Carolina Press, 2003); Erika Lee and Judy Yung, *Angel Island: Immigrant Gateway to America* (New York: Oxford University Press, 2010).

On race, class, and gender, see Najia Aarim-Heriot, *Chinese Immigrants, African Americans, and Racial Anxiety in the United States, 1848–82* (Urbana: University of Illinois Press, 2003); D. Michael Bottoms, *An Aristocracy of Color: Race and Reconstruction in California and the West, 1850–1890* (Norman: University of Oklahoma Press, 2013); John Hayakawa Torok, "Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws," *Asian Law Journal* 3 (1994): 55. See also Jean Pfaelzer, *Driven Out: The Forgotten War Against Chinese Americans* (Berkeley: University of California Press, 2008).

[3] Jung, *Coolies and Cane*; see also Bottoms, *An Aristocracy of Color*; Smith, *Freedom's Frontier*.

[4] Shah, *Contagious Divides*, 4.

Cholera outbreaks, for instance, were often traced back to Chinatowns. Opium dens not only enervated and degraded the Chinese themselves, but lured innocent white men and women into moral turpitude. Laundry businesses, a vocation many Chinese people turned to after being forced out of other trades and industries, were perceived as threats to the public health and safety. Their seemingly baleful practices were usually attributed to their owners' status as Chinese. Indeed, the Chinese were often taxed simply for being "foreign."

Continued agitation over the Chinese question in California through the end of the nineteenth century was also instrumental in the emergence of a new phase in immigration legal history. The Chinese Exclusion Acts of 1882 marked the first time in which a specific racial group was excluded from entering the United States. The tightening of these restrictions over the subsequent decade, and the U.S. Supreme Court's plenary power doctrine which insulated the decisions of federal immigration officials from judicial review, was the culmination of this new racialized immigration.[5]

Implicit in these conflicts and transitions, though rarely explored, is the role that the Chinese question played in Reconstruction and the changes occurring in the American state following the Civil War.[6] Most of the legal history of the Chinese in California has focused on questions of individual rights and/or immigration law. But the attempts to regulate and exclude the Chinese would be the basis upon which some of the terms of constitutional Reconstruction would be worked out. The Chinese were willing litigants, and, through merchant associations known as the Chinese Six Companies and other organizations, had the means to acquire talented lawyers in California. Chinese litigants regularly prevailed once in court. Federal judges evinced a willingness to protect the rights of Chinese people even when they themselves were hostile towards the presence of Chinese in California.[7] But at the end of the day, Chinese were excluded from entering the United States, wiping out many

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[5] See, e.g., Chan, *Entry Denied*; Delgado, *Making the Chinese Mexican*; Lee, *At America's Gates*; Salyer, *Laws Harsh as Tigers*.

[6] Harry Scheiber has been one of the few to point out this aspect of the Chinese question. Scheiber, "Race, Radicalism, and Reform," 74–78.

[7] See, e.g., Fritz, *Federal Justice*. Judge Ogden Hoffman's commitment to his professional duty over his personal views seems strikingly similar to Robert Cover's notion of "judicial positivism," which he argues helps to explain why anti-slavery judges would protect slaveholders' rights to slaves. Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975).

of the successes they experienced in federal courtrooms over several decades. From the perspective of the Chinese this is the tragic result of their efforts, especially after judges seemed so willing to set aside their personal convictions, and often in the face of open hostility to their decisions.

There is, however, a different narrative. It does not require us to abandon or suppress the tragedy of the Chinese experience in the nineteenth century; in a way, it makes the story tragic from the outset. But it does require us to reframe the meaning of the Chinese question. Fundamentally, the question as it played out in the courts was about state power more than individual rights. The rights of the individual Chinese litigant were always secondary; they mattered only to the extent that they provided a context for working out a new constitutional order.

The Chinese question had triggered federalism questions before the Civil War, centering on whether the state's action interfered with the federal government's commerce and treaty powers. These issues remained after the war, but Reconstruction introduced new legal technologies that transformed the relationship between state and local, and the federal government. Clauses in the Fourteenth Amendment to the U.S. Constitution such as "due process," "privileges or immunities," and "equal protection," as well as congressional legislation enforcing these clauses, provided tools for federal courts to penetrate the state's police power in novel ways. The Burlingame Treaty, ratified the same year as the Fourteenth Amendment, extended the privileges and immunities protections to Chinese immigrants.[8] The anti-Chinese movement in California became tied to a states' rights ideology that persisted even after the Civil War. It was rooted in the idea that state and local governments possessed broad authority under their police power to regulate men and things.[9] But as state and local governments used this power to regulate the Chinese, they increasingly butted up against the powers of the federal government, and the restrictions imposed by the Fourteenth Amendment. Anti-Chinese activists would recoil at the ways in which the federal courts protected the rights of Chinese. They even used the constitutional convention, an institution with a long historical connection to popular sovereignty,

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[8] The privileges or immunities clause was limited to "citizens" under the Fourteenth Amendment.

[9] William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996).

to fortify the state's power to protect itself from the threats posed by Chinese immigrants. The convention's efforts, along with those of several municipalities, ultimately proved the undoing of states' rights in this field.

The procedural trigger for applying these clauses, in the Chinese cases, was the federal courts' expanded habeas corpus jurisdiction. The Habeas Corpus Act of 1867 enabled federal judges in the Ninth Circuit to expound on the Fourteenth Amendment's clauses. The Habeas Act, passed the same year as the first Reconstruction Acts, allowed federal courts to hear petitions for habeas corpus from prisoners held by state authority for the first time. Although Congress withdrew the U.S. Supreme Court's appellate jurisdiction under the act the following year, the lower federal courts' jurisdiction remained intact. The Chinese in California took full advantage of the Act's protections, turning California's federal district and circuit courts into "habeas mills" that applied the protections of the Fourteenth Amendment and the Burlingame Treaty in ways that circumscribed the powers of state and local governments.[10] Congress would restore the Supreme Court's appellate jurisdiction in the 1880s, and the Court would use it to consolidate federal supremacy with respect to immigration.

THE OLD SUPREMACY

Throughout the last half of the nineteenth century state and local governments in California used their tax and police powers to regulate and exclude Chinese people. California was not unique in this regard. As William Novak has explained, "early American associationalism was a mode of governance. Membership in and exclusion from a range of differentiated self-governing associations determined one's bundle of privileges, obligations, and immunities . . . ."[11] Illinois and Indiana, for example, had long excluded African

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[10] Fritz, "A Nineteenth Century 'Habeas Corpus Mill.'"

[11] William J. Novak, "The Legal Transformation of Citizenship in Nineteenth-Century America," in Meg Jacobs, et al., eds., *The Democratic Experiment: New Directions in American Political History* (Princeton: Princeton University Press, 2003): 85, 98; see also Laura F. Edwards, "The People's Sovereignty and the Law: Defining Gender, Race, and Class Differences in the Antebellum South," in *Beyond Black and White: Race, Ethnicity, and Gender in the United States South and Southwest* (Arlington: University of Texas Press, 2003): 3; idem, "Status Without Rights: African Americans and the Tangled History of Law and Governance in the Nineteenth Century U.S. South,"

Americans from their borders. States on the eastern seaboard imposed taxes and other obligations on migrants likely to become public charges. And all state and local governments used the police power to protect their communities from the myriad threats to the public health, safety, welfare, and morals. What distinguished California's efforts was its specific targeting of Chinese immigrants, which butted up against federal power. Before Reconstruction, the conflict centered on Congress's power over foreign commerce.

Local governments' use of the police power in the 1850s was less likely to interfere with federal power than it would after Reconstruction. For one thing, during the 1850s the bulk of the Chinese population was engaged in mining, and thus beyond the boundaries of municipal government. In the absence of formal structures of government, miners' associations appropriated the task of exclusion. These associations of white men took it upon themselves to enforce a racialized political economy that denied property ownership (at least in mines) to Chinese, and recognized the right of exit as the Chinese miners' lone right of locomotion. The miner associations drove off Chinese miners, dispossessed them of their mining claims, and used threats of violence and murder as their chief regulatory tool.[12]

With respect to the formal organs of government, the state legislature, rather than local governments, assumed responsibility for regulating and excluding the Chinese. California's legislature experimented with a number of measures to exclude and penalize Chinese people for migrating to and/or living and working in California. These efforts were not very successful, except in generating tension within California, and between California and the federal government. The Legislature's chief tactic in dealing with the Chinese was taxation. The Legislature imposed a variety of fees and taxes on Chinese, employers, and shippers to stem Chinese migration and labor. In May 1852, for example, the state re-enacted the Foreign Miners' License Tax, "to Provide for the Protection of Foreigners and to define their liabilities and privileges," a $3/month tax on miners from foreign countries. Unlike its predecessor, this tax was aimed specifically at Chinese miners. It also denied those who did not pay the tax access to courts.

The American Historical Review 112 (2007): 365; idem., *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (Chapel Hill: University of North Carolina Press, 2009).

[12] Pfaelzer, *Driven Out*, 8–16, 34–38.

In 1861, the state revised the statute making all foreigners ineligible for citizenship residing in a mining district liable for tax. Violence was often used in the collection of such taxes. One collector, for instance, tied two Chinese men together by their hair (or queues) while they searched the men's belongings for money to pay the tax.[13]

The Chinese challenged these taxes in two separate cases on *state* constitutional grounds. In *Ex parte Ah Pong*,[14] a Chinese laundryman, Ah Pong, refused to pay the tax, and was ordered to work on roads until the tax was paid off, not an uncommon penalty at the time. Ah Pong petitioned for a writ of habeas corpus in state court, challenging the statute's constitutionality. The California Supreme Court released Ah Pong, but avoided the constitutional issue, construing the act to apply to miners only. In the second case, *Ah Hee v. Crippen*, the Chinese plaintiff secured a temporary victory on the constitutional issue. Ah Hee sued in replevin to recover a horse that had been taken for his failure to pay the tax. Ah Hee challenged the tax on state constitutional grounds, arguing that it violated article I, section 7 of California's 1849 Constitution, which granted foreigners the same property rights as United States citizens. The district court agreed. Again, however, the California Supreme Court avoided the constitutional claim, deciding the case favorably to Ah Hee on other grounds.[15]

Two other taxes imposed in the mid-1850s were aimed more directly at excluding the Chinese, and triggered federal constitutional challenges. In 1852, the state imposed a "commutation tax." This tax was designed to discourage migration by requiring shipmasters to prepare a list of all foreign passengers, identify those passengers deemed mentally ill or disabled, and post a $500 bond for each foreign passenger. The bond was usually reduced to $5, and shippers simply added it as a surcharge to the ticket. California was not the first state to impose such a tax. States in the East, including Massachusetts and New York, required shipmasters to post bonds for passengers who were likely to become public charges.[16]

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[13] McClain, *Search for Equality*, 12, 24; Pfaelzer, *Driven Out*, 31–32.

[14] 19 Cal. 491 (1861).

[15] McClain, *Search for Equality*, 24–25

[16] Hidetaka Hirota, "The Moment of Transition: State Officials, the Federal Government, and the Formation of American Immigration Policy," *Journal of American History* 99 (March, 2013): 1092.

But in 1855, the state imposed another tax on shipmasters or ship owners for landing people in California who could not become citizens, i.e. the Chinese.[17] The difference with this tax was that the early taxes imposed by other states were at least plausibly imposed in support of the state's police power to protect the public welfare; those taxes went to support indigent immigrants. California's taxes, however, were imposed to prevent the immigration of a particular group of people. California's commissioner of immigration, Edward McGowan, quickly realized the distinction, and refused to enforce the 1855 tax because he thought it was an unconstitutional interference with the federal government's power over foreign commerce. The California Supreme Court agreed, and struck down the act in *People v. Downer* in a brief opinion.[18] The state legislature tried to address the constitutional problem in 1858 by trying to exclude persons thought detrimental to public welfare, but it was also struck down.[19]

A final tax, the "Chinese Police Tax," was directed at Chinese labor. Entitled "An Act to protect Free White Labor against competition with Chinese Coolie Labor and to Discourage the Immigration of the Chinese into the State of California," the legislature imposed a monthly tax on most Chinese laborers residing in the state. Employers could also be made liable for tax. Once again, the California Supreme Court struck down the act for interfering with the federal government's foreign commerce power. Being directed at the Chinese, the effect of the tax would be to discourage immigration at the very least.[20]

Aside from the taxes, the state imposed another disability on the Chinese, though it originated in the courts. In *People v. Hall*,[21] the California Supreme Court created a ban on Chinese testimony. Section 14 of the California Criminal Proceedings Act declared, "No black or mulatto person, or indian, shall be permitted to give evidence in favor of, or against, any white person." Through a binary conception of race that divided the races into white and non-white, the court held that this statute banned Chinese testimony, too.[22]

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17 McClain, *Search for Equality*, 17.

18 7 Cal. 169 (1857).

19 As discussed in *Lin Sing v. Washburn*, 20 Cal. 534, 438 (n. 63, 293); McClain, *Search for Equality*, 18.

20 McClain, *Search for Equality*, 25–29; *Lin Sing*, 577–578.

21 4 Cal. 399 (1854).

22 McClain, *Search for Equality*, 21.

Tortured as the analysis may have been, it nonetheless fit within a concept of citizenship that allocated rights and privileges on the basis of a person's status.[23] In fact, the denial of Chinese testimony was central to the creation of a racialized state in California in the 1850s. "Extending testimony privileges to the Chinese, for instance, also meant endowing the Chinese with the power to command white action," such as compelling the arrest of white men.[24] Clearly, this should be beyond the power of an "inferior" race.

The Chinese testimony cases following the Civil War illustrate the emerging line of scrimmage in Reconstruction jurisprudence on the Chinese question. *People v. Washington*[25] examined the ban on Chinese testimony in light of the 1866 federal Civil Rights Act. In that case, a black man, George Washington, stole some gold from a Chinese miner. Washington was prosecuted for theft, but the only testimony against him was that of Chinese witnesses. Washington's attorney moved to dismiss the case on the grounds that the Civil Rights Act entitled Washington to the same privilege of the ban on Chinese testimony as that of whites. The trial judge agreed, and the prosecutor appealed to the California Supreme Court. As Michael Bottoms has explained the dilemma, "If the court found the Civil Rights Act constitutional, *all* testimony would be admissible. . . . On the other hand, if the court rejected Congress's right to pass such legislation, then the barriers to racial minorities survived, and Washington was not equal to whites." The court ultimately upheld the Civil Rights Act, and preserved California's racial structure, by resting its decision on the Thirteenth Amendment. However, the court also recognized that the recently-ratified Fourteenth Amendment likely rendered the issue moot.[26]

In 1869, the year *Washington* was decided, the basic scope of the Fourteenth Amendment was still being sorted out, and many believed that it only applied to African Americans. In fact, the United States Supreme Court raised the question without deciding it in the *Slaughterhouse Cases*. This construction of the Fourteenth Amendment of course left plenty of room for unequal protection for other groups, including the Chinese. In

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[23] Novak, "The Legal Transformation of Citizenship"; Edwards, "Status Without Rights."

[24] Bottoms, *An Aristocracy of Color*, 25.

[25] 36 Cal. 658 (1869).

[26] Bottoms, *An Aristocracy of Color*, 49–51.

1871, in another Chinese testimony case, *People v. Brady*,[27] divisions within the California Supreme Court over the boundaries of the Fourteenth Amendment began to appear. The majority again upheld the testimony ban. In so doing, the Court held that the new amendment was not intended to interfere with "internal police" of state governments, which included the state's control over its trial procedure. By contrast, the dissent argued that the Equal Protection Clause applied to the case, and abrogated the ban on Chinese testimony.[28] *Brady* raised the question at the heart of constitutional Reconstruction that would be fought out in state and federal courts through the end of the century: whether the Fourteenth Amendment imposed new limits on state and local governments' police powers.

RECONSTRUCTION

As this legal debate over Chinese testimony reveals, Reconstruction had changed the legal discourse by giving lawyers and judges new legal technologies to deploy. The most obvious change, and the most consequential, was the Fourteenth Amendment. The amendment's due process and equal protection clauses gave Chinese litigants new theories by which to challenge state and local anti-Chinese laws. The privileges or immunities clause was limited to "citizens" and thus did not apply directly to the Chinese, who could not become citizens. But a similar clause in the Burlingame Treaty with China did. Ratified the same year as the Fourteenth Amendment, it granted Chinese immigrants the same "privileges, immunities, and exemptions" as those of the most favored nation.

As important as the Fourteenth Amendment was the Habeas Corpus Act of 1867. The 1789 Judiciary Act had limited federal habeas jurisdiction as to prisoners held in federal custody. The 1867 act expanded federal habeas jurisdiction to include prisoners held in state custody. It also expanded the writ from a pre-trial procedure to a post-conviction device that allowed challenges to state denials of federal rights. This change "struck directly at traditional powers of the state courts," and of states more generally. The importance of the 1867 act has been largely overlooked because Congress withdrew the U.S. Supreme Court's appellate jurisdiction under the act the following year, fearing

[27] 40 Cal. 198 (1871).

[28] McClain, *Search for Equality*, 35–36.

that it might use it to strike down congressional Reconstruction legislation. But the lower federal courts retained the new habeas jurisdiction. Chinese litigants took advantage of the new procedural device to challenge discriminatory state laws, and federal judges largely supported those efforts. Thus while the U.S. Supreme Court has long been criticized for abandoning the promise of Reconstruction in general and the Fourteenth Amendment in particular, judges in the Ninth Circuit used the Habeas Corpus Act to build a robust jurisprudence around the due process, equal protection, and privileges or immunities clauses in the 1870s and 1880s that limited state power.

The impact of these measures began to emerge in California in the early 1870s, as Chinese litigants took advantage of the federal courts' new habeas jurisdiction to challenge state laws. Two cases decided within a month of each other in 1874 outline the main lines of debate. Both cases arose out of an incident involving passengers on the ship *Japan*. California's commissioner of immigration decided not to allow certain female passengers to land after determining that they were "lewd and debauched." Separate petitions for habeas relief were filed in state and federal courts challenging the California statute giving the commission power to make such determinations.

In *Ex parte Ah Fook* the petitioners argued that the statute violated both the Burlingame Treaty and the Fourteenth Amendment. The California Supreme Court disagreed on both counts. The Court relied on the traditional distinction between the commerce and police powers, and held that the Treaty's privileges, immunities, and exemptions clause could not intrude upon the state's police power. "Otherwise, we should be prohibited from excluding criminals and paupers — a power recognized by all the writers as existing in every independent State. We can but think, that to give the general language of the treaty a construction which would deprive both the States and the United States Government of this power of self-protection would be a departure from the evident meaning and purpose of the high contracting parties."[29]

The Court also denied that the Fourteenth Amendment's due process clause had any effect on the state's police power. In fact, the Court dismissed the significance of the Fourteenth Amendment's due process clause. "A clause substantially the same as that contained in the amendment, is found in the Constitution of California, and in the constitutions of all of the several States."

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[29] *Ex parte Fook*, 49 Cal. 402, 405 (1874).

The Fourteenth Amendment added nothing to the meaning, scope, or significance of such clauses. Due process had to be determined in light of the power being exercised. As the statute was a public health measure, the legislature was given the broadest discretion possible. "[H]ealth laws . . . must be prompt and summary" in order "to prevent the entrance of elements dangerous to the health and moral well-being of the community." And the Court saw no reason to overrule the commissioner's decision or strike down the statute.[30]

By contrast, while riding circuit, U.S. Supreme Court Justice Field held in *In re Ah Fong* that the statute violated the foreign commerce clause and the privileges, immunities and exemptions clause of the Burlingame Treaty, as well as the Fourteenth Amendment's equal protection clause. Field rejected the argument that the statute was a legitimate exercise of the police power. Police involved matters of internal governance, while exclusion dealt with external relations, or foreign commerce, which was Congress's domain. Moreover, as the statute discriminated between Chinese and people of different foreign countries, it encroached upon the federal treaty power, which in this case had been used to grant Chinese the privileges, immunities, and exemptions of the most favored nation.[31]

To this point, there was nothing terribly novel about Field's holding. Conflict with Congress's foreign commerce power had been an issue before the Civil War, and the treaty power had long been a part of the federal constitution. Field's discussion of the Fourteenth Amendment, though, was significant because the federal commerce and treaty powers arguably settled the case. Field could have avoided the Fourteenth Amendment issue. Instead, he held, "Discriminating and partial legislation, favoring particular persons, or against particular persons of the same class, is now prohibited" by the Fourteenth Amendment's equal protection clause.[32] Discriminating, or "class," legislation was distinct from the police power, which had to be directed toward protecting the general welfare. Field would later hold, as we will see, that the Fourteenth Amendment did not limit the states' police power. But since federal courts would have to determine what was class legislation and what was not, it was clear that federal courts would play a

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30 Ibid., 406–07.

31 *In re Ah Fong*, 1 F. Cas. 213 (1874).

32 Ibid., 218.

larger role in defining what was and was not within the states' police powers. The new supremacy was becoming apparent.

Ah Fook and *Ah Fong* delimited the boundaries of the Reconstruction debate over the Chinese question. Reconstruction represented a potentially major shift in the structure of constitutional authority in the United States. The state court defended traditional conceptions of state governmental power, especially the police power. It defined that power broadly, and rejected the notion that Reconstruction had transformed it in any meaningful way. Federal courts, by contrast, found in the amendment and other Reconstruction legislation, a new set of limits on the power of the states. Even though the cases that came through the federal courts in the 1870s and 1880s involved individual rights, they were vehicles for asserting the supremacy of the federal government. This debate in the courts, which spilled over into popular politics, provided the context for debates that ensued in California's constitutional convention. These debates revealed a deep ambivalence about the impact of Reconstruction, as delegates simultaneously asserted and denied a new supremacy.

AMBIVALENCE

While there were several reasons for assembling a second constitutional convention in California in the late 1870s, the Chinese question was the most proximate. The enormous growth in population and the growing complexity of the state's economy had rendered the 1849 constitution and the government organized under it largely ineffective. Reformers were especially interested in reining in the state's tax power, the power and influence of corporations, and shoring up the state's judicial and representation systems.[33] But it was the Chinese question that gave the desire for a new constitution its urgency. The movement for a new convention was driven largely by the Workingmen's Party whose slogan was "The Chinese Must Go!" Even though Workingmen did not muster a majority of the convention's delegates, they set the agenda and framed the debates, making clear that the Chinese were their central concern.

While the presence of the Chinese could be felt in debates ranging from corporations and railroads to legislative representation, I want to

[33] Noel Sargent, "The California Constitutional Convention of 1878–9," *California Law Review* 6 (1917): 1, 1–4.

focus on two interconnected debates that help to highlight the connection between the Chinese and Reconstruction in California. The first debate concerned the state's bill of rights, and specifically two clauses, the right to alter or abolish government and the "new" supremacy clause. The debate over these clauses was a prelude to the second debate over what would become article XIX of the new Constitution, which would be titled simply "The Chinese." Article XIX was intended to challenge the Ninth Circuit's jurisprudence on Chinese rights, and reaffirm the state's ability to regulate and exclude its Chinese population. But even at its most defiant, the convention revealed an ambivalence about the impact of Reconstruction.

The broad issues raised in California's debate over the right to alter or abolish government and the new supremacy clause were not unique to California. The right to alter or abolish government had been the key right undergirding a localized conception of popular sovereignty prior to the Civil War. However, because it could legitimately be used to support the idea of state sovereignty, and hence secession, lawmakers and legal thinkers after the Civil War began to search for ways to limit and abstract the right. Convention delegates throughout the country were involved in this reconceptualization of the right.[34] What was unique about California's debate was the Chinese question.

The debate over these clauses began when section two of the bill of rights was reported to the convention.[35] San Francisco lawyer and Workingmen's Party member Clitus Barbour immediately offered an amendment declaring California's right to police itself, in addition to reserving the right to alter or abolish government. It read,

> The people of the State have the inherent, sole, and exclusive right to regulate their internal government, and the police thereof. They have the right to determine what is detrimental to the well-being

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[34] I have written about this process elsewhere. Roman J. Hoyos, "A Province of Jurisprudence?: The Invention of a Law of Constitutional Conventions," in Markus Dirk Dubber, and Angela Fernandez, eds., *Law Books in Action: Essays on the Anglo-American Legal Treatise* (Oxford: Hart, 2012); idem, "Peaceful Revolution and Popular Sovereignty: Reassessing the Constitutionality of Secession," in Alfred L. Brophy, and Sally Hadden, eds., *Signposts: New Directions in Southern Legal History* (Athens: University of Georgia Press, 2013).

[35] *Debates and Proceedings of the Constitutional Convention of the State of California*, 3 vols. (Sacramento: J. D. Young, Supt. State Printing, 1880): I, 232.

> of the State, and to exhaust the power of the State to prohibit and prevent it. They have the right to alter or abolish their Constitution and form of government whenever they may deem it necessary for their safety and happiness.[36]

At first blush, Barbour's amendment appears to be an uncontroversial restatement of the state's police power. But he made it clear that the "peculiar situation of this people" gave the clause a distinct meaning; it was designed to address the "overshadowing curse everywhere present" by reserving to the people their power to protect the public welfare.

Throughout the debates anti-Chinese delegates referred to Chinese as a "nuisance," "blight," "pestilence," "filthy," "leprous," etc. These were not simply rhetorical devices, they were intended to bring the Chinese within the regulatory powers of the state. Nuisances, particularly threats to the public health, fell squarely within the state's police power to both abate and prevent threats to the public's health, safety, welfare, and morals.[37] These delegates had some contemporary science on their side. Some physicians had identified the Chinese themselves, and the Chinatowns in which many lived and worked, as sources of disease.[38] Local governments used these connections to regulate Chinese people and their territories as a threat to the public health.[39] As early as 1854, a committee of San Francisco's Common Council declared the Chinese to be a "nuisance" in the wake of a cholera epidemic, which could have led to their removal or expulsion from the city. But until the late 1860s it appears that local governments "mapped" the Chinese and the spaces in which they lived, rather than regulating them directly.[40] This mapping made the Chinese and their patterns of behavior visible and legible to local governments. By the late 1860s, California's municipalities began regulating the Chinese and Chinatowns as "nuisances" in a serious way. To protect these efforts both to regulate and exclude the Chinese, Barbour wanted up front "an emphatic declaration in the Constitution, declaring that this State has the right to regulate her own internal government."[41]

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36 Ibid.

37 Novak, *The People's Welfare*.

38 Salyer, *Laws Harsh as Tigers*, 11–12

39 Shah, *Contagious Divides*, 1–157.

40 Shah, *Contagious Divides*, 20–25, 51; Molina, *Fit to be Citizens?*, 26.

41 *California Debates*, 233.

Charles W. Cross, a Republican elected on the Workingmen's Party ticket, made clear that Barbour's amendment was a gauntlet. "And now," he argued, "as the Government of the United States, one of the parties to this compact, has declared the relation of the several States to the General Government, so we, as a party to this compact, have a right, and it is our duty, in this the only place where we can express our views of our relations to the General Government, to give a clear statement of what we consider these relations to be." Barbour's amendment was intended to challenge both Reconstruction and the Ninth Circuit's construction of it. He continued that "if it be the sentiment of the people of the State of California that no power outside the State of California has a right to interfere in our police regulations, and prevent our taking such steps to formulate such measures as we shall think for the interest, for the protection, of the people of this State, we have a right, and it is our duty, to declare ourselves upon such propositions."[42]

After a brief debate, Barbour's amendment failed.[43] Its failure was not due to a desire to protect the Chinese, however. Delegates well understood that the real issue was about the Chinese, and preferred to discuss it at the appropriate time. Moreover, delegates saw in Barbour's amendment elements of the states' rights doctrine that had led to secession. Charges of secessionism were often used against extremists on the Chinese question. In part because of these charges, as well as charges that the Workingmen were communists or socialists,[44] a new clause was inserted in California's bill of rights.

The "new" supremacy clause was one of the most important innovations of the postbellum constitutional conventions. The clause recognized the federal constitution as the supreme law, and often declared that citizens owed "paramount allegiance" to the federal government. They were called "new" supremacy clauses, because there was an "old" supremacy clause contained in Article VI of the federal constitution. The first of the new supremacy clauses appeared in West Virginia's 1863 constitution, which essentially took the clause from Article VI and inserted it into its bill of rights.[45] But the clause could be more elaborate. Maryland's 1864 constitution held that,

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42 Ibid., 233.

43 Ibid., 237.

44 Carl Brent Swisher, *Motivation and Political Technique in the California Constitutional Convention of 1878–79* (Claremont, CA: Pomona College, 1930), 93.

45 West Virginia Constitution, Article 1, sec. 1.

"every citizen of this State owes paramount allegiance to the Constitution and the Government of the United States, and is not bound by any law or ordinance of this State in contravention or subversion thereof."[46] Recognition of a citizen's "paramount allegiance" to the federal government was an implicit rejection of the secession. The implicit connection was made explicit in Nevada's 1864 constitution, where the supremacy clause was included in the same section that rejected the idea of secession as a constitutional right.

The obvious question, of course, was whether such clauses were even necessary. "[W]e can incorporate [a supremacy clause] into our constitution, but the Constitution of the United States is binding so why?" asked a delegate in Georgia's convention.[47] "Is it not all powerful in itself?"[48] The answer, of course, was the Civil War. "After what has occurred in our recent national history, it appears to me that every State which has a Constitutional Convention ought to adopt a proposition of the nature that is proposed . . . , and especially in view of the fact that it seems as if the old controversy would never die, but must come up from time to time," argued one California delegate.[49] The new supremacy clauses were designed to settle the secession question by specifically recognizing the federal government's ultimate constitutional supremacy.

As initially reported to the convention, California's supremacy clause was a far-reaching statement of the new constitutional supremacy. In addition to declaring the federal constitution the "paramount law of the land," it also held, "We recognize the Constitution of the United States of America as the great charter of our liberties."[50] Delegates debated both the "paramount law" and the "charter of our liberties" clauses. Supporters of the new supremacy urged its adoption for a couple of reasons. One was its plain obviousness. William White, an Irish farmer and Workingmen's Party member, insisted that, "We all know that the Constitution and laws of the United States are the paramount law of this land and we should declare it so."[51]

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46 Maryland Declaration of Rights (1864), Article V.

47 *Journal of the Proceedings of the Constitutional Convention of the People of Georgia* (Augusta, Georgia: E.H. Pughe, Book and Job Printer, 1868), 240 (remarks of Hager).

48 Ibid.

49 *California Debates*, I: 239 (remarks of McCallum).

50 Ibid., 232.

51 Ibid., 238.

But other delegates feared the novelty of California's new supremacy clause. Horace Rolfe, a Republican lawyer, moved to strike the clause as "entirely unnecessary." Rolfe stated that he did "not recognize the Constitution of the United States as the great charter of our liberties. We had State charters before there was any Constitution of the United States."[52] Charles Ringgold, a Workingman, also rejected entirely the notion that the federal constitution could be a charter of liberties. Recognition of the primacy of the federal constitution rearranged the entire constitutional structure. He could not "indorse this section, for it strikes at all State sovereignty. I believe in State sovereignty, and shall ever stand by it as long as I live."[53] The supremacy clause also undermined popular sovereignty. As Workingman Nathaniel G. Wyatt explained, "The powers of the Government of the United States are derived from the people through the government of the States, and wherever there is a reserved power it is with the people and not with the United States."[54]

Underlying this fear of federal supremacy was the fear that an explicit acknowledgment of federal supremacy would undermine the state's ability to deal with Chinese laborers. Barbour drew out the implications of the charter of liberties clause. It "will be construed into the doctrine of centralization." Yet, "Our purpose and duty," he argued, "is to lay down and declare the power of this State, and not the power of the Federal Government."[55] Surprisingly, Barbour here invoked the states' rights ideas of South Carolina's John C. Calhoun. He told the convention that he believed "that the principles and doctrines that were asserted by Calhoun were correct, and would have been maintained by the people of the United States if the element of slavery had been out of the consideration." Slavery was destroyed, "[b]ut the principle still lives." Indeed, without slavery, states' rights could now realize its full potential. "I say we ought to declare it here — as John C. Calhoun declared the doctrine of the sovereignty of the States — not for the purpose of preserving slavery, but for the purpose of destroying a slavery as bad as that of the South."[56]

Ultimately, the supremacy clause remained, but without the charter of our liberties clause. The final version simply stated, "The State of California

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[52] Ibid., 238.
[53] Ibid., 242–43.
[54] Ibid., 242.
[55] Ibid., 242.
[56] Ibid.

is an inseparable part of the American Union, and the Constitution of the United States is the supreme law of the land."[57] But it revealed the convention's ambivalence about the meaning of the Civil War and Reconstruction. These issues continued throughout the convention. John Miller, a Republican Non-Partisan lawyer, drew the connection between the bill of rights debate and the Chinese question. "It is evident that a long debate will be provoked here, as to the rights and powers of the States, and as to the rights and powers of the General Government. That discussion will necessarily come up in the considerations of the measures or propositions which have already been introduced here, and which are now before the Committee on Chinese."[58]

And indeed it did. The Report of the Committee on Chinese sparked a lengthy debate, but it was left substantially intact in what became article XIX. The report contained six sections. Section 1 simply reiterated the state's power to regulate aliens "dangerous or detrimental to the well-being or peace of the State. . . ." Sections 2 through 5 imposed a variety of liabilities on Chinese people and their employers. Corporations and governments were barred from employing Chinese, Chinese were barred from fishing in state waters, and were also deprived of property, contract, and residency rights. Section 6 reserved the power of the state to exclude Chinese, and to delegate that power to municipalities. It also punished companies for importing Chinese "coolie" labor, which it determined to be "a form of human slavery."[59]

While all six sections seemed directed toward the same end, different constitutional theories were contained within it. John Miller, the chairman of the Committee on Chinese, explained to the convention that the committee could not agree on how to deal with the Chinese, and so presented three plans for consideration. The least constitutionally-suspect, he thought, was section 1, which simply reaffirmed the state's police power. For Miller this was as far as the convention could go without encroaching upon the federal government's commerce power. The second plan was exclusion, which Miller argued was pre-empted by the U.S. Supreme Court's commerce clause jurisprudence. The third approach, which Miller referred to as "a plan of starvation by constitutional provision," sought to "deny Chinese rights to protection of the law," specifically the privileges and immunities clause of the

[57] Ibid., III: 1510.
[58] Ibid., I: 234.
[59] Ibid., II: 721.

Burlingame Treaty. "Because by labor all must live, and if you deprive them of their right to labor, they must starve. . . . It is indefensible, for it deprives the prohibited people of the right to life."[60] Miller's opposition to sections 2 through 6 did not mean that he was progressive toward Chinese rights. "All agreed that Chinese immigration was an evil, and that if possible the further influx of Chinese to this country should be stopped," he argued.[61] But the convention could only act within its proper sphere of authority.

Other delegates, especially Workingmen, felt that the entire report fell firmly within the state's power to police its boundaries. Jacob Freud, a Workingman from San Francisco and at 21 years of age the convention's youngest delegate, argued that California had the power both to regulate and remove Chinese, and relied on the doctrine of dual federalism, which held that federal and state governments were sovereign within their spheres. What was at issue for Freud, then, was "the universal right of every State to regulate and control its own internal affairs, such as corporations and public works within its borders." And it was clear to his mind that "every State has the avowed power to protect itself against foreign and well known dangerous classes, such as paupers, vagrants, criminals, and persons afflicted with contagious and infectious diseases. This power is a part of the police power of the State. Under this constitutional power of a State, New York and Massachusetts have been upheld by the Courts in turning back criminals from Europe."[62] The power to police, then, included within it the power to exclude.

As Freud elaborated on exclusion as a police technique he revealed his view of the changing (or rather *un*changing) constitutional order:

> The question then arises, has the State no more reserved power? I think it has. Among the reserved rights of the State I claim that there is none so prominent, essential, and constitutional as the right of the State to receive, remove, or repel any person or any people who may be dangerous to its health, to its peace, or its prosperity. No sovereign State on earth ever yielded that right. No sovereign State on earth can exist without that power. *When did the American States then cede that power to the General Government? I challenge any man to show*

[60] Ibid., 630.
[61] Ibid., 628.
[62] Ibid., 634.

> *me where, or when, or in what words.* The fundamental right of every State is to maintain its own existence. Self-preservation is not only the first law of nature, but also the first law of States. California has the right not only to protect but also to preserve herself. California has the right to declare the Chinese upon her soil dangerous and detrimental to her peace, progress, and prosperity, and therefore to prohibit them hereafter from settling or residing within her borders.[63]

In short, the police power gave California the authority to remove or exclude individuals who posed a threat to the social order. The state also had both the right and the power to determine that the Chinese — as Chinese — posed such a threat. Clitus Barbour agreed. "I do not think that the Burlingame treaty, the Fourteenth Amendment, or the Civil Rights bill would have been considered infracted by any municipal regulation for the abatement of that nuisance."[64] And the Chinese were "the crowning nuisance, which calls for the exercise of the sovereign power of the State for its abatement."[65]

Freud agreed that the federal *constitution* was the "supreme law of the land," but this did not necessarily make the federal *government* supreme; *that* was the new supremacy, and not a concept Freud could yet endorse. Federal supremacy could not vitiate the state's police power. The power of a state "to make its own Constitution and laws," along with its "sovereign control over its people" remained, and that meant that "[f]or self-preservation or self-protection, it may exclude any save citizens of other States." The federal government's commerce power was distinct, and did not include the power to impose "hordes of coolies of a degraded, servile and alien race" on a "free State." Nevertheless, he registered his ultimate ambivalence of his position by conceding the issue to arbitration by the U.S. Supreme Court. Barbour did, too, ultimately referring to the report as a "revolutionary measure" aimed at "shocking [the] sensibilities" of Congress and the rest of the nation.[66]

Where Freud saw an unchanged constitutional order, Charles J. Beerstecher registered his fears about Reconstruction's revision of that order. "I believe, sir, that in these latter days there has been a tendency to rob the States of their rights, and the time has come when persons who desire to see American

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[63] Ibid. (emphasis added).

[64] Ibid., 660.

[65] Ibid., 652.

[66] Ibid., 661.

institutions perpetuated, who desire to see the spirit that actuated the founders of this country carried out in its true intent and purposes, that they should rise up and see to the centralizing efforts at Washington."[67] Barbour shared Beerstecher's fear: "There rests the keystone of the whole arch, and that is its ultimate resort. Who is to decide? In whom is the power of judgment lodged?" This, of course, had been the key to the Chinese question all along.

Critics of the Report responded in a variety of ways. Republican delegate Horace Rolfe, for instance, thought the report was "absurd," and that if adopted would make the convention and the state a "laughing-stock of the world": "The first Court before which our work is brought would disregard it, and treat it as unconstitutional and void — as a violation of the Constitution of the United States. So that it is a mere waste of time to pass any such provisions."[68] Miller, of course, had already argued that the state could rely only upon its police power, which he distinguished from exclusion.

Charles Stuart, a Republican farmer from Sonoma, built on Miller's argument, and drew a connection between the anti-Chinese movement and secession. "I am opposed to all these sections from number one to number eight," he argued.

> They are not proper to be placed in any Constitution of the United States, let alone ours. It is in direct conflict with the Constitution of the United States and the treaty-making power. It is a boyish action for us to admit either one or the whole of these articles to be engrafted in our organic law. It would be the laughing-stock of the world, a disgrace to the State, a movement toward secession, and a disregard of the constitutional laws of the United States.[69]

Stuart's connection of exclusion and regulation of the Chinese to secessionism is revealing. He ridiculed the constitutional and jurisprudential backwardness of the Report's supporters, especially in their reliance on opinions written by Chief Justice Roger Taney. One delegate (referring to Democratic Non-Partisan James Ayers, who had drafted section 4), he began, "quoted very lengthily from Roger Taney. I remember when Taney

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[67] Ibid., 646.

[68] Ibid., 656.

[69] Ibid., 642. Stuart was a major agricultural employer, and claimed to have employed thousands of Chinese and White workers.

made another decision. Do you know what became of it? I remember his Dred Scott decision. I think that was the first political case that was ever decided in the United States, and I remember what that led to, and I think you do." For Stuart, the Civil War was the new constitutional dividing line.[70]

Republican lawyer James Shafter made the point more explicitly. He felt that the jurisprudential arguments were beside the point. "Among all the cases cited here one important one seems to have been overlooked." The Civil War had settled the question by "the force of arms. The ultimate force of government, the inexorable will guided by the highest intelligence of the people, declared that the Constitution of the United States, and the treaties made in pursuance thereof, are the paramount law of this land from this time forth." The War itself was the foundation for the new supremacy. Thus, "we recognize our allegiance, politically, first of all, to the Federal Constitution, and next, to the Constitution of the State of our adoption." And in any conflict between the police power and federal authority, the "police power must yield."[71]

While opponents of the Chinese Committee Report ultimately lost, they had managed to convince its proponents that they were at the very least on shaky constitutional ground. While the bulk of the debate focused on the conflict between the Chinese Committee Report and the federal commerce and treaty powers, it also entailed a broader construction of the impact of the Civil War and Reconstruction on the constitutional order. By the end of the debate the most that the Report's proponents actually seemed to hope for was that it would spur action at the federal level. In fact, the convention would memorialize Congress to take action on the Chinese. The irony of the Report's success in placing article XIX into the new Constitution was that, in forcing the issue, proponents sealed the demise of the constitutional order they sought to protect.

THE NEW SUPREMACY

Article XIX was challenged almost immediately after the new constitution went into effect. Over the coming decades, not only would the article

[70] Ibid., 642.

[71] Ibid., 675, 672, 684.

be gutted by federal judges in California on a variety of grounds, but the constitutional authority over immigration would be centralized in the federal government. Habeas was the central legal device upon which federal supremacy over the Chinese, and immigration more generally, would be centralized. This consolidation began in what became known as the "habeas mill," the federal district and circuit courts in California in the 1880s. District Judge Ogden Hoffman and Circuit Judge Lorenzo Sawyer were the chief cogs in the mill, and processed thousands of habeas petitions. Their willingness to discharge Chinese petitioners generated considerable criticism of their courts. Oregon's District Judge Matthew Deady would also play a role in teasing out the jurisprudential issues. Finally, U.S. Supreme Court Justice Stephen Field was perhaps the dominant figure jurisprudentially, both on circuit and in his opinions for the Supreme Court.

The first challenge to article XIX was *In re Parrott*. Tiburcio Parrott was the son of one of the wealthiest men in the state, John Parrott. Tiburcio owned a mercury mine, and employed Chinese laborers in a variety of jobs. Section 2 of article XIX barred corporations from employing Chinese labor. In February 1880, the state legislature passed enforcement legislation. A week after the Legislature criminalized employing Chinese labor, Parrott manufactured his arrest to challenge section 2, then petitioned for a writ of habeas corpus in California's federal circuit court, before Judges Hoffman and Sawyer.[72]

The state conceded that the prohibition of Chinese employment was not an exercise of the state's police power. Rather, it based its authority on its "reserved power over corporations." This power, though, according to the court, was designed to protect stockholders, creditors, and the general public. But the object with the enforcement statute clearly was to exclude the Chinese. Thus, Judge Hoffman held that the section was unreasonable, "irrespective of the rights secured to the Chinese by the [Burlingame] treaty." Nevertheless, Hoffman also held that section 2 of article XIX violated the plain terms of the Burlingame Treaty, specifically the privileges, immunities, and exemptions clause of article VI. "The declaration that 'the Chinese must

[72] Andrew Johnston, "Quicksilver Landscapes, the Mercury Mining Boom, Chinese Labor, and the California Constitution of 1879," *Journal of the West* 43 (2004): 21, 21.

go, peaceable or forcibly,'" Hoffman wrote, "is an insolent contempt of national obligations and an audacious defiance of national authority."[73]

Hoffman's opinion reveals that force, as some of the California delegates had argued, lay behind the new supremacy. For example, he explained, "The attempt to effect this object [exclusion] by violence will be *crushed by the power of the [federal] government*." While the federal government may not have yet had a monopoly on violence, it had certainly proven in the Civil War to be able to marshal superior force over the states. Hoffman appeared invigorated as a federal judge by this power:

> The attempt to attain the same object indirectly by legislation will be met with equal firmness by the courts; no matter whether it assumes the guise of an exercise of the police power, or of the power to regulate corporations, or of any other power reserved by the state; and no matter whether it takes the form of a constitutional provision, legislative enactment, or municipal ordinance.[74]

The new constitutional supremacy grew out of, indeed could only be based upon, a clear supremacy in violence.[75]

Sawyer agreed with Hoffman, but took the opportunity to discuss the meaning of "privileges" and "immunities." In contrast to modern scholars who identify the *Slaughterhouse Cases* as the death knell of the Fourteenth Amendment's privileges or immunities clause, Sawyer found in the Court's jurisprudence a robust conception of the clause. And he used *Slaughterhouse* to interpret the privileges, immunities, and exemptions clause of the Burlingame Treaty.[76] According to Sawyer, all of the opinions in *Slaughterhouse* agreed that the fundamental meaning of privileges and immunities was that it "*embraces nearly every civil right for the establishment and protection of which organized government is established*. . . . There is no difference of opinion as to the significance of the terms 'privileges and immunities.'" Certainly included among privileges and immunities was "the right to labor for

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[73] *In re Parrott*, 491, 492, 493, 494.

[74] *In re Parrott*, 499 (emphasis added).

[75] Elmer Sandmeyer made a similar point years ago, but ultimately hedged. Elmer Clarence Sandmeyer, "California Anti-Chinese Legislation and the Federal Courts: A Study in Federal Relations," *Pacific Historical Review* 5 (1936): 189, 211.

[76] *In re Parrott*, 505, 506 (Sawyer, J.) (quoting *Slaughterhouse*, 76) (emphasis in original).

subsistence" (a point Miller had made in the convention). To deny Parrott's right to employ Chinese labor, then, violated the Burlingame Treaty.

But Sawyer, unlike Hoffman, continued beyond the treaty power. He also held that article XIX violated the Fourteenth Amendment's due process and equal protection clauses, which applied to "persons," as opposed to "citizens." Moreover, section 16 of the 1870 Civil Rights Act protected property and contract rights (including the right to and of labor) of "all persons within the jurisdiction of the United States." The Fourteenth Amendment and its enforcement legislation protected Chinese and their employers from discriminatory state laws, even those made by a state constitutional convention. Thomas Joo has argued that in cases protecting the Chinese right to labor we can see the origins of the economic substantive due process that would come to define the so-called "*Lochner* era" and its "laissez-faire constitutionalism."[77] But the application of the Fourteenth Amendment to anti-Chinese legislation was less about laissez-faire than it was about federal supremacy.

In a series of cases dealing with Chinese laundries, federal courts continued to build out this new supremacy. While *In re Parrott* struck down section 2 of article XIX, other cases chipped away at the state's police power. During the convention debates, this was considered the state's narrowest and safest basis of authority. Yet Justice Field had held that even that power was subject to federal scrutiny under the Fourteenth Amendment in *Ah Fong*. In cases after the new Constitution went into effect, federal courts would continue to subject the police power to judicial scrutiny.

In re Quong Woo, for example, involved a frontage consent ordinance for laundries. Quong Woo had owned and operated a laundry for several years. A new city ordinance required him to obtain the consent of a certain number of neighbors to operate his laundry, which he was unable to do. The federal court found the ordinance problematic in two ways. First, laundries were not inherently "offensive" businesses. Thus to single out this business, as opposed to making all businesses subject to frontage consent, was held unreasonable. Second, the court held that the city could not delegate its police powers to property owners. Such delegation also called into question the reasonableness of the law, since it could embody the prejudices

[77] Thomas Wuil Joo, "New Conspiracy Theory of the Fourteenth Amendment: Nineteenth Century Chinese Civil Rights Cases and the Development of Substantive Due Process Jurisprudence," *University of San Francisco Law* Review 29 (Winter 1995): 353.

of one's neighbors. The precise basis of the court's opinion, though, was not entirely clear. The court seemed to be engaging in a due process analysis, but it concluded that the frontage consent requirement violated the privileges and immunities clause of the Burlingame Treaty.[78]

Eventually, the U.S. Supreme Court was forced to weigh in on the Chinese question. In a series of cases, the Court also moved from the commerce and treaty powers to the Fourteenth Amendment in evaluating anti-Chinese legislation. The first two cases upheld local ordinances, but nonetheless applied the equal protection clause to them. *Barbier v. Connolly* and *Soon Hing v. Crowley* dealt with San Francisco ordinances barring public laundries from operating during certain hours. These ordinances were directed at Chinese laundries that had moved into suburban areas. As the Chinese moved their laundries into more affluent neighborhoods, they found that their rent increased. To offset the increase in rent, two laundries would often operate in the same space, one during the day and one at night. The ban on operating laundries at night was designed to break up this practice and Chinese incursions into white suburbia.[79]

Field wrote the Court's opinion in both Supreme Court cases challenging the San Francisco ordinances, and used them to elaborate his opinion in *In re Ah Fong*. For instance, he made it clear that the Fourteenth Amendment was intended to reach only "class legislation," not the police power. The distinction lay in whether the regulation served a "public purpose" or favored or disfavored a particular class of people. In these cases, Field upheld the ordinances because he viewed them as public safety regulations, necessary to protect the public against fires in a city built of wood. Field's opinion demonstrated a commitment to filtering state governmental action through the new strictures of the Fourteenth Amendment. Indeed, this was required if the courts were to make distinctions between class legislation and the police power. In *Soon Hing*, Field introduced a new dimension to the analysis. In dicta, he suggested that legislation could be facially neutral but discriminatory in its administration.[80] In *Yick Wo v. Hopkins* the Court took up this question directly.

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[78] *In re Quong Woo*, 13 F. 229 (1882).

[79] Bottoms, *An Aristocracy of Color*, 136–168.

[80] *Barbier v. Connolly*, 113 U.S. 27, 31–32 (1884).

Yick Wo involved yet another San Francisco ordinance aimed at Chinese laundries. This one required laundry owners to obtain a license from the Board of Supervisors. While the ordinance applied to all public laundries, no Chinese applicant had received such a license. In separate cases filed in state court and federal courts, Chinese laundry-owners challenged the ordinance. Once again, the state and lower federal courts identified the main lines of debate. The California Supreme Court in *In re Yick Wo*, treated the case as an unproblematic police power case, giving broad deference to the board. The Court saw the ordinance as a reasonable exercise of the city's police power, rooted in a long history of licensing laws, and declared that the argument that the board's discretion is liable to abuse "cannot be held conclusive. No doubt all power is liable to abuse, wheresoever lodged."[81]

In the federal case, *In re Wo Lee*, Judge Sawyer was less charitable. He criticized the ordinance as vesting "arbitrary discretion" in the board. According to Sawyer, "The necessary tendency, if not the specific purpose, of this ordinance, and of enforcing it in the manner indicated in the record, is to drive out of business all the numerous small laundries, especially those owned by Chinese, and give a monopoly of the business to the large institutions established and carried on by means of large associated Caucasian capital." Such a construction of the ordinance suggested that it was "a violation of other highly important rights secured by the fourteenth amendment and the [Burlingame] treaty." Sawyer ultimately deferred to the California Supreme Court.[82] But on appeal the U.S. Supreme Court agreed with Sawyer, striking down the ordinance because it was "purely arbitrary, and acknowledges neither guidance nor restraint."[83]

Lower federal courts also used the Fourteenth Amendment's privileges or immunities clause directly (rather than indirectly through the Burlingame Treaty's clause) to attack state and local regulations. As municipalities began regulating Chinese through general rather than class legislation, they opened the door for courts to apply the privileges or immunities clause even in cases dealing with Chinese non-citizens. In cases like *In re Wo Lee*, *In re Tie Loy*, and *In re Wan Yin* the federal courts rejected

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[81] 9 P. 139, 142 (1885).

[82] *In re Wo Lee*, 26 F. 471, 474, 475 (1886).

[83] *Yick Wo v. Hopkins*, 118 U.S. 356, 367 (1886).

ostensibly neutral laundry ordinances directed against Chinese laundries. In *Tie Loy*, for instance, Stockton limited laundries to certain areas within or just outside of the city. Since the statute applied to all laundries, not just those owned by Chinese, Sawyer struck it down as violating the Fourteenth Amendment's privileges or immunities clause.[84]

The new supremacy did not just involve the application of new constitutional doctrines to state action. It also involved an enlarged role for federal courts at all levels. This was apparent in the 1870s, and crystal clear by 1885, when Oregon's federal District Judge Matthew Deady was forced to defend this role. In *In re Wan Yin*, which appeared while *Yick Wo* was on appeal, an Oregon municipality levied an onerous $20 per year "license fee" upon "public laundries." When Wan Yin refused to pay the fee, he was imprisoned, and then petitioned the federal district court for a writ of habeas corpus. Deady released Wan Yin, holding that the license was actually a "tax," and beyond the municipality's authority. Relying on cases like *In re Parrott* and *Ah Lee*, Deady specifically reiterated the notion that federal courts could release petitioners held in violation of the due process clause of the Fourteenth Amendment.[85]

Deady found himself at odds with local anti-Chinese folk in Oregon, as did Sawyer and Hoffman in California, so he took the opportunity to elaborate his role as a federal judge in his opinion. He noted that the "Case of Lee Tong" had been the subject of criticism at a recent American Bar Association meeting. The chief complaint was that the 1867 Habeas Corpus Act had given " 'the lowest class of federal judges' " jurisdiction in habeas cases, and by extension had conferred on them the ability to overturn judgments made by state authorities, particularly in Chinese cases. Deady responded that "however 'low' he may be" he was nevertheless conferred the power to be "a bulwark against local tyranny and oppression." Deady thus affirmed that even the lowliest federal judge still stood higher in the new constitutional hierarchy than did any state official.[86]

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[84] *In re Wan Yin* [The Laundry License Case], 22 F. 701 (D.C., D. Ore., 1885); *In re Tie Loy*, 26 F. 611 (Cir. Ct., D. Cal., 1886).

[85] Ralph James Mooney, "Matthew Deady and the Federal Judicial Response to Racism in the Early West," *Oregon Law Review* 63 (1984): 561, 605; *In re Wan Yin*.

[86] *In re Wan Yin*, 705.

CONSOLIDATION

In 1885, Congress restored the U.S. Supreme Court's habeas appellate jurisdiction that it had taken away in 1868 during the *McCardle* litigation. The restoration was a response in part to the Ninth Circuit's jurisprudence in the Chinese civil rights litigation; Congress wanted the Supreme Court to rein in the power of the lower federal courts. At the same time, in a series of acts from 1875 to 1892 Congress gradually centralized authority over immigration, and tightened restrictions on Chinese immigration. The new restrictions did not eliminate Chinese restriction, however, and the Ninth Circuit judges continued to allow Chinese immigrants to enter, even after Judges Hoffman and Sawyer died in 1891. With their restored appellate jurisdiction, the Supreme Court began to regulate and overrule the Ninth Circuit decisions. But the Court did not devolve power back to the states. Instead, it not only upheld the new immigration acts, but determined that immigration decisions of federal officials were to be immune from judicial review. The lower federal courts had always held that the Congress's power over Chinese immigration was supreme; the U.S. Supreme Court now made this power plenary.

The Page Act of 1875 was Congress's first tentative foray into the Chinese immigration issue. It barred Chinese prostitutes from entering the United States. In 1882, Congress began to build an administrative structure for regulating immigration. In the Immigration Act of 1882, which was not concerned with Chinese exclusion, Congress divvied up authority between state and federal governments, giving states an important role in matters of immigration. That same year it passed the Chinese Exclusion Act, which forbade the immigration of Chinese laborers for ten years. Two subsequent acts tightened the restrictions on Chinese immigration. The Scott Act of 1888 prohibited the return of Chinese laborers who left the country,[87] and the Geary Act of 1892, also known as the "Dog Tag Law," required all Chinese laborers lawfully in the country to apply for a certificate of residence or be deported.[88] But it was the Immigration Act of 1891 that transformed congressional power of immigration and the Chinese question; this act also consolidated federal supremacy. The act abolished the

[87] Salyer, *Laws Harsh as Tigers*, 7, 22.
[88] Pfaelzer, *Driven Out*, 291.

state–federal partnership created in 1882, and centralized immigration in the federal superintendent of immigration. It made all decisions of the inspection officers appealable only administratively, cutting off a major portion of judicial review in immigration cases.[89]

While these acts were restrictive, the Supreme Court, in an age long characterized as "laissez-faire," tightened them even more. It did so in three ways important for the new supremacy. First, in *Chae Chan Ping*, the Court held that Congress's power over immigration was plenary, and that *it* was not bound by the privileges, immunities, and exemptions clause of the Burlingame Treaty. Justice Field wrote that a treaty was simply an act of Congress, and could thus be changed by an act of Congress, even if the legislation was in direct violation of the treaty. Moreover, he continued, this type of legislation "was, of course, not a matter of judicial cognizance."[90] The power to exclude foreigners was an incident of sovereignty that the federal government could exercise at will.[91]

Second, the plenary power, which the Court applied to both expulsions and exclusions, was not subject to traditional due process requirements like the right to trial by jury. The Court distinguished between rights and privileges, and characterized both entry and residence of non-citizens as privileges, which Congress could withdraw at will.[92] Congress could confer statutory due process protections. But as long as an immigration official made a deportation or exclusion decision in accordance with the statute the process was due.[93]

Finally, the Court rendered the administrative decisions binding and conclusive on the federal courts. The finality clause included in the 1891 Immigration Act making administrative decisions final was not unusual in nineteenth-century administrative law. Other administrative bodies like the General Land Office had been given similar power. But it was used to separate administrative from legal questions.[94] In the Chinese Exclusion

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89 Salyer, *Laws Harsh as Tigers*, 26.

90 *Chae Chan Ping v. United States*," 130 U.S. 531, 600–602 (1889).

91 Ibid., 603–609; see also *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

92 Salyer, *Laws Harsh as Tigers*, 30–31.

93 *Fong Yue Ting*, 730; *Nishimura Ekiu*.

94 Salyer, *Laws Harsh as Tigers*, 29.

Cases, the Court collapsed the distinction between law and administration, and made the administrative decision binding on courts, making them immune to judicial review. In *Ju Toy v. United States*, the Supreme Court held that the determination of the collector was conclusive, "whatever the ground on which the right is claimed, — as well when it is citizenship as when it is domicil, and the belonging to a class excepted from the exclusion acts."[95] In other words, a Chinese person claiming to be a United States citizen by birth was subject to the pure discretion of an immigration official, and could not claim the protections afforded by the Fourteenth Amendment in a court of law.

Ju Toy's decision that only the federal government could make determinations as to who was or was not a citizen (or more precisely who could rely upon the law to make claims to the protections of citizenship and who could not) was consistent with the supremacy aims of the Fourteenth Amendment. Through Sections 1 and 5, the Fourteenth Amendment made the federal government supreme regarding questions of citizenship. Section 1 defined national citizenship as a birthright, and protected those citizens' privileges and immunities. Section 5 gave to Congress specifically the power to protect U.S. citizens' privileges and immunities. These powers taken together meant that the federal government had the power to decide who is included within the body politic. This power is a mark of sovereignty. Thus, the Fourteenth Amendment's conferral of that power to the federal government was an important step in the construction of the new supremacy. The Supreme Court's decision in *Ju Toy* further entrenched this power by effectively stripping American citizens of Chinese descent of their political power, reducing them to what political theorist Giorgio Agamben has termed "bare life." They were simply bodies used to further the aims of the state.[96] Here, the aim was the maintenance of a racialized state in which the federal government was supreme. The federal power to exclude even citizens marked the apex of the new supremacy.

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[95] *Ju Toy v. United States*, 198 U.S. 253, 262 (1905).

[96] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1998).

CONCLUSION

Reconstruction was, of course, a critical turning point in the history of American rights, liberty, citizenship, and the state. But too often we presume that the legal and constitutional changes effected by the Civil War and Reconstruction emerged in full form in ways we are familiar with today. Reconstruction provided Americans with new legal languages, discourses, procedures, and structures that could be applied in novel ways on the ground. Whatever the "intent" behind these new technologies, their open-endedness and flexibility meant that the new structure would have to be worked. California's experience with Chinese immigration was one of the most visible and volatile conflicts through which the new constitutional order was constructed.[97] And it suggests two revisions. First, while Reconstruction as a federal policy may have ended in 1877, Reconstruction as a phenomenon had a much longer life. This begs for a new periodization, as well as new themes to capture the larger project. Some historians have begun to do this by characterizing the period as an "age of emancipation."[98] This leads to the second revision, which deals with the meaning of Reconstruction. Historians and other scholars have tended to focus on the rise of individual rights and their protection as the central project of Reconstruction. Thus, when the Supreme Court refused to recognize those rights in cases like *Slaughterhouse* and the *Civil Rights Cases*, we characterize it as "retreating from" or "abandoning" Reconstruction.[99] Adding federal supremacy as an additional element of Reconstruction complicates that thesis, especially when individual rights and federal supremacy work against each other. Recognizing that tension should help us to look for new syntheses of the legal and constitutional history of that period.

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[97] Michael Bottoms makes a similar point. Bottoms, *An Aristocracy of Color*, 207–08.

[98] See, e.g., Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* (New York: Cambridge University Press, 1998); Jung, *Coolies and Cane*.

[99] Roman J. Hoyos, "Playing on a New Field: The U.S. Supreme Court in Reconstruction," in Edward O. Frantz, ed., *A Companion to the Reconstruction Presidents, 1865–1881* (New York: Wiley-Blackwell, 2014, forthcoming).

THE VINE VOTE:

Why California Went Dry

JONATHAN MAYER*

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I. INTRODUCTION: VOLSTEAD, CALIFORNIA

Prohibition imperiled George F. Covell's livelihood. Born into an enterprising family in 1865, Covell joined his father's grape growing business at an early age.[1] By the 1910s he was a leader in California viticulture, earning positions of authority within trade groups[2] and collaborating with University of California researchers to advance farming technology.[3] Covell championed grape grower efforts to stave off prohibition at both the federal and state levels, including a last-minute compromise that would ban saloons throughout California.[4] He failed. On January 16, 1919, Nebraska provided the final vote required to ratify the Eighteenth Amendment. National prohibition under the Volstead Act began on January 17, 1920.[5] Grape growers were despondent; many dug up their vines, and one even committed suicide.[6]

But then, something unexpected happened: national prohibition proved profitable for Covell. As the 1921 harvest came to a close, he packed over 150 railcars with his wine grapes.[7] Covell wrote to Western Pacific, tongue-in-cheek, suggesting a name for his new and suddenly bustling cargo stop: Volstead.[8]

At the same time that Covell's fortunes took an unanticipated turn, California voters were deciding on prohibition as a matter of state law. Prohibition appeared as a statewide ballot measure five times between

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[1] George H. Tinkham, History of San Joaquin County 1583 (1923).

[2] Cal. Grape Protective Ass'n, *Grape Growers to Discuss the Wine Industry*, S.F. Chron., July 1, 1917, at C7; *State Grape Meeting to Oppose Prohibition*, Cal. Fruit News, Sept. 7, 1918, at 13; *Exports from San Francisco for December*, Cal. Fruit News, Mar. 4, 1922, at 4–5.

[3] Ernest B. Babcock, *Studies in Juglans* I, 2 Univ. Cal. Publications Agric. Sci. 1, 64–65 (1913).

[4] Cal. Grape Protective Ass'n, *supra* note 2.

[5] Wartime prohibition had gone into effect in 1919, but grape growers and wineries largely ignored the law pending resolution of constitutional challenges. *Injunction Against Dry Act Denied State Grape Men*, S.F. Chron., Sept. 20, 1919, at 13.

[6] Daniel Okrent, Last Call: The Rise and Fall of Prohibition 1 (2011) ("Up in the Napa Valley . . . an editor wrote, 'What was a few years ago deemed the impossible has happened.'"); Gilman Ostrander, The Prohibition Movement in California, 1848–1933, 177–78 (1957).

[7] Eddie Boyden, *Grape Grower Puts Volstead on California Map*, S.F. Chron., Sept. 8, 1921, at 15.

[8] *Id.*

1914 and 1920.[9] It never passed. State law remained deeply controversial even after federal prohibition: The Eighteenth Amendment contemplated concurrent state enforcement, and Congress had established initial "police arrangements" that were somewhat "superficial" owing to inadequate funding and primary responsibility located within a sub-sub-unit of the Treasury Department.[10] While scholars have long debated the effectiveness of prohibition enforcement,[11] contemporaries certainly perceived state "mini" or "baby" Volstead Acts to be critical battlegrounds between the "dries" and the "wets." In the 1922 California election, after nearly a decade of campaigning, the dries finally won out.

This essay posits an explanation for California's sudden flip-flop on prohibition: federal law generated windfall profits for the state's grape growers, causing them to temper their opposition. The argument proceeds in five phases. Part II details the strategic politics of prohibition in California, especially on the part of grape growers, and how 1922 departed from prior elections. The following Part III explains how federal law under national prohibition both tolerated and subsidized home winemaking. Part IV analyzes statistics on grape growing under prohibition, which reveal a sudden surge in fruit production and price. Part V recounts how grape growers recognized prohibition as the cause of their good fortune. Finally, a Conclusion completes the argument: California went dry because prohibition was so profitable.

II. PROHIBITION POLITICS IN CALIFORNIA

Prohibition was an incremental initiative in California. A state chapter of the Woman's Christian Temperance Union was incorporated in 1879,[12]

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[9] *See infra* Part II.

[10] Thomas Pinney, A History of Wine in America: From the Beginnings to Prohibition 435 (1989); *see* Mark Thornton, The Economics of Prohibition 100 (1991) (discussing federal and state expenditures on prohibition); *Peril in Dry Repeal Shown*, L.A. Daily Times, Oct. 30, 1926, at 1 (claiming that without state, municipal, or local authorities, there would only be about seventy prohibition enforcement officers in all of California).

[11] *See* Thornton, *supra* note 10, at 100–01.

[12] Ernest H. Cherrington, The Evolution of Prohibition in the United States of America 204 (1920); Ostrander, *supra* note 6, at 58 ("The state W.C.T.U. took its place almost at once as the most effective temperance organization in California.").

and a statewide Anti-Saloon League was established in 1898.[13] Dries began with a persistent effort at the county and municipal levels, first under an 1874 local-option statute[14] (quickly declared unconstitutional by the state supreme court for excessive delegation[15]), then through land title restrictions,[16] then through 1883 statutes delegating general police powers to the counties and municipalities[17] (permissible owing to a revised 1879 state constitution[18]), and finally under a 1911 local option statute.[19] Dry achievements were slow at first, then rapidly subsumed much of the state's rural areas: 1 county in 1894,[20] 5 counties and 175 municipalities by 1901,[21] and 42% of the state's area by 1911.[22] Progress then stalled, owing to the large cities: by 1917, 55% of the state was dry by area, but only 26% by population.[23] No city with a population over 50,000 had elected to go dry; Berkeley was the largest at 40,000.[24] Prohibition forces in California required a new, statewide strategy that could leverage rural support against the urban areas.

Beginning in 1914, the California dries attempted a series of ambitious measures to enact statewide prohibition. They began with ballot initiatives to amend the state constitution; when those failed, they turned to statutory ballot initiatives; when those failed too, they at last turned to new allies in the state legislature. This final strategy nevertheless yielded statewide ballot measures owing to California's veto referendum procedure. The following table charts the course of prohibition ballot measures according to certified results from the California Secretary of State (save 1918).

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13 Cherrington, *supra* note 12, at 266; Ostrander, *supra* note 6, at 85, 91.

14 Ostrander, *supra* note 6, at 42–53.

15 Ex parte Wall, 48 Cal. 279, 313–17 (1874).

16 Ostrander, *supra* note 6, at 69–70.

17 *Id.* at 70–71.

18 Ex parte Campbell, 74 Cal. 20, 23–24 (1887).

19 Ex parte Beck, 162 Cal. 701, 704–11 (1912); Ostrander, *supra* note 6, at 71.

20 Ostrander, *supra* note 6, at 72.

21 *Id.* at 93.

22 Cherrington, *supra* note 12, at 304.

23 Ernest H. Cherrington, The Anti-Saloon League Year Book: 1917, 84 (1917).

24 *Id.* at 83–84, 86–87.

California ballot measures on prohibition, 1914–1932.

Type "(C)" denotes a constitutional initiative; type "(S)" denotes a statutory initiative.

Year	Prop.	Description	Type	For	Against	Voters
1914[25]	2	Prohibition (Supply)	Initiative (C)	41.06%	58.94%	890,317
1914	39	Enforcement Delay if Prohibition Passes	Initiative (C)	66.43%	33.57%	675,336
1914	47	Moratorium on Prohibition Initiatives	Initiative (C)	44.92%	55.08%	791,095
1916[26]	1	Prohibition (Supply and Use, Delayed)	Initiative (C)	44.79%	55.21%	974,839
1916	2	Prohibition (Transfer in Public Accommodations)	Initiative (C)	47.69%	52.31%	966,822
1918[27]	1	Liquor and Saloon Ban	Initiative (S)	43.17%	56.83%	515,425
1918	22	Prohibition (Supply)	Initiative (S)	47.02%	52.98%	559,181
1920[28]	2	Prohibition (Supply)	Referendum	46.24%	53.76%	866,012
1922[28]	2	Prohibition (Supply)	Referendum	51.98%	48.02%	856,209
1926[29]	9	Prohibition Repeal	Initiative (S)	47.04%	52.96%	1,068,403
1932[30]	1	Prohibition Repeal	Initiative (S)	68.92%	31.08%	2,118,186
1932	2	Local Option Ban	Initiative (C)	64.17%	35.83%	2,038,950

The first dry attempt was a concise, supply-side implementation of prohibition in 1914.[31] Much like the later federal Volstead Act, provisions

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[25] A.P. Night Wire, *What Happened Last November*, L.A. Daily Times, Dec. 8, 1914, at 7.

[26] Charles Morrison, *California*, Bonfort's Wine & Spirit Circular, Dec. 25, 1916, at 117.

[27] *5529 Precincts Beat Rominger Bill by 70,000*, S.F. Chron., Nov. 13, 1918, at 6 (approximately 90% of precincts reporting); *Summary of State Vote by Counties on Prohibition*, S.F. Chron., Nov. 16, 1918, at 8 (California Grape Protective Association results on Proposition 22). Low turnout in 1918 appears to have been due to World War I and an influenza outbreak. Ostrander, *supra* note 6, at 145.

[28] Cal. Sec'y State, California Referenda 1912 – Present (2012), *available at* http://www.sos.ca.gov/elections/ballot-measures/pdf/referenda.pdf.

[29] *State Tally Shows Huge Vote Given G.O.P. Ticket*, L.A. Daily Times, Dec. 10, 1926, at 4.

[30] *Here's How California Voted on Propositions*, L.A. Daily Times, Dec. 15, 1932, at 11.

[31] Cal. Sec'y State, Amendments to Constitution and Proposed Statutes with Arguments Respecting the Same 56 (1914).

targeted "[t]he manufacture, the sale, the giving away, or the transportation" of "intoxicating liquor."[32] (Not coincidentally, the Anti-Saloon League played a leading role in the campaign[33] as well as in drafting the Volstead Act.[34]) Neither side of the 1914 ballot measure was particularly well organized: The dries made a drafting "oversight" in not setting an enforcement date, necessitating an additional corrective ballot measure.[35] The wets consolidated around preexisting beer[36] and liquor[37] groups since the grape-related trades had not yet organized themselves into an influential political institution.

Dry arguments in favor of prohibition were a scattershot of morality ("those who vote [to allow liquor are] *responsible for evil results*"), statistics (on disease, mental health, crime, and economics), and anti-immigrant sentiment ("Immigrants from Europe are generally liquor drinkers . . . turn them elsewhere.").[38] Responses from the wets emphasized libertarian and enforcement concerns, as well as risk to the state's agricultural economy.[39]

The wets appreciated that statewide ballot measures threatened their urban strongholds, so they proposed their own constitutional amendment with four safeguards. First, delay: state, county, and local governments could only revise their prohibition policies every eight years.[40] Second,

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[32] *Id.* at 56.

[33] *Id.* at 77.

[34] Thomas Pinney, A History of Wine in America: From Prohibition to the Present 21–22 (2005).

[35] Without an explicit, delayed enforcement date as provided in Proposition 39, prohibition would have gone into effect mere days after enactment. The measure was intended to allow alcohol-related businesses and laborers, as well as government institutions, adequate time to prepare for prohibition "in the interest of fair dealing and to make the loss inherent in a change of state policy as light as possible." Cal. Sec'y State, *supra* note 31, at 82. The provision somewhat reflected disagreement among radical dries and the more cautious Anti-Saloon League. Ostrander, *supra* note 6, at 123–26.

[36] Cal. Sec'y State, *supra* note 31, at 57 (California State Brewers Association).

[37] *Id.* at 77 (Grand Lodge Knights of the Royal Arch); *see also Liquor Men Hosts at Entertainment*, S.F. Call, Feb. 6, 1906, at 9.

[38] Cal. Sec'y State, *supra* note 31, at 57.

[39] *Id.*

[40] *Id.* at 75–76.

mandatory local option: any municipality that voted against county or state prohibition (i.e. the cities) would be wet, and any that voted for would be dry.[41] Third, tying: a vote on statewide prohibition would trump a vote on county or municipal prohibition.[42] Fourth and finally, decentralized control: the state legislature would be (implicitly) divested of its authority to regulate or enforce alcohol law.[43]

The 1914 returns were a blow to the dries.[44] Not only did they fail to accomplish statewide prohibition (just 41% in favor), they also risked losing the ballot measure as a tool for reform (55% opposed). Both the dries (particularly the W.C.T.U. and Anti-Saloon League) and the wets (especially the grape growers and winemakers) began organizing early for the next vote.[45]

The 1916 campaign represented a professional effort on both sides and reflected the emergence of the wine and grape trades in California politics. The dries unified behind two constitutional initiatives on the ballot: a "complete" prohibition on alcohol possession, manufacture, and transfer to go into effect in 1920,[46] and a "partial" prohibition on alcohol transfer in public accommodations (i.e. saloons and hotels) to go into effect in 1918.[47]

Wets coalesced around the Grape Protective Association, a new and influential trade group representing the viticulture and wine interests.[48] This cohesion yielded a comprehensive political strategy, including frequent organizational meetings (both by the statewide organization and local

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41 *Id.* at 76.

42 *Id.* The provision was intended to target voters who opposed statewide prohibition but supported county or municipal prohibition. *Id.* at 77.

43 *Id.* at 76.

44 Cherrington, *supra* note 12, at 338.

45 Ostrander, *supra* note 6, at 126–32, 137.

46 Cal. Sec'y State, Amendments to Constitution and Proposed Statutes with Arguments Respecting the Same 3 (1916).

47 *Id.* at 5–6.

48 John R. Meers, *The California Wine and Grape Industry and Prohibition*, 42 Calif. Hist. Soc'y Q. 19, 21–23 (1967); *see generally* Charles Merz, The Dry Decade 52–53 (1932).

chapters),[49] fundraising efforts,[50] articles and advertising in newsprint,[51] and speaking engagements.[52] The Grape Protective Association even

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[49] A.P. Night Wire, *Grape Men Ask Compensation*, L.A. Daily Times, Jan. 9, 1916 ("A vigorous campaign against the proposed constitutional prohibition amendments to be voted upon next November was opened here today by the California Grape Protective Association."); *Blow at Prohibitionists is Planned by Grape Growers*, S.F. Chron., Jan. 9, 1916, at 30 ("Leading grape growers wine men of the State completed preliminary plans for a widespread campaign against prohibition in California . . . under the auspices of the California Grape Protective Association."); Charles Morrison, *California*, Bonfort's Wine & Spirit Circular, Jan. 25, 1916, at 289 ("Preliminary steps have been taken by the California Grape Protective Organization, representing the grape-growers and wine-makers of the State for an energetic campaign against prohibition."); *Life of Industry Depends on Issue, Grape Growers Tell Effects of "Dry" Amendments*, L.A. Daily Times, Mar. 5, 1916, at V13 (recounting meeting of Southern California winemakers and growers); *Grape Association to Hold Meetings*, S.F. Chron., July 21, 1916, at 2 ("The Sonoma County Grape Protective Association . . . is mapping out work to be done . . . to defeat the two proposed prohibition amendments which will be on the ballot at the November election.").

[50] Charles Morrison, *California*, Bonfort's Wine & Spirit Circular, Feb. 25, 1916, at 385 ("The officers of the California Grape Protective Association are busily engaged gathering the coin to carry on the campaign against prohibition, and they are meeting with encouraging success.").

[51] *Id.* ("Every issue of the Sacramento *Bee* contains smashing articles against the amendments . . . and the circulation of the paper has materially increased in consequence. The arguments put forth in these articles have done incalculable good to the 'wet' cause . . . ."); Charles Morrison, *California*, Bonfort's Wine & Spirit Circular, Aug. 10, 1916, at 228 ("The campaign for and against prohibition is being carried on vigorously by each side, literature forming the chief feature . . . . It is taking up considerable time of the publicity department of the California Grape Protective Association . . . ."); Charles Morrison, *California*, Bonfort's Wine & Spirit Circular, Oct. 25, 1916, at 379, 380 (noting the "thoroughly scientific advertising methods [used] by the California Grape Protective Association"); *see, e.g.*, *Stands Opposed to Prohibition, Would Destroy Viticulture of the State*, L.A. Daily Times, Mar. 31, 1916, at 12 (reporting endorsement by the San Francisco Chamber of Commerce); *Wineries Save Grape Growers*, L.A. Daily Times, Oct. 29, 1916, at 112 (recounting speech by a California Grape Protective Association spokesperson); Cal. Grape Protective Ass'n, *Don't Misunderstand Proposition Number 2 to be Voted on at the November Election*, S.F. Chron., Oct. 6, 1916, at 10 ("Proposition No. 2 would wipe out practically every legitimate avenue of distribution of California wines."); *Declares Church Dry Signs False, Organization of Grape Men Issues Statement*, L.A. Daily Times, Nov. 6, 1916, at II-2 (correcting alleged misstatements in prominent dry signage).

[52] Charles Morrison, *California*, Bonfort's Wine & Spirit Circular, Nov. 10, 1916, at 26 ("The California Grape Protective Association has now several speakers in the field, among them . . . [a former pastor,] a famous orator, . . . a vineyardist . . . [and] its secretary, and they are all doing splendid work.").

sponsored a youth essay contest to convey its message into the state's schools and homes.[53] The organization's magnum opus was a widely distributed informational pamphlet that detailed, at length and with volumes of statistics, how prohibition would obliterate California's grape and wine sectors.[54]

Unlike in 1914, official ballot pamphlet arguments uniformly emphasized the potential impacts on California agriculture.[55] Wets, now represented by the grape growers, recounted the value, land, and labor bound up in winemaking.[56] Dries went so far as to position their anti-saloon initiative as a concession to the grape and wine interests, since exports would be unaffected.[57]

The results were another victory for the wets: both initiatives failed, albeit by narrower margins than in 1914.

In the 1918 round, the grape and wine trades pursued a new political strategy. As succinctly described by a leading account of prohibition in California:

> Throughout the prohibition era the grape and wine industry vacillated between three disagreeable alternatives: To oppose the liquor interests was to support the prohibitionists, who refused to distinguish between the native fermented grape juice and other forms of

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[53] *School Children to Write on Vineyards*, S.F. Chron., Aug. 22, 1916, at 3 ("Acting in the belief that in thousands of homes the doctrine of temperance as opposed to prohibition is taught, the California Grape Protective Association . . . has appealed to the children of the State to express their views in essay forms on the topical question. . . . [T]he topic will be, 'The Vineyards of California Must Not Be Destroyed by Prohibition.'"); *see How the Youth of California Regard Prohibition*, Overland Monthly & Out West Mag. 425, 425–27 (Nov. 1916) (published text of winning essays).

[54] Cal. Grape Protective Ass'n, How Prohibition Would Affect Grape Interests in California (1916); *see* Charles Morrison, *California*, Bonfort's Wine & Spirit Circular, Apr. 25, 1916, at 555 ("The California Grape Protective Association is taking a most effective way of making the voters acquainted with the issues at stake in the forthcoming election for or against prohibition, in so far as the viticultural industry is concerned. The Association has prepared a 'Grape Manual,' illustrated, of sixty-four pages, which fully and unequivocally answers and refutes all of the arguments raised by the prohibitionists. The manual . . . will be distributed to the extent of 100,000 copies where they will do the most good.").

[55] Cal. Sec'y State, *supra* note 46, at 3–4, 6.

[56] *Id.* at 4, 6.

[57] *Id.* at 6.

> alcoholic beverage; to support the liquor interests was to associate the wine industry with the most disreputable forces in the struggle; and to attempt to stand on its own merits was to face the bitter opposition of both prohibitionists and liquor men.[58]

The Grape Protective Association and allies adopted the last of these options and backed a carefully drafted statute that banned spirits and saloons.[59] When the bill (unsurprisingly) failed in the state assembly, they took it to the voters as a statutory initiative.[60] The grape and wine trades had three reasons for charting a compromise course: First, they believed handing dries a partial victory would relieve political pressure for more complete prohibition.[61] Some dry leaders, surprisingly enough, held the opposite view — that voters would press for further restrictions, and that a weakening of liquor interests would increase the odds of future success.[62] Second, grape growers and winemakers aimed to avoid the political capital costs and reputational tarnish of lobbying in cooperation with the

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[58] Ostrander, *supra* note 6, at 135; *see also* Nuala McGann Drescher, The Opposition to Prohibition, 1900–1919, 118–20 (1964).

[59] Cal. Sec'y State, Amendments to Constitution and Proposed Statutes with Arguments Respecting the Same 2–4 (1918); Ostrander, *supra* note 6, at 135–41, 145.

[60] Ostrander, *supra* note 6, at 139.

[61] *Id.* at 134–35; *State Doesn't Want To Be Dry, He Says*, L.A. Daily Times, Apr. 13, 1918, at 10 ("If the [anti-saloon initiative] were not on the ballot, [the secretary of the California Grape Protective Association] said, 'the drys would have initiated a bone-dry measure and the voters, in disgust, would have adopted it believing that it was the only way of rid the State of the saloons and strong drink.").

[62] Ostrander, *supra* note 6, at 138, 143–44 (at a statewide convention, dries chose to take no position on the measure); *Drys of State Center Effort in Legislature*, S.F. Chron., Feb. 7, 1918, at 5 ("The [dry] federation will take no official position toward plans for a measure being initiated by the California Grape Protective Association, prohibiting saloons and the sale of ardent spirits."). In advance of the statewide convention, there had been substantial disagreement among dry groups in how to react. "Dry" Factions in Lively Row, L.A. Daily Times, Jan. 31, 1918, at 6; *To Make Plans for Campaign, Anti-Saloonists to Meet in Fresno Tuesday*, L.A. Daily Times, Feb. 3, 1918. The state chapter of the W.C.T.U. disagreed with the convention's outcome and vocally opposed the anti-saloon initiative. *Not Strict Enough, W.C.T.U. Resolves that Rominger Measure Cannot Be Supported by Organization*, L.A. Daily Times, Jan. 13, 1918, at 12; *W.C.T.U. Is Opposed to Rominger Measure*, S.F. Chron., May 11, 1918, at 14.

liquor interests.[63] Third and last, many in the grape-related trades were of wine-drinking European descent and earnestly believed that wine served a unique and honorable role in culture and dining.[64]

The wets directed their 1918 campaign toward legislative and gubernatorial elections owing to a perceived inability to pass statewide prohibition by ballot measure[65] and a desire to ratify the Eighteenth Amendment in California.[66] Radical temperance proponents nevertheless gathered sufficient signatures for a simple statutory initiative that would have prohibited all alcohol manufacture and transfer.[67]

The Grape Protective Association once again carried the banner for grape and wine interests, focusing efforts on the ballot measures;[68] a litany of prominent advertisements exhorted voters to preserve the state's valuable grape-related trades,[69] and the Association even offered transportation

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[63] Ostrander, *supra* note 6 at 136 ("It became apparent that in the course of the fight the wine interests were becoming dangerously involved in the protection of the saloon, in which they had virtually no interest.").

[64] *Id.*

[65] Editorial, *Proclamation Adopted by the California Grape Protective Association, Annual Meeting, San Francisco, February 9, 1918*, Bonfort's Wine & Spirit Circular, Mar. 15, 1918, at 66 (quoting a dry leader's convention speech that noted "[i]t is easier to carry the Legislature than to carry a [prohibition] amendment").

[66] Ostrander, *supra* note 6, at 146–47.

[67] Cal. Sec'y State, *supra* note 59, at 54; *Bone Dry State Drive to Start*, L.A. Daily Times, May 25, 1918, at II-6 (recounting upcoming meeting to strategize proposed prohibition amendment); *Bake Barley into Bread*, L.A. Daily Times, May 27, 1918, at 8 (radical prohibitionists denounce Anti-Saloon League for moderate position on anti-saloon initiative).

[68] *3 Liquor Bills To Go Before Voters*, S.F. Chron., Mar. 8, 1918, at 9 (discussing Grape Protective Association initiative and ballot pamphlet arguments); A.P. Night Wire, *Grape Growers Plan to Fight "Bone Dry."*; L.A. Daily Times, Sept. 15, 1918, at 5 ("A campaign against the proposed [prohibition] State constitutional amendment and in favor of the proposed [anti-saloon] measure, which would permit the sale of light wines and beer only, was planned at a meeting of the California Grape Protective Association . . . .").

[69] Cal. Grape Protective Ass'n, *Vote "No" on Proposition No. 22*, S.F. Chron., Oct. 29, 1918, at 6; Cal. Grape Protective Ass'n, *Grape Syrup Will Not Solve Wine Grape Problem*, L.A. Daily Times, Oct. 30, 1918, at 4 (contesting University of California, Berkeley study cited by dries to demonstrate valuable nonalcoholic uses of wine grapes); Cal. Grape Protective Ass'n, *Vote "No" on Proposition No. 22*, S.F. Chron., Oct. 31, 1918, at 8 ("We believe the people of California . . . will protest . . . against the destruction of our great grape industry which has been fostered and encouraged for more than half

to polling places in San Francisco.[70] The gubernatorial election was another significant target;[71] when it appeared both major parties would run dry candidates, the leading spokesman for the Association went so far as to launch an independent campaign.[72] Strangely, while the Association pledged to fight for control of the state legislature,[73] its efforts are not apparent from the historical record.

The grape trades were once again successful in warding off prohibition on the ballot, resorting to their reliable arguments about the economic value of grape growing and winemaking.[74] Their anti-saloon initiative fared poorly, however, likely owing to insufficient dry support and opposition from liquor interests.[75] Results in elected positions proved even more disastrous for the wets: dries claimed the Assembly, the governorship, and (barely) the Senate.[76]

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a century."); Cal. Grape Protective Ass'n, *Vote "No" on Proposition No. 22*, L.A. Daily Times, Nov. 2, 1918, at II-2 (same); Cal. Grape Protective Ass'n, *Our Soldiers in France Drink Wine and Are Sober, Says Randall the Prohibitionist*, S.F. Chron., Nov. 2, 1918, at 3 (invoking the experience of American soldiers in France to justify permitting wine); Cal. Grape Protective Ass'n, *Be Fair to the Grape Growers of California*, L.A. Daily Times, Nov. 4, 1918, at II-3.

70 Cal. Grape Protective Ass'n, *Every Public-Spirited Citizen Should Go to the Polls Today!*, S.F. Chron., Nov. 5, 1918, at 6 ("There are many important measures on which you must pass judgment. None is more important than Proposition No. 22, which would CONFISCATE the wine grape industry . . . . If we can aid you to get to the polls — ring up our office . . . and we will send an auto for you, take you to your voting booth and back again.").

71 *Grape Men Favor Hayes' Dry Policy*, S.F. Chron., May 28, 1918, at 3 (endorsement of gubernatorial candidate who favors anti-saloon initiative).

72 *Bell Candidacy Indorsed*, S.F. Chron., Oct. 5, 1918, at 3.

73 *Grape Men Will Fight Prohibition, Pledge Themselves to Resist Drys' Attempt to Capture Legislature,* S.F. Chron., Feb. 10, 1918, at 3 (recounting the annual meeting of the Grape Protective Association, which featured speeches and a proclamation urging challenges to dry attempts to seize the state legislature); *Grape Growers Join in Legislative Pledge*, S.F. Chron., Mar. 17, 1918, at 7 (additional grape growers join efforts).

74 Cal. Sec'y State, *supra* note 59, at 5 ("[T]his proposed legislation was initiated by the grape growers of California, who have an industry representing an actual investment of $150,000,000 which they naturally desire to protect, and which they feel should not unnecessarily be destroyed . . . ."); *id.* at 55 ("Does conservation contemplate the destruction of $150,000,000 worth of property in California . . . ?").

75 Ostrander, *supra* note 6, at 147.

76 *Id.* at 146–47; *Five Districts May Decide on Bone-Dry Act*, S.F. Chron., Nov. 6, 1918, at 5.

The 1920 campaign differed from its predecessors in two material respects. First, federal prohibition was in effect. The Eighteenth Amendment had been ratified, including by California, and the Volstead Act was both passed and in force. State law was a matter of amplified enforcement through state, county, and municipal police organizations. Second, dries controlled the state legislature and governorship; the wets had to rely on veto referenda to challenge statewide prohibition legislation.[77]

Despite these changes, the election took an entirely familiar tone. The Grape Protective Association and its allies launched another vigorous anti-prohibition campaign, organizing opposition,[78] placing critical coverage,[79] and purchasing prominent advertising[80] — including half-page simultaneous runs in the most widely circulated Los Angeles[81] and San Francisco[82] papers. Arguments did shift slightly, emphasizing liberty and federalism concerns. But grape industry economic protectionism remained a central message, frequently manifested through the optimistic prospect of a state or federal exception for "light" (i.e. almost all) wines.[83] Once again a Grape Protective Association affiliate authored the official ballot pamphlet anti-prohibition position.[84]

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[77] Cal. Sec'y State, Amendments to Constitution and Proposed Statutes with Arguments Respecting the Same 6–9 (1920).

[78] *Meeting Unites Foes of Harris Prohibition Act*, S.F. Chron., Oct. 8, 1920, at 13.

[79] Theodore A. Bell, *Defeat of Harris Bill Asked on Grounds That It Will Only Add to Complications in State*, S.F. Chron., Oct. 14, 1920, at 6.

[80] Cal. Grape Protective Ass'n, *Vote "No" on Proposition No. 2: Argument Against Harris State Prohibition Enforcement Act*, S.F. Chron., Sept. 13, 1920, at 8; Cal. Grape Protective Ass'n, *Vote "No" on Proposition No. 2: Argument Against Harris State Prohibition Enforcement Act*, L.A. Daily Times, Sept. 14, 1920, at 5 (same); Cal. Grape Protective Ass'n, *Californians, Do You Still Love Your Liberty?*, S.F. Chron., Oct. 19, 1920, at 6; Cal. Grape Protective Ass'n, *Vote "No" on Proposition No. 2 (Commonly Known as the Harris State Enforcement Act)*, S.F. Chron., Oct. 28, 1920, at 8; Cal. Grape Protective Ass'n, *Vote "No" on Proposition No. 2 (Commonly Known as the Harris State Enforcement Act)*, L.A. Daily Times, Oct. 29, 1920, at II-3 (same).

[81] Cal. Grape Protective Ass'n, *President of California Grape Growers' Exchange Answers Questions of Prohibition Leader*, L.A. Daily Times, Oct. 30, 1920, at 5.

[82] Cal. Grape Protective Ass'n, *President of California Grape Growers' Exchange Answers Questions of Prohibition Leader*, S.F. Chron., Oct. 30, 1920, at 7.

[83] Pinney, *supra* note 34, at 31 ("the efforts to get light wines (that is, unfortified dry table wines) legalized proved surprisingly difficult"); *see* Okrent, *supra* note 6, at 175; Ostrander, *supra* note 6, at 160.

[84] Cal. Sec'y State, *supra* note 77, at 10.

The results of the election were also familiar. Once again statewide prohibition failed, earning an even lesser share of the vote than the 1918 attempt.

Then something odd happened: in the 1922 election, organized wet opposition evaporated. The ballot featured another prohibition referendum with a simple provision to incorporate the Volstead Act into California state law.[85] The Grape Protective Association once again pledged to contest the measure.[86] But it appears to have done little: The official ballot pamphlet response was a strangely antifederal screed[87] penned by a Sacramento judge who had failed to secure reelection fifteen years prior.[88] The Association merely reprinted the piece in a few, small, poorly placed advertisements.[89]

Prohibition passed. The vote was close — roughly 52% to 48% — but a significant swing from prior years. Even in the large cities, tens of thousands of voters switched from wet to dry.[90]

The grape-related trades acquiesced in state prohibition throughout the 1920s, and no other structured wet opposition sprang up. A disorganized and last minute repeal campaign in 1926 only targeted the cities and roughly replicated the 1922 result.[91]

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[85] Cal. Sec'y State, Amendments to Constitution and Proposed Statutes with Arguments Respecting the Same 8 (1922).

[86] *Grape Men Desire Dry Law Revision*, S.F. Chron., Feb. 19, 1922, at 11 ("The [California Grape Protective Association] went on record as opposed to the Wright state prohibition enforcement act and in favor of a modification of the national prohibition act that will permit the lawful manufacture and sale of light wines and beer under proper restrictions.").

[87] Cal. Sec'y State, *supra* note 85, at 9.

[88] Cal. Courts, *Charles Emmett McLaughlin*, *available at* http://www.courts.ca.gov/2845.htm.

[89] *E.g.* Cal. Grape Protective Ass'n, *Judge McLaughlin Opposed to the Wright Act*, S.F. Chron., Oct. 9, 1922, at 12; Cal. Grape Protective Ass'n, *Judge McLaughlin Opposed to the Wright Act*, L.A. Daily Times, Oct. 10, 1922, at II-5.

[90] A.P. Night Wire, *Votes Make California "Bone Dry,"* L.A. Daily Times, Nov. 11, 1922 ("This year the unfavorable majority in San Francisco was decreased . . . . Los Angeles increased its "dry" margin . . . . San Diego switched over . . . and Santa Clara county, of which San Jose is the county seat, turned out a . . . majority for enforcement compared with a neck and neck fight over the [1920] act.").

[91] *See Dry Repeal Move On*, L.A. Daily Times, June 11, 1926, at 1; *Wet Petitions Being Printed*, L.A. Daily Times, June 16, 1926, at 3.

III. FEDERAL LAW AND THE GRAPE GROWERS

The general alcohol manufacture and transfer prohibitions in the Volstead Act were extraordinarily broad:

> No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.[92]

Furthermore, the Act defined "intoxicating liquor" to encompass any substance "fit for use for beverage purposes" with greater than 0.5% alcohol by volume.[93] In a plain reading, winemaking was a violation of federal law.

Curiously, a separate provision of the Act (Title II, Section 29) exempted certain home production:

> The penalties provided in this Act against the manufacture of liquor without a permit shall not apply to a person for manufacturing nonintoxicating cider and fruit juices exclusively for use in his home, but such cider and fruit juices shall not be sold or delivered except to persons having permits to manufacture vinegar.[94]

The provision is perplexing.[95] What does "nonintoxicating" mean? If it shares the same definition as elsewhere in the Act (i.e. less than 0.5% alcohol by volume), Section 29 would be surplusage. How does a "fruit juice" differ from wine? What does it mean to "manufacture" at home?[96]

The origins of Section 29 were contested even during national prohibition. This much is clear: the provision was added on the Senate floor, after

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[92] Title II Section 3.

[93] Title II Section 1.

[94] Title II Section 29.

[95] *See* Pinney, *supra* note 34, at 21; George Cyrus Thorpe, *Intoxicating Liquor Law,* 14 Geo. L.J. 315, 330 (1926) (describing the home manufacturing provision as "peculiar").

[96] One point of clarity was that, under tax regulations, a maximum of 200 gallons could be produced annually per household. The cap persists to this day at 27 C.F.R. § 24.75. Even a large family, of course, could not consume anything approaching 200 gallons.

the Volstead Act had passed the House and reported from committee.[97] The *Congressional Record* furnishes only a brief colloquy where a senator from California obliquely references Italian and Greek home winemaking.[98] In one version, recounted at length by a contemporary viticultural leader, the exception was intended as a minor concession to the grape growers.[99] The leading history of prohibition in California claims this origin: "hard cider was the traditional drink of certain of the rural, Protestant, native American groups which had been chiefly responsible for the coming of prohibition."[100] Wet critics offered a similar account, denouncing Section 29 as a giveaway to farming interests.[101] Yet another rendition suggested wine was more tolerable because it was less prone to induce social harms than other forms of alcohol.[102] Another version credited fears of angering the apple growers.[103] Contemporary legal scholarship suggested Section 29 was intended to restrain enforcement efforts.[104]

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[97] 58 Cong. Rec. 4,847 (1919); *see* Pinney, *supra* note 34, at 21.

[98] The following floor colloquy occurred after the amendment of Section 29, between Senators James Phelan (D–CA), Thomas Sterling (R–SD), and Charles Curtis (R–KS):

> Mr. Phelan: Mr. President, referring to the amendment which was just agreed to, I should like to learn from the chairman of the committee the exact significance of the amendment . . . . It is the practice of certain of our citizens — our Italian-American citizens and our Greek-American citizens — to make a small quantity of wine for domestic consumption in their own homes. Now, of course, wine is a fruit juice, and I suppose it is embraced within the meaning of the amendment.

58 Cong. Rec. 4,847–48 (1919).

[99] Pinney, *supra* note 34, at 22; *see* Herbert Asbury, The Great Illusion: An Informal History of Prohibition 237 (1950).

[100] Ostrander, *supra* note 6, at 178–79; *see* Okrent, *supra* note 6, at 176 ("[Section 29] was the language [the head of the Anti-Saloon League] inserted into the act ostensibly to allow farmers' wives to 'conserve their fruit,' but really to mollify rural voters who wanted their hard cider.").

[101] *Tydings Says Drys Put Wine in Volstead Act, Gift To Keep Rural Support, He Claims*, Chi. Daily Trib., Feb. 7, 1931, at 1.

[102] S.E. Nicholson, *The Volstead Differential, Explaining Why Apparent Partiality to Farmers is Praiseworthy*, N.Y. Herald Trib., Apr. 29, 1926, at 22.

[103] Pinney, *supra* note 34, at 21.

[104] Comment, *Definition of "Intoxicating Liquors" in the National Prohibition Act*, 38 Yale L.J. 520, 525 n.32 (1929).

There remains only an anecdotal record for judging among these narratives. When drafters and supporters of the Volstead Act testified after its passage, they did little to clarify the original impetus;[105] leaders in the national Anti-Saloon League repeatedly strained to explain and rationalize the special exception for home production.[106]

Whatever the motivation for Section 29, its legal implications hinged on the definition of "intoxicating."[107] Could enforcement officers and prosecutors rely on the Volstead Act's ordinary, bright-line 0.5% alcohol by volume rule? Or would they have to satisfy a vague "intoxicating in fact" standard thrown into the jury's discretion? If the rule interpretation governed, home winemaking was plainly unlawful. If the standard prevailed, home winemaking would be legal, or at minimum operate in a zone of case-specific ambiguity where juries were unlikely to convict, prosecutors were unlikely to pursue charges, and officers were unlikely to make arrests.

The reported Senate colloquy provided substantial support for the standard interpretation,[108] as did a plain reading of the statutory text. In July 1920, the Internal Revenue Bureau issued an interpretive rule that formally

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[105] PINNEY, *supra* note 34, at 22.

[106] Wayne B. Wheeler, *Wheeler Explains Testimony*, WASH. POST, May 25, 1924, at ES2 (contesting interpretation of testimony that home production of intoxicating beverages is lawful); *McBride Statement*, WASH. POST, May 15, 1930, at 1 (similar).

[107] *See Definition of "Intoxicating Liquors" in the National Prohibition Act*, *supra* note 104, at 524–25.

[108] The colloquy above continues:

> Mr. Sterling: The Senator will notice that the amendment does not permit the manufacture of intoxicating wines and fruit juices. Under the constitutional amendment we could not authorize the manufacture of wines or fruit juices which would be intoxicating.
>
> Mr. Phelan: Do I understand that the definition of intoxicating liquors in this bill applies to this particular paragraph as defining what intoxicating beverages shall be?
>
> Mr. Sterling: I will say to the Senator from California that there may be some question about that, but I think what is meant here is as to whether or not is intoxicating in fact.
>
> Mr. Phelan: Then that has to be determined, possibly, by a court in adjudicating the matter?
>
> Mr. Sterling: It might be determined by a court in any given case. If the case arises under this provision, it would be determined by the court.
>
> . . . .

endorsed the standard approach.[109] By 1921 the prevailing understanding was that home winemaking would be tolerated under national prohibition, if not entirely lawful.[110]

Representative John Philip Hill (R–MD), a vocal critic of national prohibition with a penchant for showmanship, seized upon Section 29 as an exemplary absurdity of the Volstead Act.[111] In 1923 and again in 1924 he prepared cider and wine at his home and notoriously dared federal agents to test the beverages.[112] The first year he merely received a temporary injunction.[113] The second year Hill hosted a party with hundreds of guests, serving 2.75% alcohol by volume cider;[114] he at last drew a six-count federal grand

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> Mr. Curtis: Would it not be a question of fact for the jury to pass on in trying the case?
>
> Mr. Sterling: Why, certainly. If there is a case, it will be a question of fact for a jury.
>
> . . . .
>
> Mr. Phelan: I think that is more satisfactory than an arbitrary definition.

58 Cong. Rec. 4,847–48 (1919).

[109] *Allows Home Brew Over Half Per Cent.*, N.Y. Times, July 25, 1920 (explaining and providing text of opinion: "the phrase 'non-intoxicating' means non-intoxicating in fact, and not necessarily less than one-half of 1 per cent. of alcohol"); *see* Pinney, *supra* note 34, at 22.

[110] *Rush for Grapes Like Street Fight*, N.Y. Times, Oct. 16, 1921, at 36 (explaining Internal Revenue ruling and subsequent demand for grapes).

[111] Editorial, *Hill's Home Brew*, N.Y. Times, Nov. 13, 1924 (providing an overview of Hill's campaign and motives); John Philip Hill, *Prohibition and the Republican Party*, 71 Forum 810, 816 (1924) (recounting exchanges with Representative Andrew Volstead and Federal Prohibition Commissioner Roy Haynes attempting to clarify what percentage of alcohol by volume would constitute "intoxicating in fact"); *Hill Welcomes Action by Justice Department*, Wash. Post, Sept. 23, 1924 ("I am delighted . . . that after efforts of nearly four years the Federal prohibition department, in conjunction with the Department of Justice, seems to be on the verge of deciding what section 29, title 2, of the Volstead act means."); *see* Pinney, *supra* note 34, at 22–23.

[112] *Attorney General Expected To Act in Hill's Cider Party*, Wash. Post, Sept. 23, 1924, at 5 (recounting Hill cider brewing, letter from Hill to Haynes, analysis from Haynes, and Haynes response); *see* Pinney, *supra* note 34, at 23.

[113] *Hill Is Indicted Upon Six Counts*, Atl. Const., Sept. 25, 1924, at 1.

[114] *Id.* (reporting 1,500 guests); *Hill, After Cider Content Challenge, Is Indicted Again*, Wash. Post., Sept. 25, 1924, at 2 (reporting hundreds of guests); Editorial, *Hill's Home Brew*, N.Y. Times, Nov. 13, 1924 (reporting between 500 and 2,000 guests).

jury criminal indictment.[115] Hill contested the charges,[116] won a widely publicized district court ruling in favor of the "intoxicating in fact" standard,[117] and was finally acquitted by a jury despite evidence of as much as 11.68% alcohol by volume in his various homebrews.[118] Throughout the remainder of national prohibition the federal and state courts widely, though not uniformly, followed the *Hill* opinion.[119] The Justice and Treasury departments subsequently acquiesced in the *Hill* view and declined to appeal the rule interpretation of Section 29 to the Supreme Court.[120] Many contemporary commentators viewed Section 29 post-*Hill* as a special protection for rural practices;[121] by 1926, farming interests had declared their firm support for Section 29, effectively ensuring it would not be amended out of federal law.[122]

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115 *Hill Indicted on 6 Counts for Making Wine, Cider*, N.Y. Herald Trib., Sept. 25, 1924, at 1 (detailing counts in indictment).

116 *Hill's Plea Not Guilty in Cider Making Charge*, Chi. Trib., Oct. 1, 1924, at 12.

117 United States v. Hill, 1 F.2d 954 (D. Md. 1924) (adopting standard interpretation and investing jury with near-complete discretion); *Court in Hill Case Asserts Cider May Contain More Kick*, Wash. Post, Nov. 12, 1924, at 4; *For Home-Made Wine and Cider, Judge Rules 1/2 of 1 Percent Doesn't Apply to Them*, Bos. Daily Globe, Nov. 11, 1924, at 16; *Wine Making in Home Given O.K. by Court*, Chi. Trib., Nov. 12, 1924, at 2; *Home Brew Legal If Not Intoxicating, Court Rules*, N.Y. Herald Trib., Nov. 12, 1924, at 1; *Home Brew Legal If Not Intoxicating*, N.Y. Times, Nov. 12, 1924, at 1; *Hill Cider Case in Hands of Jury*, N.Y. Times, Nov. 13, 1924, at 1 (recounting jury charge); *Waiting Verdict in Case Testing Act of Volstead*, Atl. Const., Nov. 13, 1924, at 1.

118 *Home Brew Is Legal but the Government Will Ignore Verdict*, N.Y. Times, Nov. 14, 1924, at 1 (detailing scene in the courtroom, where "[a]mong the congratulatory crowd were many of the jurors," and Hill thanked them, "[w]ell boys . . . you can make all the cider and wine you want now.").

119 Isner v. United States, 8 F.2d 487 (4th Cir. 1925); People v. Sinicrope, 109 Cal. App. Supp. 757 (App. Dep't, Sup. Ct., L.A. Cty. 1930); *but* United States v. Picalas, 27 F.2d 366 (N.D.W.Va. 1928), *rev'd*, 33 F.2d 1022 (4th Cir. 1929); *In re* Baldi, 33 F.2d 973 (E.D.N.Y. 1929).

120 *Andrews Affirms Home Brew Ruling*, N.Y. Times, Jan. 11, 1926, at 3.

121 *E.g.* Editorial, *Class Intoxication*, N.Y. Times, Nov. 20, 1924.

122 *See, e.g.*, *Declares Farmers Oppose a Repeal of Their Right To Make Wine and Cider*, N.Y. Herald Trib., Apr. 22, 1926, at 10 (transcript of Senate hearing on amending Section 29); *The Lucky Farmer*, N.Y. Herald Trib., Apr. 23, 1926, at 16 (recounting Senate testimony by a farming trade group representative, who "said he appeared for one million farmers, that a great number of them made cider for their own use, and that they were opposed to the repeal of Section 29 of the Volstead act").

In 1929, grape growers tested the limits of the home winemaking exception.[123] A number of grape-related businesses combined in a new venture, Fruit Industries, ostensibly to stabilize prices in the fruit market.[124] The following year the cooperative announced its lead product: Vine-Glo, a line of home winemaking products and services.[125] Customers could choose among a range of varietals, originally available as a convenient grape concentrate and later as a dried brick. (Home producers had previously tended to purchase the fruit itself at a grocery or rail depot and separately have it pressed for winemaking.[126]) For an added fee, a Vine-Glo agent would drop off the product and a keg, start the fermentation process, and later return to bottle the wine. Do-it-yourselfers were coyly given instructions, such as "Warning. Do not place this brick in a one gallon crock, add sugar and water, cover, and let stand for seven days . . . ."[127] The federal

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[123] *See generally* Edward Behr, Prohibition: Thirteen Years That Changed America 231–32 (2011); Ostrander, *supra* note 6, at 179–80; Garrett Peck, The Prohibition Hangover: Alcohol in America from Demon Rum to Cult Cabernet 104 (2009); Pinney, *supra* note 10, at 437; Pinney, *supra* note 34, at 28–31; Ruth Teiser & Catherine Harroun, Winemaking in California 181–82 (1982).

[124] *A California Plan*, L.A. Daily Times, Apr. 3, 1929 (proposal to Congress for a new grape cooperative); *Fruit Sale Deal Made, Growers in Huge Corporation*, L.A. Daily Times, May 8, 1929, at 1 (firm plan for new grape cooperative); *Grape Help in Offing*, L.A. Daily Times, June 20, 1929, at 1 (soliciting participants for cooperative and explaining funding scheme); *State Indorses Grape Merger*, S.F. Chron., Dec. 18, 1929, at 10 (incorporation of Fruit Industries, noting that it represents over 85% of grape byproduct revenue); *$30,000,000 Fruit Unit, New California Company, Fruit Industries Inc., Merges Grape Growers*, Wall St. J., Dec. 18, 1929 (similar).

[125] *See generally* Behr, *supra* note 123, at 231–32; Peck, *supra* note 123, at 104; Pinney, *supra* note 10, at 437; Pinney, *supra* note 34, at 28–30; Ostrander, *supra* note 6, at 178–81; Teiser & Harroun, *supra* note 123, at 181–82, 187.

[126] Okrent, *supra* note 6, at 179–80 (detailing grape supply chain for home winemaking); *id.* at 179 ("In 1926 the chief investigator for the Prohibition Bureau described what he called the 'twilight zone' of Prohibition: in tenement neighborhoods, he wrote, 'you will see grapes everywhere — on pushcarts, in groceries, in fruit and produce stores, on carts and wagons and trucks . . . Wine grapes in crates, by the truckload, and by the carload.'"); *see* Behr, *supra* note 123, at 86–87; Teiser & Harroun, *supra* note 123, at 178–81.

[127] Peck, *supra* note 123, at 104; *see also* Pinney, *supra* note 10, at 437 ("You take absolutely no chance when you order . . . which Section 29 of the National Prohibition Act permits you"); Teiser & Harroun, *supra* note 123, at 182 ("This beverage should be consumed within five days; otherwise in summer temperature it might ferment and become alcoholic.").

government was initially favorable toward Fruit Industries: the Federal Farm Board awarded sizeable loans twice, and the Bureau of Prohibition issued a Circular Letter that instructed agents not to interfere with shipments of grapes and grape products for home beverage production.[128] Mabel Walker Willebrandt, the chief federal prosecutor for national prohibition, even transitioned to private practice to represent Fruit Industries.[129]

The federal judiciary and executive finally narrowed Section 29 in response to the excesses of Vine-Glo and its competitors. In January 1931, local prohibition agents raided a Vine-Glo competitor in Kansas City, claiming a conspiracy to circumvent the Volstead Act.[130] National enforcement authorities elected to prosecute the case as a vehicle for testing Section 29, anticipating that Missouri courts and juries would sympathize with the dry cause.[131] Department of Justice officials even contemplated an eventual appeal before the Supreme Court.[132] The federal strategy was to establish sufficient precedent to enable prosecuting grape growers, grape-derivative producers, and home winemaking service providers;[133] targeting individual households would be prohibitively demanding of federal resources,[134] and furthermore, a provision of the Volstead Act sharply limited authority for home searches.[135]

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128 *Id.*

129 Some contemporaries speculated that Willebrandt had unethically won favors for her client before exiting government. Pinney, *supra* note 34, at 29–30; Teiser & Harroun, *supra* note 123, at 182, 187; *see* Behr, *supra* note 123, at 232; Ostrander, *supra* note 6, at 180.

130 *Grape Juice Firm's Heads Face Arrest*, Wash. Post., Jan. 19, 1931, at 3; *Grape Juice Men Arrested by Drys*, Atl. Const., Jan. 18, 1931, at 1 *Hold Grape Juice Men in Kansas City Raid*, N.Y. Times, Jan. 18, 1931, at 7.

131 *Test Fight Starts on Grape Juice Sale*, N.Y. Times, May 9, 1931, at 5 (detailing federal litigation strategy).

132 *Id.*

133 *Id.*

134 *Id.*; *see* Irving Fisher, The "Noble Experiment" 454 (1930) (A contemporary economist supportive of national prohibition noted that "it is absurd to expect home production to be prevented by enforcement officers.").

135 Title II Section 25 of the Volstead Act limited home searches to offenses involving the sale of alcohol. So long as home winemaking was only for personal use or gifts, federal agents could not receive judicial preclearance to enter.

After a quick indictment and bench trial, prohibition officials secured a conviction and favorable interpretation in October.[136] The district court narrowed Section 29 considerably: a supplier would be liable if it intentionally facilitated "intoxicating in fact" home winemaking, and home winemaking from grape derivatives (i.e. convenient concentrates and bricks) was entirely unprotected.[137] In the course of his opinion, the presiding judge reflected the spirit of pervasive enforcement exasperation with Section 29:

> The defendants are guilty. Nor is their guilt a technical guilt only. It is real guilt. From the very beginning of their enterprise theirs was not the spirit of the law-abiding citizen. . . .
>
> What a hodgepodge of absurdities they have resorted to. Manufacture is not manufacture. A preparation, compound, and substance is not a substance, compound, and preparation. Wine is not wine. Grape juice is not juice of grapes.
>
> A corporation which boasts that its assets are of the value of a million dollars and that its business is nation wide claims the protection of the cloak which Congress designed for the housewife and the home owner who make intoxicating fruit juices for their families.[138]

The ruling effectively empowered prohibition agents to shut down nearly any grape-derivative producer or home winemaking supplier, potentially even reaching the grape growers themselves.

Meanwhile, in April 1931, prohibition agents had raided a Vine-Glo warehouse, purportedly owing to an absent rabbinic prescription for sacramental wine.[139] In August, federal officers struck again, seizing the assets of a Vine-Glo competitor with the very purpose of orchestrating a national test case for

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136 United States v. Brunett, 53 F.2d 219 (W.D. Miss. 1931).

137 *Id.* at 231–35.

138 *Id.* at 238–39.

139 *Grape Shop Raid Made on Firm of Mrs. Willebrandt*, N.Y. Trib., Apr. 14, 1931, at 1; *Plant of Mrs. Willebrant's Client Is Raided, but McCampbell Denies New Fruit-Juice Policy*, N.Y. Times, Apr. 14, 1931, at 1.

Section 29.[140] Federal prosecutors secured a similarly favorable district court opinion from that effort in early 1932.[141]

The viticultural interests declined to litigate Section 29. In November 1931, following the Missouri decision, Fruit Industries announced it was suspending Vine-Glo home service.[142] The entire project collapsed in 1932.[143] Grape growers made initial steps toward a campaign for legislative and constitutional reform, complaining of how they had been "betrayed" by newly invigorated federal enforcement;[144] the issue was mooted by the Twenty-First Amendment in 1933.

IV. GRAPE GROWING UNDER NATIONAL PROHIBITION

Statistics on California viticulture under national prohibition are "slippery."[145] Contemporary estimates from federal agencies, state agencies, railway shippers, farming cooperatives, and economists all differ (see Appendix). That said, while each dataset may exhibit its own biases and imprecisions, several general trends are consistent among measurements of grape production, pricing, and planting.

First, California grape production boomed following the start of national prohibition. All sources of data reflect a significant increase in fruit output, both in total and in each category of fruit. (In addition

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140 *Grape Brick Trio Taken*, L.A. Daily Times, Aug. 6, 1931, at 1; *Raid Fifth Av. Shop in 'Wine Brick' Test*, N.Y. Times, Aug. 6, 1931, at 1; *U.S. Drys Raid Store Selling Grape Bricks*, Chi. Trib., Aug. 6, 1931, at 5; *Court Test Looms on Grape Products*, Wash. Post., Aug. 7, 1931, at 2; *Legal Test Coming on "Grape Bricks,"* Daily Bos. Globe, Aug. 7, 1921, at 4.

141 *In re* Search Warrant Affecting No. 277 Fifth Ave. in Borough of Manhattan, City of New York, 55 F.2d 297, 301 (S.D.N.Y. 1932).

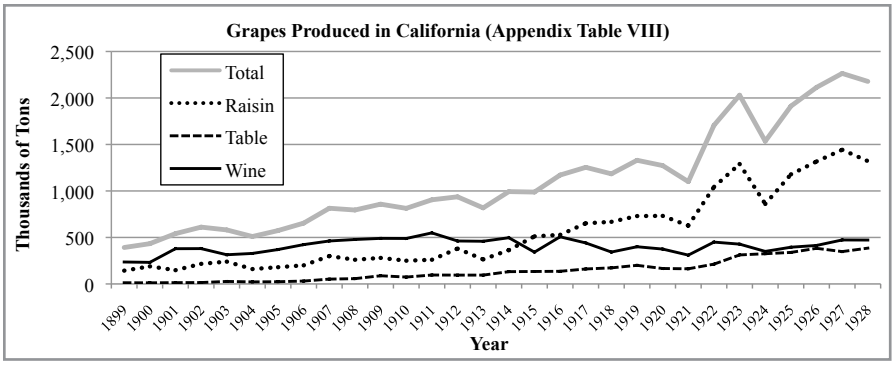
142 *Will No Longer Aid Home Wine Making*, Bos. Globe, Nov. 6, 1931, at 17; *Wine Brick Firm Drops Home Sales*, N.Y. Times, Nov. 6, 1931, at 23; *Wine Essence Sale in Homes Is Discontinued*, N.Y. Trib., Nov. 6, 1931, at 5; *Wine Plan Changed*, L.A. Daily Times, Nov. 6, 1931, at 1; *Wine Products House Service Is Discontinued*, Chi. Trib., Nov. 6, 1931, at 4.

143 *Vine-Glo Fades Out*, N.Y. Trib., Sept. 16, 1932, at 5.

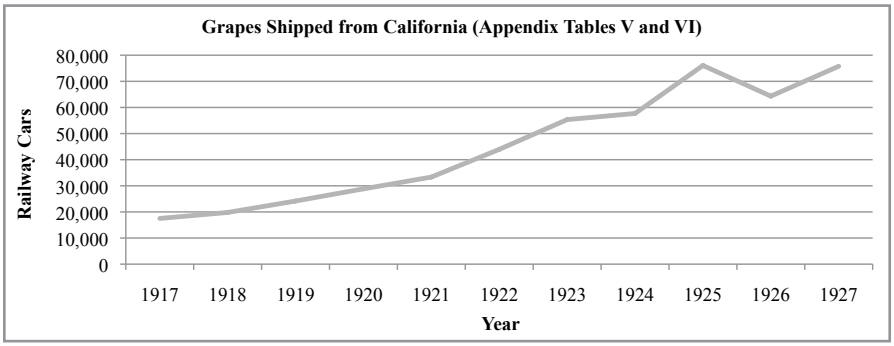
144 *Wine Move Launched*, L.A. Daily Times, Apr. 26, 1932, at 1; *California "Betrayed,"* N.Y. Times, Apr. 27, 1932, at 16.

145 Teiser & Harroun, *supra* note 123, at 144.

to wine grapes, raisins and table grapes were also commonly used in home wine production, albeit with significant dispute as to the precise proportion.[146])



Measures from railway shippers confirm the expansion in production.



The railroads were ill prepared. Car shortages and handling delays were common in the years following the imposition of national prohibition; ultimately the railroads built new terminals in Boston, Chicago, Newark, and other hubs just to relieve the strain from grape shipments.[147]

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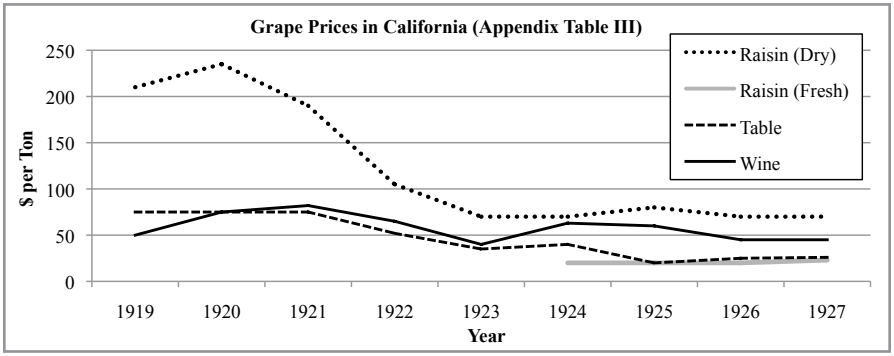
146 *See* Fisher, *supra* note 134, at 266–78 (1930), Clark Warburton, The Economic Results of Prohibition 24–40 (1932).

147 Okrent, *supra* note 6, at 178–79; Pinney, *supra* note 34, at 19–20; *see, e.g.*, *I.C.C. to Seek Cars for State Grape Crop*, S.F. Chron., Sept. 22, 1922.

Second, grape prices soared during national prohibition. Pre-prohibition data on pricing is incomplete and inconsistent;[148] grapes appear to have hovered roughly between $5 and $20 per ton.[149] At the outset of prohibition, prices soared to record highs of five to ten times previous values.[150]



The market quickly dipped, and by the mid-1920s overproduction and weather conditions began to cause further drops and instability.[151] Nevertheless, through much of national prohibition, grape prices remained far in excess of their pre-prohibition levels.

Increased demand was undoubtedly a driver of skyrocketing grape prices: national prohibition curtailed competing products. The dynamics of the home winemaking market may also have contributed. Individual home winemakers (and intermediary wholesalers and retailers) were scattered across the country; their pricing influence was much less than the pre-prohibition winery purchasers'.[152] Eliminating wine-related intermediaries may have allowed grape growers to capture additional value.[153]

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148 Alan L. Olmstead & Paul W. Rhode, *Quantitative Indices on the Early Growth of the California Wine Industry* 8 (Ctr. Wine Econ. Working Paper 901, May 8, 2009).

149 *See* James Simpson, Creating Wine 209 (2011); Okrent, *supra* note 6, at 176; Pinney, *supra* note 34, at 19; Teiser & Harroun, *supra* note 123, at 178.

150 *E.g. Grape Growers Now Receiving Record Price*, S.F. Chron., Jun. 1, 1919, at B12.

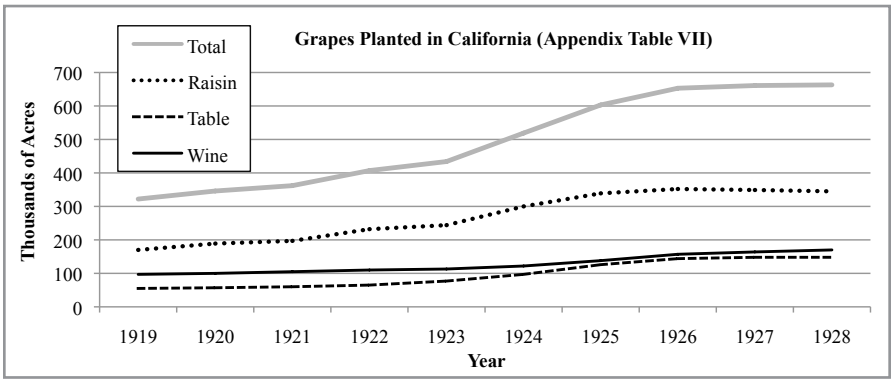
151 *See* Ostrander, *supra* note 6, at 181; Pinney, *supra* note 34, at 24–27; Teiser & Harroun, *supra* note 123, at 179.

152 *See* Teiser & Harroun, *supra* note 123, at 178–79; *You Can Never Tell*, S.F. Chron., Sept. 17, 1921 ("individuals will pay more for grapes to be made into wine at home than any winemaker would pay for the same grapes for commercial pressing").

153 Ira F. Collins, *A Marketing Lesson in the Eighteenth Amendment*, Chi. Trib., Sept. 9, 1922, at 6.

Home wine producers may also have been more wasteful than the wineries, further increasing demand.[154]

A third point of consistency is that grape growers planted during national prohibition, even after the initial price bubble had burst.[155] Given the substantial investment required for new vines, the data suggests that grape growers expected favorable market conditions for years to come.



Estimates of national wine production and consumption during prohibition do not exhibit consensus. At one end, Yale economics professor Irving Fisher — a vocal prohibition supporter[156] — questionably calculated that wine consumption had dropped by roughly a third.[157] At the other end, Clark Warburton authored a dry-funded economics dissertation at Columbia[158] that estimated leaps in wine production and consumption.[159] The Prohibition Bureau issued figures that roughly aligned with Warburton's calculations, as did the Wickersham Commission (a presidential blue-ribbon panel on national prohibition).[160]

154 *See* Fisher, *supra* note 134, at 274.

155 *See* Peck, *supra* note 123, at 104; Pinney, *supra* note 34, at 19.

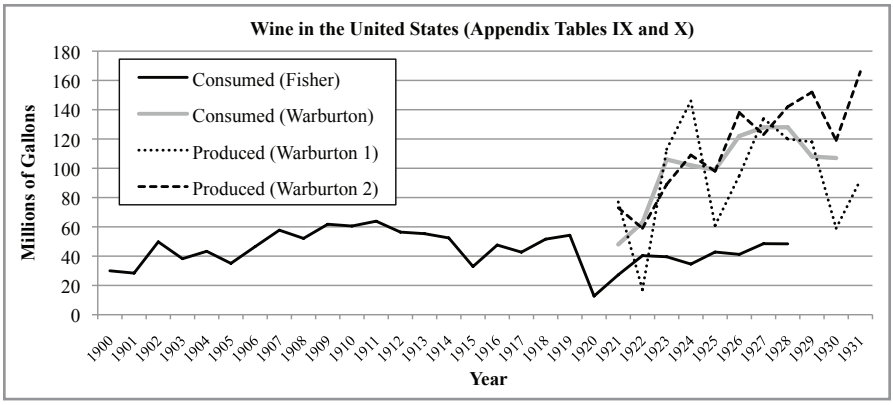
156 Thornton, *supra* note 10, at 15–23.

157 Fisher, *supra* note 134, at 277.

158 Thornton, *supra* note 10, at 28.

159 Warburton, *supra* note 146, at 37–40. Warburton used two different methodologies to estimate illegal winemaking, one based on total grape production less other uses, and the other based on particular types of grapes.

160 *See* Behr, *supra* note 123, at 87; Pinney, *supra* note 34, at 19.



It bears mentioning that national prohibition was not a boon to all of California's grape-related trades. Wineries struggled to scrape by on exceptions for sacramental, medicinal, industrial, and cooking purposes.[161] Treasury authorities kept a close watch to ensure both prohibition and tax compliance.[162] Before national prohibition, California was home to over 700 wineries; by the ratification of the Twenty-First Amendment, fewer than 150 remained.[163]

Varietals also suffered.[164] Home purchasers favored grapes that shipped well and were brightly colored, sacrificing taste for convenience and appearances. Vines of delicate varietals were torn out and replanted to sate the home winemakers. The quality of California's wines took decades to recover.

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[161] Okrent, *supra* note 6, at 182–88. In one strange channel for illicit wine distribution, there was a rash of fake rabbis at the outset of national prohibition, and California's synagogues suddenly swelled . . . including with deceased congregants. *Id.* at 187–88.

[162] Pinney, *supra* note 34, at 12; *id.* at 18 ("The licensed wineries were under close supervision; it was known precisely how much wine they had on hand and what sort of wine it was. If any discrepancy occurred between what was on the record and what the inspectors actually found on the premises, an explanation was at once demanded. Under such close surveillance, the winemaker had little chance to cheat, whatever his wishes might have been.").

[163] Peck, *supra* note 123, at 104; Teiser & Harroun, *supra* note 123, at 180–82; *see* Pinney, *supra* note 34, at 10–18.

[164] *See generally* Okrent, *supra* note 6, at 177; Pinney, *supra* note 10, at 438; Pinney, *supra* note 34, at 26.

V. GRAPE GROWERS RECOGNIZED THE SOURCE OF THEIR WINDFALL

Grape growers had, to be sure, been very concerned about the nation going dry; as the Eighteenth Amendment and Volstead Act loomed, grape growers demanded government compensation[165] and assistance finding new outlets for their products.[166] Some early observers credited the grape boom to a speculative bubble or new outlets for grape-derivative products.[167]

Throughout 1920 and 1921 the grape growers came to recognize how Section 29 had worked a gerrymander in their favor. Early news coverage reflected confusion: In a March interview with the *Los Angeles Times*, for example, a representative of a large raisin processor pondered the sudden demand for inedible grapes on the East Coast.[168] In August the *San Francisco Chronicle* recounted the Prohibition Administrator's interpretative opinion on Section 29 and noted related "conversations whispered in offices, street cars and ferry boats."[169] Later that month, grape prices rose on account of the news.[170] When the 1921 crop came in, the *New York Times* declared: "Home wine making has saved the wine grape growers of California."[171] The *Los Angeles Times* dubbed the windfall a "prohibition miracle" and noted: "There was never any doubt who bought those grapes. They were bought by thousands of persons who made wine in their homes."[172] The head of the grape growers' trade group (a Grape Protective Association affiliate) finally acknowledged in September that the industry's

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165 *E.g. The Ruined Wine Grape Growers*, S.F. Chron., Jan. 28, 1919, at 18.

166 *E.g. Help Wine Grape Growers*, N.Y. Times, Dec. 16, 1920, at 16.

167 *E.g. Golden Vineyards*, N.Y. Times, Nov. 30, 1919, at 8; *Wine Grape Vineyards Will Be Profitable*, S.F. Chron., May 30, 1920, at W2; *Wine Grape to be Turned into Genuine Money*, S.F. Chron., July 25, 1920, at F3; *What Prohibition Didn't Do to the Grape Industry*, L.A. Daily Times, Aug. 21, 1921, at 10.

168 *Grapes To Get Increased Price*, L.A. Daily Times, Mar. 6, 1920, at 11 ("There never was a market until this year for dried wine grapes to speak of. It is, I suppose, a development of prohibition.").

169 *Dry Act Proves No Nemesis to Grape Industry*, S.F. Chron., Aug. 4, 1920, at 2.

170 *Grape Price Up on Wine Ruling*, L.A. Daily Times, Aug. 28, 1920, at II-10; *see also Price of Wine Grapes Goes to $150 Per Ton*, S.F. Chron., Aug. 15, 1920, at F1.

171 *Home Wine Making Saves Grape Growers*, N.Y. Times, Oct. 30, 1921, at 38; *see also Crop Is Saved by Home Brew*, L.A. Daily Times, Oct. 10, 1921, at II-11.

172 *Grape Growers Are Perplexed*, L.A. Daily Times, Sept. 5, 1921, at II-11; *see also Grape Sales Are Enormous*, L.A. Daily Times, Nov. 1, 1921, at 14.

newfound success was "largely because of prohibition"[173] and proudly declared to his constituency:

> One million homes throughout the United States have supplanted the 300 [sic] wineries that were operating in California before prohibition, and not only are they taking care of the California wine grape crop, but they are paying for grapes three times the price [sic] the wineries paid.[174]

To the extent grape growers could claim ignorance of Section 29's effects at the very start of national prohibition, they were unambiguously apprised by the close. When the Director of the Prohibition Bureau delivered an address to grape growers in 1929, his remarks focused almost exclusively on home winemaking.[175] The Vine-Glo episode was national news and involved a substantial proportion of grape-related firms. A series of oral recollections from grape growers collected by University of California, Berkeley historians provides a final source of confirmation: many accounts reflect detailed knowledge of home winemaking, from fruit production to shipping to retail to fermentation.[176] In the words of one grape grower: "Andrew Volstead ought to be considered the patron saint of the San Joaquin Valley."[177]

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173 *Grape Growers Prosper*, N.Y. Times, Sept. 17, 1921, at 8.

174 *Once Again*, S.F. Chron., Sept. 17, 1921, at 22.

175 *Grape Juice Within Law*, L.A. Daily Times, Aug. 28, 1929, at 4.

176 Ruth Teiser, *William V. Cruess: A Half Century in Food and Wine Technology* 22–27 (1967) (discussing grape grower relationships with government agencies to prevent enforcement against home winemaking; home winemaking sales to and practice in the Italian-American community); Ruth Teiser, *Horace O. Lanza, Harry Baccigaluppi: California Grape Products and Other Wine Enterprises* 9–15 (recalling the founding of Fruit Industries); *id.* at 88–96 (1971) (recounting sale of sacramental wine; production of grape concentrate and use in home winemaking); Ruth Teiser, *Louis A. Petri: The Petri Family in the Wine Industry* 6–7 (1971) (recounting the business models of illicit organized home winemaking); Ruth Teiser, *Maynard A. Joslyn: A Technologist Views the California Wine Industry* 3–10, 35–37 (1973) (explaining the distribution and usage of various grape products for home winemaking); Carole Hicke, *Louis J. Foppiano, A Century of Winegrowing in Sonoma County*, 1896–1996, 14–18 (1996) (discussing enormous demand for grapes for home winemaking on the East Coast).

177 Sean Dennis Cashman, Prohibition: The Lie of the Land 39 (1981).

VI. CONCLUSION: WHY CALIFORNIA WENT DRY

The previous sections detailed how grape growers suddenly ceased their organized and strategic opposition to dry ballot measures in California, how federal law both allowed and encouraged home winemaking, how California's grape growers prospered under national prohibition, and how those viticulturists recognized the source of their windfall. This concluding section aims to complete the argument's arc: California went dry and stayed dry, in large measure, owing to Section 29 of the Volstead Act.

Direct proof of causation is, admittedly, limited. In my searching, I have found just one conclusive link: a 1921 *Los Angeles Times* dispatch on the California government in Sacramento, claiming, "Wine grape growers of California are strong for prohibition."[178] That said, the circumstantial case is strong — so strong that a 1926 *New York Times* article reported on a likely connection.[179]

Furthermore, other theories fall short in explanatory force. A review of census data does not reveal any sudden shift in California's voting base. There was not a wave of state prohibition enactments following national prohibition — in fact, larger states resisted going dry,[180] and New York even flipped back to being wet.[181] Some evidence suggests that, owing to personnel and organization shifts, the dries were marginally better prepared[182] and the wets were marginally worse prepared in 1922.[183] But was the difference so great? And if so, why would the wets (almost) entirely give up the fight following the election? A final explanation might be that state prohibition enforcement law did not matter — but the lobbies and voters

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178 *King Tax Bill May Be Invalid*, L.A. Daily Times, Oct. 16, 1921, at 6.

179 Alfred Holman, *Strict Dry Laws Suit California*, N.Y. Times, June 13, 1926, at E3 ("Circumstances and conditions contributing to this change of mood on the part of a State which officially and otherwise for many years had promoted the wine and brandy industries, and which, again and again, and still again, had registered negatively in the matter of prohibition legislation, are significant.").

180 Jack S. Blocker, Retreat from Reform 236–40 (1976) (collecting and comparing results of state prohibition votes).

181 *See* Cashman, *supra* note 177, at 50; Pinney, *supra* note 34, at 4–5.

182 *See* Ostrander, *supra* note 6, at 181.

183 *See Theodore A. Bell Killed in Auto Smash*, N.Y. Times, Sept. 5, 1922 (death of Grape Protective Association spokesman and counsel immediately before election).

appear to have earnestly believed otherwise, and news reports after 1922 reflect a string of state prohibition arrests and prosecutions.

So, why did California go dry? At least in part, it appears, because the state helped the rest of the union stay wet.

* * *

APPENDIX.

STATISTICS ON GRAPE GROWING IN CALIFORNIA UNDER PROHIBITION

Table I: California grape production, price, and value (1919–1921).[184]

Year	Production (Thousands of Tons)				Price ($ per Ton)			Total Value ($M)
	Raisin	Table	Wine	Total	Raisin	Table	Wine	
1919	182.5	200	400	782.5	210	75	40	69.33
1920	177	190	375	742	235	75	65	80.22
1921	130	125	310	565	190	75	82	59.50

Table II: California grape production, price, and value (1919–1921).[185]

Year	Production (Thousands of Tons)				Price ($ per Ton)			Total Value ($M)
	Raisin	Table	Wine	Total	Raisin	Table	Wine	
1919	182.5	200	400	782.5	210	75	50	73.33
1920	177	190	375	742	235	75	75	83.97
1921	130	125	310	565	190	75	82	59.50

Table III: California grape production, price, and value (1919–1927).[186]

Year	Production (Thousands of Tons)					Price ($ per Ton)				Total Value ($M)
	Raisin		Table	Wine	Total	Raisin		Table	Wine	
	Dry	Fresh				Dry	Fresh			
1919	182.5	–	200	400	782.5	210	–	75	50	73.33
1920	177	–	190	375	742	235	–	75	75	83.97
1921	145	–	210	310	665	190	–	75	82	68.72
1922	237	–	308	450	995	105	–	52	65	70.15
1923	290	–	442	428	1,160	70	–	35	40	52.89
1924	170	180	325	350	1,025	70	20	40	63	50.55
1925	200	378	339	395	1,312	80	20	20	60	54.04
1926	272	229	383	414	1,298	70	20	25	45	51.83
1927	285	303	348	473	1,409	70	23	26	45	57.25

184 United States Dep't Agriculture, Yearbook 1921, 634 (1922).

185 Cali. Dep't Agriculture, The California Grape Industry — 1919, 749 (1920).

186 E.W. Stillwell & W.F. Cox, United States Dep't Agriculture, *Marketing California Grapes* 10 (Circular No. 44, Aug. 1928).

Table IV: California wine grape planting and production (1880–1930).[187]

Year	Wine Grapes	
	Acres (Thousands)	Tons (Thousands)
1880	36.00	–
1885	65.78	–
1890	90.23	–
1900	86.00	–
1910	145.00	–
1920	118.39	338
1925	172.57	442
1930	200.82	486

Table V: California grape shipments (1921–1927).[188]

Year	Railway Cars
1921	33,344
1922	43,952
1923	55,348
1924	57,695
1925	76,066
1926	64,327
1927	75,764

Table VI: California grape shipments (1917–1926).[189]

Year	Railway Cars
1917	17,500
1918	19,800
1919	24,167
1920	28,832
1921	33,344
1922	43,952
1923	55,348
1924	57,695
1925	76,065
1926	63,522

Table VII: California grape planting (1919–1928).[190]

Year	Acres Bearing Grapes (Thousands)			
	Raisin	Table	Wine	Total
1919	170	55	97	322
1920	189	57	100	346
1921	197	60	105	362
1922	232	65	110	407
1923	244	77	113	434
1924	300	97	122	519
1925	339	126	138	603
1926	352	144	157	653
1927	349	148	164	661
1928	345	148	170	663

[187] Charles L. Sullivan, A Companion to California Wine 48 (1998) (providing data from the California Agricultural Statistics Service).

[188] E.W. Stillwell & W.F. Cox, *supra* note 186, at 8.

[189] S.W. Shear & H.F. Gould, *Economic Status of the Grape Industry* 38 (U. Cal. Col. Agriculture Agricultural Experiment Station Bulletin 429, June 1927).

[190] *Id.* at 34.

Table VIII: California grape production (1899–1928).[191]

Year	Acres Bearing Grapes (Thousands)			
	Raisin	Table	Wine	Total
1899	143	13	236	392
1900	189	12	232	433
1901	148	14	379	541
1902	216	15	380	611
1903	240	27	314	581
1904	160	22	328	510
1905	180	24	370	574
1906	200	31	423	654
1907	300	52	462	814
1908	260	57	478	795
1909	280	88	490	858
1910	250	74	489	813
1911	260	96	549	905
1912	380	95	462	937
1913	264	95	459	818
1914	364	132	497	993
1915	512	134	342	988
1916	528	136	507	1,171
1917	652	161	441	1,254
1918	668	173	343	1,184
1919	730	200	400	1,330
1920	732	166	375	1,273
1921	627	163	310	1,100
1922	1,043	213	450	1,706
1923	1,290	312	428	2,030
1924	860	325	350	1,535
1925	1,178	339	395	1,912
1926*	1,261	366	413	2,040
1926	1,317	383	414	2,114
1927*	1,443	348	473	2,264
1928*	1,321	385	472	2,178

*estimate

Table IX: Estimated U.S. wine consumption (1900–1930).[192]

Year	Wine Consumed in United States (Millions of Gallons)	
	Fisher	Warburton
1900	29.99	–
1901	28.40	–
1902	49.76	–
1903	38.24	–
1904	43.31	–
1905	35.06	–
1906	46.49	–
1907	57.74	–
1908	52.12	–
1909	61.78	–
1910	60.55	–
1911	63.86	–
1912	56.42	–
1913	55.33	–
1914	52.42	–
1915	32.91	–
1916	47.59	–
1917	42.72	–
1918	51.60	–
1919	54.27	–
1920	12.72	–
1921	27.24	48
1922	40.35	63
1923	39.57	106
1924	34.57	102
1925	42.81	99
1926	41.21	122
1927	48.51	128
1928	48.39	128
1929	–	108
1930	–	107

[191] Fisher, *supra* note 134, at 269; Shear & Gould, *supra* note 189, at 30.

[192] Fisher, *supra* note 134, at 277; Warburton, *supra* note 146, at 34–40.

Table X: California grape production and United States wine production (1921–1931).[193]

Year	Grapes Produced in California (Thousands of Tons)	Wine Produced in United States (Millions of Gallons)		
		Illegal		Legal
		Total Method	Varietal Method	
1921	1,249	56	52	21
1922	1,053	11	53	6
1923	1,611	98	74	15
1924	2,030	137	100	9
1925	1,535	57	94	4
1926	1,912	89	132	6
1927	2,114	130	119	4
1928	2,264	115	137	5
1929	2,213	107	141	11
1930	1,751	56	116	3
1931	1,967	85	159	7

[193] Warburton, *supra* note 146, at 34–40.

Table XI: California raisin and wine production (1897–1915).[194]

Year	Raisin Crop (Tons)	Wine Production (Gallons)	
		Dry	Sweet
1897	46,852	28,736,400	5,197,500
1898	40,368	10,750,000	7,779,000
1899	35,784	15,103,000	8,330,000
1900	47,167	16,737,260	6,940,300
1901	37,125	16,473,731	6,270,300
1902	54,375	28,224,146	14,835,146
1903	60,000	21,900,500	12,670,356
1904	37,500	15,589,342	13,571,856
1905	43,750	20,000,000	10,700,000
1906	47,500	26,000,000	15,000,000
1907	60,000	27,500,500	15,500,000
1908	60,000	22,500,000	14,750,000
1909	70,000	27,000,000	18,000,000
1910	56,000	27,500,000	18,000,000
1911	67,500	26,000,000	23,280,044
1912	85,000	22,500,000	17,797,781
1913	65,000	25,000,000	17,307,600
1914	90,000	22,000,000	16,620,212
1915 (est.)	124,000	21,571,000	4,035,240

[194] Cal. Development Bd., California Resources and Possibilities 30–31 (1915).

CALIFORNIA'S IMPLAUSIBLE CRIME OF ASSAULT

MIGUEL A. MÉNDEZ*

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.
>
> 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
>
> (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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> . . . .
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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

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[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

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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

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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

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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

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[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

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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

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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

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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

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[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

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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).

CALIFORNIA LAWYER:

Aaron Sapiro and the Progressive-Era Vision of Law as Public Service

VICTORIA SAKER WOESTE*

Much scholarly attention has been paid to the lawyers who established the profession in California during the nineteenth century. By following the migration of Midwesterners and former Confederate officers to the West after the 1860s, historians have reconstructed the lives and work of the legal and judicial professions in California after statehood. During the Progressive Era, California's lawyers took up the concerns of Progressives nationwide, sanding the sharp corners of industrialism and the economic inequalities that resulted from it. The rights of workers, small-scale entrepreneurs, children, women laborers, and women's right to vote all became central focus points of California politics after 1900. The stories of many lawyers who played a part in transitioning California to this new era of public policy and the new areas of law practice that came with it have gone largely untold. With the founding of the state's first law schools, a generation of home-grown and — trained

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lawyers were positioned to become the foundation of Progressive Era California.[1]

One such lawyer was Aaron Sapiro, who typified several salient characteristics of this new generation of lawyers. Sapiro is best known as the man who sued Henry Ford for libel in 1927. The case ended in mistrial and an out-of-court settlement; as a result, few people understand not only what the trial was about but what Sapiro had done in his legal career to draw Ford's ire in the first place. For more than a dozen years, Sapiro organized farmers' marketing cooperatives that were designed to provide farmers with the same economic advantages as those enjoyed by labor unions and corporations. Sapiro saw law as a tool to reshape society and to make economic institutions behave rationally. His determination to use law to achieve social change stemmed from an awareness of his own talent as well as an undeniable ability to seize the moment. As he told an interviewer in 1923, "[T]he gift of leadership is not so much a matter of brains as of *intensity*. If you are so completely saturated with anything that you think it and dream it and live it, to the exclusion of all distracting influences, nothing on earth can stop you from being a leader in that particular movement." For Sapiro, what mattered was to have a vision of the world as it ought to be; persuading others was merely a matter of insisting on his vision as against "all distracting influences."[2] This article, in telling Sapiro's life story, reconnects him to his intellectual roots in California's tradition of legal progressivism.

Sapiro's career followed an unlikely route. He was born in San Francisco to Polish immigrants who raised him and seven siblings in desperate

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[1] A good example of work on this topic is Molly Selvin, "The Loeb Firm and the Origins of Entertainment Law Practice in Los Angeles, 1908–1940" (unpublished paper on file with author). On nineteenth-century developments in California legal history and the establishment of the legal profession, see, e.g., Gordon Bakken, *Practicing Law in Frontier California* (Lincoln: University of Nebraska Press, 1991); Bakken, *The Development of Law in Frontier California: Civil Law and Society, 1850–1890* (Westport, Conn.: Greenwood Press, 1985); Christian G. Fritz, *Federal Justice in California: The Court of Ogden Hoffman, 1851–1891* (Lincoln: University of Nebraska Press, 1991); Lucy E. Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (Chapel Hill: University of North Carolina Press, 1995).

[2] Merle Crowell, "Nothing Could Keep This Boy Down," *American Magazine* (Apr. 1923), 16–17, 136–46, 146.

poverty. His father died in a train accident when Aaron was nine, forcing his mother to send him and most of the Sapiro children to a San Francisco orphanage. After six wretched years, Aaron escaped to Hebrew Union College in Cincinnati, where he attended college and studied for the rabbinate. His orphanage experience seared into him a thorough distrust for authority. Spending time in seminary hardened in him the conviction that organized religion was useless if he were going to change the world. And so with one year left before ordination, he returned to California to enroll at Hastings College of the Law.[3]

During his seminary years, Sapiro encountered new friends who influenced his life in lasting ways. On his summer breaks, he returned to Northern California to visit his mother and teach in synagogues. One assignment placed him in a children's bible class in Stockton, up the Sacramento River Delta from Oakland. Sapiro's teaching position brought him in contact with one of Stockton's most prominent Jewish families, Michael and Rose Arndt. The Arndts had two children: Stanley, a studious boy, and Janet, a girl who was barely ten in 1905 when her parents enrolled her in Aaron's scripture class.[4] Rose Arndt took more than a passing interest in the serious seminarian. She introduced him to Stockton society, broadening his circle beyond the families he met at the synagogue. Soon she invited him to accompany the family on day trips around Northern California. Before long an understanding emerged: Aaron and Janet were betrothed. In 1913, the couple married and settled in San Francisco.[5]

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[3] Victoria Saker Woeste, "Sapiro, Aaron," *American National Biography Online*, April 2004 update, accessed 8 Nov. 2013, http://www.anb.org/articles/11/11-01215.html.

[4] Jeannette Arndt Anderson, interview by author, tape recording, Palo Alto, Cal., 31 Mar. 2005, p. 14 (transcript on file); Janet Sapiro, Certificate of Death, County of Los Angeles, State of California, Department of Public Health, 4 June 1936, no. 7502. Stanley Arndt became a lawyer who wrote an article on agricultural cooperation and practiced law for a time with his brother-in-law. Anderson interview, 7; Stanley Arndt, "The Law of California Co-operative Marketing Associations," *California Law Review* 8 (1920): 281–94.

[5] Anderson interview, 13–14; Linda Sapiro Moon, interview by author, tape recording, Huntington Beach, Cal., 23 Sept. 2002, pp. 4–5 (transcript on file). On the practice of Jewish families betrothing their young daughters through the late nineteenth century, see Sydney Stahl Weinberg, *The World of Our Mothers: The Lives of Jewish Immigrant Women* (Chapel Hill: University of North Carolina Press, 1988), 23–24.

Law proved to be Sapiro's métier. As the top graduate in his class at Hastings, he was selected to address the commencement exercises. His speech, entitled "Law as a Training for Citizenship," conveyed his conviction that lawyers played a special role in building the American civic community. More particularly, he wanted to express a sense of vocation. Such a profession marked out, he said, a "prominent and important place . . . in the upbuilding of [the] state," according to the Berkeley *Daily Gazette*. In his "eloquent and forceful speech," Sapiro argued that the standards for professional attainment had shifted: "A lawyer who wins big cases is no longer considered successful unless he takes an important part in the issues of the day and works for the advancement of the community." Law — or, more precisely, the life of a lawyer — gave his inchoate sense of mission concrete meaning. As a lawyer, he planned to work for social change.[6]

As it so happened, California Governor Hiram Johnson attended the Hastings law school graduation and heard Sapiro's inspiring speech. A barnstorming Progressive reformer, he was seeking out lawyers to help wage what a contemporary journalist called a "political revolution" in California state government. Just a few months after completing law school, Sapiro was offered the position of secretary and legal counsel to the state's new Industrial Accident Board. At a time when victims of dangerous working conditions could expect little help from their employers, the innovation of workers' compensation programs provided real relief. Providing help in such cases was a favorite cause of Progressive reformers; California was not far behind states such as New York in passing these laws.[7]

The Board's first task was to set up a voluntary workers' compensation program that included the administrative forms and processes for handling workers' cases under the new law. Dealing with these cases showed

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[6] *Berkeley Daily Gazette*, 17 May 1911, p. 1.

[7] Robert Cherny, "Johnson, Hiram Warren," *American National Biography Online*, Feb. 2000, accessed 8 Nov. 2013, http://anb.org/articles/06/06-00315.html; Trial Transcript, 1148. On the legal history of workers' compensation, see, e.g., Lawrence Friedman and Jack Ladinsky, "Social Change and the Law of Industrial Accidents," *Columbia Law Review* 67 (1967): 50–82; Arthur F. McEvoy, "Freedom of Contract, Labor, and the Administrative State," in Harry N. Scheiber, ed., *The State and Freedom of Contract* (Palo Alto, Cal.: Stanford University Press, 1998), 198-235; and John Fabian Witt, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* (Cambridge, Mass.: Harvard University Press, 2004).

the Board and its counsel that a voluntary program was inadequate to meet the scope of workers' injuries and damages. Sapiro then was assigned to redraft the statute to require employer participation, guide the bill through the state legislature, and then defend the act in the state courts. The compulsory participation act that Sapiro drafted remains the foundation of California's workers' compensation system. Sapiro stayed with the Industrial Accident Board for nearly two years, while practicing law on the side with a small firm in San Francisco.[8]

Sapiro had his mind fixed on other goals. During these years, Sapiro began to capitalize on the personal and professional connections he had been building for years in the Sacramento Delta area. Through his future father-in-law, he met the person who would provide direction for his legal career after he left state employment. In mid-1908, he was introduced to Harris Weinstock, a wealthy Sacramento merchant who had begun a second career in public service around the turn of the century.[9]

Weinstock and his half-brother David Lubin dedicated their lives to public service and agricultural reform. Both believed in the Jeffersonian vision of agrarian freeholding. The idea was that democratic values went hand-in-hand with individual landownership and that agriculture supplied the bedrock of American civic virtue. In the mid-1880s, the brothers purchased a 300-acre fruit orchard near Sacramento and two wheat farms in a neighboring county. Then they took the lead in forming the California Fruit Union, an early growers' cooperative that was one of the first organizations to market fruit east of the Rockies. To help realize his twin goals of

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[8] Roseberry Act of 1911 (Stats. 1911, ch. 399, p. 796; participation voluntary for employers); Boynton Act of 1913 (Stats. 1913, ch. 176, p. 279; compulsory participation); Testimony, *Aaron Sapiro v. Henry Ford and the Dearborn Publishing Company*, Case No. 7522, U.S. District Court, Eastern Division of Michigan, Southern Division, Transcript of Proceedings, 28 Mar. 1927, pp. 1148–50 (hereafter Trial Transcript), file 4, box 43, accession 48, Benson Ford Research Center, Dearborn, Michigan; Glenn Merrill Shor, "The Evolution of Workers' Compensation Policy in California, 1911–1990" (Ph.D. diss., University of California, Berkeley, 1990); Sam Bubrick, interview by author, tape recording, 23 Sept. 2002 (transcript on file); Leland Sapiro, telephone interview by author, June 1998.

[9] Grace H. Larsen and Henry E. Erdman, "Aaron Sapiro: Genius of Farm Co-operative Promotion," *Mississippi Valley Historical Review* 49:2 (1962), 242–68. Larsen and Erdman say the two met in 1905 ("Genius of Co-operative Promotion," 244), but this claim contradicts Sapiro's Ford trial testimony.

rural prosperity and world peace, Lubin founded the International Institute of Agriculture in Rome in 1905. The organization eventually worked on projects with the League of Nations in the 1930s and became a part of the Food and Agricultural Organization of the United Nations in 1946. For his part, Weinstock stayed closer to home, working in California state government. When Harris Weinstock met Aaron Sapiro, he found a ready-made acolyte.[10]

Weinstock introduced Sapiro to the study of agricultural cooperation and the problems bedeviling California producers. Weinstock gave Sapiro access to his enormous library of books on farming, agricultural cooperation, and law, some in German and French. Sapiro proved an adept and quick student, devouring every volume Weinstock "had . . . on the subject of world credits and farm marketing, and also [everything] that I could get in the library at the University of California." By the time Sapiro began law school, he had drawn a handmade chart of all state laws dealing with agricultural credits and marketing. On visits to Stockton, Aaron often traveled the countryside with Weinstock, visiting fruit orchards and dairy farms while Weinstock "point[ed] out to me a great many things." Sapiro was eager to "[sit] at the feet" of Lubin and Weinstock and "absorb some of their views and vision and some of their sense of service."[11]

The relationship blossomed. Weinstock was already a member of Governor Johnson's administration by the time Sapiro delivered his law school graduation address. That proximity enabled Weinstock to buttress the governor's inclination to hire the young lawyer with a strong recommendation of his own: "There are two classes of men. One you have to drive. On one you have to keep a bridle to hold them back. Aaron Sapiro is one of the latter."[12] Sapiro was already fully committed to Weinstock and

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[10] Olivia Rossetti Agresti, *David Lubin: A Study in Practical Idealism* (Boston: Little, Brown and Co., 1922), 267–79; Michael Magliari, "Lubin, David," *American National Biography Online*, Feb. 2000, accessed 8 Nov. 2013, http://www.anb.org/articles/15/15-00979.html. Jefferson expressed these ideas most fully in his *Notes on the State of Virginia*. See his *Writings*, ed. Merrill D. Peterson (New York: Viking Press, 1984).

[11] Larsen and Erdman, "Genius of Farm Co-operative Promotion," 245; Trial Transcript, 1153–54; Aaron Sapiro, "An Experience with American Justice," *Free Synagogue Pulpit* 8, no. 5 (1927–28): 5.

[12] Quoted in Larsen and Erdman, "Genius of Farm Co-operative Promotion," 244.

Lubin's platform of economic reform and government service by the time he finished law school. Lubin and Weinstock's belief that world peace and national prosperity could only be secured through agricultural prosperity gave Sapiro's social justice convictions a concrete underpinning. Soon he would have another opportunity to put those convictions into practice, this time working directly with his mentor, Weinstock.

The 1900s and 1910s were a time of real innovation for California's agricultural marketing cooperatives and their members. By that time, California's Central and San Joaquin valleys were chockablock with small fruit and nut farms. Raisins, apricots, plums, cherries, almonds, and many other tree crops were growing by the tidy acre. Armenians, Turks, Greeks, Japanese, Italians, Scandinavians, Hindus, and northern Europeans all combined in a great agricultural melting pot as California's arid lands turned green under the artificial rain of constructed irrigation works. As fruits and nuts became profitable to produce, growers sought to expand their markets eastward and reach consumers year-round. Even before the turn of the century, growers banded together in cooperatives to sell their crops collectively. Still, they encountered difficulties.[13]

The traditional form of cooperative was a loose affiliation of individuals, held together by good will and the bonds of neighborliness. True cooperatives returned all proceeds to members in proportion to the amount of business each conducted through the organization; they were "non-profit" in the fullest sense. In the nineteenth century, such local non-profit societies proved no match for the corporate brawn of industrial distributors. California fruit growers quickly learned they had to overcome more than geography in order to get their crops onto the dinner tables of Eastern consumers. Packing companies charged an arm and a leg to prepare the fruit for shipping, railroads added their share for transportation, and then the distribution system larded on surcharges, all before the fruit got to retailers. Informal associations tended to implode when confronted with the competitive forces of the industrial marketplace.[14]

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[13] Victoria Saker Woeste, *The Farmer's Benevolent Trust: Law and Agricultural Cooperation in Industrial America, 1865–1945* (Chapel Hill: University of North Carolina Press, 1998), 17–24.

[14] Ibid., 24–36.

After repeated failures and long, vituperative struggles, growers took a page from their opponents' book. They pooled their crops and then marketed them collectively for the highest price obtainable. The new cooperatives that formed during the Progressive Era used monopoly and price-fixing to control the marketing of the state's largest horticultural industries. By 1915, Sunkist oranges, Sun-Maid raisins, Blue Diamond almonds, and Diamond walnuts became multi-million dollar brand names. These cooperatives looked less like the traditional small-scale organizations of the previous century and more like U.S. Steel.[15] This new model had already drastically reconfigured the relationship of growers to markets by the time Weinstock and Sapiro became advocates of the cooperative movement.

Johnson and Weinstock saw these developments as essential to agricultural progress. They had witnessed the destruction and misery that accompanied the boom and bust cycles of the previous generation. At the same time, the governor and state legislature wanted to quell public outrage over the high food prices that consumers attributed to these powerful growers' organizations. But the different branches of California's government had different ways of going about this task. In June 1915, the Legislature created the California State Commission Market and the position of State Market Director, who was to "act as a head commission merchant" for all staple goods such as milk, eggs, and flour sold in the state. The Legislature's intent was to instill a nominal level of supervision over the markets for essential foodstuffs. Johnson appointed Weinstock as State Market Director, ostensibly to run the Commission Market under its enabling legislation. Weinstock had other ideas, and he intended for his protégé, Sapiro, to help execute them.[16]

With Johnson's support, Weinstock proceeded to turn the Commission Market into a vehicle for organizing marketing cooperatives for California's farmers and, by extension, for making the California model of cooperation the official model for the state's agricultural economy. Johnson and

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[15] Crowell, "Nothing Could Keep This Boy Down," 136.

[16] Steven Stoll, *The Fruits of Natural Advantage: Making the Industrial Countryside in California* (Berkeley: University of California Press, 1998), 212n61; Woeste, *Farmer's Benevolent Trust*, 197; Arthur F. McEvoy, *The Fisherman's Problem: Ecology and Law in the California Fisheries, 1850–1980* (New York: Cambridge University Press, 1986), 169; Larsen and Erdman, "Genius of Farm Co-operative Promotion," 245.

Weinstock did not want intermediaries and speculators or, worse, financial interests beholden to east coast investors and interests to determine agricultural profitability; yet they knew those interests would fight every move the Commission made to organize cooperatives. The Commission would need expert help from a well-informed lawyer who shared the governor's commitment to economic and political reform, but the Legislature had not provided funds for legal staff. By inviting Sapiro to serve as the Commission's staff attorney and paying his retainer personally, Weinstock neatly evaded the Legislature's fiscal handcuffs. The position enabled Sapiro to build a substantial private law practice from the referrals he received from the Commission.[17]

Sapiro eagerly greeted the parades of growers who traveled the dusty Central Valley roads to his San Francisco office. They came from "all classes of growers," Sapiro later remembered, including "Japanese onion growers and Japanese potato growers and Hindu potato diggers, and then the owners of the Delta lands. We would have conferences with other large growers and quite small growers, with owners and tenants — all different types and growers with different kinds of commodities." After these conferences, growers went back to their farms and their neighbors with what soon became known as the "Sapiro plan" for organizing a cooperative. This plan was hardly original; rather, Sapiro distilled what worked and carefully culled what did not from the various elements of cooperative marketing he had studied. In short order this plan made Sapiro famous among California's growers. It also made the Commission Market controversial for the activist way in which it reorganized the marketing of fruits and vegetables throughout the state.[18]

The Sapiro plan combined elements from many of the successful California cooperatives then in existence, particularly those in raisins, oranges, walnuts, and almonds. The most important principle these growers had discovered was to organize by commodity: thus, Sun-Maid sold only raisins and Sun-Kist only citrus. This kind of specialization enabled

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[17] Sapiro was already on retainer as Weinstock's personal attorney; see Larsen and Erdman, "Genius of Farm Co-operative Promotion," 245; on Sapiro's not receiving an official state salary, see Trial Transcript, 1154.

[18] Trial Transcript, 1155; Woeste, *Farmer's Benevolent Trust*, 197; McEvoy, *Fisherman's Problem*, 170.

cooperatives to invest in all of the operations involved in harvesting, processing, packing, and marketing — including retail branding — for just their own crops and nothing else. The raisin growers found an innovative device to keep their organization together from one year to the next. To solve the perennial problem of losing members to commercial packers, who easily tempted growers with temporarily higher prices, the California Associated Raisin Company came up with a long-term membership contract that "ran with the land," rather than ending when the farm changed owners. Cooperatives conducted membership campaigns to get growers to sign contracts, and they ran these campaigns with all the fanfare of county fairs and community picnics. Cooperative officials knew that their only hope of maintaining a fair price lay in maintaining the loyalty of a majority of the growers.[19]

Sapiro treated growers as pupils who needed instruction, good care, and expert leadership. Once they were organized into cooperatives run by leaders with business acumen and armed with the proper corporate authority, he felt, growers could live the lives they deserved. Their wives would be able to keep lovely homes, and their children would stay in school, exactly the idyllic life he had been denied. As a lawyer, he believed that quality of life was what social and economic reform could bring about. But only the authority of law could make that gain secure.[20]

The growers who "crowded into the market director's office for help" were largely oblivious to the sense of social mission that inspired Sapiro's work. They asked him to form marketing cooperatives whose grower contracts would hold up in court. Sapiro organized his first cooperative for the poultry producers in 1916; the next year, he formed the prune and apricot growers association. The Central California Berry Growers Association also formed that year; two-thirds of its members were Japanese tenants barred by state law from owning land. In 1919, the pear, tomato, olive, milk, and bean industries used Sapiro's plan to incorporate their own associations. Barely five years into his career as a cooperative lawyer, Sapiro was

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[19] Woeste, *Farmer's Benevolent Trust*, 117–31; Catherine Merlo, *Heritage of Gold: The First 100 Years of Sunkist Growers, Inc., 1893–1993* (Los Angeles: Sunkist Growers, Inc., 1993), 1–58.

[20] Crowell, "Nothing Can Keep This Boy Down," 146.

earning as much as $80,000 annually practicing an area of law he was essentially inventing as he went.[21]

By 1917, the nation was at war. The war disrupted and transformed American political and economic institutions. Conscription created an instant army, as young men of every race and ethnicity flowed into the armed forces. The administrative power of the modern American state expanded to regulate the nation's mobilization. In an act that would never have been tolerated in peacetime, the federal government set up an agency to freeze food prices for the duration of hostilities.[22] Instead of lending his expertise to the government, Sapiro sought to join the military. Rejected by the Officers Training Corps for color blindness (though he suspected antisemitic bias), Sapiro enlisted in the field artillery and was awaiting his assignment when the Armistice was declared in November 1918. His dream of defending his country in uniform was permanently deferred.[23]

The end of the war thus added a sense of urgency and missionary zeal to the work with cooperatives he had begun before the war. When Sapiro returned to California, he resumed his work organizing cooperatives, but he no longer needed an official affiliation with the State Marketing Director to draw referrals. Indeed, as Sapiro's private practice boomed, Weinstock and the commission became mired in controversy. The public markets Weinstock established in the fish industry, for example, drew accusations that the state was fixing prices and condoning monopolistic tactics. Complicating matters, Hiram Johnson was elected to the U.S. Senate in 1916; his successor as governor, William Stephens, was too distracted by radicalism, urban bombings, and labor unrest to defend Weinstock effectively. Exhausted and ill, Weinstock resigned under pressure in early 1920. A dispute over Sapiro's fees from a mutual business interest led to

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[21] Larsen and Erdman, "Genius of Farm Co-operative Promotion," 247; Trial Transcript, 1156–60, 1168; Arno G. Weinstein, "*Aaron Sapiro v. Henry Ford*: The Events Prior to, during and following the Confrontation" (M.A. thesis, Arizona State University, Tempe, 1986), 8.

[22] Richard Slotkin, *Lost Battalions: The Great War and the Crisis of American Nationality* (New York: Henry Holt and Company, 2005), 1; Woeste, *Farmer's Benevolent Trust*, 139.

[23] Trial Transcript, 1162–66; *New York Times*, 17 Mar. 1927, p. 1; "Sapiro, Aaron," *Who's Who in America* 15 (1928-29), 1831; Orville Dwyer, "Sapiro Reveals Life," *Chicago Daily Tribune*, 29 Mar. 1927, p. 8.

the permanent end of their relationship, once described as close as "father and son."[24]

A larger stage was materializing for farmers' cooperatives, and Sapiro was anxious to step onto it. In 1920, he burst onto the national scene with a two-hour speech at the meeting of the American Cotton Association in Birmingham, Alabama. His vision of cooperation as a system in which farmers, not detested middle merchants, controlled the prices they received for their crops, electrified the delegates. As one observer wrote, "The whole direction of the movement toward a new control of the cotton industry was changed by one man." The depression into which agriculture sank after World War I led Congress to exempt farmers from federal antitrust liability, on the assumption that farmers could never create monopolies harmful to consumers. At the same time, Sapiro boldly claimed monopoly to be the farmers' right: "Only the farmer can have a complete [and] unlimited monopoly and still be in any measure within the law." Sapiro's vision captivated because he did more than preach economic efficiency and free market competition; he uplifted "dirt farmers" with an inspiring modernization of the Jeffersonian ideal of the agrarian citizen. As he wrote in 1923, "The justification of cooperative marketing is that it [is] the means of a more progressive form of living and a superior type of citizenship, as well as an economic remedy."[25]

Sapiro's fame and popularity among farmers made him the nation's premier cooperative organizer during the 1920s. He became a consultant to such figures as former War Industries Board chair Bernard Baruch, Illinois Governor Frank Lowden, and top officials in the U.S. Department of Agriculture. He also became affiliated with the American Farm Bureau Federation, serving for a short time as legal counsel to the organization.

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[24] Larsen and Erdman, "Genius of Farm Co-operative Promotion," 250; Cherny, "Johnson, Hiram Warren;" Trial Transcript, 1169; Grace Larsen, "A Progressive in Agriculture: Harris Weinstock," *Agricultural History* 32, no. 3 (July 1958): 187–93, 193; McEvoy, *Fisherman's Problem*, 170.

[25] Woeste, *Farmer's Benevolent Trust*, 198 (quoting Robert H. Montgomery, *The Cooperative Pattern in Cotton* [New York: Macmillan, 1929], 74, and William C. Brooker, *Cooperative Marketing Associations in Business* ([New York: Privately published, 1935], 69); Silas Bent, "Three City-Bred Jews that the Farmer Trusts," *Outlook* 134 (8 Aug. 1923), 553–56, 555; Sapiro, "True Farmer Cooperation," *World's Work* 46 (1923), 85–96, 96. At the time, however, local newspapers entirely ignored his speech. See, e.g., *Birmingham Advertiser*, 1–20 Apr. 1920.

Having finally caught the attention of national agricultural leaders, Sapiro proceeded to bring the cooperative movement under his personal supervision and control. He oversaw the organization of dozens of cooperatives in major staple crops, coordinating thousands of farmers across many states under long-term contracts. Newspapers hailed him as the farmer's savior:

> What John Wesley and John Knox did for religion, what Oliver Cromwell did for society, Aaron Sapiro is doing in an economic way for the farmers of this continent. He has liberated them, through the principles of cooperation, from the clutches of exploiters. . . . Sapiro went into the tobacco and cotton fields of the South, he went into the orchards of California, he went to the wheat fields of Canada. And by preaching the common sense of cooperation, he helped retrieve those areas from a condition of economic dry rot.

He moved his practice to Chicago in 1923 and opened offices in New York and Dallas; in his absence, his younger brother Milton, also a lawyer, ran the firm's San Francisco branch. The national press began to take notice, finding his biography compelling: "He stands as another personal proof that none is too poor to succeed in this country."[26]

Sapiro argued the case for commodity-based monopolistic cooperatives to two secretaries of agriculture. Henry C. Wallace remained skeptical, answering a distributor's demand for information about Sapiro with a noncommittal response that neither defended Sapiro nor endorsed his plan. The Farm Bureau split into two camps over the question of whether Sapiro should be retained as counsel. In 1923, when he insisted that he would not assist in any capacity unless he were placed on retainer, the factions engaged in an ugly civil war that ended Sapiro's association with the Farm Bureau and cost his partisans their jobs. After this highly publicized setback, Sapiro formed the National Council of Farmers' Cooperative Marketing Associations. Ineffective and poorly funded, it did little more than dilute agricultural influence in Congress.[27]

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[26] *Vancouver Sun*, 11 Aug. 1927, editorial page, File 5, Box 70, Lewis Lichtenstein Strauss Papers, American Jewish Historical Society, New York City; Bent, "Three City-Bred Jews," 554; *New York Times*, 30 Mar. 1927, p. 16.

[27] Henry C. Wallace to E.L. Mack, 8 Feb. 1924, Correspondence of the Secretary of Agriculture, Drawer 455 (1924 Marketing), RG 16, National Archives and Records Administration, College Park, Maryland; see also Sapiro to Edwin T. Meredith, 1 Sept.

By far Sapiro's most lasting accomplishment in cooperative marketing was to write a model statute that incorporated the salient features of the Sapiro plan. The statute legalized monopoly control for cooperatives, incorporated the iron-clad contract, and granted cooperatives the power to sue others for interfering with farmers' crop deliveries. Cooperatives, their members, and their officers were guaranteed immunity from antitrust prosecution as long as they conformed to the goal of the statute. Since that goal was to serve the public interest by bringing rationality and order to the marketing of agricultural commodities, it was not an onerous condition. Between 1921 and 1926, thirty-eight states adopted versions of the law, which distributors and warehouses promptly attacked in the courts. Indeed, the most lucrative part of Sapiro's law practice after 1923 was the appellate advocacy he performed in defense of the marketing laws he had helped to enact. He was peerlessly effective. In 1923, the North Carolina Supreme Court awarded him a major victory by upholding the statute's broad public purpose in sweeping terms. Victories in a dozen other state high courts followed, topped off by a unanimous U.S. Supreme Court decision upholding Kentucky's version of the act in 1928. That case gave Sapiro his only opportunity to appear before the nation's highest court.[28]

Stunning as these achievements were, they could not change the stark facts of the 1920s agricultural economy: overproduction and low prices led to continuing cycles of excess supply and lower profits for producers. When some of the crown jewels of Sapiro's cooperative movement collapsed under the pressure of the continued postwar recession, Sapiro came under attack. His unyielding insistence on adherence to his model in all its particulars, some traditionalists complained, caused the cooperative movement's spectacular failures. The difficulty, agricultural leaders and economists insisted, was that the Sapiro model was best suited to California. It was relatively easy to organize fruit growers, according to this

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1920, Correspondence of the Secretary of Agriculture, Drawer 521 (1920 Marketing), ibid.; Meredith to Sapiro, 4 Sept. 1920, ibid.; Robert P. Howard, *James R. Howard and the Farm Bureau* (Ames: Iowa State University Press, 1983); James Shideler, *Farm Crisis: 1919–1923* (Berkeley: University of California Press, 1957).

[28] *Tobacco Growers Cooperative Association v. Jones*, 185 N.C. 265 (1923); *Liberty Warehouse Co. v. Burley Tobacco Assn.*, 276 US 71 (1928); Woeste, *Farmer's Benevolent Trust*, 203–06.

critique, because they lived in proximity to one another. In contrast, the nation's major staple crops — cotton, wheat, corn, and tobacco, to name a few — grew across states and regions. Producers in these industries had less in common, shared less of a social identity, and felt less connected to a growers' cooperative than the California cooperatives, with their strong community ties.[29]

Ultimately, Sapiro-style cooperation proved to be no panacea. Farmers continued to produce larger crops each year, and cooperatives could do nothing to stop it. Unable to break the continuing cycle of overproduction and depressed prices, many Sapiro cooperatives collapsed by mid-decade. Even after they gained the statutory authority to control their markets, cooperatives were undone by the fateful decisions of thousands of individual farmers and the structural workings of national and international economies. The movement was already dying when Henry Ford began accusing Sapiro of using cooperative marketing to enslave American farmers.[30] Sapiro's libel suit against Ford, as well as his subsequent legal career, have been discussed in detail.[31] It is sufficient to note that one of Ford's lawyers, sitting U.S. Senator James A Reed, wrote privately in the case file: "[Our aim is] to harass and impoverish the plaintiff." In the end, Sapiro settled for a sum of money that did not come close to making him whole. As he told the press, however, the money was not the point: "I wanted no damages whatsoever, and I state this definitely and openly. I wanted no money from Mr. Ford. I wanted the truth from Mr. Ford."[32]

In 1928, he and his family relocated to Scarsdale, New York. There he aimed to start his career "with a clean slate," as he told Lewis Strauss in

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[29] Larsen and Erdman, "Genius of Farm Co-operative Promotion," 260, 263–68; Grant McConnell, *The Decline of Agrarian Democracy* (Berkeley: University of California Press, 1953), 60–61; William E. Ellis, "Robert Worth Bingham and the Crisis of Cooperative Marketing in the Twenties," *Agricultural History* 56 (1982): 99–116.

[30] Robert Morgan, "Jewish Exploitation of Farmers' Organizations," *Dearborn Independent*, 19 Apr. 1924, p. 4. In one of the lionizing biographies he commissioned, Ford claimed he supported agricultural cooperation in principle but criticized Sapiro-style cooperation as unnecessary in a free market. Henry Ford with Samuel Crowther, *Today and Tomorrow* (Garden City, N.Y.: Garden City Publishing Co., 1926), 214–22, esp. 219.

[31] See Woeste, *Henry Ford's War.*

[32] Aaron Sapiro, "An Experience With American Justice," *Free Synagogue Pulpit*, 8 (1927–28), 3–40, 36.

July 1927, with nothing but his dignity and his good name as collateral.[33] His career as a promoter of farmers' cooperatives, which had been on the wane at the time he filed suit, came to a slow and unheralded end, at least in the U.S. He remained an active consultant to the movement in Canada, where a more radical offshoot attempted to enforce compulsory pooling in the wheat industry. After the stock market crashed in 1929, accusations of profiteering proliferated in such essential commodities as milk and bread, and Sapiro was called upon to advise state and federal officials and agencies struggling to reconcile longstanding deference to free markets with pressing public need.[34]

Sapiro decided to return to California with his family in 1935. The Sapiros settled in Pasadena, just outside Los Angeles. Janet Sapiro fell ill in January 1936, and five months later she died of breast cancer at the age of forty-one. For the next two decades, Sapiro practiced law quietly, occasionally providing free legal services to distinguished friends such as John Barrymore and Igor Stravinsky. In his last years, Sapiro suffered badly from arthritis. When he died at 75 on November 23, 1959, he left his body to the UCLA medical center for arthritis research, disappointing competing schools.

Sapiro's indelible connection to Henry Ford should not obscure his contributions to the causes that Progressive politicians and lawyers held dear. The Sapiro model of cooperation, while not nearly as prevalent as it was in the 1920s, continues to offer farmers an economically viable mode of organization. Moreover, because of Sapiro's promotional, legislative, and advocacy work, agricultural cooperation is legally recognized across the country in state and federal statutes and remains immune from antitrust prosecution. One scholar has argued that despite the brevity of Sapiro's stay with the California Industrial Accident Board, his work there is his greatest legal legacy.[35] There is no need to debate the point. We ought to view his contributions to labor and agriculture as two parts of a greater whole, as elements of a grand Progressive-Era vision.

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[33] Sapiro to Lewis Strauss, 18 July 1927, File 5, Box 70, Strauss Papers.

[34] *New York Times*, 6 Oct. 1929, p. E1; ibid., 25 Aug. 1930, p.1.

[35] Shor, "The Evolution of Workers' Compensation Policy."