# "With the Intent to Inflict Such Injury": The Courts and the Legislature Create Confusion in California Penal Code Section 12022.7

## INTRODUCTION

For 60 years the California criminal justice system followed an indeterminate approach to sentencing its criminals. Under this system, the judge would sentence the convicted defendant to an indeterminate term.[1] When the defendant reached prison, the parole board would determine the length of that individual's stay, placing emphasis on the particular attributes of the criminal and the possibility of successful rehabilitation.[2] Operative July 1, 1977, however, the Determinate Sentencing Law repealed and replaced the indeterminate sentencing system.[3]

The California legislature declared that the purpose of imprisoning convicted criminals is punishment, not rehabilitation.[4] The legislature concluded that determinate sentencing is the most effective manner to achieve this purpose.[5] Under determinate sentencing, statutes provide fixed terms of years for specific crimes. Felonies are divided into seven categories, the majority of which are further subdivided into three tiers of a low, middle, and high term.[6] The judge has the discretion to choose which tier is appropriate for an individual.[7]

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1. 3 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW § 1446, at 1712 (2d ed. 1989).
2. *Id.*
3. The Determinate Sentencing Law modified many penal code statutes simultaneously. *See generally* CAL. PENAL CODE § 1170 (West 1985 & Supp. 1991).
4. CAL. PENAL CODE § 1170(a)(1).
5. *Id.* The legislature determined that focusing on the seriousness of the crime committed, instead of on the ability to rehabilitate the offender, is the best way to punish. By fixing terms, the legislature hoped to end disparity and promote uniformity of sentences. *Id.*
6. REPORT OF THE ASSEMBLY COMM. ON CRIMINAL JUSTICE, NEW STATUTES AFFECTING THE CRIMINAL LAW, 1976 GEN. SESS. OF THE CAL. LEG. 17, 18-20.
7. *Id.* Due to the statutory preference for the middle term, the judge must denote

Under determinate sentencing, the presence of certain factors act as enhancements that may add a further term to the sentence for the base crime. These factors include: being armed with a firearm or a deadly weapon;[8] the use of a firearm;[9] an excessive taking or damage;[10] and the infliction of great bodily injury.[11] The great bodily injury enhancement of section 12022.7 is frequently charged and sentenced in criminal cases in California. However, the requisite intent of section 12022.7 is the center of much debate.

Section 12022.7, in its most recent form,[12] provides that "[a]ny person who, with the intent to inflict such injury, personally inflicts great bodily injury on any person . . . shall, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he has been convicted, be punished by an additional term of three years."[13] Although section 12022.7 is an enhancement, not an offense, it contains an *actus reus*, the infliction of significant or substantial injury, and a *mens rea*, the intent to inflict such injury. However, California's courts have turned the *mens rea* element into a debate by developing alternate theories and manipulating California's intent doctrine.

This Comment will address whether the specific or the general intent label applies to section 12022.7's mental element and what the mental element of section 12022.7 actually requires. Due to the difficulties of California's doctrines of general and specific intent and the difficulty of requiring the defendant to intend great bodily injury, this Comment will recommend that the legislature modify the language of section 12022.7's intent requirement. Section 12022.7 should instead ask whether the defendant intended the injury which resulted or whether the defendant intended to inflict additional harm beyond that inherent in the base crime.

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reasons for choosing the higher or lower term. The judge may justifiably impose the upper term when the aggravating circumstances outweigh the mitigating circumstances. 3 B. WITKIN & N. EPSTEIN, *supra* note 1, at § 1459. Alternatively, the judge may justifiably impose the lower term when the mitigating circumstances outweigh the aggravating circumstances. *Id.*

8. CAL. PENAL CODE § 12022 (West 1982 & Supp. 1991).
9. *Id.* § 12022.5.
10. *Id.* § 12022.6.
11. *Id.* § 12022.7 (West 1982).
12. Section 12022.7 has undergone many changes since its creation by the legislature. *See infra* notes 16-29 and accompanying text.
13. CAL. PENAL CODE § 12022.7. This enhancement does not apply when the infliction of great bodily injury is an element of the offense for which the defendant is convicted. *Id.* Although the definition of great bodily injury has varied in the past, currently it is defined as a significant or substantial injury and is a question to be determined by the trier of fact. People v. Wolcott, 34 Cal. 3d 92, 107, 665 P.2d 520, 530, 192 Cal. Rptr. 748, 758 (1983). The great bodily injury must be charged in the accusatory pleading and must be admitted by the defendant or found to be true by the trier of fact. CAL. PENAL CODE § 12022.7. Section 12022.7 does not apply to murder, manslaughter, or arson. *Id.*

## I. BACKGROUND

### *A. The Legislative History of Section 12022.7*

The enhancement for the infliction of great bodily injury existed before the passing of the Determinate Sentencing Law. Several particular crimes scattered throughout the Penal Code contained in their definitions the increased sentence for the infliction of great bodily injury. The legislature amended three Penal Code sections in 1967 to escalate possible punishments to 15 years to life when a defendant intentionally inflicted great bodily injury in the course of a burglary, robbery, or rape.[14] The Penal Code sections amended in 1967 escalated punishment when the defendant "in the course of commission of the [burglary, robbery, or rape], with the intent to inflict such injury, inflicted great bodily injury on [the victim of the crime]."[15] The Determinate Sentencing Law deleted the definitions of the increased punishments from the substantive offenses and placed all of the similar increases in a distinct section — section 12022.7 — identified as an enhancement. However, section 12022.7 underwent many transformations before reaching its current form.

The Determinate Sentencing Law was first introduced to the California Senate on December 2, 1974.[16] It passed the Senate and was sent on to the Assembly without the enhancement for infliction of great bodily injury.[17] The Assembly Committee on Criminal Justice added section 12022.7.[18] However, many versions were drafted before section 12022.7 finally passed.[19] The first version used the

14. Section 461 applied to burglary, § 213 to robbery, and § 264 to rape. A defendant committing robbery and burglary without great bodily injury faced a possible sentence of one year to life or five years to life, depending on the degree of the crime. *See* People v. Miller, 18 Cal. 3d 873, 880 n.3, 558 P.2d 552, 557 n.3, 135 Cal. Rptr. 654, 659 n.3 (1977); People v. Caudillo, 21 Cal. 3d 562, 575 n.5, 580 P.2d 274, 281 n.5, 146 Cal. Rptr. 859, 866 n.5 (1978).

15. *See Miller*, 18 Cal. 3d at 880 n.3, 558 P.2d at 557 n.3, 135 Cal. Rptr. at 659 n.3; *Caudillo*, 21 Cal. 3d at 575 n.5, 580 P.2d at 281 n.5, 146 Cal. Rptr. at 866 n.5. These definitions are very similar to the language of § 12022.7 as it stands today. The § 12022.7 enhancement applies when the defendant, "with the intent to inflict such injury, personally inflicts great bodily injury on any person . . . in the commission or attempted commission of a felony." CAL. PENAL CODE § 12022.7 (West 1982). *See infra* notes 77-85 and accompanying text.

16. 1 LEGISLATURE OF THE STATE OF CALIFORNIA, JOURNAL OF THE SENATE, 1975-76 Reg. Sess. 11, 16 (referring to Senate Bill 42, the bill responsible for the Determinate Sentencing Law).

17. 2 *id.* at 3624-25, 3632-33.

18. 5 LEGISLATURE OF THE STATE OF CALIFORNIA, JOURNAL OF THE ASSEMBLY, 1975-76 Reg. Sess. 8096, 8107.

19. *See* 9 JOURNAL OF THE SENATE, *supra* note 16, at 17346 (introduction of bill

language "with the intent to inflict such injury"; however, instead of requiring the defendant to inflict the great bodily injury, the first version applied when great bodily injury resulted.[20] In an amendment to the bill,[21] the legislature struck out the "great bodily injury resulted" language and instead inserted "the defendant inflicts such injury upon any person."[22] This last version of the bill passed and officially became section 12022.7 in 1976.

A year later, the Assembly amended section 12022.7 through Assembly Bill 476 (A.B. 476). This bill underwent three revisions before it finally passed. The first version of A.B. 476 struck out the old law of section 12022.7 in its entirety, except for the definition of great bodily injury,[23] and replaced it with similar language.[24] The Assembly then amended A.B. 476 by striking out all of the language of section 12022.7, including the original definition of great bodily injury. This amended version of A.B. 476 instead stated that the enhancement applies to "[a]ny person who, with the intent to inflict such injury, personally inflicts great bodily injury on any person."[25] The intent section of this second version of A.B. 476 defined great bodily injury as a "serious impairment of a physical condition."[26] A.B. 476 was amended a third time to change the language of great bodily injury to read a "significant or substantial physical injury,"

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into Senate from Assembly), 17357 (first set of amendments to Senate Bill 42), 17382 (third set of amendments), 17399 (fifth set of amendments), 17406 (sixth set of amendments). This bill also included many of the requirements which still exist today: Great bodily injury cannot be an element of the crime charged; the injury must be charged in the indictment; the allegation must be found true by the trier of fact; and the injury must occur in the course of the commission of the original felony. *Id.* at 17357.

20. The bill stated "in the course of the commission of said crime and with the intent to inflict such injury, great bodily resulted to other than the defendant." *Id.* at 17357.

21. There were two other amendments to the bill. However, these dealt with the definition of great bodily injury and possible mitigation by the court. *Id.* at 17382, 17399.

22. *Id.* at 17406.

23. Section 12022.7 originally defined great bodily injury as:

a serious impairment of physical condition, which includes any of the following:

(a) Prolonged loss of consciousness.
(b) Severe concussion.
(c) Protracted loss of any bodily member or organ.
(d) Protracted impairment of function of any bodily member or organ or bone.
(e) A wound or wounds requiring extensive suturing.
(f) Serious disfigurement.
(g) Severe physical pain inflicted by torture.

*Id.* at 17382.

24. A.B. 476, Cal. Leg., 1977-78 Reg. Sess. 71-72 (Feb. 10, 1977) (on microfiche). This version applied to "[a]ny person who . . . intentionally inflicts serious or great bodily injury on any person." *Id.* at 72.

25. 1 LEGISLATURE OF THE STATE OF CALIFORNIA, JOURNAL OF THE ASSEMBLY, 1977-78 REG. SESS. 1435, 1449-50.

26. *Id.* at 1450.

but this third version left the second version's intent section intact.[27] The third version of A.B. 476 was codified as section 12022.7.[28]

In 1978 and 1979 the legislature again amended section 12022.7. These amendments stated that the enhancement does not apply to certain crimes.[29]

Although the wording of section 12022.7 has varied over the years, the current intent requirement remains similar to the intent requirement in the separate Penal Code punishments for the infliction of great bodily injury.[30] All use the language "with the intent to inflict such injury."[31]

### *B. The Intent Debate*

California criminal law follows the doctrine of specific and general intent. For years this distinction has spurred debate and criticism,[32] and it is the cause of much of the conflict involving the intent requirement of section 12022.7.

Courts have followed two approaches in questioning whether the defendant acted, as section 12022.7 requires, "with the intent to inflict such injury." The first approach asks whether the defendant intended to cause the act which caused great bodily injury. The second approach asks whether the defendant intended to cause great bodily injury.

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27. *Id.* at 1706. In People v. Caudillo, 21 Cal. 3d 562, 580 P.2d 274, 146 Cal. Rptr. 859 (1978), the court stated, without mentioning the intent modifications, that the legislature removed the examples of great bodily injury from the definition of the crime because they did not want to make the 1976 statute all inclusive. The legislature desired to leave the determination of great bodily injury to the trier of fact. *Id.* at 581-82, 580 P.2d at 285, 146 Cal. Rptr. at 870.

28. *See* CAL. PENAL CODE § 12022.7 (West 1982) (Historical Note).

29. *Id.* § 12022.7.

30. *See supra* note 15 and accompanying text.

31. *See supra* note 15 and accompanying text.

32. *See* J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 142 (2d ed. 1960) (calling for the discontinuance of the use of such "unfortunate" terms as "general" and "specific" intent); Roth, *General v. Specific Intent: A Time for Terminological Understanding in California*, 7 PEPPERDINE L. REV. 67, 84 (1979) (advising that because of the confusion and uncertainty surrounding such terms, future use "should not extend beyond that of merely differentiating two vague classes of crime"); Comment, *Rethinking the Specific - General Intent Doctrine in California Criminal Law*, 63 CALIF. L. REV. 1352, 1376 (1975) (suggesting, as a possible approach to the specific - general intent problem, the abandonment of such terms which "have been the cause of much judicial confusion and abuse, and that have at times been either too inflexible or too vague").

### 1. *The "Cause the Act" Approach*

In *People v. Bass*,[33] the Second District Court of Appeal questioned the intent requirement. The court held that the language of section 12022.7 requires only that the defendant intended to cause the act which haphazardly caused great bodily injury.[34] The *Bass* court read the word "inflict" to mean "to lay a blow on" or "to cause by physical assault."[35] Therefore, an intent to inflict great bodily injury means an intent to commit a violent act. Under this approach, the intent requirement of section 12022.7 is met when a deliberate violent act of the defendant causes great bodily injury.[36]

The Fourth District Court of Appeal followed this approach in *People v. Martinez*,[37] stating that section 12022.7 requires the "mere intent to do the violent act" which happens to cause great bodily injury.[38]

### 2. *The "Cause the Great Bodily Injury" Approach*

The *Bass* decision has faced much criticism from other courts of appeal in California. In *People v. Simpson*,[39] the First District Court of Appeal opposed the *Bass* court's holding by emphasizing the definition of the word "inflict."[40] The *Simpson* court held that the word "inflict" means "to cause."[41] The intent to inflict great bodily injury thus requires the intent to cause such injury by, as the *Bass* court described, physical assault or to lay great bodily injury on.[42] According to the *Simpson* court, "[t]he plain meaning of section 12022.7 is that the defendant must have intended to cause great bodily injury."[43] The *Simpson* court declared that the *Bass* court, according to the California Supreme Court's definitions of specific and general

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33. 147 Cal. App. 3d 448, 195 Cal. Rptr. 153 (1983).

34. *Id.* at 456, 195 Cal. Rptr. at 158.

35. *Id.* at 454, 195 Cal. Rptr. at 157. The *Bass* court used WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1170 (1981) and THE AMERICAN HERITAGE DICTIONARY 660 (2d College ed. 1982) for these definitions.

36. *Id.* The *Bass* court did not state that § 12022.7 requires only general intent; however, other courts have stated that the *Bass* decision suggests this conclusion. *See infra* note 44 and accompanying text.

37. 171 Cal. App. 3d 727, 217 Cal. Rptr. 546 (1985).

38. *Id.* at 735, 217 Cal. Rptr. at 550.

39. 192 Cal. App. 3d 1360, 237 Cal. Rptr. 910 (1987).

40. Another court of appeal opposed the *Bass* court's holding by emphasizing that the word inflict is a verb, which requires an object. *In re* Sergio R., 228 Cal. App. 3d 588, 279 Cal. Rptr. 149 (1991). The statute requires that the object be a person. The prosecution must prove more than that the defendant set the injury causing force in motion. The prosecution must prove the defendant intended to inflict great bodily injury on a person. *Id.* at 601, 279 Cal. Rptr. at 156.

41. *Simpson*, 192 Cal. App. 3d at 1367, 237 Cal. Rptr. at 913.

42. *Id.*

43. *Id.*

intent in *People v. Hood*,[44] had merely instructed on general intent, and *Bass* was therefore improperly decided because section 12022.7 required specific intent.[45]

In *People v. Santos*,[46] the Sixth District followed *Simpson*.[47] Using the *Hood* definitions, the *Santos* court pointed out that section 12022.7 requires an intent not simply "to inflict," but "to inflict *such injury*."[48] The "necessary intent is linked to the end result and not merely to the act that brings about that result."[49] The *Santos* court concluded that section 12022.7 is not a general intent crime, which would require the intent to commit a violent act, but a specific intent crime, which requires the intent to commit a violent act intending to cause great bodily injury.[50]

Several courts have followed the *Simpson* and *Santos* approach of asking whether the defendant intended to cause great bodily injury.[51] These courts agree that section 12022.7 requires the intent to cause great bodily injury, and not an intent to do an act which haphazardly causes great bodily injury.[52]

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44. Under the definitions explained in People v. Hood, 1 Cal. 3d 444, 462 P.2d 370, 82 Cal. Rptr. 618 (1969), a general intent crime asks whether the defendant intended to do the proscribed act and does not refer to an intent to do a further act or achieve a future consequence. *Id.* at 456-57, 462 P.2d at 378, 82 Cal. Rptr. at 626. On the other hand, a specific intent crime asks whether the defendant intended to do some further act or achieve some additional consequence. *Id. See infra* notes 73-76 and accompanying text.

45. *Simpson*, 192 Cal. App. 3d at 1367-68, 237 Cal. Rptr. at 913.

46. 222 Cal. App. 3d 723, 271 Cal. Rptr. 811 (1990).

47. *Id.* at 744, 271 Cal. Rptr. at 823. The *Santos* court concluded that *Simpson* was "correctly decided." *Id.*

48. *Id.* (emphasis in original).

49. *Id.*

50. *Id.*

51. *See* People v. Phillips, 208 Cal. App. 3d 1120, 1123, 256 Cal. Rptr. 654, 656 (1989) (rejecting the *Bass* line of reasoning and following *Simpson*); *In re* Sergio R., 228 Cal. App. 3d 588, 601, 279 Cal. Rptr. 149, 156 (1991) (agreeing with *Phillips'* proposition that *Bass* was improperly decided); People v. Superior Court (Duval), 198 Cal. App. 3d 1121, 1132, 244 Cal. Rptr. 522, 528 (1988) (following *Simpson*).

52. *Phillips*, 208 Cal. App. 3d at 1123, 256 Cal. Rptr. at 656; *Sergio*, 228 Cal. App. 3d at 601; 279 Cal. Rptr. at 156; *Duval*, 198 Cal. App. 3d at 1132, 244 Cal. Rptr. at 528.

However, these courts conflict over the method of proving the specific intent to cause great bodily injury. On the one hand, the *Phillips* and *Sergio* courts held that the requisite intent of § 12022.7 can be presumed. *Phillips*, 208 Cal. App. 3d at 1124; 256 Cal. Rptr. at 656; *Sergio*, 228 Cal. App. 3d at 601, 279 Cal. Rptr. at 156.

Citing People v. Owens, 27 Cal. App. 2d 606, 610 P.2d 429 (1938), the *Phillips* court asserted that if a defendant assaults a victim with a deadly weapon and takes a life, then the trier of fact presumes an intent to kill or commit great bodily harm. Moreover, if an assault is reasonably certain to produce death, then the only rational presumption is an intent to kill. The *Phillips* court concluded that if a defendant applies force which is

## II. ANALYSIS

In analyzing section 12022.7, two questions arise. First, does the label of specific intent apply to the intent requirement of section 12022.7? And second, what does the intent requirement of section 12022.7 really require?

### *A. The Specific Intent Label*

The first question is whether to attach the label of specific intent to section 12022.7's intent requirement.[53] Professor Roth points out the inherent difficulties often associated with attaching the label "specific intent" to a statute's intent requirement.[54] The label means different things at different times and courts are not consistent in its use.[55] "[O]ften a writer will use it in one sense but the reader will understand it to mean something else."[56] Attaching the label will not, by itself, solve the intent debate. Nonetheless, it will suggest several possible results for the intent requirement of section 12022.7.

The following will examine whether the label should apply using

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reasonably certain to produce great bodily injury, and it in fact produces great bodily injury, then the trier of fact can presume the requisite intent. *Phillips*, 208 Cal. App. 3d at 1124, 256 Cal. Rptr. at 656.

The *Sergio* court presumed intent to inflict great bodily injury when an individual fired a shotgun into a group of people at close range. *Sergio*, 228 Cal. App. 3d at 601, 279 Cal. Rptr. at 156-57.

On the other hand, the *Duval* court held that the required intent of § 12022.7 may be proved by direct evidence and any inferences reasonably deducible from the evidence, but the required intent may not be based on a presumption. *Duval*, 198 Cal. App. 3d at 1133, 244 Cal. Rptr. at 528 (citing People v. Snyder, 15 Cal. 2d 706, 708, 104 P.2d 639, 639-40 (1940)).

This use of presumptions raises constitutional questions of whether using a presumption impermissibly shifts the burden of proving the mental element of § 12022.7 and whether enhancements are subject to the same requirements as crimes. However, such analysis is beyond the scope of this Comment.

53. Each of the courts now arguing over the question of intent, including *Bass* and *Martinez*, has cited § 12022.7 as requiring specific intent. People v. Bass, 147 Cal. App. 3d 448, 454, 195 Cal. Rptr. 153, 157 (1983); People v. Martinez, 171 Cal. App. 3d 727, 735, 217 Cal. Rptr. 546, 550 (1985). However, none of the courts citing § 12022.7 as a specific intent statute explained their reasoning.

Most often cited for the proposition that § 12022.7 requires specific intent is People v. Wolcott, 34 Cal. 3d 92, 665 P.2d 520, 192 Cal. Rptr. 748 (1983) and CAL. JURY INSTRUCTIONS - CRIMINAL NO. 17.20 (4th ed. 1979 & 5th ed. 1988) [hereinafter CALJIC]. The court in *Wolcott* did not attempt to define whether specific or general intent governed the question at hand. The court mentioned specific intent regarding jury instructions, but did not directly question whether § 12022.7 required specific intent. *Wolcott*, 34 Cal. 3d at 109, 665 P.2d at 531, 192 Cal. Rptr. at 759. CALJIC happened to define § 12022.7 in terms of specific intent without referring to any decisions for that rationalization. *See* 2 CALJIC 17.20, at 273 (4th ed. 1979), at 87 (4th ed. Supp. 1987), at 455-56 (5th ed. 1988). In 1991, the Committee on Standard Jury Instructions cited *Phillips* for the specific intent requirement. *Id.* at 117 (5th ed. Supp. 1991).

54. Roth, *supra* note 32, at 71 n.21.

55. *Id.*

56. *Id.*

three different perspectives. The three perspectives are scholarly distinctions between general and specific intent, judicial distinctions between general and specific intent, and possible legislative intentions for the application of the specific intent label and the application of the general intent label.

### *1. Academic Distinctions*

Scholars have pointed out three general reasons why the courts or the legislature might attach the label of specific intent to a statute's intent requirement.[57]

First, scholars have suggested that the label of specific intent designates that an offense requires the defendant to possess the mental state of "purpose."[58] This approach classifies the varying degrees of intent according to their definitions.[59] The meaning of specific intent is narrowed to "purpose" or "conscious desire" and occupies the top position of this ascending vertical scale of mental culpability.[60] Under this approach, section 12022.7 would require the defendant to inflict great bodily injury with the purpose or conscious

57. *See* Roth, *supra* note 32; Comment, *supra* note 32. Roth suggested the first two reasons: the designation of the mental state of purpose and the horizontal time perspective. Roth, *supra* note 32, at 71, 73. Young, in his Comment, suggested the third reason, the particular element approach. Comment, *supra* note 32, at 1355-57.

Roth suggested a fourth reason why courts or the legislature might attach the label of specific intent to a statute's intent requirement. This fourth reason is a historical distinction which evolved as a judicial response to the intoxicated defendant. Roth, *supra* note 32, at 71 n.21. To permit the mitigating effect of intoxication to extend only to the mental states of purpose and knowledge, courts used the specific intent label to designate just those two mental states. *See id.* However, the intent debate of § 12022.7 has not focused on the effects of voluntary intoxication.

Although this issue was raised in *People v. Bass* and *People v. Simpson,* both courts rejected the defense. *Bass,* 147 Cal. App. 3d at 457, 195 Cal. Rptr. at 158-59; *Simpson,* 192 Cal. App. 3d at 1369-70, 237 Cal. Rptr. at 915.

The *Bass* court questioned whether the defendant was capable of forming the intent to do a violent act, not whether the defendant was capable of forming the intent to inflict great bodily injury. *Bass,* 147 Cal. App. 3d at 457, 195 Cal. Rptr. at 159. However, the *Bass* court held that the evidence supported the conclusion that the infliction of the injury on the victim was intentional. *Id.*

The *Simpson* court rejected the defense of voluntary intoxication because the first defendant's primary defense theory was nonparticipation and the second defendant's primary defense theory was self-defense. *Simpson,* 192 Cal. App. 3d at 1369, 237 Cal. Rptr. at 915. In such a case, the *Simpson* court held, the trial court has no *sua sponte* duty to instruct on voluntary intoxication. *Id.* Furthermore, there was no suggestion that the second defendant "was so intoxicated that he could not entertain a specific intent to inflict great bodily injury." *Id.* at 1370, 237 Cal. Rptr. at 915.

58. Roth, *supra* note 32, at 71.

59. *Id.* at 71-72.

60. *Id.* at 72.

desire to do so. If the defendant haphazardly caused great bodily injury without the specific purpose to do so, there would be no enhancement.[61] By inserting the phrase "with the intent to inflict such injury," the legislature included an intent requirement in section 12022.7.[62] The legislature may have wanted the intent requirement of section 12022.7 at the top of this intent scale.

Second, scholars have suggested that the courts or the legislature would attach the specific intent label to a statute in order to describe a mental state that refers to the future.[63] This approach creates a horizontal time perspective to specific and general intent.[64] In general intent crimes, the intent refers to present physical circumstances.[65] In specific intent crimes, the intent refers to some future situation.[66] Professors LaFave and Scott further distinguish specific intent crimes under this approach. They refer to specific intent crimes as "a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime."[67]

Attaching the label of specific intent to section 12022.7 does not fit this scheme. The infliction of great bodily injury is the *actus reus*

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61. Under this approach, the *Bass* decision is incorrect. The *Bass* court held that the intent requirement of § 12022.7 is met when the defendant intended to commit a violent act. *See supra* notes 34-36 and accompanying text. Under *Bass*, the defendant need not have the purpose of inflicting great bodily injury so long as the violent act which the defendant intentionally set in motion caused great bodily injury. However, if the courts and the legislature attached the specific intent label to § 12022.7 to designate the mental state of purpose, causing great bodily injury would not meet the mental requirements of § 12022.7 unless the defendant caused great bodily injury with the purpose of causing great bodily injury.

62. *Compare* § 12022.7 *with* § 12022.8. The legislature did not include an intent requirement in § 12022.8, which enhances for the infliction of great bodily injury during the commission of certain sex offenses. Section 12022.8 provides that "any person who inflicts great bodily injury, as defined in Section 12022.7, on any victim . . . shall receive a five-year enhancement." (West 1982 & Supp. 1991). In People v. Brown, 174 Cal. App. 3d 762, 220 Cal. Rptr. 264 (1985), the court concluded that the legislature purposely omitted an intent requirement from § 12022.8. *Id.* at 767, 220 Cal. Rptr. at 267. In contrast, by including the phrase "with the intent to inflict such injury" which was omitted from § 12022.8, the legislature included an intent requirement in § 12022.7.

63. Roth, *supra* note 32, at 73.

64. *Id.*

65. *Id.*

66. *Id.*

67. Roth, *supra* note 32, at 73 (citing W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 202 (1972)). Two examples of this horizontal time perspective are burglary, the entering of a dwelling with the intent to commit a theft or felony, and larceny, the taking of property with the intent to permanently deprive the owner of that property. W. LAFAVE & A. SCOTT, CRIMINAL LAW §§ 8.1(a), 8.5 & 8.13 (2d ed. 1986); R. PERKINS & R. BOYCE, CRIMINAL LAW 246, 292, 327 (3d ed. 1982). The entering of a dwelling and the taking of property refer to present physical circumstances and are the *actus reus* of the crimes. The intent to commit a theft or felony and the intent to permanently deprive the owner refer to a future situation. These intents are special mental elements required in addition to the mental state required with respect to the *actus reus* of entering the dwelling or taking property.

of section 12022.7. The intent to inflict such injury is the mental state required with respect to the *actus reus* of actually inflicting great bodily injury. This intent is not a special mental element required above and beyond the mental state required for the *actus reus*. The intent to inflict such injury also does not refer to some future situation. Instead, it refers to the mental state required during the present physical circumstances of the defendant's infliction of great bodily injury. Under this approach, the label of specific intent should not apply.

Third, scholars have suggested that the courts or the legislature would attach the specific intent label to a statute to signify a particular mental element.[68] Some crimes require no particular mental element to be demonstrated. However, when an individual commits the prohibited act without justification, the law will impute a criminal intent.[69] Those crimes where no particular mental element must be demonstrated but the law will impute it are general intent crimes.[70] Specific intent crimes, on the other hand, require the demonstration of a particular mental element.[71]

Section 12022.7 requires the prosecution to demonstrate the particular mental element of the defendant's intent to inflict great bodily injury. Section 12022.7 is not like section 12022.8, where once the defendant commits the prohibited act of inflicting great bodily injury during rape, the law will impute a criminal intent.[72] Section 12022.7 contains the additional phrases "with the intent to inflict such injury," a particular mental element. Under this approach, the label of specific intent should apply to section 12022.7.

In summary, the horizontal time perspective does not suggest attaching the label of specific intent to section 12022.7. However, the courts and the legislature might use the label of specific intent to require proof of a particular mental element or to denote "purpose" as the meaning of intent.

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68. Comment, *supra* note 32, at 1355-57.
69. *Id.* at 1355-56.
70. *Id.* at 1356.
71. *Id.* Again, the examples of burglary and larceny are good illustrations. The crime of burglary requires the prosecution to demonstrate the defendant's intent to commit a theft or felony. The crime of larceny requires the prosecution to demonstrate the defendant's intent to permanently deprive the owner of that property.
72. Section 12022.8 contains no intent requirement. *See supra* note 62.

### 2. *Judicial Distinctions*

In *People v. Hood*,[73] the California Supreme Court tried to differentiate between specific and general intent. The court explained that a general intent crime is defined only in terms of a particular act and contains no reference to an intent to do a further act or achieve a future consequence.[74] In the case of a general intent crime, the court asks only whether the defendant intended to do the proscribed act.[75] The definition of specific intent crimes, however, refers to the defendant's intent to do some further act or achieve some additional consequence.[76]

It is unclear where section 12022.7 fits in the *Hood* scheme. On the one hand, section 12022.7 only refers to the *present* act of inflicting great bodily injury, and not a *further* act. Section 12022.7 also does not refer to an intent to achieve some *future* consequence. Therefore, under *Hood*, section 12022.7 is not a specific intent crime.

On the other hand, section 12022.7 also does not fit the *Hood* definitions of a general intent crime. General intent crimes are defined only in terms of a particular act, such as the infliction of great bodily injury. Section 12022.7 requires the additional mental element of the intent to inflict such injury, thus distinguishing section 12022.7 from a general intent crime. Moreover, in the case of a general intent crime, the court only asks whether the defendant intended to do the proscribed act. In section 12022.7 the proscribed act is the infliction of great bodily injury. Asking whether the defendant intended to do the inflicting of great bodily injury and requiring in the definition of the crime the intent to inflict such injury is redundant. Therefore, section 12022.7 seems to fall under neither of the *Hood* court's definitions, and it is unclear whether the label of specific intent should apply.

Alternatively, by focusing on the enhancement status of section 12022.7 and not strictly on its *actus reus* and *mens rea*, section 12022.7 does fall under the *Hood* court's definition of specific intent. Section 12022.7 is a punishment imposed in addition to the punishment received for the base crime. An assault, burglary, robbery, or

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73. 1 Cal. 3d 444, 462 P.2d 370, 82 Cal. Rptr. 618 (1969).
74. *Id.* at 456-57, 462 P.2d at 378, 82 Cal. Rptr. at 626.
75. *Id.*
76. *Id.* By defining general intent crimes only in terms of a particular act and without reference to a further intent, the *Hood* definition seems to reflect the particular element approach. *See supra* text accompanying notes 68-71. This definition implies that specific intent requires something more, such as any particular mental element. However, the *Hood* court went on to describe the mental element of a specific intent crime as an intent to do some *further* act or achieve some *future* consequence. This sounds more like the horizontal time perspective. *See supra* text accompanying notes 63-67.

other crime has already been committed. The infliction of great bodily injury is a further act or additional consequence beyond that of the base crime. The definition of section 12022.7 therefore refers to the defendant's intent to do the further act or achieve the additional consequence, beyond that of the base crime, of inflicting great bodily injury. Under this approach, the label of specific intent should apply to section 12022.7's intent requirement.

In summary, under one interpretation of the *Hood* definitions the label of specific intent should not apply to section 12022.7's intent requirement. However, under an alternative approach the label would attach.

### *3. Legislative Intent*

There are two possible legislative intentions regarding section 12022.7 The first, the legislature's use of language which the courts had already designated as requiring specific intent, implies that the legislature intended section 12022.7 to be a specific intent statute. The second, a later reference by the legislature to section 12022.7, implies that the legislature did not intend section 12022.7 to require specific intent.

In 1967, before section 12022.7 existed, the legislature amended three Penal Code sections concerning robbery, rape, and burglary to provide additional years to a defendant's sentence if the defendant, "with the intent to inflict such injury, inflicted great bodily injury on the victim" in the course of the crime.[77] The cases interpreting these punishments held that the three Penal Code sections required specific intent, but these courts failed to explain their reasoning, and it is unclear why case law in the early 1970s required specific intent.[78] Nevertheless, for years specific intent remained a necessary element of the three Penal Code sections.

In 1976, the legislature deleted the additional punishments from the three crimes and combined them into one enhancement under section 12022.7. The legislature originally used different wording in

77. *See supra* notes 14-15 and accompanying text.

78. *See, e.g.*, People v. Richardson, 23 Cal. App. 3d 403, 410, 100 Cal. Rptr. 251, 257 (1972) (stating that specific intent is an essential ingredient to § 213 without stating why); People v. Collins, 44 Cal. App. 3d 617, 622, 118 Cal. Rptr. 864, 868 (1975) (concerning an instruction for aiding and abetting but citing *Richardson* for the proposition that § 213 requires specific intent).

this new section.[79] However, the legislature later modified the wording of section 12022.7 to mirror the wording of the previous three Penal Code sections.[80]

By adopting the same language which for years had been labeled specific intent, the legislature may have intended for the courts to continue applying that same doctrine.[81] If the legislature had used new wording for the same additional punishments, it would have suggested to the courts to at least examine the label they had been attaching, if not to completely change their doctrines. However, the legislature did not change the wording and may have intended for the courts to continue applying the specific intent label to the intent requirement of section 12022.7.

On the other hand, an alternative legislative intent exists. When the legislature created section 12022.8,[82] the Assembly Committee on Criminal Justice pointed out that this new law contained no intent requirement.[83] The Committee compared section 12022.8 with section 12022.7,[84] stating that section 12022.7 requires that "the act causing the injury be intentional."[85] This language does not require the defendant to act with the purpose of inflicting great bodily injury. The defendant could haphazardly cause great bodily injury and still be guilty. Under *Hood*, asking whether the defendant intended to do the proscribed act signifies a general intent crime.[86] Therefore, the legislature may have intended section 12022.7 to require only general intent.

In summary, it is very difficult to determine what the legislature intended section 12022.7 to require. The legislature used the same

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79. *See supra* notes 20-24 and accompanying text.

80. *See supra* note 25 and accompanying text.

81. When the legislature amends "a statute which has been the subject of judicial construction," the courts may presume that "the Legislature was fully cognizant of such construction, and when substantial changes are made in the statutory language it is usually inferred that the lawmakers intended to alter the law in those particulars affected by such changes." Palos Verdes Faculty Ass'n v. Palos Verdes Peninsula Unified School Dist., 21 Cal. 3d 650, 659, 580 P.2d 1155, 1159, 147 Cal. Rptr. 359, 363 (1978). The legislature, with the opportunity to modify the judicial interpretation by leaving different wording, chose to return the language of § 12022.7 to the way it existed as separate Penal Code sections. "It would appear that the Legislature remained content with this construction as applied by the courts for many years." *Id.* at 659-60, 580 P.2d at 1160, 147 Cal. Rptr. at 364.

82. Section 12022.8 enhances sentences for the infliction of great bodily injury during the commission of certain sex offenses. *See supra* note 62.

83. COMMITTEE ON CRIMINAL JUSTICE, BILL ANALYSIS OF SENATE BILL 13, 1979 Reg. Sess. 7 (as amended July 5, 1979).

84. *Id.* The Committee did not specifically discuss § 12022.7, but described "current law." *Id.* Before the creation of § 12022.8, no separate enhancement existed for the infliction of great bodily injury during sex offenses. The infliction of great bodily injury in these cases was previously incorporated into § 12022.7.

85. *Id.* The Committee on Criminal Justice created § 12022.7's intent requirement only three years before. *See supra* note 18 and accompanying text.

86. *Hood*, 1 Cal. 3d at 456-57, 462 P.2d at 378, 82 Cal. Rptr. at 626.

language which the courts had already designated as requiring specific intent. However, the reference to section 12022.7 in a later committee report implied only a requirement of general intent.

### *B. The Intent Requirement of Section 12022.7*

The application of the specific intent label to section 12022.7 does not resolve the debate as to what constitutes its intent requirement. Even if section 12022.7 requires a specific intent to be shown, the second question asks what is the intent which must be proved.

Section 12022.7 states that the defendant must act "with the intent to inflict such injury." "Such injury" is great bodily injury. Great bodily injury is defined in section 12022.7 as a significant or substantial injury; it is further defined in cases as not a minor or moderate injury of a temporary nature.[87] Therefore, section 12022.7 requires that the defendant act with the intent to inflict a significant or substantial injury as distinguished from a minor or moderate injury of a temporary nature.[88] However, most defendants do not think in such terms.[89]

Defendants usually only desire that their victims feel pain or sustain some sort of injury.[90] Beyond these general desires, a defendant

87. CALJIC 17.20 uses the distinguishing language of "minor or moderate injuries of a temporary nature." 2 CALJIC, *supra* note 53, No. 17.20 (5th ed. 1988). One court distinguished great bodily injury from "transitory and short-lived bodily distress." People v. Caudillo, 21 Cal. 3d 562, 588, 580 P.2d 274, 290, 146 Cal. Rptr. 859, 875 (1978). Another court distinguished great bodily injury from "trivial or insignificant injury or moderate harm." People v. Miller, 18 Cal. 3d 873, 883, 558 P.2d 552, 559, 135 Cal. Rptr. 654, 661 (1977).

Although these terms are usually only instructed to the jury regarding the determination whether great bodily injury actually occurred, they should likewise be instructed to the jury regarding the determination of whether the defendant actually intended such injury.

88. Most courts have glossed over this requirement. No courts have truly questioned what went on in the defendant's mind during the infliction of great bodily injury. Almost all courts look at the defendant's actions and then infer the requisite intent.

89. Although most defendants do not think in such terms, in People v. Guest, 181 Cal. App. 3d 809, 226 Cal. Rptr. 525 (1986), the court held that the term "great bodily injury" in § 12022.7 is not unconstitutionally vague.

90. Defendants think only in terms of hitting, kicking, stabbing, or shooting their victims. *Cf.* People v. Lee, 220 Cal. App. 3d 320, 323, 269 Cal. Rptr. 434, 435 (1990) (defendant hit victim with fist in the nose, eye, and mouth); People v. Johnson, 104 Cal. App. 3d 598, 603, 164 Cal. Rptr. 69, 71 (1980) (defendant hit victim with fist, shattering her jaw); People v. Goins, 228 Cal. App. 3d 511, 514, 279 Cal. Rptr. 42, 44 (1991) (defendant kicked victim in ribs and legs); People v. Simpson, 192 Cal. App. 3d 1360, 1364, 237 Cal. Rptr. 910, 911 (1987) (defendant kicked victim while victim lay on ground); People v. Lesnick, 189 Cal. App. 3d 637, 641, 234 Cal. Rptr. 491, 493 (1987) (defendant stabbed victim in neck); People v. Wolcott, 34 Cal. 3d 92, 97, 665 P.2d 520,

typically does not formulate what specific injury he will inflict. Juries often look to the extent of medical treatment, the length of medical treatment, and the long term effects of the defendant's action to determine whether the injury is significant or substantial as distinguished from a minor or moderate injury of a temporary nature.[91] However, most defendants do not intend extensive, protracted medical treatment and long term effects as the result of their actions.

Clearer language describing the intent requirement would rectify the confusion.[92] The legislature needs to further define what demonstrates section 12022.7's intent requirement. Two possible suggestions exist which might make the intent requirement easier to understand.

The first suggestion is to have the legislature adopt language which would ask whether the defendant intended the injury which resulted. Section 12022.7 would read: "with the intent to inflict the injury which resulted, the defendant personally inflicted great bodily injury." Under this approach, the jury would first determine if the injury was significant or substantial. The jury would then determine if the defendant actually intended that specific injury to occur.

The second suggestion is to have the legislature adopt language which would ask whether the defendant intentionally inflicted additional harm beyond that inherent in the base crime committed. Section 12022.7 would read: "with the intent to inflict harm beyond that inherent in the crime for which the defendant is being convicted, the

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523, 192 Cal. Rptr. 748, 751 (1983) (defendant shot victim in leg after struggling with victim for control of gun); People v. Miller, 18 Cal. 3d 873, 878, 558 P.2d 552, 556, 135 Cal. Rptr. 654, 658 (1977) (defendant shot victim twice after struggling with victim for control of gun).

91. For various factors of actual injuries suffered which likely played a role in the juries' determinations, see, *e.g.*, People v. Mixon, 225 Cal. App. 3d 1471, 1478, 1489, 275 Cal. Rptr. 817, 820, 828 (1990) (victim of strangulation and beating received a dark purple line across her neck and numerous facial bruises and was hospitalized for five days and incapacitated for fifteen); People v. Lee, 220 Cal. App. 3d 320, 323-24, 269 Cal. Rptr. 434, 435 (1990) (victim of beating paralyzed by acute head trauma and now permanently disabled in right arm and leg and brain); People v. McKelvy, 194 Cal. App. 3d 694, 700, 239 Cal. Rptr. 782, 784 (1987) (victim hit in eye with pool cue hospitalized for five days and will never regain vision in that eye); People v. Simpson, 192 Cal. App. 3d 1360, 1365, 237 Cal. Rptr. 910, 912 (1987) (victim sustained multiple fractures of face and jaw after being kicked by defendant; hospitalized for one month and unconscious for ten days); People v. Smith, 122 Cal. App. 3d 581, 585, 176 Cal. Rptr. 73, 75 (1981) (victim hit on side of head sustained linear skull fracture requiring intercranial hemorrhage surgery to remove bone and drain blood).

92. In other specific intent crimes it is easier to conclude whether the defendant truly intended the requisite element. In burglary, the defendant's entering of a dwelling and removing belongings more clearly demonstrates an intent to commit a theft. In larceny, the defendant's taking of property and keeping it more clearly demonstrates an intent to permanently deprive the owner. In the infliction of great bodily injury, the action of inflicting great bodily injury demonstrates an intent to injure, but not necessarily an intent to significantly or substantially injure.

defendant personally inflicted great bodily injury." Although this approach increases the essential elements of the crime, it is consistent with the enhancement focus of section 12022.7.

Section 12022.7 enhances the punishment for a felony already committed. The defendant is already being punished for the harm caused by the base crime. The enhancement punishes for any additional harm and deters the further infliction of harm above and beyond what the crime ordinarily requires.[93] The use of the language "with the intent to inflict such injury" implies the legislature's desire to punish only those who intentionally inflict more harm than is necessary. Therefore, the fundamental inquiry should be into the amount of force necessary to commit this crime and whether the defendant acted with the purpose or conscious desire to exceed that amount of force.

## CONCLUSION

Two problems have created the confusion surrounding the intent requirement of section 12022.7. The first problem, which has plagued the courts and the legislature for many years, is the use of the terms general and specific intent. Over the years these terms have come to signify many different things, and it is unclear how they apply to section 12022.7. Academic distinctions, judicial distinctions, and possible legislative intent suggest that applying both the specific and the general intent labels is appropriate.

The second problem creating the confusion of section 12022.7's intent element is the requirement that the defendant must intend to inflict great bodily injury. Most defendants do not think in terms of inflicting a significant or substantial injury as distinguished from a minor or moderate injury of a temporary nature.

The legislature should adopt language which asks whether the defendant intended to inflict the injury which resulted or whether the defendant intended to inflict additional harm beyond that inherent in

93. People v. Wolcott, 34 Cal. 3d 92, 108, 665 P.2d 520, 531, 192 Cal. Rptr. 748, 759 (1983). The court held that to enhance under great bodily injury for the physical manifestations of psychological stress ordinarily caused by rape and kidnapping (which had occurred in cited cases) would be inconsistent with the purpose of § 12022.7. Great bodily injury, however, occurred in this case because the injury was the result of an additional violent act beyond that of the robbery itself. *Id.*

the base crime. This clearer language would eliminate the obscurity surrounding section 12022.7's intent requirement.

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