

ESSAY

A Sisyphean Task: The Common Law Approach to Mens Rea

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INTRODUCTION

The idea that punishment should be reserved for those who are blameworthy has ancient roots. The common-law judges insisted that all crimes possess a mens rea in addition to an actus reus. In contemporary times, the Model Penal Code has rejected strict liability as a basis for conviction.¹ Although the growth of regulatory offenses lacking a mental element has accelerated in this century, legislatures and courts generally still limit serious punishment to offenses that require a culpable mental state. Because conviction and punishment depend on proof of the requisite mental state, one would expect that legislatures and courts would have defined mental states precisely. After all, those seeking to avoid criminal sanction, those accused of violating specific laws, and those administering criminal laws — law enforcement officers, prosecutors, defense counsel, judges, and jurors — need to know exactly what conduct is forbidden.

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¹ See MODEL PENAL CODE § 2.02 (1962).

The terms the common-law judges employed — “scienter,” “maliciously,” “willfully,” “feloniously,” “unlawfully,” and the like — have failed to define mental states precisely. In the middle of this century, the American Law Institute responded to the need for precise definitions by including in the Model Penal Code a remarkable section articulating the general mens rea requirements for establishing criminal liability.² As we shall see, the Institute succeeded in redefining vague terms into precise ones and in describing the relationship among discrete mental states. Unhappily, neither the California Legislature nor the Congress adopted the Code’s approach to culpability. Consequently, California and federal appellate courts still face the problem of interpreting terms whose original meanings — if they ever existed — have been lost to us.

One would think that the efforts to define mental states precisely would have succeeded by the end of the twentieth century. Courts such as the California Supreme Court have had over one hundred years to settle the meaning of the common-law terms that define the mens rea of offenses. However, the California courts, the federal courts, and the other jurisdictions that continue to rely on the common law have been unable to infuse these terms with the desired precision.

At the state level, two 1994 California Supreme Court decisions, as well as several 1993 California Court of Appeal decisions, furnish ample evidence of the confusion over the use of these terms. None of these cases asked the courts to decide novel substantive criminal law issues. All involved questions that are old to the criminal law: the mens rea of attempts, the admissibility of intoxication to disprove the mens rea of the offense charged, and the limits of accomplice liability. In each case, however, the presence of common-law mens rea terms enormously complicated the courts’ interpretive task.

At the federal level, United States Supreme Court cases, decided as recently as the 1993 Term, reflect similar interpretive difficulties. The Court has faced questions that embrace the entire spectrum of criminal liability, from guilt based on strict liability to the requirement that federal prosecutors prove that

² *Id.*

the accused knew that his conduct was unlawful. As with the California cases, the use of common-law mens rea concepts made the Court's interpretive task harder.

This Essay, however, is not just about statutory construction problems. Difficulties in interpreting common-law mens rea terms can cloud the clarity needed to identify and resolve conflicting substantive law policies. The questions that confronted the United States Supreme Court and the California courts are not just old; they are also important. This Essay, then, is about how interpretive problems can lead to bad legal rules, either because they are the product of poor reasoning or because their application remains unclear, despite all the words employed. The Essay is also about the need for jurisdictions such as California and the United States to replace uncertain mens rea terms with the kind of precise concepts the Model Penal Code provided.

This Essay first examines several definitional problems that have arisen recently in California law. Part I discusses the California Supreme Court's recent efforts in *People v. Colantuono*³ to define the mens rea of attempts. Part II examines the court's endeavors in *People v. Whitfield*⁴ to determine the admissibility of intoxication evidence to disprove the mens rea of recklessness offenses. Part III explores the confusion among the California Courts of Appeal over the mens rea necessary to establish accomplice liability. Part IV then contrasts these cases with the American Law Institute's radical, new approach to mens rea definitions and explains how it would have simplified the interpretive tasks facing the California courts. Finally, Part V discusses how the use of traditional mens rea terms has also complicated the interpretative problems before the United States Supreme Court.

I.

A California jury convicted Vernon Colantuono of assault and assault with a deadly weapon.⁵ He appealed on the ground that

³ 865 P.2d 704 (Cal. 1994).

⁴ 868 P.2d 272 (Cal. 1994).

⁵ *Colantuono*, 865 P.2d at 707.

the trial judge incorrectly instructed the jury on the elements of both offenses. He claimed that the judge had improperly instructed the jury on the mens rea of assault and had compounded that error by inviting the jury to presume the existence of the mens rea of assault with a deadly weapon.⁶

An assault is an attempted battery. An attempt is defined as an unsuccessful effort to commit an offense.⁷ Attempts are comprised of two elements. One element, a mental one, consists of the offender's desire to bring about the harm the criminal law proscribed. The other, a physical one, consists of the conduct the offender undertakes in the hope of causing the harm.

The question of what conduct comprises the physical element of attempts has been the focus of most of the literature, but the debate over the proper contours of the physical element of an attempt has not obscured the mental element. "Purpose" was and remains the linchpin. The prosecution must convince the jurors that the offender engaged in the conduct complained of for the purpose of bringing about the harm the criminal law proscribed. Thus, if an offender is charged with attempting a battery, the prosecution must show that the offender's goal in swinging his fist or firing the weapon was to hit or shoot the victim. In light of these settled principles, it is surprising that the California Supreme Court had to revisit the mental state of the law of attempt and disconcerting that it managed to confuse California law on the subject even further.

The California Supreme Court agreed to review the defendant's claims in order "to eliminate the confusion . . . which has developed throughout the courts of this state" on the elements of assault.⁸ The court, however, fell short of its goal. The court was unable to clearly formulate the mens rea of the offense of assault. Even worse, by appealing to doctrines that have no bearing on the question, it added one more layer to the confusion facing the bench and bar.

The *Colantuono* opinion, though of concern to California practitioners, would not ordinarily merit a lot of attention. What

⁶ *Id.*

⁷ California defines an attempt as "a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." CAL. PENAL CODE § 21a (West 1988).

⁸ *Colantuono*, 865 P.2d at 706.

makes *Colantuono* interesting is the extent to which the common-law mens rea terms created analytical problems for the court. It is but the latest example in a series of recent California cases betraying a judicial (as well as a legislative) inability to deal with fundamental issues of criminal culpability in a clear and principled manner.

A.

The evidence offered in *Colantuono* was not complicated. The victim and his friends testified that the accused aimed and shot the victim with a revolver when the victim attempted to engage the accused in a "play fight." 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. The victim and his friends were also friends of the accused. After the shooting, the accused turned himself in.⁹

California law defines a battery as "any willful and unlawful use of force or violence upon the person of another."¹⁰ On the simple assault charge, the judge instructed the jury that to convict the accused of an attempted battery it would have to find that at the time of the attempt the accused 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."¹¹ On the charge of assaulting the victim with a deadly weapon, the judge instructed the jury that even though this charge required the prosecution to prove that at the time of the attempt the accused intended to commit a battery, "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."¹² The accused objected to these instructions on the ground that they unconstitutionally relieved the prosecution of having to prove that at

⁹ *Id.*

¹⁰ CAL. PENAL CODE § 242 (West 1988).

¹¹ *Colantuono*, 865 P.2d at 707 n.1.

¹² *Id.* at 707.

the time he fired the gun it was his purpose to commit a battery upon the victim.¹³

In evaluating the accused's claims the court began by conceding that the mens rea for an assault must be the intent to commit a battery.¹⁴ In California, the force required for a battery need not cause any injury or even pain, or leave any mark upon the victim. Therefore, a nonconsensual touching can constitute the actus reus of a battery.¹⁵ To constitute a battery, however, the touching must be willful and unlawful.¹⁶ The touching is willful if the accused knew his conduct was practically certain to cause such a touching.¹⁷ The touching is unlawful if it is not done in self-defense or defense of others.¹⁸

It is immaterial that as a crime of knowledge the mens rea of a battery is lower than that of an assault. As an attempt, the crime of assault necessarily connotes purpose.¹⁹ To convict a defendant of assault, the prosecution must prove that at the time the defendant undertook the conduct, his conscious object was to engage in the prohibited touching. Thus, if the jurors are convinced only that the defendant was aware that his course of conduct could result in a nonconsensual touching, the jurors would have to find the defendant not guilty of assault.

The *Colantuono* majority missed this central difference. To them, the mens rea of an assault "is established upon proof [that] the defendant willfully committed an act that by its nature will probably and directly result in . . . a battery In other words, '[t]he use of the described force is what counts, not the intent with which same is employed.'"²⁰ The exact opposite is true. What matters is whether or not the defendant had the requisite purpose in mind at the time he engaged in the conduct giving rise to the assault. It may be that the court

¹³ *Id.*; see *In re Winship*, 397 U.S. 358, 364 (1970) (holding that due process requires prosecution to prove beyond reasonable doubt) every fact essential to conviction.

¹⁴ *Colantuono*, 865 P.2d at 708.

¹⁵ *Id.* at 709 n.4.

¹⁶ CAL. PENAL CODE § 242 (West 1988).

¹⁷ California law does not state the mens rea of a battery this clearly. *But see* MODEL PENAL CODE §§ 2.02(2)(b)-(c), 2.02(8) (defining "wilfulness").

¹⁸ CALIFORNIA JURY INSTRUCTIONS, CRIMINAL (CALJIC) No. 9.00 (5th ed. 1988).

¹⁹ WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 59 (2d ed. 1986).

²⁰ *People v. Colantuono*, 865 P.2d 704, 709 (Cal. 1994) (quoting *People v. Finley*, 33 Cal. Rptr. 31, 37 (Cal. Dist. Ct. App. 1963)).

had another principle in mind, namely that the type of force the defendant uses can be probative of whether the defendant had the requisite state of mind. For example, evidence that the defendant loaded, aimed, and discharged a gun at the victim would be probative of the defendant's intention to invade the victim's interests in her physical integrity irrespective of whether the bullet hit or missed the victim. The court's language, however, does not suggest that it was relying on this principle. In the very next paragraph the court affirms its position that in California an accurate analysis of the mens rea of assault requires that the focus be "on the violent-injury-producing nature of the defendant's acts, rather than on a separate and independent intention to cause such injury" ²¹

The court committed a second error when it appealed to the specific-general intent distinction when defining the mens rea of assault. It blamed much of the confusion surrounding the subject on "the traditional shorthand characterization of assault as 'attempted battery' and the unexamined assumption that, as with other attempted crimes, it must require a specific intent to commit the underlying offense."²² The court ignored statutory language that defines assault as an attempted battery²³ and defines the mens rea of attempt as consisting of the "specific intent" to commit the crime attempted.²⁴ Instead, the court engaged in an unnecessary and unnecessarily dense discussion about why assault, as a crime independent of battery, is a general intent crime.²⁵

²¹ *Id.*

²² *Id.* at 710.

²³ For a moment (though quite unwittingly), the court in *Colantuono* almost had the correct mens rea for an attempt: engaging in conduct with the purpose of bringing about the very harm proscribed by the substantive law (a battery in the case of assault). *Id.* at 710 & n.7.

²⁴ CAL. PENAL CODE § 21a. This section was added in 1986 because existing statutory law did "not specify the elements involved in an attempt to commit a crime." 1986 Cal. Summary Dig. ch. 519, at 165.

²⁵ *Colantuono*, 865 P.2d at 710. Among the reasons advanced by the court in concluding that assault is a general intent offense is the "infrangible nexus" between assault and battery — a nexus allegedly stemming from the fact that assault "lies on a definitional, not merely a factual, continuum of conduct that describes its essential relation to battery." *Id.* at 710-11.

Even under California law, relying on the specific-general intent dichotomy was a mistake. California law makes the distinction in order to determine whether the court should admit evidence of intoxication to disprove the mens rea of the offense charged.²⁶ Any offense requiring proof that the defendant harbored a specific mental state opens the door to defense evidence that the defendant for some reason was unable to form that state of mind.

Some form of mens rea is a requisite of all but strict liability offenses. Accordingly, the effects of intoxication can reduce and even overwhelm a defendant's ability to form the mens rea of an offense. Therefore, unless limited, evidence of intoxication can undermine the traditional rule 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 that condition."²⁷ In an effort to compromise between conflicting feelings of sympathy and reprobation for intoxicated offenders, the California Supreme Court in *People v. Hood* adopted the common-law tradition of limiting the use of intoxication evidence to disprove the mens rea of "specific intent" offenses.²⁸ As a matter of policy, the court held that intoxication should be inadmissible to disprove the mens rea of general intent offenses.²⁹ These offenses require only the mental capacity to engage in "simple goal-directed behavior."³⁰ They do not require the kind of mental activity necessary for "exercising judgment about the social consequences of an [offender's] acts."³¹ Whether or not one finds this distinction persuasive is beside the point. What the *Colantuono* court failed to understand is that California law makes the distinction strictly for policy reasons. The distinction is not mandated by a belief that evidence of intoxication is irrelevant and hence not admissible. Evidence of intoxication is as probative of the defendant's failure to form the mens rea of a general intent offense as of a specific intent crime. Thus, the

²⁶ *People v. Hood*, 462 P.2d 370, 377 (Cal. 1969); see CAL. PENAL CODE § 22 (West 1988) (specifying when intoxication evidence is admissible).

²⁷ CAL. PENAL CODE § 22(a).

²⁸ See *Hood*, 462 P.2d at 374.

²⁹ *Id.* at 379.

³⁰ *Id.*

³¹ *Id.*

court's appeal to a classification system that has nothing to do with defining the mens rea of a given offense obfuscated rather than clarified the issue.

Having missed the key difference between a mens rea requiring proof of knowledge and one requiring proof of purpose, the court concluded that the jury instructions properly defined the mens rea of an assault and affirmed the convictions.³² After all, if assault is a crime of knowledge, then an instruction that the jurors can presume that the defendant was aware that his actions could result in a battery from evidence that he committed "an act inherently dangerous to others . . . with a conscious disregard of human life and safety" could be constitutional.³³ Having found "that the defendant willfully [knowingly] engaged in the conduct described in the instruction, [the jurors] will necessarily have determined the question of intent independently of any legal presumption."³⁴

In his concurrence, Justice Mosk stated 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.³⁵ In Justice Mosk's view, assault and its derivatives are necessarily crimes of purpose. But he concurred on the ground that the instructional errors were harmless.³⁶

Justice Kennard agreed that the instructions were defective, but like Justice Mosk, she concurred in affirming the convictions because the error was harmless.³⁷ Her opinion, however, underscores the confusion emanating from the classification of offenses as specific or general intent crimes. In Justice Kennard's view, assault is a crime of purpose because it is a "specific intent" offense.³⁸ She voted to overrule *People v.*

³² *People v. Colantuono*, 865 P.2d 704, 714 (Cal. 1994).

³³ *Id.* at 713. Jurors, of course, would have to understand that to convict the defendant the prosecution would have to convince them beyond a reasonable doubt that the defendant was aware that his contemplated conduct could result in a battery. See generally MIGUEL A. MENDEZ, CALIFORNIA EVIDENCE: HIGHLIGHTING THE DIFFERENCE BETWEEN THE CALIFORNIA EVIDENCE CODE AND THE FEDERAL RULES OF EVIDENCE § 18.07 (1993).

³⁴ *Colantuono*, 865 P.2d at 713.

³⁵ *Id.* at 716 (Mosk, J., concurring).

³⁶ *Id.*

³⁷ *Id.* at 717 (Kennard, J., concurring and dissenting).

³⁸ *Id.*

Rocha,³⁹ a California Supreme Court case holding that assault is a general intent offense. She believed that it had 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.⁴⁰

B.

In *Rocha*, the California Supreme Court faced the question of whether evidence of intoxication should be admissible to disprove the mens rea of assault. The court held that such evidence should not be admissible for this purpose because assault is a general intent offense.⁴¹ "Since alcohol is so often a factor inducing simple assaults and assaults with a deadly weapon," the court reaffirmed its position in *Hood* that "it would be anomalous to permit exculpation because of intoxication."⁴² The court stressed that offenses should be categorized by policy considerations regarding the advisability of admitting intoxication evidence, not by principles inherent in the specific-general intent dichotomy.⁴³ Thus, the court would not have to overrule *Rocha* in order to hold that assault is a crime of purpose. But Justice Kennard's concerns with *Rocha* do raise questions about how well the specific-general intent dichotomy has served California in determining the kinds of prosecutions in which the accused may offer intoxication evidence to disprove the mens rea of the offense charged.

The role of intoxication evidence is best understood from an evidentiary perspective. If the offense's definition requires the prosecution to prove that the defendant entertained a specific mental state, then evidentiary principles (as well as fairness) require that the defendant be able to contest the existence of that state of mind. Since alcohol temporarily reduces and perhaps destroys cognitive abilities, under an evidentiary model a defendant would always be free to offer intoxication evidence to

³⁹ 479 P.2d 372 (Cal. 1971).

⁴⁰ See *Colantuono*, 865 P.2d at 717 (Kennard, J., concurring and dissenting); see also *infra* text accompanying notes 41-43 (discussing *People v. Rocha*).

⁴¹ *Rocha*, 479 P.2d at 376.

⁴² *Id.* at 375.

⁴³ *Id.* at 374.

disprove the required mental state. The evidence would be relevant because it reduces the likelihood that he entertained the required mental state.⁴⁴ Section 22 of the California Penal Code, as enacted in 1872, acknowledged the relevance of intoxication in this regard. It provided that “whenever the actual existence of any particular . . . intent is a necessary element to constitute any . . . crime, the jury may take into consideration the fact the accused was intoxicated at the time . . . in determining the intent with which he committed the act.”⁴⁵ But that principle was embedded within a more general one: that “no act committed by a person while in a state of intoxication is less criminal by reason of his having been in such a condition.”⁴⁶

The California Legislature had other choices. It could have adopted only the broader principle and banned the use of intoxication to disprove the mens rea of any offense. In 1872, concerns that such a limitation could violate the accused’s constitutional right to offer exculpatory evidence would have been unimaginable. The legislature could have created an exception for involuntary intoxication,⁴⁷ or adopted some other formulation to guide judges in ruling on the admissibility of intoxication evidence. Instead, the legislature opted for admitting the evidence when relevant to disproving the mens rea of the offense charged.

Whether or not this was a sound policy, it was at least a clear one if “intent” is read as mens rea. But the *Hood* court rejected this construction, holding that the various terms employed in section 22 — “purpose” and “motive,” as well as “intent” — did not relieve courts from having to decide whether the mens rea of a given offense fell into one of the listed categories.⁴⁸ The *Hood* court then took the giant step of engrafting onto section 22 the common-law resolution of intoxication’s role. To “achieve a compromise between the conflicting feelings of sympathy and

⁴⁴ See CAL. EVID. CODE §§ 210, 350 (West 1966) (providing that only relevant evidence is admissible).

⁴⁵ CAL. PENAL CODE § 22.

⁴⁶ *Id.* § 22(a).

⁴⁷ New Jersey created an exception for involuntary intoxication. See *State v. Stasio*, 396 A.2d 1129 (N.J. 1979).

⁴⁸ *People v. Hood*, 462 P.2d 370, 378 (Cal. 1969).

reprobation for the intoxicated offender," it held that under section 22 evidence of intoxication would be admissible only to disprove the mens rea of specific intent offenses.⁴⁹

The *Hood* court acknowledged that the inordinate difficulty in distinguishing specific from general intent offenses had led a number of commentators to urge abandoning the classification.⁵⁰ But the court justified its use on the ground that its application depended not so much on the definition of offenses as on the wisdom of allowing a defendant to offer intoxication evidence in a given case.⁵¹ Policy as determined by judges, not the parsing of statutes, was to be the guide.

How well has this approach served California? In addition to the confusion it has engendered in cases such as *Colantuono*, another recent case, *People v. Whitfield*,⁵² raises troubling questions.

II.

Stephen Whitfield's lawyer could not have been surprised by some of the charges filed against his client. Among them was a murder charge, based on the theory that Whitfield consciously disregarded a substantial risk that he could kill another human being if he drove while intoxicated.⁵³ Whitfield did not dispute that he was under the influence of alcohol at the time that he collided with the victim. Indeed, at the trial his own evidence disclosed that his blood alcohol level may have been as high as 0.27% by weight at the time of the collision,⁵⁴ almost three and one-half times the amount established for driving under the influence by the California Vehicle Code.⁵⁵

Since the California Supreme Court decided *People v. Watson*⁵⁶ in 1981, California courts have clearly held that a drunk driver who kills may be charged with murder. Under the implied malice doctrine of Penal Code section 188, a person who

⁴⁹ *Id.* at 377-78.

⁵⁰ *Id.* at 377.

⁵¹ *Id.* at 378.

⁵² 868 P.2d 272 (Cal. 1994).

⁵³ *Id.* at 273.

⁵⁴ *Id.* at 275.

⁵⁵ See CAL. VEH. CODE § 23152(b) (West Supp. 1994) (providing that person having 0.08% blood alcohol level is driving under influence).

⁵⁶ 637 P.2d 279 (Cal. 1981).

kills under circumstances evincing "an abandoned and malignant heart" is guilty of murder.⁵⁷ In the drunk driving context, this means that the prosecution must prove that the driver consciously disregarded that driving while intoxicated could pose a homicidal risk to others.⁵⁸ Put another way, despite the driver's awareness of the risks driving drunk created, he nonetheless persisted in drinking and driving.

The prosecution had solid evidence that Whitfield was aware of the dangers of driving while intoxicated:

In 1989, pursuant to the sentence imposed upon his being convicted a second time for driving under the influence of alcohol, defendant attended several sessions of a program for repeat offenders and viewed a film that graphically depicted the carnage caused by intoxicated drivers, including footage of scenes of accidents caused by such drivers and interviews with relatives of persons who had been killed in this manner.⁵⁹

A year later, Whitfield was convicted once again of driving under the influence of alcohol, so he surely had some idea of the effects of alcohol on his ability to drive a car safely.

Whitfield, however, rested his defense on the theory that on the occasion in question he was not aware of the dangers posed by drinking and driving precisely because he was drunk. To prove his inability to appreciate the dangers, he offered the testimony of a paramedic who found Whitfield unconscious at the scene of the accident; of another driver who, while passing Whitfield shortly before the accident, saw that his head was nodding "like he was fighting sleep;" and of a clinical psychologist who described the impairing effects of alcohol on memory, judgment, and the ability to predict one's actions.⁶⁰

Whitfield was convicted. He appealed because the judge refused to instruct the jurors that they should convict him of only involuntary manslaughter if they found that, because of his voluntary intoxication, he killed without malice aforethought.⁶¹ The court of appeal affirmed, holding that because malignant

⁵⁷ CAL. PENAL CODE § 188 (West 1988).

⁵⁸ See *Whitfield*, 868 P.2d at 273.

⁵⁹ *Id.*

⁶⁰ *Id.* at 274.

⁶¹ *Id.* at 275.

heart murder is not a "specific intent" offense, Whitfield was not entitled to offer evidence of his voluntary intoxication to disprove an awareness of the risks posed by drinking and driving.⁶² Because the court of appeal's decision conflicted with cases from other districts, the California Supreme Court granted review to determine whether malignant heart murder is a specific intent offense.⁶³

A majority of the justices held that malignant heart murder is a specific intent offense. In their view, Penal Code section 22, as amended in 1982, is simply declarative of California precedents treating malicious killings as specific intent crimes.⁶⁴ Section 22 provides that "[e]vidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged."⁶⁵ Their review of the section's legislative history failed to disclose that in using the term, "malice aforethought," the legislature intended to restrict intoxication evidence to disproving only express malice.⁶⁶

The statute's express reference to specific intent crimes, however, forced the justices to consider whether offenses based on recklessness are by definition excluded from the section. According to *Hood*:

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 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.⁶⁷

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *See id.* at 276-77.

⁶⁵ CAL. PENAL CODE § 22(b) (West 1988).

⁶⁶ *See Whitfield*, 868 P.2d at 277. Express malice is distinguished from implied malice in that the former requires proof of an intent to kill while the latter requires only a conscious disregard that death might ensue. In Model Penal Code terms, killings in which malice is express are committed purposely while those in which it is implied are committed recklessly. *See* MODEL PENAL CODE § 210.2-3 (1962).

⁶⁷ *People v. Hood*, 462 P.2d 370, 378 (Cal. 1969).

A defendant charged with malignant heart murder does not "intend" to bring about the victim's death. The defendant simply disregards a substantial risk that death might ensue if he persists in his course of action. Therefore, as a definitional matter, it is hard to see how malignant heart murder could be a specific intent offense. The majority conceded the problem, and then proceeded to give an unresponsive explanation:

Although implied malice may not fall literally within the *Hood* formulation of specific intent, the element of implied malice that requires that the defendant act with knowledge of the danger to, and in conscious disregard of, human life, is closely akin to *Hood*'s specific intent, which requires proof that the defendant acted with a specific and particularly culpable mental state. Thus, read in context, the phrase "when a specific intent crime is charged" in section 22 includes murder, even where the prosecution relies exclusively upon the theory that malice is implied, rather than express.⁶⁸

The justices would have been better off emphasizing another part of *Hood*. Whether an offense should be classified as a specific or general intent crime depends principally on whether it makes sense to allow the defendant to use evidence of intoxication to disprove the mens rea. *Hood* seems to suggest that defendants charged with especially serious offenses should be given that opportunity. In terms of punishment, murder is one of the most serious offenses under the California Penal Code. Consequently, a defendant charged with this offense should be permitted to offer intoxication evidence to disprove the mens rea, under either an express or implied theory of malice. In either case, the defendant is charged with harboring a state of mind that is dangerous to human life, precisely the type of "particularly culpable mental state" contemplated by the *Hood* majority. But the *Whitfield* court's fixation with the definitional differences between specific and general intent offenses introduces semantic uncertainties that complicate the policy analysis.

To a significant degree, the difficulties the California Supreme Court encountered in *Colantuono* and *Whitfield* are not entirely of its own making. The legislature should also be held accountable. So long as California persists in defining the mental states

⁶⁸ *Whitfield*, 868 P.2d at 278 (footnotes omitted).

of offenses in archaic common-law terms, uncertainties will continue to abound. Moreover, definitional concerns will cloud important policy issues — such as the admissibility of intoxication evidence to disprove the mens rea of an offense. Referring to other classificatory schemes, such as general and specific intent, to resolve these definitional concerns will only create further confusion. Eliminating the uncertainties would help establish a framework for examining these policies free of unnecessary distractions.

Common-law jurisdictions, such as California, attempt to define the mens rea of offenses by employing such terms as “willfully,” “maliciously,” “feloniously,” “knowingly,” and “with malice aforethought.” It may be that the English common-law judges who formulated these terms understood precisely the states of mind they defined. If so, judges have lost that knowledge today. Even judges noted for their intelligence and clarity of thought have encountered insurmountable difficulties in distilling the meaning of these terms. Almost fifty years ago, Justice Douglas, in *Screws v. United States*,⁶⁹ devoted over a page to defining “willful” in a statute punishing willful deprivations of federal rights.⁷⁰ To this day, judges and lawyers disagree on the construction that he gave to the term.⁷¹ Legislative efforts to clarify these terms have generally not succeeded. The California Penal Code, for example, defines “malice” and “maliciously” as “a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law.”⁷² The definition hardly helps to give meaning to one important type of malicious killing, an abandoned and malignant heart murder.

The specific-general intent formulation compounds the definitional confusion by assuming that all offenses possessing a

⁶⁹ 325 U.S. 91 (1945).

⁷⁰ *Id.* at 101-04.

⁷¹ Compare *United States v. Ehrlichman*, 546 F.2d 910, 922 (D.C. Cir. 1976) (holding that to convict defendant it is unnecessary for government to prove that he was aware that his conduct violated victim’s federal rights), *cert. denied*, 429 U.S. 1120 (1977) with *United States v. Barker*, 546 F.2d 940, 942 (D.C. Cir. 1976) (holding that defendant was entitled to offer evidence that he honestly but mistakenly believed that his conduct, though it violated victim’s federal rights, was lawful).

⁷² CAL. PENAL CODE § 7.4 (West 1988).

mens rea can be placed in one category or the other. Why this is so is unclear, and will remain unclear until the legislative intent behind the various mental states is better understood.

Whitfield illustrates one aspect of the definitional difficulty. As Justice Mosk pointed out, depraved heart murder, as a crime of recklessness, hardly satisfies the goal-oriented behavior the *Hood* court had in mind when defining a specific intent offense.⁷³ The *Whitfield* majority, however, categorized it as a specific intent crime. *Colantuono* highlights another difficulty. An attempt, as a crime of purpose, is precisely the goal-oriented behavior that the *Hood* court contemplated. Yet the court categorized attempts as a general intent crime. Much of the confusion could be dispelled if the legislature distinguished the concept of mens rea from the rules of intoxication and dealt with each matter separately.

III.

The mischief that common-law terms have caused has not been limited to problems relating to the state of mind for attempts and intoxication evidence. As other recent cases illustrate, these terms have also created new uncertainties in the law of complicity. The law of complicity determines whether a person may be held accountable for the crimes committed by others. Encouraging another to commit an offense for the purpose of causing the prescribed harm creates no unusual problems in determining blameworthiness. The law deems the accused to be as guilty as the individual he encouraged to cause the harm.

Difficulties arise, however, when the aid takes a form not readily perceived as "encouragement." Take the case of a defendant who provided friends with the location of jewels belonging to family members. To convict the defendant, must the prosecution merely prove that the defendant provided the information with knowledge that his friends would use it to steal the jewels, or must the prosecution convince the jurors that the defendant did so with the purpose of facilitating the theft? The problem

⁷³ *People v. Whitfield*, 868 P.2d 272, 288 (Cal. 1994) (Mosk, J., concurring and dissenting).

confronted the American Law Institute as well as the California courts. Both opted to require the prosecution to prove purpose.⁷⁴

Neat doctrines of complicity do not always anticipate the complexities attending the commission of actual offenses. Suppose that on the way to steal the jewels the friends run out of gas and steal a car to carry out the theft. Is the defendant who provided the location of the jewels also guilty of car theft? Under the Model Penal Code, the defendant can be convicted of the car theft only if he was an accomplice to that offense.⁷⁵ Since under the Model Penal Code accomplice liability is predicated on purpose, the defendant would be guilty only if he aided his friends in planning or committing the car theft with the goal of promoting or facilitating the commission of that offense.⁷⁶

One would expect the same outcome in California, since the state's complicity principles are likewise predicated on the accomplice's desire to effectuate the proscribed harm. In dictum that has come to haunt the courts, however, the California Supreme Court stated in *People v. Beeman*⁷⁷ that the accomplice's liability "extends also to the natural and reasonable consequences of the acts he knowingly and intentionally aids and encourages."⁷⁸ Since that is the language of negligence, the defendant's liability for the car theft would depend on whether he should have foreseen his friends' theft of the car and not on whether he aided or attempted to aid them with the purpose of promoting that offense.

The California Penal Code does not address whether negligence is a sufficient mens rea to hold defendants liable for offenses that are committed by accomplices and are collateral to the offense aided. It defines as principals (and, therefore, as subject to punishment) all persons who "directly commit the act constituting the offense" or who "aid and abet in its commis-

⁷⁴ MODEL PENAL CODE § 2.06(3)(a) (1962); *People v. Beeman*, 674 P.2d 1318, 1325 (Cal. 1984).

⁷⁵ See MODEL PENAL CODE § 2.06(2)(c)-(3)(a) (1962) (defining accomplice as person who acts with purpose of promoting or facilitating commission of crime).

⁷⁶ See *id.* § 2.06(3)(a)(ii).

⁷⁷ 674 P.2d 1318.

⁷⁸ *Id.* at 1326.

sion, or not being present, have advised and encouraged its commission”⁷⁹ In support of the negligence position, *Beeman* cites a 1949 district court of appeal case,⁸⁰ which in turn cites a 1907 California Supreme Court opinion,⁸¹ which in turn quotes a legal encyclopedia as follows:

The general rule is well settled that, where several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance of any prosecution of the common design for which they combine. . . . Each is responsible for everything done by his confederates, which follows incidentally in the execution of the common design as one of its probable and natural consequences, even though it was not intended as a part of the original design or common plan. Nevertheless the act must be the ordinary and probable effect of the wrongful act specifically agreed on, so that the connection between them may be reasonably apparent, and not a fresh and independent product of the mind of one of the confederates outside of, or foreign to, the common design.⁸²

One can only wonder what the California courts would have done if the author had neglected to include the negligence limitation. Some jurisdictions hold accomplices liable for collateral offenses on a strict liability basis. Prosecutors in these jurisdictions need prove only that the collateral offenses committed by the defendant’s confederates furthered the common design.⁸³ It is immaterial whether the defendant foresaw or should have foreseen the commission of the collateral offenses.

From a blameworthiness perspective, negligence and especially strict liability pose serious justification issues for holding accomplices accountable for collateral offenses. Since the collateral offense may have a mens rea requiring at least proof of recklessness, convicting the defendant based on a lower mens rea erodes the relationship between criminal liability and the moral culpability the legislature had in mind in defining the mens rea

⁷⁹ CAL. PENAL CODE § 31 (West 1988).

⁸⁰ *People v. Beltran*, 210 P.2d 238, 243 (Cal. Dist. Ct. App. 1949).

⁸¹ *People v. Kauffman*, 92 P. 861, 862 (Cal. 1907).

⁸² *Id.* (quoting 8 CYCLOPEDIA OF LAW AND PROCEDURE 615, 641-42 (W. A. Martin ed. 1903)) (footnotes omitted).

⁸³ *See, e.g., People v. Kessler*, 315 N.E.2d 29, 33 (Ill. 1974).

of the offense and in fixing the penalty. The car theft example is illustrative. To convict the perpetrator of this offense, jurors must be convinced beyond a reasonable doubt that the perpetrator took a car belonging to another intending to permanently deprive the owner of possession of the car.⁸⁴ Yet, under *Beeman*, the jury could convict the defendant of the same offense even if it never occurred to him that his friends might steal the car. The defendant could be punished as severely as the perpetrator even though he was merely negligent and did not act with the purpose required to convict and punish the perpetrator.

The consequences flowing from the negligence approach to collateral offenses are neither theoretical nor trivial. In *People v. Solis*,⁸⁵ the defendant was convicted of murder on precisely this theory. Yet, in the purposive sense he was an accomplice only to the crime of aiding another to brandish a weapon, which in California is a misdemeanor.⁸⁶ To justify punishing the defendant as a murderer when he intended to assist only in the commission of a misdemeanor, the court engaged in a non sequitur:

Is it fair or reasonable to hold a defendant liable for a crime carrying a penalty of as much as 16 years to life in prison, as imposed here, when the crime intended and expected was only a misdemeanor? The answer is yes, and the reason is the existence of the safety valve provided by the requirement that the ultimate crime be a "natural and reasonable consequence" of the predicate offense.⁸⁷

That reasoning might be defensible in a jurisdiction seeking to use negligence to curb the outcomes on collateral offense liability stemming from a strict liability approach. It is hardly responsive, however, in a jurisdiction like California where the complaint is that the negligence approach itself undermines the relationship between a prescribed state of mind and the punishment imposed for a particular harm.

The mischief caused by the "ordinary and probable effect" language has had other, unanticipated consequences. Suppose

⁸⁴ See CAL. VEH. CODE § 10851(a) (West Supp. 1994).

⁸⁵ 25 Cal. Rptr. 2d 184 (Cal. Ct. App. 1993).

⁸⁶ *Id.* at 189; see also *People v. Francisco*, 27 Cal. Rptr. 2d 695, 700-01 (Cal. Ct. App. 1994) (upholding defendant's conviction for first degree murder on ground that he should have foreseen homicide as accomplice to assault with firearm).

⁸⁷ *Solis*, 25 Cal. Rptr. 2d at 189.

that a prosecutor, relying on the negligence component, chooses to charge an accomplice only with the collateral offense. Should the jurors be told that to convict the defendant they must first find that he was an accomplice to the target offense that ostensibly gave rise to the collateral offense? One would think so since due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged,"⁸⁸ and proof that the commission of the target offense reasonably gave rise to the collateral offense is one of those ingredients. The lower courts, however, are split on this question.

The First District Court of Appeal believes that jurors should not be left to determine the accused's guilt of collateral offenses "without guidance concerning the identity or definition of the originally contemplated (or target) offenses and without instruction as to the beyond-a-reasonable-doubt burden of proof concerning those offenses."⁸⁹ The Fourth District Court of Appeal disagrees, holding that the jurors need to be told only that the collateral offense must be the reasonably foreseeable result of "'nefarious' conduct in which the aider and abettor participated," provided "that the objective of such conduct is 'criminal.'"⁹⁰ According to the Fourth District:

The reason we need not focus on the specifics of the predicate offense (at least where it is not a charged offense) is that the legal elements of the predicate offense are irrelevant to the determination of whether the ultimate crime was a natural and probable consequence of the predicate. Whether there is a nexus of foreseeability between the predicate and the perpetrated offenses depends not on crime definitions but on the specific *facts* of each offense. In this case, for instance, the jury was obliged to consider whether a plan [by the defendant] to drive by the [victim and his friends] with a passenger equipped with a firearm, who could be expected to either brandish or fire the gun into the air, should objectively have raised in the mind of the [defendant] the expectation of a possible homicide. . . . It makes no difference to this deliberation whether the drive-by and use of the gun be deemed misdemeanor brandishing, assault with

⁸⁸ *In re Winship*, 397 U.S. 358, 364 (1970).

⁸⁹ *People v. Mouton*, 19 Cal. Rptr. 2d 423, 427 (Cal. Ct. App. 1993).

⁹⁰ *Solis*, 25 Cal. Rptr. 2d at 191.

a deadly weapon, or any other possible definitional crime. So long as it is understood that the activity is in fact in some way criminal . . . there is no need to focus on the legal definition of the elements of the predicate crime.⁹¹

The accused, however, is guilty as an accomplice of committing the collateral offense only if he is guilty as an accomplice of committing an underlying offense giving rise to the collateral offense. It would therefore seem indispensable to instruct the jurors on the nature of the underlying offense if the defendant is to be accorded due process. Liability for the collateral offense still requires proof that the accused was an accomplice in the commission of the target offense. As *Beeman* recognized, proof of complicity in the commission of the underlying offense in turn requires proof that the accomplice furnished the aid or provided the encouragement with the purpose of bringing about a specific harm proscribed by the penal laws.

Convicting the perpetrator of committing the collateral offense will, of course, require the prosecution to prove that the perpetrator harbored the mens rea of that offense. But since convicting the accomplice of the collateral offense will require that the prosecution prove only that the accomplice should have foreseen the commission of the harm caused by the perpetrator, it may be that the Fourth District was concerned with the suggestion in *Beeman* that the perpetrator and the accomplice must share the same mens rea, at least with respect to the underlying offense.⁹² Although that may ordinarily be the case, identity of mens rea is not essential to accomplice liability.⁹³ An accomplice, for example, may lend a gun to the perpetrator in the hope that she will kill her husband. If the perpetrator does use the weapon to kill her husband, the accomplice will be guilty of murder since the taking of human life is the harm he intended to facilitate.⁹⁴ The perpetrator, however, may be guilty only of voluntary manslaughter if at the time she killed her husband she

⁹¹ *Id.* at 190 (footnotes omitted).

⁹² See *People v. Beeman*, 674 P.2d 1318, 1326 (Cal. 1984) (stating that when definition of offense includes intent to do some act or achieve some consequence beyond actus reus of crime, aider and abettor must share specific intent of perpetrator).

⁹³ See *People v. Nguyen*, 26 Cal. Rptr. 2d 323, 333 (Cal. Ct. App. 1993).

⁹⁴ See CAL. PENAL CODE § 188 (West 1988).

did so under the heat of passion.⁹⁵ Therefore, perpetrator and accomplice need not have the same mens rea.

The fact that the accomplice's state of mind may differ from the perpetrator's, however, does not relieve the judge from instructing the jurors that to find the accomplice guilty of murder they must find that he aided the perpetrator with the purpose of facilitating the taking of the victim's life. If the perpetrator commits some other offense that the accomplice failed to foresee but should have foreseen (stealing bullets for the gun, for example), the accomplice would be liable for that offense under *Beeman's* negligence approach. The availability of this theory of liability, however, should not relieve the judge of the obligation to instruct the jurors that to convict the accomplice of this crime they must first find that it was a reasonably foreseeable consequence of the underlying crime, in this case murder, that the accomplice aided.

The use of a negligence approach to determine an accomplice's liability for collateral offenses has given rise to an additional complication. Suppose that the state prosecutes the accused for first degree murder on the theory that as an accomplice to an assault he should have foreseen the premeditated killing of the victim. Is the accused entitled to instructions on a lesser homicide, such as second degree murder, on the ground that only the lesser homicide was reasonably foreseeable? Again, the lower courts are split on the question.

The Third District Court of Appeal would grant the request for the instructions:

*[T]he aider and abettor does not stand in the same position as the perpetrator. While the perpetrator is liable for all of his or her criminal acts, the aider and abettor is liable vicariously only for those crimes committed by the perpetrator which were reasonably foreseeable under the circumstances. Accordingly, an aider and abettor may be found guilty of crimes committed by the perpetrator which are less serious than the gravest offense the perpetrator commits*⁹⁶

The Fourth District would deny the request for the instructions on lesser offenses. At least with respect to accomplice lia-

⁹⁵ See *id.* § 192(a).

⁹⁶ *People v. Woods*, 11 Cal. Rptr. 2d 231, 240 (Cal. Ct. App. 1994).

bility for collateral offenses, it objects to the Third District's elimination of

"derivative" liability by divorcing the aider's liability from that of the principal. [The Third District] posits that an aider's liability is partly *independent* of his principal's crimes, allowing the aider to be acquitted of the level of culpability attributable to the principal by claiming that while the aider could foresee the actus reas [sic], he could not foresee the principal's mens rea. Under the [Third District's] approach, a jury would have to be instructed on every crime the principal's actus reas [sic] might implicate, and every crime and degree thereof which might be implicated depending on the mental state of the principal at the time he committed the various acts. Against this matrix, the jury would have to decide which acts and mental states were reasonably foreseeable consequences of the originally encouraged conduct.⁹⁷

Since the Fourth District views the accomplice's liability for collateral offenses as derivative, either the accomplice is liable for the collateral offenses committed by the principal because they are a reasonably foreseeable consequence of the offense he aided, or he is not liable because they are not.⁹⁸

Which position is the more sensible is probably less important than the reason for the conflicting views. The quagmire in which the courts find themselves is due in part to the legislature's failure to provide the courts with clear guidance on the limits of accomplice liability. It can also be attributed to the legislature's and the courts' continued use of vague common-law terms to supplement the statutory deficiencies in the definition of core concepts of criminal liability.

IV.

A solution to the confusion the common-law terms have created is to adopt the mens rea terms conceived by the American Law Institute. The American Law Institute introduced radical conceptual changes in the way we think about mens rea. In his casebook, Professor Phil Johnson calls these changes "The Model Penal Code Reform."⁹⁹ Some might label the changes revolu-

⁹⁷ *People v. Prettyman*, 29 Cal. Rptr. 2d 299, 304 (Cal. Ct. App. 1994).

⁹⁸ *Id.* at 299-305; *accord Woods*, 11 Cal. Rptr. 2d at 252 (Sparks, J., concurring).

⁹⁹ PHILLIP E. JOHNSON, *CRIMINAL LAW* 61 (4th ed. 1990).

tionary, because Professor Herbert Wechsler, as chief reporter for the Criminal Law Advisory Committee, and his collaborators achieved the lucidity in defining criminal mental states that had eluded the common law. They began by jettisoning the common-law terms. In their place the Institute substituted four different kinds of culpability: purpose, knowledge, recklessness, and negligence.¹⁰⁰ Professor Johnson provides an apt example to illustrate the meaning of these terms:

An anarchist throws a bomb into the royal carriage, killing the king, the king's valet, the royal coachman, and a bystander on the street. The assassin's purpose was to kill the king. He knew that the bomb would also kill the valet (who was riding in the coach) but sincerely regretted this inevitable consequence of the assassination. He told a friend beforehand that he was aware that the bomb might possibly kill the coachman, but he hoped that the coachman would survive. He never thought about the possibility that any bystanders might be injured or killed, but this possibility was sufficiently likely that he ought to have foreseen it. The anarchist purposely killed the king, knowingly killed the valet, recklessly killed the coachman, and negligently killed the bystander.¹⁰¹

The difference between negligence and recklessness is that the latter requires conscious risk creation. A person acts negligently if she fails to perceive a risk which reasonable persons would have foreseen. She acts recklessly if she disregards the risk which she perceives. Knowledge also entails conscious risk creation but is distinguished from recklessness by requiring a heightened awareness of the risk. For example, in the case posited by Professor Johnson, convicting the anarchist of knowingly killing the valet would require proof that at the time he threw the bomb he was aware that it was "practically certain" that it would kill the valet.¹⁰² To convict him of recklessly killing the coachman, however, would require only proof that the assassin "consciously disregard[ed]" a substantial risk that the coachman's death could result from throwing the bomb.¹⁰³ Purpose also entails conscious risk creation, but is distinguished from knowledge in that an awareness of the consequences that can

¹⁰⁰ MODEL PENAL CODE § 2.02.

¹⁰¹ JOHNSON, *supra* note 99, at 66.

¹⁰² MODEL PENAL CODE § 2.02(2)(b)(ii).

¹⁰³ *See id.* § 2.02(2)(c).

ensue from the contemplated conduct is insufficient to establish liability. A desire to bring about the consequences is indispensable. Convicting the assassin of purposely killing the king would require proof that at the time the assassin threw the bomb it was his "conscious object" to take the king's life.¹⁰⁴

Another aspect of this formulation of mental states bears comment. A hierarchy is involved.

When the law provides that negligence suffices to establish an element of an offense, such element also is established if a person acts purposely, knowingly or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts purposely.¹⁰⁵

The evidentiary implications flowing from the hierarchy are significant. To prove one of the mental states, a prosecutor may always offer evidence of one of the higher states. For example, proof that the assassin desired to kill the coachman would be relevant in establishing that he killed the coachman recklessly. Conversely, a prosecutor may also offer evidence of one of the lower mental states in the hope that the jurors will infer the existence of a higher one. Although not as persuasive, evidence that the assassin was aware that the bomb could kill the king would be relevant in prosecuting the assassin for purposely killing the king. Jurors might infer that the assassin's conscious object was to kill the king.

The Model Penal Code approach would have considerably simplified the task that faced the *Colantuono* court. Since attempt is a crime of purpose, the jurors should have been told that to convict the defendant they would have to find beyond a reasonable doubt that at the time he aimed and fired the gun at the victim it was his conscious object to inflict a battery upon him. In making this determination the jurors would have been free to consider all of the evidence, including the manner in which the defendant handled the weapon and the kind of injury inflicted upon the victim. But no court following the Model Penal Code approach would have instructed the jurors that the "use of the

¹⁰⁴ See *id.* § 2.02(2)(a)(i).

¹⁰⁵ *Id.* § 2.02(5).

described force is what counts, not the intent with which same is employed,"¹⁰⁶ for precisely the opposite is true.¹⁰⁷

The Model Penal Code approach would have helped the *Whitfield* court in two respects. First, it would have freed the court from the uncertainties inherent in the specific-general intent dichotomy. The Model Penal Code does not use this distinction for the same reason that the framers abandoned the common-law terms defining different mens rea: specific and general intent are so uncertain as to obscure rather than illuminate the task at hand. Second, to the extent that a categorical approach to the problem of the intoxicated offender is desirable, the Model Penal Code would have allowed the court (and the legislature) to consider which specific states of mind should be disproved by evidence of the offender's intoxication.

The framers of the Model Penal Code recognized that a relevance approach to intoxication would result in its admission whenever an offender was charged with purposely, knowingly, or recklessly committing an offense. Some members of the Advisory Committee favored this approach, which would simply leave the question of admissibility to the rules of evidence.¹⁰⁸ A majority agreed with Professor Wechsler that policy, rather than relevance concerns, should determine the question.¹⁰⁹ The result was a compromise: evidence of intoxication would be admissible to disprove purpose and knowledge but not recklessness.¹¹⁰

Two major problems . . . are presented by the draft.

The first . . . is the question whether intoxication ought to be accorded a significance that is entirely co-extensive with its relevance to disprove purpose or knowledge We submit that the answer clearly ought to be affirmative [W]hen purpose or knowledge, as distinguished from recklessness, is made essential for conviction, the reason very surely is that in

¹⁰⁶ *People v. Colantuono*, 865 P.2d 704, 709 (Cal. 1994) (quoting *People v. Finley*, 33 Cal. Rptr. 31, 37 (Cal. Dist. Ct. App. 1963)).

¹⁰⁷ See MODEL PENAL CODE § 2.02(1). Indeed, whether a judge could have commented on the inference that the jurors could draw from the evidence would depend on whether the instruction satisfied due process. See *Barnes v. United States*, 412 U.S. 837, 843 (1973). In *Barnes*, the United States Supreme Court held that statutory inferences submitted to the jury as sufficient to support conviction do not violate due process if such inferences satisfy both the more-likely-than-not standard and the reasonable doubt standard. *Id.*

¹⁰⁸ MODEL PENAL CODE § 2.08 cmt. 3 (Tentative Draft No. 9, 1959).

¹⁰⁹ *Id.*

¹¹⁰ MODEL PENAL CODE § 2.08 (1962).

the absence of such states of mind the conduct involved does not present a comparable danger . . . ; or that the actor is not deemed to present as significant a threat . . . ; or, finally, that the ends of legal policy are served by bringing to book or subjecting to graver sanctions those who consciously defy the legal norm

The second and more difficult question relates to recklessness, where awareness of the risk created by the actor's conduct ordinarily is a requisite for liability. . . . The case [opposing a special rule for drunkenness in relation to recklessness] . . . is worthy of respect, but there are strong considerations on the other side. We mention first the weight of the prevailing law which here, more clearly than in England, has tended towards a special rule for drunkenness. Beyond this, there is the fundamental point that awareness of the potential consequences of excessive drinking on the capacity of human beings to gauge the risks incident to their conduct is by now so dispersed in our culture that we believe it fair to postulate a general equivalence between the risks created by the conduct of the drunken actor and the risks created by his conduct in becoming drunk. Becoming so drunk as to destroy temporarily the actor's powers of perception and of judgment is conduct which plainly has no affirmative social value to counterbalance the potential danger. The actor's moral culpability lies in engaging in such conduct. Added to this are the impressive difficulties posed in litigating the foresight of any particular actor at the time when he imbibes¹¹¹

Justice Mosk would have appreciated the Advisory Committee's reference to the difficulties in proving a defendant's awareness of a potential risk while drinking. In his *Whitfield* opinion, he agreed with the attorney general's contention that the majority's position erected "a serious and unnecessary roadblock to prosecutors who seek to enforce the Legislature's command to severely punish intoxicated drivers who kill innocent victims."¹¹² But his concern would be pertinent only in a Model Penal Code jurisdiction that would prosecute someone like Stephen Whitfield on the theory that his conduct constitutes a knowing murder. Defining Whitfield's

¹¹¹ MODEL PENAL CODE § 2.08 cmt. 3 (Tentative Draft No. 9, 1959).

¹¹² *People v. Whitfield*, 868 P.2d 272, 283 (Cal. 1994) (Mosk, J., concurring and dissenting).

conduct as merely reckless could bar using the intoxication evidence to disprove his awareness of the risks posed by drinking and driving.

Still, the Model Penal Code's categorical approach to drunkenness can pose serious fairness questions whenever the mens rea of an offense is defined alternatively to include purpose, knowledge, and recklessness.¹¹³ Defendants who are prosecuted on the theory that they committed the offense purposely or knowingly can rely on intoxication evidence to disprove these states of mind. Defendants prosecuted on a recklessness theory, however, cannot rely on intoxication evidence, although the punishment is the same whatever the offender's state of mind. This anomaly moved the *Whitfield* majority to conclude that the "laws governing prosecutions for murder must apply equally whether the defendant kills the victim by means of a firearm or an automobile."¹¹⁴

The point is not whether the Model Penal Code's approach to intoxication is flawed. Withdrawing the intoxication rule when an offense's mens rea incorporates recklessness, as well as purpose and knowledge, would eliminate the inequities. Rather, the point is that clearly defining the applicable states of mind would allow legislatures and courts to approach policy concerns, such as intoxication evidence, without the confusion engendered by the common law.

One can make strong arguments against importing the Model Penal Code's intoxication rule wholesale into the California Penal Code. It would allow defendants to use intoxication evidence to disprove the mens rea of attempt and its derivatives, since these are crimes of purpose. *Hood* and *Rocha* may have correctly concluded that the law should preclude defendants from using their voluntary intoxication to escape liability for these types of offenses. The Code's approach to mens rea and intoxication, however, would at least afford the legislature (and the courts) a more principled and informed basis for making these policy choices.

¹¹³ See MODEL PENAL CODE §§ 210.2, 211.1(a) (1962) (defining murder and assault, respectively).

¹¹⁴ *Whitfield*, 868 P.2d at 280.

Adopting the Model Penal Code's approach to mens rea would also resolve the confusion among the divisions of the California Courts of Appeal over the limits of accomplice liability. Under the Model Penal Code, an accomplice is guilty only of those offenses he aids or agrees or attempts to aid.¹¹⁵ Since accomplice liability requires a purpose to bring about the commission of the offenses,¹¹⁶ as a rule negligence cannot suffice to hold the accomplice liable for the commission of collateral offenses. An owner who lends her car to a drunk with the purpose of facilitating a drunk-driving offense is liable for the death of a pedestrian killed by the drunk only if at the time the owner turned over the keys she harbored the mental state of the homicide charged against her.¹¹⁷

The problems that the court has faced with respect to the proper contours of accomplice liability are related to those it has encountered in delineating the role of intoxication and in defining the mental state of attempt and its derivatives. In each instance, the legislature's failure to adopt a culpability model that distinguishes clearly among the mental states that suffice for conviction has complicated the court's interpretive tasks. The court's penchant for drawing on the common law to give meaning to ambiguous terms employed by the legislature has only compounded the definitional problem. Redefining mens rea into the discrete mental states the Model Penal Code provides would go a long way toward resolving some of the current definitional uncertainties.

¹¹⁵ MODEL PENAL CODE § 2.06(3)(a)(ii).

¹¹⁶ *Id.* § 2.06(3)(a).

¹¹⁷ *Id.* § 2.06(4). For example, under the Model Penal Code, the owner who lends her keys to a drunk would be guilty of murder only if at the time she turned over the keys to the drunk it was her conscious object to take human life, or if she was aware that it was practically certain that lending the car to someone in the drunk's condition would result in the loss of human life. *See id.* §§ 210.2(a), 2.02(2)(a)(i), 2.02(2)(a)(ii). On the other hand, if the owner only consciously disregarded a substantial risk that human life could be lost, she would be guilty of manslaughter. *See id.* §§ 210.3(1)(a), 2.02(2)(c). If she failed to appreciate this risk but should have been aware of it, she would be guilty of negligent homicide, but not murder as would be the case in California. *Compare id.* §§ 210.4(1), 2.02(2)(d) with *People v. Solis*, 25 Cal. Rptr. 2d 184, 189 (Cal. Ct. App. 1993).

V.

California is not the only jurisdiction plagued by vague mens rea terms. Any jurisdiction that relies on common-law mens rea definitions runs the same risk. Although thirty-four states have adopted new penal codes influenced by the Model Penal Code,¹¹⁸ some, like California, have declined to adopt any part of it.¹¹⁹ Most significantly, the United States has also refused to follow the Model Penal Code. The result is that the United States Supreme Court has had to address the mens rea requirements of federal statutes repeatedly.

The Court's recent decisions embrace the entire spectrum of criminal liability and illustrate the confusion that results from the use of traditional mens rea terms. At one end, the Court has had to decide in *United States v. Park*¹²⁰ whether a federal statute imposed only strict liability and, at the other, in *Cheek v. United States*¹²¹ and *Ratzlaf v. United States*,¹²² whether another statute required the government to prove that the defendant was aware that his actions violated federal penal laws. Just in the last term, two cases, *Posters 'N' Things, Ltd. v. United States*¹²³ and *Staples v. United States*,¹²⁴ called on the Court to construe statutes that said nothing about a mens rea. In another case, *United States v. International Minerals Chemical Corp.*,¹²⁵ the Court was

¹¹⁸ Herbert Wechsler, *Foreword to MODEL PENAL CODE* at xi (1985).

¹¹⁹ *Id.* Other states that have not adopted the Model Penal Code include Massachusetts, Michigan, Oklahoma, Tennessee, and Vermont. *Id.*

¹²⁰ 421 U.S. 658 (1975) (holding that 21 U.S.C. § 331(k) (1988), which prohibits adulteration of food, requires prosecution to prove only that defendant had authority and power to prevent adulteration).

¹²¹ 498 U.S. 192 (1991) (holding that 26 U.S.C. § 7201 (1988), which makes it a felony to "willfully attempt[] in any manner to evade or defeat" tax laws, requires the government to prove that defendant knew of his duty to pay tax).

¹²² 114 S. Ct. 655 (1994) (holding that 31 U.S.C. § 5322(a) (Supp. V 1993), which imposes criminal penalties for willfully breaking up single financial transaction to evade financial institution's duty to report cash transactions exceeding \$10,000, requires government to prove that defendant knew that structuring in which he engaged was unlawful).

¹²³ 114 S. Ct. 1747 (1994) (holding that 21 U.S.C. § 857(a) (1988) (current version at 21 U.S.C. § 863(a) (Supp. V 1993)), which prohibits sale of drug paraphernalia, requires prosecution to prove that defendant was aware that customers in general are likely to use merchandise with drugs).

¹²⁴ 114 S. Ct. 1793 (1994) (holding that 26 U.S.C. § 5861(d) (1988), which punishes failure to register "machinegun," requires prosecution to prove that defendant was aware that weapon he possessed could fire automatically upon single pull of trigger).

¹²⁵ 402 U.S. 558 (1971) (holding that 18 U.S.C. § 834(f) (1960) (repealed 1979), which

asked to withdraw the application of the culpability requirement from an element seemingly embraced by the mens rea term employed by the statute. In all of these cases, the Model Penal Code's approach to culpability would have substantially eased the burden facing the Court.

In *United States v. Park*,¹²⁶ Acme Markets and its chief executive officer (CEO) were charged with violating the Food, Drug, and Cosmetic Act.¹²⁷ This Act prohibits the adulteration of food shipped in interstate commerce.¹²⁸ Though Acme pleaded guilty, the CEO insisted on a trial. He appealed his conviction on the ground that under prevailing federal decisions he could not be convicted solely on the basis of the position he held in the corporation. The court of appeals agreed and reversed. The United States Supreme Court, in turn, reversed and reinstated the conviction. It held that all the government had to prove was "that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance or promptly to correct, the violation complained of, and that he failed to do so."¹²⁹

Three Justices dissented.¹³⁰ In their view, the government had to prove at least "common-law negligence."¹³¹ The statute helped neither the majority nor the dissenters, as it was silent on the mens rea required for conviction. Each group was free to argue that its position would best attain Congress' goals without unjustly punishing corporate officers. As the dissenters underscored, however, the CEO's appeal dealt with "a criminal conviction, not a civil forfeiture."¹³² The American Law Institute agrees. Under the Model Penal Code, strict liability is not a basis for imposing criminal liability.¹³³

punishes anyone who knowingly violates enumerated shipping regulations, does not require prosecution to prove that defendant was aware that his conduct violated regulations governing shipment of corrosive liquids).

¹²⁶ 421 U.S. 658 (1975).

¹²⁷ *Id.* at 660.

¹²⁸ 21 U.S.C. § 331(k) (1988).

¹²⁹ *Park*, 421 U.S. at 673-74.

¹³⁰ Justices Stewart, Powell, and Marshall were the dissenting Justices in *Park*.

¹³¹ *Park*, 421 U.S. at 683 (Stewart, J., dissenting).

¹³² *Id.* at 682.

¹³³ MODEL PENAL CODE § 2.02.

In *Cheek v. United States*¹³⁴ the defendant appealed his convictions under the federal tax laws for “willfully attempt[ing] . . . to evade or defeat [a] tax,” a felony,¹³⁵ and “willfully fail[ing]” to file a tax return, a misdemeanor.¹³⁶ He appealed the convictions on the ground that the trial judge failed to instruct the jurors that they should acquit him if they found that he honestly believed that he was not required to pay the taxes or file the returns. The United States Supreme Court agreed. Although the Court acknowledged that ignorance or mistake of law is generally not a defense to a criminal prosecution,¹³⁷ it created an exception to that rule because the “proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws.”¹³⁸ Those of us who prepare our own returns would hardly disagree. Closer analysis, however, reveals that the exception is not so much the product of Congress’ intent as it is the child of the Court’s mens rea tax jurisprudence.¹³⁹ Under the Model Penal Code, the state does not have to prove that the accused was aware that the forbidden conduct violates the penal laws unless the definition of the offense otherwise provides.¹⁴⁰ This provision is designed to constrain judges from carving exceptions to the general rule, unless the legislature has clearly indicated a contrary intent.

Cheek’s departure from the traditional rule could be defended as limited to tax cases. *Ratzlaf v. United States*,¹⁴¹ however, indicates that this narrow reading of *Cheek* may be incorrect. To discourage the evasion of a financial institution’s duty to report cash transactions exceeding \$10,000, federal laws prohibit break-

¹³⁴ 498 U.S. 192 (1991).

¹³⁵ 26 U.S.C. § 7201 (1988).

¹³⁶ 26 U.S.C. § 7203 (Supp. V 1993).

¹³⁷ *Cheek*, 498 U.S. at 199.

¹³⁸ *Id.* at 199-200.

¹³⁹ *See id.* at 200 (citing Court’s tax jurisprudence). The Court notes, for example, that because of the complexity of the tax laws, Congress has “softened the impact of the common-law presumption [that ignorance of the law is not an excuse] by making specific intent to violate the law an element of certain federal criminal tax offenses.” *Id.* But in the next sentence, the Court cites one of its cases — not statutory language or legislative history — as justification for relaxing the rule. *Id.*

¹⁴⁰ MODEL PENAL CODE § 2.02(9).

¹⁴¹ 114 S. Ct. 655 (1994).

ing up into smaller amounts a single transaction that exceeds that amount.¹⁴² Ratzlaf admitted “that he structured cash transactions, and that he did so with knowledge of, and a purpose to avoid, the banks’ duty to report currency transactions in excess of \$10,000.”¹⁴³ He claimed, however, that he could not be convicted unless the government also proved that he knew that it was unlawful to engage in that conduct.¹⁴⁴ The Court agreed. Although the Court purported to honor “the venerable principle that ignorance of the law generally is no defense to a criminal charge,”¹⁴⁵ it nonetheless held that the statute required the government to prove that Ratzlaf was aware that his conduct was unlawful.¹⁴⁶ Four justices dissented. They failed to find persuasive evidence that this was Congress’ unmistakable intent.¹⁴⁷

*Posters ‘N’ Things, Ltd. v. United States*¹⁴⁸ involved a federal law that prohibits the sale of drug paraphernalia in interstate commerce.¹⁴⁹ The statute is silent about the mens rea required to commit the offense. To resolve a conflict among the circuits about the requisite mental state, the Court in *Posters* held that the government must prove that a “defendant is aware customers in general are likely to use the merchandise with drugs.”¹⁵⁰

A similar question faced the Court in *Staples v. United States*.¹⁵¹ The National Firearms Act imposes strict registration requirements on the possession of certain firearms, including machine guns.¹⁵² Staples was convicted of failing to register an assault rifle that had been modified to fire more than one bullet upon a single pull of the trigger. He claimed that he could not be convicted unless the government proved that he knew that the gun would fire fully automatically. As in *Posters*, the statute said nothing about a mens rea requirement, and as in *Posters* the

¹⁴² 31 U.S.C. § 5324(a)(3) (Supp. V 1993).

¹⁴³ *Ratzlaf*, 114 S. Ct. at 659.

¹⁴⁴ *Id.* at 657.

¹⁴⁵ *Id.* at 663.

¹⁴⁶ *Id.*

¹⁴⁷ See *id.* at 667-69 (Blackmun, J., dissenting) (arguing that legislative history contradicts majority’s position).

¹⁴⁸ 114 S. Ct. 1747 (1994).

¹⁴⁹ 21 U.S.C. § 863(a)(2) (Supp. V 1993).

¹⁵⁰ *Posters ‘N’ Things*, 114 S. Ct. at 1753.

¹⁵¹ *Id.* at 1793.

¹⁵² See 26 U.S.C. §§ 5801-5872 (1988).

Court agreed with the defendant. Moved by the "long tradition of widespread lawful gun ownership by private individuals in this country," the Court stressed the need to avoid a construction of the statute that would result in criminalizing "a broad range of apparently innocent conduct."¹⁵³ Reaching for such policy justifications would be unnecessary under the Code. Statutes that fail to provide a mens rea are deemed to require at least recklessness.¹⁵⁴ Thus, under the Code, at a minimum only those defendants who consciously disregarded a substantial risk that purchasers might use the merchandise with drugs or that a weapon might qualify as a machine gun could be convicted under the statutes. In the absence of due process claims, it is doubtful that either case would have reached the Court had Congress been influenced by the culpability sections of the Code.

In *United States v. International Minerals Chemical Corp.*,¹⁵⁵ it was the presence, rather than the absence, of a mens rea term that troubled the Court. Title 18 U.S.C. § 834(a) gives the Interstate Commerce Commission (ICC) the power to formulate regulations for the safe transportation of corrosive liquids, and 18 U.S.C. § 834(f) provides that whoever "knowingly violates any such regulation" shall be fined or imprisoned. In *International Minerals*, a shipper claimed that he could not be convicted under these statutes unless the government proved that he was aware that his shipment of sulfuric acid violated an ICC regulation requiring shippers to identify the acid in the shipping papers.¹⁵⁶ The Court disagreed, holding that "knowingly" did not travel down that far in the statutory language. The government had to prove only that the shipper was aware that he had shipped sulfuric acid. In support of its holding, the Court cited the maxim that ignorance of the law is no defense to a criminal prosecution.¹⁵⁷

International Minerals would not have posed a difficult issue under the Model Penal Code. The mens rea extends to each

¹⁵³ *Staples*, 114 S. Ct. at 1799.

¹⁵⁴ MODEL PENAL CODE § 2.02(3) (1962).

¹⁵⁵ 402 U.S. 558 (1971).

¹⁵⁶ *Id.* at 559.

¹⁵⁷ *Id.* at 563.

element of an offense except those relating exclusively to such matters as the statute of limitations, jurisdiction, venue, and other matters unconnected with the harm that the statute defining the offense seeks to prevent.¹⁵⁸

The Code, of course, does not prevent any legislature from imposing different requirements. Congress, for example, could still choose to use strict liability for punishing regulatory offenses, make special provisions for taxpayers, and expand the liability of shippers of dangerous substances. By eliminating the confusion engendered by the common-law terms, however, the Code enables legislatures to focus clearly on policies that may call for the imposition of different requirements. Thus, the Code does more than ease interpretative tasks; it allows courts and especially legislatures to give policy concerns the unfettered attention they deserve.

CONCLUSION

A model code that was crafted over forty years ago may in important ways be unresponsive in an age of persistent poverty, rampant drug use, drive-by shootings, environmental degradation, abuse of authority, entrenched racism and sexism, and other ills plaguing today's society. But so long as the American model of criminal justice is predicated on the premise that society is morally justified in punishing mainly those who choose to disobey its rules, the Model Penal Code will continue to occupy a special place. The American Law Institute's major achievement is the construction of a system of mental states that allows us for the first time to see clearly the kinds of culpability that might suffice for holding offenders accountable for the harms they cause.

Defining mental states with precision is indispensable to the efficient and fair administration of the criminal laws. The accused, their lawyers, prosecutors, judges, and jurors need to know exactly what conduct the offense charged forbids. So do law enforcement officers. Vague statutes place unacceptable discretion in the hands of those charged with enforcing the

¹⁵⁸ MODEL PENAL CODE § 1.13(10) (1962).

law.¹⁵⁹ Moreover, those seeking to stay within the law will find it easier to do so if they do not have to guess about the scope of the prohibited conduct. But ambiguous mens rea terms exact an additional penalty. They prevent judges and legislators from focusing on the social policies that should help determine the level of culpability that ought to suffice to hold individuals accountable for the harms they cause.

California and the United States are among a minority of jurisdictions resisting the influence of the Model Penal Code.¹⁶⁰ The current confusion, especially in the California courts, suggests it is time for the California Legislature and Congress to reconsider their position.

¹⁵⁹ See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 168 (1972).

¹⁶⁰ Herbert Wechsler, *Foreword* to MODEL PENAL CODE at xi (1985).

