Pepperdine Law Review

Volume 23 | Issue 2 Article 3

1-15-1996

Reforming California's Homicide Law

Charles L. Hobson

Reforming California's Homicide Law

Charles L. Hobson*

"[T]he law of homicide is in need of revision."[1] Justice Mosk is right. California's homicide law centers around archaic statutes that since their enactment have undergone little meaningful change. The legislative and judicial attempts to deal with this are piecemeal at best, frequently creating more problems than they solve. Comprehensive legislative reform can correct the errors of the past and limit future errors from further confusing homicide law.

This Article will point out the problems with California's homicide law and suggest reforms.[2] Part I examines the defects in California's homicide law.[3] Part II suggests an analytical framework for reforming criminal statutes.[4] Part III applies this framework and suggests statutory reforms for California's homicide law.[5]

I. THE NEED FOR REFORM

A. *The Problem with Malice*

The problems with California's homicide law begin with the term "malice." California defines murder as "the unlawful killing of a human

---

* Attorney, Criminal Justice Legal Foundation; J.D. 1987, University of the Pacific, McGeorge School of Law; A.B. 1984, University of California, Berkeley.

1. *In re* Christian S., 872 P.2d 574, 584 (Cal. 1994) (Mosk, J., concurring).

2. This Article will not discuss the death penalty. Given the overwhelming public support for the death penalty, any reform of homicide law should not endeavor to reduce capital punishment if it is to have a chance of public acceptance. *See, e.g.*, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1993, 200-01 (1994) [hereinafter SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1993]. Furthermore, the death penalty and the structure of homicide law are two different topics. Any discussion of capital punishment is best left for another time.

In addition, this Article will not discuss the doctrine of justification. There are serious problems with California's law of justification, particularly with self-defense. Justification is a topic worthy of its own article, however, and time and space considerations prevent this Article from giving justification the attention it deserves.

3. *See infra* notes 6-206 and accompanying text.

4. *See infra* notes 207-33 and accompanying text.

5. *See infra* notes 234-481 and accompanying text.

being, or a fetus, with malice aforethought."[6] The problem with the definition is that the current definition of malice aforethought has gone far beyond both its common sense and original legal meaning. The resulting conflicts resonate throughout homicide law, warping an entire body of law.

1. Artificial Term

Under early English law, liability for homicide was not predicated upon the defendant's mental state.[7] Malice grew out of the common law's efforts to attach the idea of mens rea to criminal liability.[8] As the common law began to treat homicides differently, it developed the concept of malice aforethought to distinguish the excusable from the felonious homicides.[9] At this time, malice meant no more than a general criminal intent, as opposed to a killing committed by accident or in some other pardonable way.[10] In this sense, malice was at least related to a general sense of ill will by the defendant. By the 17th century, malice was understood to be a deliberate intent to kill.[11] As the common-law concept of murder developed, malice grew further away from any notion of ill will.[12] By Blackstone's time, malice had reached its modern form, completely divorced from any common sense notion of ill will and subdivided into express and implied malice.[13]

Malice aforethought was thus already archaic and divorced from its original meaning when it was used to define murder in section 19 of the original Crimes and Punishment Act.[14] Malice has remained in California's murder law ever since.[15] This use of malice in murder re-

---

6. CAL. PENAL CODE § 187(a) (West 1988). All future statutory references will be to California codes unless otherwise noted.

7. ROY MORELAND, THE LAW OF HOMICIDE 1-4 (1952); *see* 2 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 50-54 (3d ed. 1923); 2 FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW 468-69 (2d ed. 1968); 3 JAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 24 (1883). Others, however, have refused to concede that early English law ignored the transgressor's mental state. *See* OLIVER W. HOLMES, THE COMMON LAW 4 (1881); Percy H. Winfield, *The Myth of Absolute Liability*, 42 LAW Q. REV. 37, 40 (1926).

8. MORELAND, *supra* note 7, at 12.

9. *See id.* at 10.

10. *See id.*

11. *See id.* at 10-12; 3 STEPHEN, *supra* note 7, at 47-48.

12. MORELAND, *supra* note 7, at 11. Even after state of mind became an important consideration, courts inferred motive and malice from the facts. *Id.*

13. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 199 (Special Ed. 1983).

14. 1850 CAL. STAT. 231, ch. 99, § 19, 5th Div.

15. *Compare* CAL. PENAL CODE § 187(a) (West 1988) ("murder is the unlawful killing of a human being, or a fetus, with malice aforethought") *with* 4 BLACKSTONE,

tains its artificial, common-law flavor, rejecting any requirement of ill will.[16]

California relies on two different meanings of malice derived from the common law: express malice, which is "a deliberate intention unlawfully to take away the life of a fellow creature," or implied malice, which is "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart."[17] This divergence between the legal and common sense definitions of malice is the most obvious problem with California's homicide law.

Since the law contains a great deal of specialized knowledge, a technical vocabulary is inevitable. "Estoppel," "proximate cause," and "laches" are examples of terms developed to describe situations unique to the law. There is little confusion with such terms because they have no meaning outside the law.

"Malice," however, is more than a legal term of art. Since it is a term used by society, there is an inevitable risk of confusion when malice is given its highly artificial definition within the murder statute. The standard California jury instruction defines murder in the language of Penal Code section 187, describing the crime as the "unlawful killing of a human being with malice aforethought."[18] While jurors are given definitions of express and implied malice and are told that malice does not require ill will,[19] the risk of confusion still remains.[20] Jurors are given many instructions in criminal cases, particularly in murder cases.[21] In

---

supra note 13, at 195 ("Murder is . . . 'when a person of sound memory and discretion, unlawfully killeth any reasonable creature in being and under the kings peace, with malice aforethought, either express or implied.'").

16. *See* People v. Conley, 411 P.2d 911, 967 (Cal. 1966) (stating that Penal Code § 7, defining malice as a form of ill will, does not supply the definition of the malice necessary for murder).

17. *See* CAL. PENAL CODE § 188 (West 1988).

18. CALIFORNIA JURY INSTRUCTIONS, CRIMINAL 8.10 (5th ed. 1988) (CALJIC).

19. *See id.* at 8.11.

20. *See* People v. Phillips, 414 P.2d 353, 363 (Cal. 1966). In *Phillips*, the California Supreme Court recognized this risk and disapproved an instruction defining implied malice "in terms of 'abandoned and malignant heart'" because of the risk that this would make the jury confuse malice with ill will. *Id.*

21. A typical California murder trial can include instructions defining the following: murder (CALJIC 8.10); malice (CALJIC 8.11); deliberate and premeditated murder (CALJIC 8.20); unpremeditated second-degree murder (CALJIC 8.30); second-degree murder resulting from an unlawful act dangerous to life (CALJIC 8.31); voluntary manslaughter (CALJIC 8.40); sudden quarrel or heat of passion (CALJIC 8.42); the

light of the many instructions a jury will receive, an inevitable risk arises that clarifications regarding ill will and malice will be lost in the mass of instructions.[22] Even if the courts are cognizant of the need to instruct clearly, stating the law correctly will always take priority, making jury instructions inherently difficult to understand.[23]

Given the inherent difficulty of instructing juries, and the overriding need for courts to tailor their instructions to conform to the law, criminal statutes should be written in easily understood language. If a crime is defined in terms lay jurors can understand, it will be much easier for courts to give juries understandable instructions that conform to the law.

2. Express Malice

The problem with malice is not limited to the lay public. Courts have spent many years struggling with the problems caused by California's common-law definition of murder. Following the common law, California breaks malice into two variants: express and implied.[24] California Penal Code section 188 defines express malice as "when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature."[25] This definition has only two real problems. First, one could interpret the phrase "deliberate intent" to mean a mental state greater than intent to kill. The court dealt with this potential problem in *People v. Saille*[26] and held that express malice required only intent to kill, rendering the deliberation requirement insignificant.[27]

---

cooling period and heat of passion (CALJIC 8.43); no specific emotion alone can constitute heat of passion (CALJIC 8.44); involuntary manslaughter (CALJIC 8.45); due caution and circumspection (CALJIC 8.46); distinguishing murder and manslaughter (CALJIC 8.50); cause of homicide (CALJIC 8.55); negligence of deceased or a third person (CALJIC 8.56); plus the many other instructions that are required for every criminal trial.

22. *See* Frank G. Swain, *Common Sense in Jury Trials*, 30 CAL. ST. B.J. 405, 412 (1955).

> One of the greatest fictions known to the law is that a jury of twelve laymen can hear a judge read a set of instructions once, then understand them, digest them and correctly apply them to the facts in the case. It has taken the judge and the lawyers years of study to understand the law as stated in those instructions.

Id.

23. *See* Robert Winslow, *The Instruction Ritual*, 13 HASTINGS L.J. 456, 471-73 (1962).

24. *Compare* 4 BLACKSTONE, *supra* note 13, at 199-200 *with* CAL. PENAL CODE § 188 (West 1988).

25. CAL. PENAL CODE § 188 (West 1988).

26. 820 P.2d 588 (Cal. 1991).

27. *Id.* at 595.

The second problem is the use of "unlawfully," which the courts have defined as a lack of mitigation, excuse, or justification.[28] Although the lack of a valid defense is necessary before the state can convict a person of murder, there is no reason to include this truism in the mens rea for murder. "Unlawfully" does not belong because it at best indirectly refers to the mental state of the killer. Requiring the absence of any defense places an unnecessary strain upon the mental element of murder.

Furthermore, this use of "unlawfully" adds another artificial term to the definition of murder. If the absence of excuse, justification, or mitigation makes the killing "unlawful," then the presence of one of these factors should render the killing "lawful." This assertion is true for justification and excuse, which are complete defenses to murder.[29] It is not true, however, for mitigation, which simply makes the killing less unlawful by reducing murder to voluntary manslaughter.[30]

3. Implied Malice

The statutory definition of implied malice is much more problematic. Penal Code section 188 defines implied malice as "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart."[31] The "lack of provocation" language is a restatement of the notion that "[w]hen the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of law is that it was malicious and an act of [second-degree] murder."[32] Provocation rebutted this presumption.[33]

The main problem with the "lack of provocation" language is its implicit presumption. Given the United States Supreme Court's strong hostility to presumptions, particularly where malice is concerned,[34] any

28. *Id.*

29. CAL. PENAL CODE § 199 (West 1988).

30. *See id.* § 192.

31. *Id.* § 188.

32. People v. Howard, 295 P. 333, 336 (Cal. 1930); *accord* People v. Lines, 531 P.2d 793, 796-97 (Cal. 1987). One can trace this notion back to the common law, where once the prosecution proved that the defendant committed the killing, the law inferred express malice and the defendant had the burden of proving excuse, justification, or mitigation. *See* MORELAND, *supra* note 7, at 21.

33. *See* People v. Wells, 76 P.2d 493, 499 (Cal. 1938).

34. *See* Mullaney v. Wilbur, 421 U.S. 684 (1975); Yates v. Evatt, 500 U.S. 391

definition of a crime that contains a presumption will be viewed with suspicion. This is particularly true here because the inference is wrong that all unprovoked homicides are committed with malice.[35] California courts attempt to avoid this problem by labeling this presumption a permissive inference.[36] There is no reason to retain this needless and potentially dangerous definition.

The "malignant heart" portion of section 188 is little better. This is another example of archaic language being kept in the murder statutes long after it has served its purpose.[37] "Abandoned and malignant," while indicating some evil purpose, gives no clue as to what purposes are improper and provides no guidelines for separating improper purposes from simple ill will towards the victim. It is no surprise that the California Supreme Court has relentlessly criticized the statutory definition of implied malice.[38] The California Supreme Court disfavors instructions containing "malignant heart," as the term "adds nothing to the jury's understanding of implied malice; its obscure metaphor invites confusion and unguided speculation."[39]

The California Supreme Court responded to this problem by creating its own definition of implied malice.[40] After a long evolution, implied malice is now defined as "an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life."[41]

(1991).

35. *See* MORELAND, *supra* note 7, at 22-23.

36. *See* People v. Love, 168 Cal. Rptr. 407, 413 (Cal. Ct. App. 1980); CALJIC 8.11.

37. "Abandoned and malignant heart," like malice, can trace its roots back to the common law. *See* MORELAND, *supra* note 7, at 15; 4 BLACKSTONE, *supra* note 13, at 200.

38. *See, e.g.*, People v. Phillips, 414 P.2d 353, 363 (Cal. 1966).

39. *Id.*

> Hardness of the arteries is an ascertainable concept—but not of the heart; malignant cancer is similarly ascertainable, but not malignant hearts; also abandoned children but not abandoned hearts. As sophisticated as human knowledge has become regarding anatomy of the body, the anatomy of the crime concept—and especially of malice—has remained as mysterious for many courts as it was for cavemen. Why not stop abusing the poor heart?

Id. at 363 n.11 (quoting Gerhard Meuller & Patrick Wall, *Criminal Law*, 1964 ANN. SURV. AM. L. 33, 41 (1964)).

40. *See* People v. Dellinger, 783 P.2d 200, 201 (Cal. 1989).

41. *Id.* Before *Dellinger*, the Court had accepted an alternative definition of implied malice, "when [the] defendant does an act with a high probability that it will result in death and does it with a base antisocial motive and with a wanton disregard for human life." People v. Watson, 637 P.2d 279, 285 (Cal. 1981). The *Dellinger* court disapproved this definition. *Dellinger*, 783 P.2d at 205.

Although wordy, nothing is inherently wrong with this definition. The problem is that it is not the legislature's definition of implied malice.[42] The definition of implied malice given in *People v. Watson* and approved in *People v. Dellinger* contains no reference to the statutory terms "no considerable provocation" or "malignant heart."[43] Instead, it represents the best effort of the judiciary to determine which unintentional homicides are murders. Although court-created crimes are part of the common-law tradition,[44] California law forbids this form of judicial activism.[45]

This does not mean that the California Supreme Court was necessarily wrong when it substituted its own definition of implied malice for the statutory one. It recognized that the language of Penal Code section 188 was hopelessly archaic and confusing.[46] Something better was needed, and, in the face of legislative inaction, California's high court came up with what it saw as the best alternative.[47]

The fact that the court came up with a serviceable definition of implied malice does not justify legislative inaction. If "conscious disregard for life" is the best definition of unintentional murder, the legislature should enact it. Anything less is a dereliction of its duty to define crimes.

Allowing the California Supreme Court to establish its own definition of implied malice murder also establishes a dangerous precedent. There is nothing to prevent the California courts from using the implied malice experience to rewrite other criminal laws they find objectionable. Furthermore, no guarantee exists that a court will refrain from changing its definition of implied malice in the future.[48] In order to limit un-

---

42. *See* CAL. PENAL CODE § 188 (West 1988); *supra* note 31 and accompanying text.

43. *See Watson*, 637 P.2d at 285; *Dellinger*, 783 P.2d at 201.

44. *See* ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW, 34-35 (3d ed. 1982).

45. *See* CAL. PENAL CODE § 6 (West 1988); Keeler v. Superior Court, 470 P.2d 617, 625 (Cal. 1970).

46. People v. Phillips, 414 P.2d 353, 363 (Cal. 1966).

47. *See id.*

48. Another example of how easy it is to manipulate malice is the diminished capacity saga. In a series of cases beginning with People v. Wells, 202 P.2d 53 (Cal. 1949), *cert. denied*, 388 U.S. 836 (1949), and culminating with People v. Conley, 411 P.2d 911 (Cal. 1966), the California Supreme Court fashioned a diminished capacity defense that reduced murder to voluntary manslaughter by negating malice. *See, e.g.*, People v. Saille, 820 P.2d 588, 591-92 (Cal. 1991) (discussing *Conley* and *Wells*). The problem with the diminished capacity defense was finding a way to justify reducing

controlled judicial experimentation with the law of "murder," the most serious crime, the California Legislature should provide a clear definition of malice.

4. Malice and Manslaughter

The problem of malice is not confined to murder. California Penal Code section 192 defines manslaughter as "the unlawful killing of a human being without malice."[49] This definition, like the definition of murder, is a holdover from the common law.[50] Like the law of murder, the law of manslaughter would be much better off without any mention of malice.

Manslaughter was not a distinct crime at early common law, but instead evolved from efforts to punish less culpable, but still wrongful, homicides with something less than the death penalty. Initially, there was no difference between the punishment for murder and that for what would now be called manslaughter; both were felonies and thus were punished by death.[51] At early common law, however, lesser homi-

---

murder to voluntary manslaughter because of a defendant's diminished capacity. Because California Penal Code § 192(a) limits voluntary manslaughter to cases involving provocation, California's high court needed an alternative. *See* CAL. PENAL CODE § 192(a) (West 1988). Thus, the court chose to manipulate the definition of malice. *See Conley*, 411 P.2d at 918-19. Since manslaughter is defined as an unlawful killing without malice, diminished capacity simply eliminated malice and thus reduced murder to manslaughter. CAL. PENAL CODE § 192 (West 1988); People v. Gorshen, 336 P.2d 492, 501-03 (Cal. 1959).

Gorshen did not complete the puzzle, however, because it did not explain how diminished capacity negated malice. That piece was added by *Conley*, where the California Supreme Court created a new standard for malice, i.e., "[a]n awareness of the obligation to act within the general body of laws regulating society." *Conley*, 411 P.2d at 918. This allowed diminished capacity to mitigate an intentional killing to voluntary manslaughter. *Id.*

The legislature eliminated the diminished capacity defense, but the problem with malice remains. *See* CAL. PENAL CODE § 28(b) (West 1988). The California Supreme Court was able to fashion the diminished capacity defense out of thin air because "malice" is inherently vague and poorly defined. *See Conley*, 411 P.2d at 918. The reforms that aborted the diminished capacity defense, however, will not prevent other manipulations of the definition of malice. *See, e.g., In re* Christian S., 872 P.2d 574, 583 (Cal. 1994) (concluding that the statutory elimination of the diminished capacity defense did not eliminate the doctrine of imperfect self-defense). Until malice is eliminated, the law of murder will be a hostage of the courts.

49. CAL. PENAL CODE § 192 (West 1988 & Supp. 1995). Section 192 subdivides manslaughter into three distinct forms: voluntary, involuntary, and vehicular. *Id.* § 192 (a)-(c).

50. *See* MORELAND, *supra* note 7, at 9-12, 60.

51. *See* 3 STEPHEN, *supra* note 7, at 44.

cides, those other than murder, were subject to a "general pardon."[52] One way of avoiding the harsh consequences of the common law was by claiming the benefit of clergy.[53] Those who successfully claimed this benefit were immune from the harsh jurisdiction of the common-law courts and were tried in the much more lenient ecclesiastical courts run by the church.[54] Over time, the law extended this privilege to much of the general population.[55] A reaction against this leniency led to the removal of certain serious offenses from the benefit of clergy.[56]

Thus, under the common law, whether a crime was subject to the benefit of clergy determined whether it was punished by the death penalty.[57] Courts classified homicides with malice aforethought as murder and withdrew them from the benefit of clergy.[58] The remaining unlawful homicides, by being allowed the benefit of clergy, were not subject to capital punishment.[59] For this grade of homicides, the common law created the new term, "manslaughter."[60] Since malice aforethought separated capital from noncapital homicide, the common law defined manslaughter as an unlawful killing without malice aforethought.[61] The distinction between the different types of manslaughter was factual, not legal, as both voluntary and involuntary manslaughter carried the same punishment: one year's imprisonment and branding on the thumb.[62] Therefore, there was no need to dispense with the general definition of manslaughter.

---

52. *See id.*

53. The benefit of clergy started as a prohibition against secular courts from exercising jurisdiction over clerics. *See* 4 BLACKSTONE, *supra* note 13, at 365.

54. *See* PERKINS, *supra* note 44, at 4.

55. *Id.* at 4-5; *see* FREDERIC W. MAITLAND & FRANCIS C. MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY 72-73 (James F. Colby ed., 1915). The exemptions accorded clergy were extended to laypersons attached to the church in "minor orders" and eventually to anyone who appeared to be able to read. *Id.* The test of literacy used the same verse of Psalms, so a prisoner only needed to know it by heart to escape punishment. *Id.*

56. *See* PERKINS & BOYCE, *supra* note 44, at 5.

57. *See id.* at 4-5.

58. *See id.* at 5.

59. *Id.* at 4.

60. *See* MAITLAND & MONTAGUE, *supra* note 55, at 72-73; MORELAND, *supra* note 7, at 60.

61. *See* MORELAND, *supra* note 7, at 9-12, 60.

62. *See id.* at 60 (citing Francis B. Sayre, *Mens Rea*, 45 HARV. L. REV. 975, 996 n.82 (1932)).

There is no reason to continue this archaic treatment of manslaughter. Voluntary, involuntary, and vehicular manslaughter are distinct crimes with their own distinct acts, mental elements, and punishments.[63] There is no reason to classify them all as unlawful homicides without malice.

Lack of malice is a particularly inappropriate way to define voluntary manslaughter. Voluntary manslaughter is an unlawful, intentional killing "upon a sudden quarrel or heat of passion."[64] Since intent to kill is express malice under California law, voluntary manslaughter is actually committed with malice.[65]

The California Supreme Court endeavored to surmount this analytical inconsistency by focusing on the word "unlawful."[66] The court noted that express malice is defined as an "intent unlawfully to kill,"[67] with "unlawfully" meaning that "there is no justification, excuse, or mitigation for the killing recognized by law."[68] Thus, provocation, a legally recognized form of mitigation, would negate malice while retaining intent to kill.[69] This does not work, however, because section 192 defines manslaughter as the "*unlawful* killing of a human being without malice."[70] "Unlawful" cannot mean a lack of mitigation. Mitigation only makes something less criminal; it does not absolve a defendant from responsibility, as does excuse or justification.[71] Because a mitigated crime is still unlawful, lack of mitigation is not a proper component of unlawfulness.[72] Contrary to California Penal Code section 192, provocation does not negate malice. While the crime may be reduced to voluntary manslaughter, malice still exists.[73]

This inconsistency does more theoretical than practical harm. While analytically unsatisfactory, Penal Code section 192 still describes three valid, distinct crimes.[74] Defining manslaughter as the negation of mal-

---

63. *See* CAL. PENAL CODE §§ 192, 193 (West 1988 & Supp. 1995).

64. *Id.* § 192(a); People v. Forbs, 402 P.2d 825, 828 (Cal. 1965).

65. *See* People v. Saille, 820 P.2d 588, 594 (Cal. 1991).

66. *Id.* at 595.

67. *Id.* at 594.

68. *Id.* at 595 (citing People v. Stress, 252 Cal. Rptr. 913, 918 (Cal. Ct. App. 1988)).

69. *See* CAL. PENAL CODE § 192(a) (West 1988 & Supp. 1995).

70. *Id.* § 192 (emphasis added).

71. *Compare* CAL. PENAL CODE § 195 (West 1988) (providing that excuse is a complete defense to homicide) *and* CAL. PENAL CODE § 197 (West 1988) (providing justification is a complete defense to homicide) *with* CAL. PENAL CODE § 192(a) (West 1988 & Supp. 1995) *and* CAL. PENAL CODE § 193(a) (providing that the mitigation supplied by provocation only lowers the punishment for intentional homicides).

72. *See id.* § 192.

73. *See* People v. Saille, 820 P.2d 588, 594 (Cal. 1991).

74. CAL. PENAL CODE § 192 (West 1988 & Supp. 1995).

ice also creates greater practical difficulties, however, by giving birth to the judicial creation of "nonstatutory voluntary manslaughter."[75]

The term "nonstatutory voluntary manslaughter" had its origins in the diminished capacity defense, where the term was used to describe the fact that diminished capacity created a form of voluntary manslaughter outside the statutory definition of the crime found in Penal Code section 192.[76] This creation continues today in spirit, if not in form, in the doctrine of imperfect self-defense. The imperfect self-defense doctrine has no basis in statutory law and is the ideal example of the problem with defining manslaughter in terms of an absence of malice.

In *People v. Flannel*,[77] the California Supreme Court laid out the imperfect self-defense doctrine.[78] It held[79] that "[a]n honest but unreasonable belief that it is necessary to defend oneself from imminent peril to life or great bodily injury" reduces murder to voluntary manslaughter.[80]

The main problem with imperfect self-defense was that there was no specific statutory authorization for it, as Penal Code Section 192 only listed sudden quarrel or heat of passion as factors mitigating murder to voluntary manslaughter.[81] Thus imperfect self-defense, like diminished capacity, created a form of nonstatutory voluntary manslaughter.[82]

The *Flannel* court attempted to finesse this problem by borrowing a page from the diminished capacity defense.[83] The diminished capacity defense allowed a defendant to reduce murder to manslaughter by showing that defendant was "incapable of harboring malice afore-

---

75. *See* People v. Graham, 455 P.2d 153, 161 (Cal. 1969).

76. *Id.* at 160. The supreme court subsequently backtracked from this language as it related to diminished capacity in People v. Mosher, 461 P.2d 659, 662 n.1 (Cal. 1969).

77. 603 P.2d 1 (Cal. 1979).

78. *Id.* at 4.

79. Only three justices signed the lead opinion in *Flannel*, but the other four justices did not disagree on the imperfect self-defense issue. *See id.* at 12 n.1 (Bird, C.J., concurring and dissenting); *id.* at 14 (Richardson, J., concurring). The four disagreed with the lead opinion on either the issue of the duty to give *sua sponte* imperfect self-defense instructions in future cases or the need to give diminished capacity instructions under the facts presented in *Flannel*. *Id.* at 14 (Richardson, J., concurring); *id.* at 11-14 (Bird, C.J., concurring and dissenting).

80. *Id.* at 4 (emphasis omitted).

81. *Id.* at 5; CAL. PENAL CODE § 192 (West 1988 & Supp. 1995).

82. *See supra* note 81 and accompanying text.

83. *Flannel*, 603 P.2d at 6-7.

thought because of a mental disease, defect, or intoxication."[84] As with imperfect self-defense, there was no specific statutory authorization for diminished capacity.[85] In *People v. Conley*, the California Supreme Court skirted this problem by manipulating the definition of malice.[86] The *Conley* court added a new requirement to malice, "an awareness of the obligation to act within the general body of laws regulating society," which was negated by diminished capacity.[87] In *Flannel*, imperfect self-defense negated this new, nonstatutory element of malice, allowing imperfect self-defense to negate malice, and reduce second-degree murder to voluntary manslaughter.[88]

Flannel and *Conley* provide ideal examples of what is wrong with malice. Because malice, as it relates to murder, is so vague and artificial, the California Supreme Court fashioned diminished capacity and imperfect self-defense without any legislative authorization.[89] Malice is no more than judicial putty, twisted and shaped by the whims of the judicial branch.

The legislature abolished *Conley*'s "awareness of duty" element along with the diminished capacity defense in 1981.[90] Negating this element of malice, which was central to the imperfect self-defense doctrine, would seem to eliminate imperfect self-defense. In *In re Christian S.*,[91] the court rejected this result, finding that the legislative reforms of 1981 were not meant to abrogate *Flannel* since it only specifically eliminated "diminished capacity, diminished responsibility, and irresistible impulse."[92] Since imperfect self-defense was an established concept at the time of the 1981 reforms, the California Supreme Court stated that the defense could be abolished only upon a showing of clear legislative

84. People v. Conley, 411 P.2d 911, 916 (Cal. 1966).

85. *See* CAL. PENAL CODE § 192 (West 1988 & Supp. 1995).

86. *Conley*, 411 P.2d at 918-19.

87. *Id.* at 918.

88. People v. Flannel, 603 P.2d 1, 6-7 (Cal. 1979).

89. *See Conley*, 411 P.2d 911; *Flannel*, 603 P.2d 1.

90. People v. Saille, 820 P.2d 588, 592-93 (Cal. 1991). In 1981 the legislature enacted and the Governor signed Senate Bill No. 54, which abolished diminished capacity in Penal Code sections 28 and 29 and specifically eliminated the *Conley* duty by amending the definition of malice in Penal Code § 188. *Id.* at 593; *see also* CAL. PENAL CODE §§ 28-29, 188 (West 1988). Senate Bill No. 54 also changed the definition of premeditation and deliberation in Penal Code § 189. *Saille*, 820 P.2d at 593; *see also* CAL. PENAL CODE § 189 (West 1988). The legislature made subsequent, but minor changes to the statutes enacted in SB 54. *Saille*, 820 P.2d at 593 n.5.

91. 872 P.2d 574 (Cal. 1994).

92. *Id.* at 582.

intent.[93] The failure to single out imperfect self-defense made the *Christian S.* court determine that there was no intent to overrule *Flannel*.[94]

While the 1981 reforms may not explicitly overrule *Flannel*, they did remove statutory pretense for imperfect self-defense. With the *Conley* duty to conform to society gone, there is no longer any way for imperfect self-defense to rebut malice.

The *Christian S.* court stated that cases had recognized imperfect self-defense before the court added the *Conley* duty to malice.[95] While this may give *Flannel* some alternative support, it does not overcome the fact that imperfect self-defense is not rooted in the Penal Code. These cases did no more than state that imperfect self-defense reduced murder to manslaughter; they did not explain how a means not found in the Penal Code could mitigate murder.[96] Imperfect self-defense remains free of any statutory mooring.

The problem with malice is that it is an archaic, artificial label divorced from any notion of common sense. It has allowed California's homicide law to evolve into a needless web of artifice and complexity. Removing malice from homicide law will help untangle this web and bring some needed consistency and common sense to the law of homicide.

B. Other Problems

1. Voluntary Intoxication

Malice is not the only problem with California's homicide law. A related problem is the current state of the voluntary intoxication defense to implied malice murder. In *People v. Whitfield*,[97] the California Supreme Court allowed voluntary intoxication to be a defense to implied malice.[98] This allowance resulted from a strained interpretation of

93. *Id.* at 577.
94. *Id.* at 578-79.
95. *Id.* at 578.
96. *See* People v. Sedeno, 518 P.2d 913, 920-921 (Cal. 1974); People v. Wells, 202 P.2d 53, 62-63 (Cal.), *cert. denied*, 388 U.S. 836 (1949); Roads v. Superior Court, 80 Cal. Rptr. 169, 171 n.2 (Cal. Ct. App. 1969); People v. Lewis, 9 Cal. Rptr. 263, 269 (Cal. Ct. App. 1960); People v. Best, 57 P.2d 168, 169-70 (Cal. Ct. App. 1936).
97. 868 P.2d 272 (Cal. 1994).
98. *Id.* at 273.

California's homicide law and created a needless loophole suspiciously similar to the legislatively discredited diminished capacity defense.

Whitfield was a drunk-driving second-degree murder case[99] in which the defendant claimed he was so intoxicated that he did not have the implied malice necessary to support his murder conviction.[100] Despite the fact that the defendant's voluntary intoxication helped provide the basis for the implied malice finding, the *Whitfield* court held that this same intoxication could also negate the defendant's implied malice.[101]

The *Whitfield* decision revolved around the issue of whether implied malice murder was a specific intent crime.[102] The *Whitfield* court took two approaches to justify its finding that this was a specific intent crime. First, the court found that the legislative history of Penal Code section 22 supported the notion of allowing voluntary intoxication to negate implied malice.[103] Second, it found that designating implied malice murder a specific intent crime conformed to the policy behind distinguishing between specific and general intent crimes.[104] This distinction was meant to deal with intoxicated offenders by mitigating liability for certain crimes.[105] As voluntary intoxication could only reduce implied malice murder to involuntary manslaughter, the *Whitfield* court found it appropriate to designate implied malice as a form of specific intent.[106]

While the *Whitfield* court engaged in very suspect statutory interpretation in reaching its conclusion,[107] there is no need to engage in any extensive analysis of *Whitfield*'s reasoning. Since this Article addresses

---

99. In People v. Watson, the California Supreme Court held that a homicide committed by a drunk driver could support a second-degree murder conviction under an implied malice theory. People v. Watson, 637 P.2d 279, 285-86 (Cal. 1981).

100. *Whitfield*, 868 P.2d at 273.

101. *Id.* at 280.

102. *Id.* at 275. "Evidence 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." CAL. PENAL CODE § 22(b) (West 1988).

103. *Whitfield*, 868 P.2d at 275-77.

104. *Id.* at 277-78.

105. *Id.* at 279.

106. *Id.*

107. *Id.* at 275-77. The *Whitfield* dissent found several serious flaws in the majority's analysis. *Id.* at 282-96 (Mosk, J., dissenting). The dissent noted that the majority paid insufficient attention to the language of Penal Code § 22. *Id.* at 285-86 (Mosk, J., dissenting). The dissent further noted that the majority's reading of the legislative history of section 22 was incorrect and that historically, voluntary intoxication did not rebut implied malice murder in California or the rest of the country. *Id.* at 286 n.1, 290 (Mosk, J., dissenting). According to the dissent, the policy behind the specific intent rule is best served by classifying voluntary intoxication as a general intent crime. *Id.* at 294-95.

legislative reform of the law of homicide, *Whitfield* must stand or fall as a matter of public policy. As a policy matter, *Whitfield* is fundamentally unsound and deserves to be overruled by legislation.

The decisive problem with *Whitfield* is that it contradicts the specific intent doctrine it purports to serve. Because the specific and general intent dichotomy was designed to deal with the problem of the intoxicated offender,[108] it follows that voluntary intoxication should not be allowed to negate the mental element of those crimes substantially more likely to be committed if the actor is intoxicated.[109]

It is for this reason that the Model Penal Code does not allow voluntary intoxication to negate its version of recklessness.[110] Voluntary intoxication cannot negate this mental element, which is very close to most common definitions of implied malice,[111] because drunkenness makes recklessness more likely.[112] This reasoning applies equally well to implied malice murder.[113]

---

108. *See* People v. Hood, 462 P.2d 370, 377 (Cal. 1969).

109. *See id.*

110. MODEL PENAL CODE § 2.02(2)(c) (1985).

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

Id.

111. *Cf. Whitfield*, 868 P.2d at 295 (Mosk, J., dissenting).

112. MODEL PENAL CODE, § 2.08 cmt. 1 (1985).

> [T]here 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 it is not unfair 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 judgment is conduct that plainly has no affirmative social value to counterbalance the potential danger. *The actor's moral culpability lies in engaging in such conduct.*

Id. (emphasis added).

113. *See* Cirincione v. State, 540 A.2d 1151, 1154 n.1 (Md. App. 1988).

> The real difficulty concerns the intoxicated person who conducts himself in a very risky way but, because of his drunkenness, fails to realize it. If his conduct causes death, should he escape murder liability? The person who unconsciously creates risk because he is voluntarily drunk is perhaps morally

The facts of *Whitfield* provide the best evidence of that decision's absurdity. As the *Whitfield* court recognized, sufficiently aggravated drunk driving can increase a defendant's liability for a vehicular homicide to second-degree murder.[114] After *Whitfield*, however, sufficiently severe intoxication can simultaneously *mitigate* liability to involuntary or vehicular manslaughter by negating implied malice.[115] Allowing the same fact to both aggravate and mitigate liability can only confuse juries. As Justice Mosk noted, after *Whitfield*, jurors will now be confronted with the following "multiple anomalies":

> (1) a grossly intoxicated defendant may be punished less than a legally intoxicated, but not stuporous, defendant; (2) the parties will use the same evidence of intoxication to both prove and disprove culpability and the defendant will try to prove a greater degree of intoxication while the prosecution will try to prove a lesser degree, thereby doubly confusing the jury; and (3) if intoxication is successfully invoked as a defense to implied-malice murder, a drunk driver could receive a significantly higher penalty (Pen. Code, § 191.5) than someone who commits another reckless act and is convicted of only involuntary manslaughter (*id.*, §§ 192(b), 193(b)).[116]

Nothing in *Whitfield* can possibly justify further confusing California's homicide law. *Whitfield* created a needless loophole when it allowed voluntary intoxication to negate implied malice murder. Voluntary conduct that makes the existence of a mental state more likely should not be a defense to that same mental element. Any reform of implied malice murder should specifically exclude voluntary intoxication as a defense and close the *Whitfield* loophole.

Whitfield's contradictions prompted a legislative response. In 1995 the legislature passed and the governor signed SB 121, which overturned *Whitfield* by modifying Penal Code section 22.[117]

> worse than one who does so because he is sober but mentally deficient. At all events, the cases generally hold that drunkenness does not negative a depraved heart by blotting out consciousness of risk, and the Model Penal Code, which generally requires awareness of the risk for depraved-heart murder (and for recklessness manslaughter), so provides.

Id. (quoting WAYNE LAFAVE & AUSTIN SCOTT, CRIMINAL LAW 545 (1972)).

114. *See Whitfield*, 868 P.2d at 281.

115. *See id.* at 279.

116. *In re* Christian S., 872 P.2d 574, 584 (Cal. 1994) (Mosk, J., concurring).

117. After SB 121, PENAL CODE § 22 reads as follows:

> '(a) No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his or her having been in that condition. Evidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crime charged, including, buy not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act.
>
> "'(b) Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent or,

While SB 121 does overturn *Whitfield* it may not solve the problem posed by voluntary intoxication and implied malice. Dicta in *People v. Saille*[118] creates the possibility of a successful due process attack against any narrow effort to overturn *Whitfield*.[119] The author believes that SB 121 is constitutional; the notion that the Due Process Clause protects the voluntary intoxication defense is wrong.[120] Yet, the threat from *Saille*, however unreasonable, remains.[121] While SB 121 is a good effort to achieve the limited objective of overturning *Whitfield*, any comprehensive reform of California's homicide law should contemplate a more fundamental change to give second-degree murder maximum security from constitutional attack.

2. Second-Degree Felony Murder

The problem of nonstatutory crimes[122] manifests itself again in the problem of second-degree felony murder. The Penal Code classifies as first-degree murder those homicides committed in the course of "arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking," or a variety of serious sex crimes.[123] This embodies the modern approach to felony murder, which limits this crime to homicides committed in the course of certain very serious felonies.[124]

In addition to the Penal Code's felony murder, the courts have created an additional crime—second-degree felony murder.[125] Since the adoption of Penal Code in 1872, courts have inferred that homicides committed during the commission of felonies other than those listed in Penal Code section 189 were second-degree murder.[126] This crime has no statutory sanction, but nonetheless "lies embedded in our law."[127] Any re-

---

when charged with murder, whether the defendant premeditated deliberated, or harbored express malice aforethought.

"'(c) voluntary intoxication includes the voluntary injection, or taking by another means of any intoxicating liquor, drug, or other substance. (Ch. 793.)

118. 820 P.2d 588 (1991).

119. *See infra* notes 357-63 and accompanying text.

120. *See infra* note 360 and accompanying text.

121. *See infra* notes 360-63 and accompanying text.

122. *See supra* notes 75-96 and accompanying text.

123. CAL. PENAL CODE § 189 (West 1988 & Supp. 1995).

124. *See* 2 WAYNE R. LA FAVE & AUSTIN SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 7.5(b), at 208-09 (1986).

125. People v. Dillon, 668 P.2d 697, 715 n.19 (Cal. 1983).

126. *See id.*

127. People v. Phillips, 414 P.2d 353, 360 (Cal. 1966).

form of homicide law should explicitly abolish this particular crime, as it is both unnecessary and confusing.

Initially, "relatively unlimited possibilities existed, in connection with the many classes of statutory felonies, for application of the felony-murder doctrine to find second degree murder."[128] These usually involved aggravated batteries but were extended to many other felonies.[129]

Over the last thirty years, the California Supreme Court substantially reduced the scope of second degree felony murder, limiting it to those felonies which, when viewed in the abstract, are inherently dangerous to human life.[130] A few felonies have satisfied this stringent standard.[131] Most felonies, however, are not inherently dangerous under the *Phillips* test.[132]

For a felony to be inherently dangerous to human life, there must be "a high probability that it will result in death."[133] By borrowing the dangerousness standard of *Watson*, the California Supreme Court has effectively transformed second-degree felony murder into a form of implied malice murder.[134] The only difference is that implied malice requires the defendant to also subjectively appreciate the danger of his conduct.[135] The California Supreme Court thus has rendered second degree felony murder unnecessary.[136] Since the underlying felony must be inherently dangerous in the abstract, any act constituting a felony will, in practice,

---

128. 1 BERNARD E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW § 493, at 557 (2d ed. 1988).

129. *See, e.g.*, People v. Balkwell, 76 P. 1017, 1018 (Cal. 1904) (involving death from illegal abortion); People v. Bauman, 103 P.2d 1020, 1022 (Cal. Ct. App. 1940) (involving larceny).

130. *See Phillips*, 414 P.2d at 360.

131. *See, e.g.*, People v. Nichols, 474 P.2d 673, 681 (Cal. 1970), *cert. denied*, 402 U.S. 910 (1971) (involving willful and malicious burning of a motor vehicle); People v. Johnson, 18 Cal. Rptr. 2d 650, 653-54 (Cal. Ct. App. 1993) (involving willful or wanton disregard for safety of persons or property while eluding a peace officer); People v. Morse, 3 Cal. Rptr. 2d 343, 355-56 (Cal. Ct. App. 1992) (involving reckless or malicious possession of a destructive device); Brooks v. Superior Court, 48 Cal. Rptr. 762, 764-65 (Cal. Ct. App. 1966) (interfering with a law officer by threat or violence).

132. *See, e.g.*, People v. Burroughs, 678 P.2d 894, 895 (Cal. 1984) (involving unlicensed practice of medicine); People v. Henderson, 560 P.2d 1180, 1184-85 (Cal. 1977) (involving false imprisonment); People v. Lopez, 489 P.2d 1372, 1376 (Cal. 1971) (involving escape); People v. Satchell, 489 P.2d 1361, 1370 (Cal. 1971) (involving possession of a firearm by an ex-felon); *Phillips*, 414 P.2d at 361 (involving grand theft); People v. Williams, 406 P.2d 647, 650 (Cal. 1965) (involving conspiracy to possess methedrine).

133. People v. Watson, 637 P.2d 279, 285 (Cal. 1981).

134. *See id.*

135. *Id.* at 283.

136. *See id.*

be inherently dangerous.[137] Furthermore, the overwhelming majority of those who commit such felonies will subjectively appreciate the danger of their conduct.[138]

Thus, second-degree felony murders would still be murders without the felony murder rule. It is a potentially confusing redundancy that California's homicide law would be better off without.

Nor should second degree felony murder be saved through expansion. Expanding it to include felonies committed in a highly dangerous manner would still leave the crime too similar to implied malice murder. The only other alternative, expanding it to include all felonies regardless of the danger they posed, would risk the gross miscarriages of justice associated with the worst applications of the felony murder rule.[139] Any reform of the law of homicide should eliminate this part of the felony murder doctrine.[140]

For the same reasons, California should abolish the crime known as "misdemeanor manslaughter." Currently, involuntary manslaughter is a homicide committed either through criminal negligence or "in the commission of an unlawful act, not amounting to felony."[141] To ameliorate this harsh doctrine, the courts require that "the act in question must be dangerous to human life or safety" and committed with criminal intent.[142] As in second-degree felony murder, this limitation has made involuntary manslaughter redundant.[143] The mens rea for involuntary manslaughter is criminal negligence.[144] This is "'such a departure from what would be the conduct of an ordinarily prudent or careful man under the same circumstances as to be incompatible with a proper regard for human life, or, in other words, a disregard of human life or an indifference to consequences.'"[145] It is difficult to see how committing an inherently dangerous act with criminal intent will not satisfy criminal negligence.

---

137. *See id.* at 285.

138. 2 LA FAVE & SCOTT, *supra* note 124, § 7.4 at 205 (finding little practical difference between subjective and objective standards for knowledge of danger of conduct, as most will know that their conduct is dangerous).

139. *See, e.g.*, State v. Robinett, 279 S.W. 696 (Mo. 1926) (convicting the defendant under felony murder for the illegal manufacture of liquor).

140. There are, however, good reasons for maintaining first-degree felony murder. *See infra* notes 271-313 and accompanying text.

141. CAL. PENAL CODE § 192(b) (West 1988 & Supp. 1995).

142. People v. Stuart, 302 P.2d 5, 9 (Cal. 1956).

143. *See supra* notes 130-38 and accompanying text.

144. People v. Penny, 285 P.2d 926, 937 (Cal. 1955).

145. *Id.* (quoting 26 AM. JUR. *Homicide* § 210 (1940)).

Like second-degree felony murder, it is a redundancy that California should eliminate.

3. First-Degree Murder

Unlike other aspects of its homicide law, California's definition of first-degree murder does not contain any structural flaws. The first-degree murder definition is not as archaic as the use of malice, nor as inconsistent as second degree felony murder. Nonetheless, first-degree murder still needs work.

First-degree murder consists of three different categories: felony murder, premeditated killing, and murder perpetrated by special means such as torture, poison, armor-piercing bullets or an explosive or destructive device.[146] The problem lies with the latter two definitions, which try to separate the most cold-blooded killings for heightened punishment. This creates two problems. First, the requisite cold-bloodedness is very difficult to define, and second, these types of murders do not necessarily warrant more punishment.

Defining murder by torture, poisoning, or other specific means as first-degree is drawn from the common-law tradition of identifying particular means of committing homicide as particularly abhorrent and punishing them with even greater severity.[147] Thus in 1530, after someone poisoned a number of poor people who were the guests of the Bishop of Rochester, the government elevated murder by poison to high treason, entitling the government to boil the offender to death.[148] Similarly, the common law made killing by stabbing a non-clergiable offense, even when committed without malice.[149] The common law also regarded cer-

---

146. CAL. PENAL CODE § 189 (West 1988 & Supp. 1995).

> All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of murders are of the second degree.

Id.

147. *See infra* notes 148-50 and accompanying text.

148. 3 STEPHEN, *supra* note 7, at 44. The government removed this special punishment soon after by the statute that excluded murders with "malice prepensed" from the benefit of clergy. *Id.* at 44-45.

149. 4 BLACKSTONE, *supra* note 13, at 193. Blackstone states that this grew out of the "frequent quarrels and stabbings with short daggers, between the Scotch [sic] and

tain ways of killing as bearing particularly strong evidence of malice, such as when the killer lay in wait for his victim.[150]

The specific means portion of California Penal Code section 189 is a continuation of this practice.[151] It treats both a particularly unpleasant or dangerous way of killing such as murder by torture, explosive device or armor-piercing bullets, and manners of killing that strongly show premeditation, such as lying in wait or poison, as a type of murder that warrants extra punishment.[152]

The problem with these distinctions is that most of them serve little purpose. As premeditated killings are already first-degree murder, those crimes specifying cold-blooded ways of killing are redundant. Furthermore, there is usually little reason to punish one method of killing more severely than another. "For, in point of solid and substantial justice, it cannot be said that the mode of killing, whether by stabbing, strangling or shooting, can either extenuate or enhance guilt . . . ."[153] While the defendant's mental state will have a great deal to do with his moral responsibility, the manner in which the victim is killed is generally immaterial; the victim is just as dead regardless of the manner of the killing.

The one exception is the crime that demonstrates a mental state other than premeditation: murder by torture. In addition to the malice required by all the other specific act forms of first degree murder,[154] murder by torture also requires an intent to cause pain and suffering.[155] This desire to have the victim suffer certainly makes the defendant more culpable and thus deserving of greater punishment.[156] While there is ample reason to punish this form of murder more severely, there is little need to enhance punishment for the other ways of committing murder.[157]

---

the English at the accession of James the first." *Id.*

150. *Id.* at 199.

151. *See supra* notes 147-50 and accompanying text.

152. CAL. PENAL CODE § 189 (West 1988 & Supp. 1995).

153. 4 BLACKSTONE, *supra* note 13, at 193.

154. *See* People v. Mattison, 481 P.2d 193, 196 (Cal. 1971).

155. People v. Proctor, 842 P.2d 1100, 1115-16 (Cal. 1992).

156. *See* Walton v. Arizona, 497 U.S. 639, 654-55 (1990) (inflicting mental anguish or physical abuse before the victim's death is a constitutionally sufficient justification for imposing the death penalty).

157. It is also worth noting that since 1990, "torture" has also been a separate crime. *See* CAL. PENAL CODE § 206 (West Supp. 1995). This makes killing during torture a prime candidate for inclusion in the felony murder statute. *See infra* notes 331-33 and accompanying text.

Besides the manner-of-killing distinction, the other problem with first-degree murder is premeditation. While Penal Code section 189 states that the killing must be "willful, deliberate, and premeditated,"[158] the courts have focused on premeditation and deliberation.[159] The focus of these efforts has been to devise a way to meaningfully differentiate between premeditation and simple intent to kill without excluding the truly cold-blooded murders from extra sanction.[160] The courts' lack of meaningful success in this task, however, raises serious doubts about the propriety of retaining premeditation as a means of measuring culpability.[161]

At first, premeditation was expanded to the point where simple specific intent to kill satisfied the premeditation and deliberation requirement.[162] Understandably, this led to widespread concern about maintaining a distinction between first-and second-degree murder.[163] Eventually, the California Supreme Court changed course, finding that premeditation required "substantially more reflection than may be involved in the mere formation of a specific intent to kill."[164] "Reflection" provided a temporal requirement. While there may be "'no appreciable space of time between the intention to kill and the act of killing,'"[165] it must first be *preceded* by some reflection.[166]

While there is a temporal component to premeditation, it is inexact. "Neither the statute nor the court undertakes to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent which is truly deliberate and premeditated."[167] Premeditation must be examined on an individual basis and

---

158. CAL. PENAL CODE § 189 (West 1988 & Supp. 1995).

159. *Cf.* People v. Anderson, 447 P.2d 942, 949 (Cal. 1968) (establishing a three-part test to determine if there was sufficient circumstantial evidence of premeditation and deliberation.).

160. *See id.*

161. *Id.* at 948 (stating that classifying murder as first- or second- degree "would be meaningless if 'deliberation' and 'premeditation' were construed as requiring no more reflection than may be involved in the mere formation of a specific intent to kill"); People v. Valentine, 169 P.2d 1, 8 (1946) (stating that it is erroneous to differentiate manslaughter and murder "on the basis of deliberate intent"); People v. Watts, 247 P. 884, 893 (Cal. 1926) (inferring premeditation from intent to kill); People v. Fowler, 174 P. 892, 893 (Cal. 1918) (same); *In re* Thomas C., 228 Cal. Rptr. 430, 436 (Cal. Ct. App. 1986) (noting that deliberate intent is only an essential element of *first* degree murder); *supra* notes 158-60 and accompanying text.

162. *See, e.g., Watts*, 247 P. at 893; *Fowler*, 174 P. at 893.

163. *See* People v. Wolff, 394 P.2d 959, 974 (Cal. 1964); People v. Holt, 153 P.2d 21, 37 (Cal. 1944); James A. Pike, *What is Second Degree Murder in California*, 9 S. CAL. L. REV. 112, 120 (1936).

164. People v. Thomas, 156 P.2d 7, 18 (Cal. 1945).

165. *Id.* (quoting People v. Sanchez, 24 Cal. 17, 30 (1864)).

166. *Id.*

167. *Id.*

quality of reflection is elevated over the quantity of reflection.[168] "The time would vary with different individuals and under differing circumstances. The true test is not the duration of time as much as it is the extent of the reflection."[169]

Unfortunately, the courts have been unable to get more specific than this. Outside of circumstantial means of proving premeditation, it is extremely difficult to set guidelines for how much reflection is enough to demonstrate premeditation because neither courts nor jurors can read a defendant's mind. In *People v. Anderson*[170] the California Supreme Court attempted to construct a model for examining circumstantial evidence of premeditation.[171] It found that three types of circumstantial evidence support premeditation:

> (1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing—what may be characterized as "planning" activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a "motive" to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of "a pre-existing reflection" and "careful thought and weighing of considerations" rather than "mere unconsidered or rash impulse hastily executed" (People v. Thomas, *supra*, 25 Cal.2d 880, at pp. 898, 900, 901, 156 P.2d 7, at p. 14); (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a "preconceived design" to take his victim's life in a particular way for a "reason" which the jury can reasonably infer from facts of type (1) or (2).[172]

The complexity of this test underscores the difficulty of ascertaining premeditation. *Anderson* involved the murder of a ten-year-old girl by her mother's live-in boyfriend.[173] The killing was brutal; the girl was stabbed more than sixty times by the defendant.[174] There was also evidence of a sexual motivation to the attack: the defendant had torn off the girl's dress and underpants.[175] Finally, there was evidence that the girl had fled and that the defendant pursued her during the attack.[176]

---

168. *See id.*
169. *Id.*
170. 447 P.2d 942 (Cal. 1968).
171. *Id.* at 949.
172. *Id.*
173. *Id.* at 943.
174. *Id.* at 945.
175. *Id.*
176. *Id.*

The *Anderson* Court split over the premeditation issue.[177] The four-justice majority held that none of the three forms of circumstantial evidence showing premeditation[178] was present.[179] The majority characterized the killing as "a 'random' violent, indiscriminate attack."[180] Two justices vehemently disagreed with this result, finding the sexual motive, the duration of the assault, and the pursuit through several rooms sufficient to support premeditation.[181]

That reasonable jurists can disagree so severely on the issue of premeditation shows how difficult it is to define this concept.[182] While a majority of the court found the killing to be a motiveless spasm of violence, the others found that the killing was intended to achieve sexual gratification.[183] Yet both sides made plausible cases. As the majority pointed out, it is almost impossible to infer motive from the brutality of the attack[184] and there was no evidence that the defendant had any sexual contact with the victim during the attack.[185] Yet, as the Burke dissent noted, the sexual nature of several wounds, the fact that the defendant tore off the victim's clothes and removed his own clothes before the attack strongly suggested a sexual motivation behind the assault.[186] This demonstrates how difficult it can be to determine the existence of motive, and thus premeditation, under *Anderson.*

The California Supreme Court recently backed away from *Anderson.*[187] "[T]he *Anderson* analysis was intended as a framework to assist reviewing courts in assessing whether the evidence supports an inference that the killing resulted from [premeditation and that] [i]t did not refashion the elements of first degree murder or alter the substantive law of murder in any way."[188] Thus, "[u]nreflective reliance on *Anderson* for a definition of premeditation is now inappropriate."[189]

---

177. *Id.* at 942.

178. The three forms of circumstantial evidence are conduct before the killing, motive, and the manner of killing. *See id.* at 949.

179. *Id.*

180. *Id.*

181. *Id.* at 955 (Burke, J., dissenting). The seventh justice did not reach the premeditation issue, finding enough evidence of felony murder to support first-degree murder. *Id.* at 956 (Sullivan, J., dissenting).

182. *See supra* notes 177-81 and accompanying text.

183. *Anderson*, 447 P.2d at 949.

184. *Id.* at 953.

185. *Id.* at 945.

186. *Id.* at 955 (Burke, J., dissenting).

187. *See infra* notes 188-95 and accompanying text.

188. People v. Thomas, 828 P.2d 101, 114 (Cal. 1992), *cert. denied*, 113 S. Ct. 1006 (1993).

189. *Id.*

The court expanded upon this theme in *People v. Perez*.[190] It noted that *Anderson*'s guidelines were "descriptive, not normative," and intended only to "aid reviewing courts in assessing whether" the killing was premeditated.[191] Most importantly, the *Perez* court found that:

> [i]n identifying categories of evidence bearing on premeditation and deliberation, *Anderson* did not purport to establish an exhaustive list that would exclude all other types and combinations of evidence that could support a finding of premeditation and deliberation. The *Anderson* factors, while helpful for purposes of review, are not a sine qua non to finding first degree premeditated murder, nor are they exclusive.[192]

Finally, in *People v. Pride*,[193] the state high court continued its retreat from *Anderson* when it held that the three *Anderson* factors need not "be present in some special combination or that they be accorded a particular weight."[194] *Anderson* has thus gone from a three-prong test with a clear hierarchy of preferred evidence to an informal set of guidelines that may be discarded if other evidence supporting premeditation does not fit the model.[195]

While there has been a retreat from the *Anderson* test, no well-reasoned substitute case has stepped into the void. The *Perez* court, after reviewing the evidence in the light most favorable to the judgment,[196] determined that the three *Anderson* factors—planning, motive, and means—were all present, thus supporting the premeditation finding.[197] There was a similar reliance on the three *Anderson* factors in *Thomas* and *Pride*.[198]

The problem with premeditation is not with the court, but with the concept of premeditation. The problem is that it is too difficult to ascertain when premeditation exists.

> The difficulty arises when we try to discover what is meant by the words deliberate and premeditated. A long series of decisions, beginning many years ago, has given to these words a meaning that differs to some extent from the one revealed upon the surface. To deliberate and premeditate within the meaning of the statute,

---

190. 831 P.2d 1159 (Cal. 1992).
191. *Id.* at 1163.
192. *Id.* (citation omitted).
193. 833 P.2d 643 (Cal. 1992), *cert. denied*, 113 S. Ct. 1323 (1993).
194. *Id.* at 674.
195. *See supra* notes 170-94 and accompanying text.
196. *See Perez*, 831 P.2d at 1162.
197. *Id.* at 1163.
198. *See Pride*, 833 P.2d at 674; People v. Thomas, 828 P.2d 101, 114 (Cal. 1992), *cert. denied*, 113 S. Ct. 1006 (1993).

> one does not have to plan the murder days or hours or even minutes in advance, as where one lies in wait for one's enemy or places poison in his food and drink. The law does not say that any particular length of time must intervene between the violation and the act. The human brain, we are reminded, acts at times with extraordinary celerity . . . . One may say indeed in a rough way that an intent to kill is always deliberate and premeditated within the meaning of the law unless the mind is so blinded by pain or rage as to make the act little more than an automatic or spontaneous reaction to the environment—not strictly automatic or spontaneous, for there could then be no intent, and yet a near approach thereto.[199]

Justice Cardozo was right. Given the speed at which we think, and the relatively long time it takes for us to act on our thoughts, all intentional killers have thought about killing and then decided to kill the victim before the killing occurred. If the intent to kill occurred only after the killing act took place, then there could be no intent to kill as far as the criminal law is concerned.[200]

As difficult as premeditation is for jurists, it is even more difficult for jurors.

> What we have is merely a privilege offered to the jury to find the lesser degree when the suddenness of the intent, the vehemence of the passion, seems to call irresistibly for the exercise of mercy. I have no objection to giving them this dispensing power, but it should be given to them directly and not in a mystifying cloud of words.[201]

The problem is that the question posed by premeditation—how much deliberation is enough—has no clear answer.

> If one were to ask the average person what he would consider to be a deliberate, premeditated murder, he would probably get an answer such as this: "It would be a murder in which the defendant after carefully weighing all alternatives for a long time had finally committed the fatal act." That is the kind of murder the legislators had in mind in drafting the statute. So, if this average person were asked how long a time of meditation would be needed, he would probably say, "Oh, several days; at least over-night." But, if he were pushed further, he would probably conclude that several hours, even one hour, would be enough to constitute "premeditation." And, then, it would not take long to convince him, by the use of illustrations, that all that is needed to satisfy the term is that the murderer deliberate "an appreciable period of time." Finally, in the end, he would probably admit that an "appreciable period of time" may be satisfied by a few seconds.[202]

This ephemeral distinction should not mean the difference between first- and second-degree murder.

Even if premeditation were readily definable, it is not the best way to distinguish between first- and second-degree murder. Length of delibera-

---

199. BENJAMIN CARDOZO, *What Medicine Can Do for Law, in* LAW AND LITERATURE 97-99 (1931) (footnote omitted).

200. *Cf.* CAL. PENAL CODE § 20 (West 1988). "In every crime or public offense there must exist a union, or joint operation of act and intent . . . ." *Id.*

201. CARDOZO, *supra* note 199, at 100.

202. MORELAND, *supra* note 7, at 208-09.

tion is not a consistent indicator of moral blame. "Prior reflection may reveal the uncertainties of a tortured conscience rather than exceptional depravity. The very fact of a long internal struggle may be evidence that the homicidal impulse was deeply aberrational and far more the product of extraordinary circumstances than a true reflection of the actor's normal character."[203] It is also present in some of the least blameworthy homicides—mercy killings.[204] *Anderson*, with its savage sexual mutilation of a young girl,[205] is an excellent example of a murder far worse than many premeditated killings.[206]

Premeditation is thus both confusing and unnecessary. It has needlessly complicated California's law of homicide while providing a dubious distinction between first- and second-degree murder.

California's homicide law needs substantial revision. Before deciding what changes must be made, it will first be necessary to establish the guiding principles behind any reform. Too much criminal law is made on an ad hoc basis. An intrinsically consistent reform can save California much of the doubt and inconsistency that has plagued its law of homicide.

II. STRUCTURING THE REFORM

Before embarking on any reform of California's homicide law, it is first necessary to structure the reform. Lack of planning and structure was the bane of the old criminal codes.[207] California's homicide law is a col-

---

203. MODEL PENAL CODE § 210.6 cmt. at 127 (1980).

204. *See id.*

205. *See supra* notes 173-76 and accompanying text.

206. 3 STEPHEN, *supra* note 7, at 94.

> As much cruelty, as much indifference to the life of others, a disposition at least as dangerous to society, probably even more dangerous, is shown by sudden as by premeditated murders. The following cases appear to me to set this in a clear light. [A man,] passing along the road, sees a boy sitting on a bridge over a deep river and, out of mere wanton barbarity, pushes him into it and so drowns him. A man makes advances to a girl who repels him. He deliberately but instantly cuts her throat. A man civilly asked to pay a just debt pretends to get the money, loads a rifle and blows out his creditor's brains. In none of these cases is there premeditation unless the word is used in a sense as unnatural as "aforethought" in "malice aforethought," but each represents even more diabolical cruelty and ferocity than that which is involved in murders premeditated in the natural sense of the word.

Id.

207. Herbert Wechsler, *The American Law Institute: Some Observations on Its*

lection of common-law concepts and language that has changed only incrementally and sporadically, with no consistent world view.[208] Any reform should avoid repeating these mistakes. A good way to start is to examine the purpose of criminal law.

"The object of criminal law is to deter the individual from committing acts that injure society by harming others, their property, or the public welfare, and to express society's condemnation of such acts by punishing them."[209] These two properties—preventing crime and expressing society's moral condemnation—are similar but distinct interests that must be served by any reform of the criminal law.

The need for moral sanction comes from the community's need to see certain wrongful acts punished.[210] "Inherent in the concept of moral regard as a rule for human conduct is the idea that there must be negative consequences for its violation."[211] If violations of societal norms are not identified and punished as crimes, there is an inevitable risk of more and more members becoming alienated from society. Criminal law is thus part of the glue that binds society by sanctioning society's moral values.[212]

Crime prevention, on the other hand, focuses generally on deterrence, incapacitation, and rehabilitation.[213] This theory of criminal law has been predominant for much of the last century.[214]

Model Penal Code, 42 A.B.A. J. 321, 321 (1956). "Viewing the country as a whole, our penal codes are fragmentary, old, disorganized and often accidental in their coverage, their growth largely fortuitous in origin, their form a combination of enactment and of common law that only history explains." *Id.*

208. *See supra* notes 7-62 and accompanying text.

209. People v. Roberts, 826 P.2d 274, 298 (Cal. 1992), *cert. denied*, 113 S. Ct. 436 (1992).

210. *See* Samuel H. Pillsbury, *Evil and the Law of Murder*, 24 DAVIS L. REV. 437, 442-43 (1990).

211. *Id.*

212. OLIVER W. HOLMES, *The Path of the Law*, *in* COLLECTED LEGAL PAPERS 167, 170 (1920). "The law is the witness and external deposit of our moral life." *Id.*

> A final justification of a penalty structure which takes account of resulting harm can be based on the "condemnatory" theory of punishment. This theory sees punishment as a symbolic statement that the conduct on which the punishment is based is strongly in conflict with societal norms. An important practical function of punishment, according to this view, is defining and preserving society's value system.

David J. Karp, Note, *Causation in the Model Penal Code*, 78 COLUM. L. REV. 1249, 1258-1259 (1978) (footnote omitted).

213. *See* 1 LA FAVE & SCOTT, *supra* note 124, § 1.5(a)(2)-(4) at 32-34.

214. *See, e.g.*, HOLMES, *supra* note 7, at 49; Wechsler, *supra* note 207, at 393 (dominant purpose of the law of homicide is protecting life); MODEL PENAL CODE § 1.02(1)(a), (2)(a)-(b) (1980).

Unfortunately, crime prevention is much easier to advocate than accomplish. Deterrence is very difficult to measure,[215] making the deterrent effect of any criminal measure debatable.[216] Similar difficulties also plague the concept of rehabilitation as a rationale for punishment.[217]

Any reform must recognize and reconcile these goals. No goal can be more worthy than reducing homicides, and reforms of homicide law that can prevent homicides through deterrence, incapacitation, or rehabilitation should be encouraged. Yet society's sense of right and wrong should be heeded. Criminal law that varies significantly from popular notions of justice ultimately undermines respect for the law.[218]

Treating conduct too lightly is particularly corrosive to public respect for law and order. The diminished capacity experience[219] is an excellent example of what happens when legal innovations designed to help defendants stray too far from common notions of right and wrong. In 1978 Dan White, a former San Francisco supervisor, successfully used the diminished capacity defense while on trial for the killings of Mayor George Moscone and Supervisor Harvey Milk.[220] In spite of overwhelming evidence of premeditation,[221] the jury accepted his diminished capacity defense and convicted him of only voluntary manslaughter.[222] In addition to causing a riot in San Francisco, this verdict also crystallized

---

215. *See generally* Peter Passell, *The Deterrent Effect of the Death Penalty: A Statistical Test, in* CAPITAL PUNISHMENT IN THE UNITED STATES 396 (Hugo Bedau & Chester M. Pierce eds., 1976) (analyzing statistics collected by the Justice Department). "It cannot be proven that executions do not serve as a deterrent to murder. Proof is simply beyond the capabilities of empirical social science." *Id.* at 410.

216. *See* 1 LAFAVE & SCOTT, *supra* note 124, § 1.5(a)(1) at 31 n.12.

217. *See id.* at 33; HERBERT L. PACKER, *The Practical Limits of Deterrence, in* CONTEMPORARY PUNISHMENT: VIEWS, EXPLANATIONS AND JUSTIFICATIONS 102, 105 (Rudolph J. Gerber & Patrick D. McAnany eds., 1972).

218. *See* Woodson v. North Carolina, 428 U.S. 280, 293 (1976); MAITLAND & MONTAGUE, *supra* note 55, at 72-73. Criminal law that classifies and punishes conduct too harshly leads to its subversion. Thus, jury nullification was common in the United States when the death penalty was the mandatory punishment for all murders. *See Woodson*, 428 U.S. 280, 293 (1976). Similarly, the vast application of capital punishment in common-law England led to repeated faking of the reading test so that even illiterates could claim the benefit of clergy by "reading" a previously memorized and well-known part of the Bible and thus escape capital punishment. *See* MAITLAND & MONTAGUE, *supra* note 55, at 72-73.

219. *See supra* note 48.

220. *See* People v. White, 172 Cal. Rptr. 612, 614-15 (Cal. Ct. App. 1981).

221. *Id.* at 613-14.

222. *Id.* at 615.

public opposition to the diminished capacity defense, leading to its legislative abolition.[223]

In addition to serving these broad policy goals, any reform should be well constructed. Along with advancing several necessary but potentially conflicting goals, such as deterrence and punishment, statutes should be clear, comprehensive, practical, and constitutional. Any reform worth the effort must balance the first three objectives while assuring the scheme's constitutionality.

Lack of clarity is the single greatest failing of statutory law. The foremost problem with unclear statutes is that they place too much power in the courts. Courts are never shy to state that they do not second-guess the wisdom of the legislation they interpret.[224] Ambiguous statutes, however, make judicial policymaking much easier.[225] As the California Supreme Court's forays into diminished capacity and imperfect self-defense demonstrate, courts will fill any policy void left by ambiguous statutes. In order to wrest control of policy from the unelected branch, statutes must be clear.

Furthermore, a clearly written statute is easier on everyone who has to deal with the law.[226] Overly complex, poorly written statutes are prone to misinterpretation and frustrate those who must deal with them.[227]

At the same time, penal statutes should be comprehensive. Statutes should attempt to prohibit as much similarly situated conduct as is possible. For example, it would make no sense to only prohibit kidnapping committed on a Thursday. The goal of comprehensiveness is served by expanding the prohibition to the rest of the week.

There is a limit, however, to the sweep of any penal sanction. Given the enormous variety of wrongful conduct, it is inevitable that some misconduct will not be covered by the criminal law.[228] Any attempt to be truly comprehensive runs the risk of bogging down the criminal law

---

223. *See* Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1, 25-26 n.88 (1984).

224. *See, e.g.*, F.C.C. v. Beach Communications, 113 S. Ct. 2096, 2101 (1993); Wells Fargo Bank v. Superior Court, 811 P.2d 1025, 1035 (Cal. 1991).

225. *See* MORELAND, *supra* note 7, at 211 (recommending definitions in statutes to "prevent the courts from defeating the purpose of the legislature by watering down the meaning of . . . words").

226. *See, e.g.*, People v. Holt, 277 Cal. Rptr. 323, 324 (Cal. Ct. App. 1991).

227. *Id.*

228. *See* 1 LAFAVE & SCOTT, *supra* note 124, § 1.2(e), at 14, n.18 (citing Peebles v. State, 28 S.E. 920, 920 (1897)).

in needless detail.[229] For the sake of clarity, some comprehensiveness must be sacrificed.

Above all, any reform must be practical. This means that it must have a decent possibility of being enacted. A reform that never passes legislative muster is a waste of time and energy. Most importantly, this means that any reform should conform to popular notions of justice.[230] By both nature and design, legislatures are very sensitive to public opinion.[231] Any reform contrary to public opinion is unlikely to survive legislative scrutiny.[232] Furthermore, since the reform proposed in this Article intends to modify or repeal provisions that have been enacted by initiative, it will be necessary to place them on the ballot for ratification.[233]

Finally, any reform must be constitutional. This is more than civics-book obedience to the state and federal constitutions. It means that any reform must be written with an eye towards current and future interpretations of the Constitution. The law of homicide is simply too important to be a test case for constitutional theory. The threat of invalidation typically will far outweigh the benefit of any innovations that stretch the borders of the constitutionally permissible.

III. THE REFORMS

This section applies the principles of part II to the faults identified in Part I. As some aspects of California's homicide law should be left unchanged, this section will mention them and discuss why they should be retained. The final mixture of reform and retention, if adopted, would provide California with a homicide law more consistent and coherent than currently in place.

A. Classification

The structure of the criminal law is provided by the classification of crimes. Creating different crimes for different forms of criminal behavior

229. *See* Connally v. General Constr. Co., 269 U.S. 385, 391 (1926). A statute that goes to the other extreme, one that attempts to cover all possible misconduct through broad and general statutory language, runs the risk of being unconstitutionally vague. *Id.*

230. *See* THE FEDERALIST No. 52, at 327 (James Madison) (Clinton Rossiter ed., 1961).

231. *See id.*

232. *See id.*

233. CAL. CONST. art. II, § 10(c).

is central to any notion of having the punishment fit the crime. While all criminal homicides were once treated the same,[234] common-law jurisdictions abandoned this practice more than two hundred years ago.[235] Modern criminal law classifies criminal homicides in a wide array of offenses.[236] Because there are many different types of criminal homicides, each with its own level of culpability, California should continue to grade homicides.

1. Degree

American jurisdictions have been dividing murder into degrees since the landmark Pennsylvania reforms of 1794.[237] Murder was originally divided into degrees to keep less culpable murderers from being subject to capital punishment.[238] Although California does not use first- and second-degree murder as the sole means of distinguishing capital from noncapital homicides,[239] there is still good reason to retain the distinction between first- and second-degree murder.

The notion of dispensing with degrees of murder is most forcefully asserted in the Model Penal Code. The Code focused on the Pennsylvania model, which used premeditation and deliberation to distinguish first- from second-degree murders.[240] It found premeditation too difficult to determine[241] and an insufficient indicator of culpability to distinguish between capital punishment and a prison sentence.[242] Nor was the Model Penal Code swayed by those states that distinguished types of noncapital murders.[243] It found no good reason for distinguishing between purposeful, knowing, and reckless homicides.[244]

---

234. *See* 3 STEPHEN, *supra* note 7, at 4.2(a).

235. *See generally* MORELAND, *supra* note 7 (discussing the development of the law of homicide).

236. *See* MODEL PENAL CODE § 210.2 cmt. 2 (1980).

237. *See id.*

238. *See id.* § 210.6 cmt. 4(b).

239. *See* CAL. PENAL CODE § 190.4(a) (West 1988). California distinguishes between capital and noncapital homicides through a special circumstances finding that is a necessary precondition to the imposition of capital punishment. *Id.* Degree is important, however, because special circumstances can only be found if defendant is convicted of first degree murder. *Id.* If the jury finds a special circumstance, then a separate penalty phase is held where the jury determines whether the sentence is the death penalty or life without the possibility of parole. *See id.* § 190.1.

240. *See* MODEL PENAL CODE § 210.6 cmt. 4(b) (1980).

241. *Id.*

242. *Id.*

243. *See id.* § 210.2 cmt. 3.

244. *Id.*

The Model Penal Code does not justify this decision with extensive analysis. It simply asserts that its three mental states of murder should be treated the same.[245] The closest it comes to detailed analysis is in its statement that purposeful knowledge and recklessness have a common theme of indifference to human life.[246]

There are several good reasons not to rely on this unadorned value judgment from the drafters of the Model Penal Code. In the first place, degree plays a role in determining eligibility for the death penalty in California, where first-degree murder is a necessary precondition to the special circumstance finding that transforms a murder into a capital crime.[247] As this reform contemplates keeping capital punishment,[248] and since distinguishing between capital and noncapital murder is the original reason for dividing murder into degrees, murder should retain degrees.

Another reason for continuing the current degree structure is that there is a valid way to distinguish between types of murder.[249] Since murder can be sorted into degrees of severity, the Model Penal Code's rationale for dispensing with degrees disappears. Furthermore, it makes sense to divide murder into degrees; leaving murder as one undifferentiated crime removes too much discretion from the jury and runs the risk of leaving juries with "unpalatable" all-or-nothing decisions.[250] Retaining degrees keeps necessary flexibility in the system.

2. Manslaughter

The various forms of manslaughter should be retained. There are homicides that are less culpable than murder but still deserve punishment.

---

245. *Id.* "Capital punishment aside, however, there seems to be no basis in principle for separating purposeful from knowing homicide." *Id.* "This provision [treating reckless homicide manifesting an extreme indifference to human life the same as murder] reflects the judgment that there is a kind of reckless homicide that cannot fairly be distinguished in grading terms from homicides committed purposely or knowingly." *Id.* § 210.2 cmt. 4.

246. *Id.* § 210.2 cmt. 4.

247. *See* CAL. PENAL CODE § 190.2(a) (West Supp. 1995).

248. *See supra* note 2.

249. *See infra* notes 316-26 and accompanying text.

250. People v. Geiger, 674 P.2d 1303, 1306-07 (Cal. 1984) (stating that an instruction on lesser included offenses is required to avoid the unpalatable choice between conviction for too high a charge or acquittal even though the defendant has committed some crime).

Voluntary, involuntary, and vehicular manslaughter fit the bill quite nicely. The only possible objection is to the two forms of manslaughter involving driving: vehicular manslaughter[251] and gross vehicular manslaughter while intoxicated.[252] Like specific means of first-degree murder,[253] they single out a particular means of killing for special treatment.[254] Dead is dead, whether by gunshot, knife, or automobile, and there is no reason to target the automobile for special treatment.

Of the two, gross vehicular manslaughter while intoxicated is the easiest to justify. Drunk driving is a scourge of American life, killing tens of thousands every year.[255] The heightened penalty for this particularly frequent lethal conduct demonstrates an effort to deter people from driving while intoxicated and to thus reduce fatalities.

Vehicular manslaughter is more problematic. The "ordinary" vehicular manslaughter proscribed in Penal Code section 192 actually involves three very separate crimes.[256] Section 192(c)(1)[257] creates a parallel form of involuntary manslaughter; the only substantive difference between the two is that 192(c)(1) requires that the killing be committed while driving a vehicle.[258] There is no reason for this different treatment simply because a car was used in the killing. The problem that makes vehicles so dangerous—fatalities caused by drunk driving— is already punished more severely under Penal Code section 191.5.[259] Once drunk driving is factored out, the automobile becomes significantly less dangerous, and the reason for treating vehicular homicides differently from other criminally negligent homicides disappears.

The second form of vehicular manslaughter, codified at Penal Code section 192 subdivision (c)(2),[260] parallels the definition of involuntary

---

251. CAL. PENAL CODE § 192(c) (West 1988). There is also a separate form of vehicular manslaughter for vessels. *See* CAL. PENAL CODE § 192.5 (West Supp. 1995).

252. CAL. PENAL CODE § 191.5 (West 1988).

253. *See supra* notes 146-57 and accompanying text.

254. *See supra* notes 146-47 and accompanying text.

255. *See* Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990); Ingersoll v. Palmer, 943 P.2d 1299, 1311 (Cal. 1987).

256. *See* CAL. PENAL CODE § 192 (West 1988 & Supp. 1995).

257. "Except as provided in Section 191.5, driving a vehicle in the commission of an unlawful act, not amounting to felony, and with gross negligence; or driving a vehicle in the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence." *Id.* § 192(c)(1) (West 1988 & Supp. 1995).

258. *See id.* § 192(b). This statute defines involuntary manslaughter as a homicide committed without malice "in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. This subdivision shall not apply to acts committed in the driving of a vehicle." *Id.*

259. *See id.* § 191.5.

260. "Except as provided in paragraph (3), driving a vehicle in the commission of

manslaughter, except that it involves ordinary negligence. This stems from the special nature of vehicular homicides and the alleged reluctance of some to convict drivers who kill of involuntary manslaughter.[261] While automobiles occupy a special place in society as a potentially lethal instrument that is a necessity to many people, it is difficult to justify singling it out for this special treatment. While automobiles are dangerous when used negligently, so are guns, knives, and many other devices. Yet none of the others has been singled out for this treatment. Dead is dead, regardless of the means used.[262]

Public perceptions toward auto-related deaths is a similarly weak reason to criminalize ordinary negligence. While it may be true that jurors were once reluctant to punish vehicular homicides very seriously, there is no reason to believe this today, since public attitudes towards the most irresponsible drivers have hardened over the years.[263]

Nor should the legislature expand this crime to include all civilly negligent homicides. When ordinary civil negligence results in death, the death is truly accidental. There is no reason to punish the merely negligent driver for simple bad luck.[264] It is understandable why most jurisdictions require something more than ordinary negligence for criminal liability.[265] As there is no special reason for distinguishing vehicular homicides, the legislature should repeal Penal Code section 192 subdivision (c)(2).

The final form of vehicular manslaughter, found in Penal Code section 192(c)(3),[266] punishes deaths that result from drunk driving without

---

an unlawful act, not amounting to felony, but without gross negligence; or driving a vehicle in the commission of a lawful act which might produce death, in an unlawful manner, but without gross negligence." *Id.* § 192(c)(2).

261. *See* 1 WITKIN & EPSTEIN, *supra* note 128, § 526.

262. *See supra* note 146 and accompanying text.

263. *See* BUREAU OF JUSTICE STATISTICS, REPORT TO THE NATION ON CRIME AND JUSTICE 7 (2d ed. 1988), BUREAU OF JUSTICE STATISTICS, REPORT TO THE NATION ON CRIME AND JUSTICE: THE DATA 4 (1983) (ranking public perceptions of various crimes, with vehicular manslaughter seen as worse than robbing a victim at gunpoint and causing injuries that require hospitalization) [hereinafter THE DATA]. A 1977 survey of public perception of the seriousness of various crimes rated killing a person by recklessly driving an automobile as more serious than armed robbery of ten dollars that results in the wounding of the victim or attempting to kill someone with a gun. *Id.*

264. *Cf.* HOLMES, *supra* note 7, at 58 (criticizing punishing accidental deaths as felony murder). As a critique of California's first-degree felony murder statute, however, this argument has many shortcomings. *See infra* notes 279-90 and accompanying text.

265. *See* 1 LA FAVE & SCOTT, *supra* note 124, § 3.7.

266.

gross negligence.[267] There is no reason for this crime. Drunk driving homicides are already marked for special treatment under section 191.5.[268] Those few drunk driving homicides that do not involve gross negligence should not be treated as felonies. Ordinary civil negligence, no matter what form it takes, should not be felonious.

The forms of vehicular manslaughter found in Penal Code section 192 are outdated. They come from a time when jurors were sometimes unwilling to hold grossly negligent drivers accountable for their actions.[269] Times have changed. Public attitudes towards vehicular killings have hardened considerably, particularly where drunk driving is involved.[270] The manifestation of the new public attitude, Penal Code section 191.5, transforms the other forms of vehicular manslaughter into historical artifacts. There is no longer any reason to keep these outdated crimes.

3. Felony murder

Although felony murder is not a separate class of homicide, but simply another form of murder, it is best discussed as a classification issue because felony murder is distinct from the other types of murder. In spite of unyielding academic criticism,[271] the felony murder rule continues to flourish.[272] Although cynics attribute this retention to misinforma-

---

> Driving a vehicle in violation of section 23140, 23152 or 23153 of the Vehicle Code and in the commission of an unlawful act, not amounting to felony, but without gross negligence; or driving a vehicle in violation of section 23140, 23152, or 23153 of the Vehicle Code and in the commission of a lawful act which might produce death, in an unlawful manner, but without gross negligence.

CAL. PENAL CODE § 192(c)(3) (West 1988 & Supp. 1995).

267. *Id.*

268. *Id.* § 191.5.

269. *See supra* note 263 and accompanying text.

270. *Id.*

271. *See, e.g.*, MODEL PENAL CODE, § 210.2(1)(b) cmt.; HOLMES, *supra* note 7, at 58; 2 LA FAVE & SCOTT, *supra*, note 124, § 7.5(h); MORELAND, *supra* note 7, at 49-53; PERKINS & BOYCE, *supra* note 44, at 70, 136-37; 3 STEPHEN, *supra* note 7, at 57. *But see* David Crump & Susan W. Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL'Y 359 (1985); George P. Fletcher, *Reflections on Felony-Murder*, 12 S.W. U. L. REV. 413, 417 (1981); James J. Hippard, *The Unconstitutionality of Criminal Liability Without Fault: An Argument for a Constitutional Doctrine of Mens Rea*, 10 HOUS. L. REV. 1039, 1045 (1973); Frederick C. Moesel Jr., *A Survey of Felony Murder*, 28 TEMP. L.Q. 453, 466 (1955); Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103, 1104-1105 (1990).

272. *See* 2 LA FAVE & SCOTT, *supra* note 124, § 7.5(h); Crump & Crump, *supra* note 271, at 359-60. Indeed the persistence of the felony murder doctrine is considered the single greatest rejection of the Model Penal Code by the states. *See* Fletcher, *supra* note 271, at 413.

tion or anti-crime hysteria,[273] others wonder if the states know something that the commentators do not.[274]

The academic critics have missed much. They have overemphasized *mens rea* at the expense of the *actus reus*. They have ignored the popular perceptions of the culpability of felony murders and the need for the criminal law to validate public morality. Most importantly, the critics of the felony murder rule have focused on the relatively rare, truly accidental killing in the commission of a felony, while ignoring the reality behind most felony murders.[275]

The earliest criticisms of the felony murder rule were based on the harshness of the common law felony murder doctrine,[276] where a killing in the commission of any unlawful act was murder.[277] While liability was eventually limited to killings in the commission of felonies, the felony murder rule was still extremely harsh.[278]

California's crime of first-degree felony murder is much narrower. The felonies listed in Penal Code section 189 are the most serious felonies short of murder.[279] Thus it has not needed the narrowing doctrines that have subverted more open-ended felony murder provisions, such as California's second-degree felony murder rule. It is simply much less severe to convict a lethal rapist or arsonist of first-degree murder than it is to convict a still operator who happens to be involved in a killing.[280]

---

273. *See, e.g.*, Note, *The Felony Murder Rule: In Search of a Viable Doctrine*, 23 CATH. LAW. 133, 161 (1978).

274. *See* Crump & Crump, *supra* note 271, at 360 n.7 and authorities cited therein.

275. *See generally* MORELAND, *supra* note 7, at 42-54 (discussing the felony murder rule and recommending that it be "weeded out of the law").

276. *See* 3 STEPHEN, *supra* note 7, at 57.

277. *See* LORD EDWARD T. COKE, 3 INSTITUTES OF THE LAWS OF ENGLAND 56 (W. Clarke & Sons ed., 1817).

> If the act be unlawful it is murder. As if A, Meaning to steale a deere in the park of B, shooteth at the deer, and by the glance of the arrow killeth a boy that is hidden in a bush: this is murder, for that the act was unlawfull, although A had no intent to hurt the boy, nor knew not of him. But if B, the owner of the park had shot at his own deer, and without any ill intent had killed the boy by the glance of his arrow, this had been homicide by misadventure, and no felony.

Id. (declension or inconsistent spelling in original).

278. *See* 3 STEPHEN, *supra* note 7, at 75-76.

279. *See supra* note 146 and accompanying text.

280. *Compare* People v. Clark, 789 P.2d 127, 134-35 (Cal.), *cert. denied*, 498 U.S. 973 (1990) (involving arson) *and* People v. McDowell, 763 P.2d 1269, 1271-72 (Cal. 1988), *cert. denied*, 490 U.S. 1059 (1989) (involving rape) *with* State v. Robinett, 279

Therefore, much of the injustice that the critics complain about is absent from California's first-degree felony murder law.

The modern critics of the felony murder rule are concerned that it punishes killings as murder without examining the underlying mens rea.[281] According to the critics, this leads to the anomalous and unjust result of some felons being convicted of murder simply because an "accidental" death occurred during the felony.[282] "If the object of the [felony murder] rule is to prevent [accidental killings], it should make accidental killing with firearms murder, not accidental killing in the effort to steal; while, if its object is to prevent stealing, it would do better to hang one thief in every thousand by lot."[283] While typically pithy, Justice Holmes's statement is also a near-perfect example of all that is wrong with the critiques of felony murder. It places too much emphasis on *mens rea* and not enough on the *actus reus*. Justice Holmes focuses exclusively on the deterrent rationale of the criminal law, forgetting the many other important interests criminal law serves.[284] Furthermore, the focus on accidental killings misstates the reality of the felony murder rule. When felony murder is limited to serious felonies, the risk of a truly accidental killer being convicted of murder is low. The accidents that concerned Justice Holmes are very rare exceptions that do not justify dispensing with an appropriately narrow felony murder rule.

The critics of the felony murder rule are also wrong about the importance of actus reus in setting criminal liability. Although the robber who kills may not have meant to kill, the result of his robbery, killing another person, is far more harmful to society than any ordinary robbery. The felony murder rule recognizes the greater harm caused by the killing and accordingly increases culpability. This is fully consistent with basic principles of criminal law.[285]

The closest analogy is found in the law of attempts. It is the near-universal rule in American jurisdictions that an attempt to commit a crime is punished less severely than the underlying crime in spite of the fact that both crimes have the same mental element.[286] "Luck" will therefore have

---

S.W. 696 (Mo. 1926) (involving illegal manufacture of liquor).

281. *See, e.g.*, MODEL PENAL CODE § 210.2 cmt. (1980); 2 LA FAVE & SCOTT, *supra* note 124, § 7.5(h); People v. Washington, 402 P.2d 130, 134 (Cal. 1965).

282. *See* HOLMES, *supra* note 7, at 58; 2 LA FAVE & SCOTT, *supra* note 124, § 7.5(h), at 232-33.

283. HOLMES, *supra* note 7, at 58; *accord* 2 LA FAVE & SCOTT, *supra* note 124, § 7.5(h), at 232-33.

284. *See* HOLMES, *supra* note 7, at 58.

285. *See* 2 LA FAVE & SCOTT, *supra* note 124, § 1.2(b),(e), at 10, 14 (discussing the purpose of criminal law); PERKINS & BOYCE, *supra* note 44, at 5-6 (same).

286. *See* CAL. PENAL CODE § 664 (West 1988) (stating attempt is punishable with half the punishment for the completed crime); 2 LA FAVE & SCOTT, *supra* note 124,

an effect on the criminal's culpability. A hired assassin who shoots at someone in order to fulfill the "contract" is subject to life imprisonment without the possibility of parole or the death penalty if he[287] is a good shot;[288] if his aim is bad and he fails to kill the victim, the punishment is only life with possibility of parole in seven years.[289] There is little difference between this and felony murder. Under both doctrines, people with the same mens rea are given different punishments depending upon the consequences of their actions. The only difference is that under the law of attempt the "unlucky" criminal receives a windfall because he fails to complete his crime, while under felony murder the "unlucky" felon who kills receives more punishment than expected. If not identical, the two doctrines are at least very closely related.[290]

Punishing an attempt less severely than the completed crime is best justified as a matter of retribution; the person who does less harm to society by failing to complete the crime warrants less punishment than one who completes the crime and increases society's loss.[291] Retributive

---

§ 6.3; Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 681 (1994). *But see* MODEL PENAL CODE § 5.05(1) (1985) (punishing attempts as seriously as the completed crime except for the most serious felonies).

287. Males commit most criminal homicides. *See* SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1993, *supra* note 2, at 430 (providing statistics of arrests by gender). With this in mind, but mainly for convenience, the masculine form will be used for third person singular references to perpetrators.

288. *See* CAL. PENAL CODE § 190.2(a)(1) (West Supp. 1995).

289. *See id.* § 664(1) (West 1988) (punishing attempted premeditated murder by life with possibility of parole); *id.* § 3046 (West Supp. 1995) (providing seven-year minimum for life with possibility of parole sentence).

290. *See* Crump & Crump, *supra* note 271, at 366-67; Kadish, *supra* note 286, at 695-696.

291. *See* Kadish, *supra* note 286, at 697-702. The thesis of Professor Kadish's article is that no rational reason exists for reducing punishment "for intentional wrongdoers . . . if by chance the harm they intended or risked does not occur." *Id.* at 679. While dismissing most justifications for this doctrine as not serving their intended purposes, Professor Kadish does recognize that some retributive principles are advanced by the harm doctrine. *See id.* at 697-98. He does not find retribution to be a rational support for the harm doctrine, however, because he finds that punishing a wrongdoer simply for committing the wrong is "a principle unworthy of our allegiance." *Id.* at 698. This does not, however, mean abandoning the principles of retribution within the criminal law. As Professor Kadish recognizes, retribution has a deep and profound influence in our culture. *See* ERNEST VAN DEN HAAG, PUNISHING CRIMINALS: CONCERNING A VERY OLD AND PAINFUL QUESTION 113-14 (1975). Abandoning retribution would be both impractical and profoundly disruptive. Kadish, *supra* note 286, at 699-702. Thus even Professor Kadish was unwilling to make revolutionary changes

principles provide similar justification for the felony murder rule.

The best available evidence shows that society considers felony murder to be an extremely serious crime.[292] Its near universal adoption provides at least circumstantial evidence of the importance we place on punishing felony murderers.[293] Also, "[t]here is impressive empirical evidence that this classification [felony murder] does indeed reflect widely shared social attitudes."[294] In 1977, the Justice Department conducted a survey in which respondents were asked to grade the severity of 204 hypothetical events ranging from a terrorist bombing resulting in numerous deaths to truancy by a child under sixteen.[295] "Respondents assigned widely differing scores to various differences in result, without reference to mens rea."[296] Situations closely resembling rape and robbery felony murder received the second- and third-highest severity scores in the survey.[297] Finally, jury studies also support the notion that the public agrees with the results in felony murder cases.[298]

Public sentiment this strong neither can nor should be ignored. Criminal law, by providing sanction for public morality, is part of the glue that holds society together.[299] For this reason any reform of the criminal law must take heed of society's strong moral interest in retributive justice,[300] and retain felony murder.

Felony murder also serves more than retribution. The doctrine has a potentially strong deterrent effect.[301] Most attacks on the deterrence of the felony murder rule ridicule its purported attempt to deter accidental killings.[302] Yet, very few fel ny-murder killings are truly accidental. As one of the most ardent critics of the felony murder rule admits, "[T]he

---

in the criminal law that run counter to deeply held retributive principles. *See id.* at 701.

292. *See* THE DATA, *supra* note 263, at 4.

293. *See* Crump & Crump, *supra* note 271, at 362.

294. *Id.* at 363.

295. *See* THE DATA, *supra* note 263, at 4-5.

296. Crump & Crump, *supra* note 271, at 364.

297. THE DATA, *supra* note 263, at 4. The rape homicide is described as follows: "A man forcibly rapes a woman. As a result of physical injuries she dies." *Id.* The robbery killing is described as "[r]obbing a victim at gunpoint. The victim struggles and is shot to death." *Id.* The only incident rated higher is "[p]lanting a bomb in a public building. The bomb explodes and twenty people are killed." *Id.*

298. *See* Crump & Crump, *supra* note 271, at 364-65 (citing H. KALVEN & H. ZEISEL, THE AMERICAN JURY 443 n.18 (1966)).

299. *See supra* note 212 and accompanying text.

300. *See supra* notes 209-11 and accompanying text.

301. *See supra* note 213 and accompanying text. The deterrent effect of felony murder is qualified with "potentially" because of the extreme difficulty of measuring deterrence in the criminal law. *Id.*

302. *See, e.g.*, MODEL PENAL CODE § 210.2 commentary at 38.

number of felony murder defendants who are not intentional killers is unclear *but probably not many.*"[303] The most likely felony murderer is not Justice Holmes' unlucky thief.[304] The most likely felony murderer is the felon who cold-bloodedly kills the only witnesses to his crime.[305]

The typical response of critics of the felony murder rule is to claim that intentional, knowing or reckless killings committed in the course of felonies can be prosecuted as murder without the felony murder rule.[306] This is wrong. An intentional killing during a robbery or rape is not necessarily "clearly . . . subject to prosecution"[307] as intent to kill murder. The state can only prosecute if it has the evidence to establish beyond a reasonable doubt that the killing was intentional.[308] Too often, the exact circumstances behind the killing will be unknown because the defendant has killed the only witness.[309] The felony murder rule attempts to deter this conduct in two ways. First, by dispensing with the mens rea for murder, it eliminates a significant advantage of killing the witness. Second, the felony murder rule significantly increases the risk to the felon who chooses to kill. While he may be more likely to get away with his rape or robbery, the felon who kills cannot claim mitigating circumstances and, charged with first-degree murder, may suffer much more if he is finally caught.

The felony murder rule attempts to change the calculus of the felon who can kill the witnesses. There is evidence that serious crimes can be deterred if the consequences are properly communicated.[310] "The felony

303. Rosen, *supra* note 271, at 1131 (emphasis added); *see also* MODEL PENAL CODE § 210.2 commentary at 38. "For the vast majority of cases it is probably true that homicide occurring during the commission or attempted commission of a felony is murder independent of the felony-murder rule." *Id.*

304. *See supra* note 283 and accompanying text.

305. *See, e.g., People* v. *Benson*, 802 P.2d 330, 337 (Cal. 1990) (noting the defendant's remark that he killed the two children he molested, their mother, and their brother in order "'to protect my freedom'"), *cert. denied*, 502 U.S. 924 (1991).

306. *See* 2 LA FAVE & SCOTT, *supra* note 124, § 7.5(h), at 232 n.131.

307. *Id.*

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

309. In cases with accomplices there may be another witness, but accomplice testimony brings its own set of considerable problems for the criminal justice system. *See* 7 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 2057, at 417 (Chadbourne rev. 1978).

310. *Cf.* VAN DEN HAAG, *supra* note 291, at 113 ("Deterrence depends on the likelihood and on the regularity of human responses to danger, and not on rationality.").

murder rule is just the sort of simple, commonsense, readily enforceable, and widely known principle that is likely to result in deterrence."[311]

The case against the felony murder rule is more superficial than most academics realize. There are strong retributive and deterrent reasons for retaining the rule. Because it is a clear, easily understood, constitutional[312] rule that fulfills the twin goals of crime prevention and satisfying society's sense of justice,[313] California's first-degree felony murder rule should be retained.

B. Redefining Homicide

The most important task of any criminal reform is redefining the crimes. Crimes drive the criminal law. The primary problem with California's homicide law is the definition of various criminal homicides.

This section consists of the text of proposed changes to the homicide laws of California followed by reasons for the changes. Where appropriate, there will be explanations for statutes or terms omitted from the prior law.

1. Murder

The first change from the Penal Code is the omission of any general definition of murder such as the one found in Penal Code section 187.[314] Murder is not one crime. While different mental states, such as express and implied malice, may be punished the same way, they are not the same crime.[315] Any effort to bind all forms of murder under some central theme such as malice aforethought is doomed to failure. Therefore, the definition of murder will be found where it belongs, in the definition of the various degrees of murder.

The following would replace Penal Code section 187.

§ 187. Murder

a) Murder consists of two distinct crimes, first-degree murder and second-degree murder.

b) First-Degree Murder consists of the killing of a human being or fetus

---

311. Crump & Crump, *supra* note 271, at 370-71.

312. *See* People v. Dillon, 668 P.2d 697, 718 (Cal. 1983); *cf.* Schad v. Arizona, 501 U.S. 624, 645 (1991) (plurality) (stating felony murder can be treated as the equivalent of murder by deliberation); Tison v. Arizona, 481 U.S. 137, 158 (1987) (noting that felony murder can justify the death penalty).

313. *See supra* note 210 and accompanying text.

314. "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." CAL. PENAL CODE § 187(a) (West 1988).

315. *See infra* notes 316-20 and accompanying text.

1) with the intent to kill, or;

2) in the perpetration of, or attempt to perpetrate, arson, rape, torture, carjacking, robbery, burglary, mayhem, kidnapping, or any act punishable under section 286, 288, 288a, or 289.

c) Subdivision (b) provides the sole means of committing first-degree murder. No other act or mental element is necessary to commit first-degree murder. Liability for first-degree murder under subdivision (b)(1) is subject to mitigation, as provided for in section 192, and justification, as provided for in section 197. Liability for first-degree murder under subdivision (b)(2) is subject to accident, as provided for in section 187.1.

d) Second-degree murder is the killing of a human being or fetus that is the result of an act an ordinary prudent person would know to involve an unreasonable and very high risk of death.

e) Subdivision (d) provides the sole means of committing second-degree murder. No other act or mental element is necessary to commit second-degree murder. There is no crime of second-degree felony murder. Liability for second-degree murder under subdivision (d) is subject to justification, as provided for in section 197.

f) This section shall not apply to any person who commits an act which results in the death of a fetus if any of the following apply:

(1) The act complied with the Therapeutic Abortion Act, Chapter 11 (commencing with Section 25950) of Division 20 of the Health and Safety Code.

(2) The act was committed by a holder of a physician's and surgeon's certificate, as defined in the Business and Professions Code, in a case where, to a medical certainty, the result of childbirth would be death of the mother of the fetus or where her death from childbirth, although not medically certain, would be substantially certain or more likely than not.

(3) The act was solicited, aided, abetted, or consented to by the mother of the fetus.

(g) Subdivision (f) shall not be construed to prohibit the prosecution of any person under any other provision of law.

a. First-degree murder

i. Defining the crime

The most noticeable change from prior law is the elimination of the premeditation requirement for first-degree murder. As noted earlier, pre-

meditation is not up to the task of classifying murders because premeditation is too difficult to define with any meaningful precision.[316]

Intent to kill, however, provides a clear and meaningful definition of first-degree murder. "Intent to kill" is murder stripped down to its most basic terms, a nearly universal way of defining murder.[317] Furthermore, it has the additional advantage of being the current definition of express malice in California,[318] and thus will lessen the disruption caused by the reforms. Because it is so straightforward, intent to kill is very difficult for the courts to manipulate. Unlike malice, which brought about diminished capacity,[319] or premeditation, which gave California the three-part *Anderson* test,[320] the courts have not manipulated intent to kill.

Intent to kill also provides a meaningful distinction from the unintentional murders that will constitute second-degree murder under the proposed reforms. There is no act more serious than killing another person. It is the one act that cannot be excused by the necessity defense,[321] and its most culpable form, murder, is considered the ultimate crime.[322] The intent to commit this ultimate crime is what makes intentional murder more culpable than unintentional murder.[323] A person can commit unintentional murder although intending to harm no one.[324] While uninten-

---

316. *See supra* notes 194-99 and accompanying text.

317. *See, e.g.*, 2 LA FAVE & SCOTT, *supra* note 124, § 7.2, at 191; MORELAND, *supra* note 7, at 17-19; 3 STEPHEN, *supra* note 7, at 19.

318. *See* People v. Saille, 820 P.2d 588, 594 (Cal. 1991).

319. *See supra* note 48 and accompanying text.

320. *See* People v. Anderson, 447 P.2d 942, 949 (Cal. 1968).

321. *See* People v. Petro, 56 P.2d 984, 985 (Cal. Ct. App. 1936); Regina v. Dudly & Stephens, 14 Q.B.D. 273, 287-88 (1884); PERKINS & BOYCE, *supra* note 44, at 1058.

322. *Cf.* IMMANUEL KANT, THE PHILOSOPHY OF THE LAW 198 (W. Hastie trans., 1887) (1796).

> [W]hoever has committed Murder, must *die* . . . . Even if a Civil Society resolved to dissolve itself with the consent of all its members . . . the last Murderer lying in the prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realize the desert of his deeds . . . .

Id.; *see* Coker v. Georgia, 433 U.S. 584, 598-99 (1977) (plurality) (holding that the death penalty is unconstitutionally excessive for rape but not for murder).

323. People v. Eshelman, 275 Cal. Rptr. 810, 816 (Cal. Ct. App. 1990). "The intentional killing of another human being is the ultimate expression of violence . . . ." *Id.*

324. *See, e.g.*, People v. Watson, 637 P.2d 279, 285-86 (driving while intoxicated can support implied malice); People v. Thomas, 261 P.2d 1, 2, 7 (Traynor, J., concurring) (Cal. 1953) (finding implied malice when the defendant intended to shoot a coffee cup out of the victim's hand for sexual gratification, but missed, killing the victim); People v. Protopappas, 246 Cal. Rptr. 915, 924 n.9 (Cal. Ct. App. 1988) (finding implied malice for "acts committed as a practicing, licensed dentist under circumstances where there can be no doubt he did not truly intend to kill anyone"); People v. Stein, 137 P.2d 271, 274 (Cal. Ct. App. 1913) (stating that firing shots into crowded room because music was too loud supports implied malice).

tional murder is a terrible crime, the fact that no killing is *intended* creates the appropriate degree of difference between the two crimes.[325]

The only other major issue raised by intentional murder is how to define it. The main alternatives to intent to kill are found in the Model Penal Code, which uses "purposeful" and "knowing" to define intentional murders.[326] While these may be adequate ways to define the most culpable form of killing, they are not so clearly superior to warrant dispensing with the familiar and sound "intent to kill."

ii. Felony murder

Although the felony murder rule itself requires some justification,[327] there is little to change in California's first-degree felony murder law. Like most modern felony murder statutes, California's limits first-degree felony murder to the most serious felonies.[328] Judicial interpretation of this law is not perfect, but there is no interpretation that requires statutory overruling.

One change in the felony murder law is the omission of mayhem from the new definition. Mayhem is too close to an assault-based crime to be within the felony murder rule. Under traditional doctrine, felony murder cannot be based upon assault or other crimes that are an integral part of the homicide.[329] Mayhem, or "unlawfully and maliciously depriv[ing] a human being of a member of his body, or disabl[ing], disfigur[ing] or render[ing] it useless,"[330] is too much an assault-based crime to be included in the definition of felony murder.

---

325. It is interesting to note that the examples given by James Stephen of unpremeditated murders that are worse than many premeditated murders are still intentional, if not premeditated. *See* 3 STEPHEN, *supra* note 7, at 94. Two are clearly intentional murders: "deliberately but instantly" slitting the throat of someone who rejects the defendant's advances, and blowing the brains out of a creditor who just asked for his money. *See id.* The third, drowning a small boy by pushing him off a bridge and into a river, provides at least strong circumstantial evidence of an intent to kill. *See id.*; *see also supra* note 202 and accompanying text. None of the examples is clearly unintentional murder.

326. *See* MODEL PENAL CODE § 210.2 (1980).

327. *See supra* notes 271-313 and accompanying text.

328. *See supra* note 146 and accompanying text.

329. *See* People v. Wilson, 462 P.2d 22, 28 (Cal. 1969) (stating that assault cannot be the predicate felony for the burglary underlying a felony murder conviction).

330. CAL. PENAL CODE § 203 (West Supp. 1995).

The crime of torture,[331] however, is an assaultive crime that deserves to be part of the felony murder statute. The intent to inflict pain heightens culpability for killings committed through torture, making it worthy of serious punishment.[332] Furthermore, the mental element for the crime of torture, "intent to cause cruel or extreme pain," is essentially the same as the mental element for the "specific act" first-degree murder by torture.[333] The reform simply moves this crime from specific act murder to felony murder.

The final change to first-degree felony murder, an affirmative defense of accidental killing, is discussed later.[334]

iii. Specific act murder

The final change to the definition of first-degree murder is the omission of all specific methods of killing from first-degree murder except for murder by torture, which is transferred to felony murder. As noted before, with the exception of torture, the specific means punished as first-degree murder were little more than circumstantial proxies for premeditation.[335] As premeditation has no place in the law of murder, there is no reason to retain its proxies.

b. Second-degree murder

The reform makes four significant changes in California's second-degree murder law.

i. Definition of risks

The first change is in the definition of the risky behavior that is at the heart of unintentional murder. Unintentional murder, whether it is called "depraved heart," "implied malice," or given some other label, centers

---

331.

> Every person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury as defined in Section 12022.7 upon the person of another, is guilty of torture.
>
> The crime of torture does not require any proof that the victim suffered pain.

CAL. PENAL CODE § 206 (West Supp. 1995).

332. *See supra* notes 154-57 and accompanying text.

333. *See* People v. Wiley, 554 P.2d 881, 883-84 (Cal. 1976). Murder by torture is an act with a "high probability of death" committed "with the intent to cause cruel pain and suffering for the purpose of revenge, extortion, persuasion or for any other sadistic purpose." *Id.*

334. *See infra* notes 465-70 and accompanying text.

335. *See supra* notes 147-57 and accompanying text.

around a very risky act that causes the death of another, even though the defendant does not intend to kill.[336] Through a series of decisions, the California Supreme Court has devised the following definition of the risk necessary for unintentional murder: "an intentional act, the natural consequences of which are dangerous to life."[337]

Although this phrase is better than "abandoned and malignant heart," it is still too wordy and obscure. Unintentional murder addresses risk-creating behavior. Instead of using the euphemism "natural consequences," the proposed definition addresses risk directly. The reform defines the risk in very general terms because any further specificity would be futile. Unintentional murders may be committed in an enormous variety of ways.[338] As we cannot expect to define such varied conduct with any great precision,[339] a general but clear definition of the necessary risk is the most prudent course. The "very high risk of death" language provides the proper compromise between clarity and breadth.[340]

While it differs from the current California definition of implied malice, the difference is more a matter of style than substance. While current law may look to the "natural consequences" of a defendant's conduct, the ultimate issue is "the [degree of] life threatening risk created by [a defendant's] conduct."[341] The proposed definition simply makes this key issue clearer and more easily understood.

ii. Objective standard

The second change, adopting an objective standard for unintentional murder, is a much greater break from current law. Several jurisdictions, including California, and most commentators, require that the defendant be subjectively aware of the danger of his actions before he may be found liable for unintentional murder.[342] The rationale behind the sub-

336. *See, e.g.*, 3 STEPHEN, *supra* note 7, at 21; MORELAND, *supra* note 7, at 32; 2 LA FAVE & SCOTT, *supra* note 124, § 7.4.

337. People v. Dellinger, 783 P.2d 200, 201 (Cal. 1989).

338. *See* 2 LA FAVE & SCOTT, *supra* note 124, § 7.4.

339. "Condemned to the use of words, we can never expect mathematical certainty from our language." Grayned v. City of Rockford, 408 U.S. 104, 110 (1972).

340. *See Dellinger*, 783 P.2d at 201.

341. *Id.*; *see also* People v. Watson, 637 P.2d 279, 285 (Cal. 1981) (requiring a standard of "high probability that [the conduct] will result in death"); People v. Washington, 402 P.2d 130, 134 (Cal. 1965) (same); People v. Thomas, 261 P.2d 1, 7 (Cal. 1953) (same).

342. *See, e.g.*, *Watson*, 637 P.2d at 283; MODEL PENAL CODE § 210.2 (1980); 2 LA

jectivity requirement is that the crime should fit the individual offender.[343] A second-degree murder conviction following a "depraved heart" finding is so serious that it should only be imposed on those who are subjectively aware of the seriousness of their acts.[344] The problem with this rationale is that it ignores reality. Few people do not truly understand the consequences of their actions, and many of those who do not are undeserving of extra defenses to their crimes.

In the overwhelming majority of cases there is little practical difference between the objective and subjective awareness standards; it will be only "the unusual case where the defendant is not aware of the risk."[345] These rare instances involve the unreasonably "absent-minded, stupid or intoxicated."[346] The intoxicated are by far the largest group protected by the subjective standard. Relatively few people are so mentally disabled that they cannot appreciate the danger of their acts.[347] Most of those few that meet this standard are too incompetent to be liable for any crime.[348] Many people become intoxicated, however, and too many of these people commit homicides.[349]

The voluntarily intoxicated[350] defendant simply does not deserve the protection afforded by the subjective standard. Intoxication makes

---

FAVE & SCOTT, *supra* note 124, § 7; 3 STEPHEN, *supra* note 7, at 22.

343. *See* MORELAND, *supra* note 7, at 36-41 (discussing subjective intent), 196-212 (discussing intentional murder under statutes).

344. *See, e.g.*, 2 LA FAVE & SCOTT, *supra* note 124, § 7.4.

345. *Id.*; *accord* JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 166-67 (2d ed. 1960).

346. 2 LA FAVE & SCOTT, *supra* note 124, § 7.4.

347. Morse, *supra* note 223, at 40-41. "Craziness seems to affect impulses, controls, and motivations for actions, but it does not stop persons from intending to do what they do or from narrowly knowing factually what they are doing." *Id.* at 41.

348. *See* CAL. PENAL CODE § 26 (West 1988) (noting that "idiots" are not capable of committing crimes). In *In re Ramon M.*, the California Supreme Court held that the A.L.I. test for insanity adopted in *People v. Drew* also applied to the defense of idiocy under Penal Code section 26. *In re* Ramon M., 584 P.2d 524, 530 (Cal. 1978) (citing People v. Drew, 583 P.2d 1318, 1326 (Cal. 1978)). Penal Code section 25(b), adopted as part of Proposition 8, abrogated the A.L.I. test of insanity and replaced it with the M'Naghten test. *See* 1 WITKIN & EPSTEIN, *supra* note 128, §§ 204-205, at 233-34. Since section 25(b) refers only to "insanity," it is uncertain whether the M'Naghten test also applies to idiocy claims. *See id.* § 187, at 216.

349. While voluntary intoxication is a more popular defense, as a practical matter it is very rare for intoxication to truly negate mens rea. *See* Morse, *supra* note 223, at 45-47.

350. Involuntary intoxication is theoretically at least a valid defense if it produces unconsciousness. See CAL. PENAL CODE § 26(15) (West 1988); People v. Cruz, 147 Cal. Rptr. 740, 754 (Cal. Ct. App. 1978). This condition is rare to the point of nonexistence with respect to alcohol, and rare with respect to drugs. See 1 WITKIN & EPSTEIN, *supra* note 128, § 216, at 250.

crimes like unintentional murder more likely to happen.[351] There is no reason to reward people for engaging in behavior that makes them more dangerous. Indeed, the better argument is that those who commit crimes while intoxicated have all the more reason to be isolated from the public.[352]

The Model Penal Code recognized the problem of the intoxicated offender and did not allow voluntary intoxication to negate reckless murder.[353] Most jurisdictions follow suit and prohibit intoxication from negating implied malice.[354]

The California Supreme Court foreclosed this option in *People v. Saille* and *People v. Whitfield.* In *Whitfield,* the high court held that implied malice murder was a specific intent crime and could thus be negated by voluntary intoxication under California Penal Code section 22.[355] Although *Whitfield* turned on statutory interpretation, *Saille* precludes a simple statutory answer to *Whitfield.*

Saille was the California Supreme Court's first major interpretation of the 1981 reforms that abolished the diminished capacity defense.[356] One issue in *Saille* was whether these reforms violated due process by preventing the defendant from mounting a diminished capacity defense.[357] The *Saille* court dismissed this argument, holding that since the abolition of the diminished capacity defense did not prevent the defendant from using his intoxication to prove that he did not have the necessary mens rea, the abolition was constitutional.[358] This precludes the Model Penal Code solution. "If, however, a crime requires a particular mental state the Legislature may not deny a defendant the opportunity to prove he did not possess that state."[359]

Although the *Saille* dicta is an incorrect statement of constitutional law,[360] there is no good reason to challenge it by statute. While the Cali-

---

351. *See supra* notes 111-12 and accompanying text.

352. "As the purpose is to compel men to abstain from dangerous conduct, and not merely to restrain them from evil inclinations, the law requires them at their peril to know the teachings of common experience, just as it requires them to know the law." HOLMES, *supra* note 7, at 57.

353. *See supra* note 110 and accompanying text.

354. *See* 2 LA FAVE & SCOTT, *supra* note 124, § 7.4.

355. *See supra* notes 97-106 and accompanying text.

356. *See supra* notes 26-27 and accompanying text.

357. People v. Saille, 820 P.2d 588, 596 (Cal. 1991).

358. *Id.*

359. *Id.*

360. The only support the *Saille* court cites for its dictum, *Patterson v. New York,*

fornia Supreme Court might reverse itself or the United States Supreme Court could reverse California's high court,[361] there is no reason to expect this. The California Supreme Court has shown no great willingness to overturn its past decisions.[362] In addition, it would be foolish to predict that the United States Supreme Court would grant certiorari to address this particular issue.[363]

Second-degree murder is too important for constitutional experimentation. The objective standard is thus necessary to overrule *Whitfield* while avoiding the constitutional roadblock established in *Saille*.[364] The *Whitfield* court based its finding that implied malice could be negated by intoxication on the fact that implied malice "requires that the defendant act with knowledge of the danger to, and in conscious disregard of, human life."[365] The objective standard, by eliminating this requirement, removes any mental element that defendant can negate through intoxication. Since this redefines an element of the crime as opposed to limiting the defendant's evidence, it will not run afoul of *Saille*.

iii. The reasonableness requirement

The objective standard brings with it the requirement that the risk to human life be "unreasonable."[366] This common sense requirement is derived from both the law of negligence that is the basis of the objective standard, and California's law of implied malice murder.[367] "Unreasonable" is thus best seen as a bridge between the current, subjective law of implied malice murder and the objective standard of the reform.

Those homicides where death was unintended, but involved conduct sufficiently risky to be considered murder, have a variety of labels.

---

does not support the proposition that a state cannot limit mens rea defenses. *See* Patterson v. New York, 432 U.S. 197, 215 (1977). *Patterson* concerned ensuring that the prosecution had to prove every element beyond a reasonable doubt. *Id.* at 215-16. It wanted to prevent the state from manipulating the elements of a crime in order to lessen the prosecution's burden of proof. *Id.* at 210. Preventing the use of intoxication to lessen a defendant's liability does not lower the prosecution's burden of proving every element of the crime beyond a reasonable doubt. *See* People v. Whitfield, 868 P.2d 272, 289-90 (Cal. 1994) (Mosk, J., concurring and dissenting).

361. Even if the United States Supreme Court overruled the *Saille* statement, California's high court could reimpose the ruling under the California Constitution's due process provision. *See* CAL. CONST. art. I, § 7(a).

362. One example of this reluctance is the immortality of the imperfect self-defense doctrine. *See supra* notes 77-95 and accompanying text.

363. *See* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 3.13 (6th ed. 1986).

364. *See supra* notes 355-64 and accompanying text.

365. People v. Whitfield, 868 P.2d 272, 278 (Cal. 1994).

366. *See* MORELAND, *supra* note 7, at 36-38.

367. *See id.*; *supra* notes 31-48 and accompanying text.

Whether called "implied malice," "depraved heart," "unintentional," or "reckless," this type of murder is ultimately derived from the principles of negligence.[368] A fundamental aspect of negligence is that in addition to creating risk, an act must be "unreasonable" in order to be negligent."[369] The reform imports this concept into its definition of negligent murder.[370]

In the overwhelming majority of cases, the unreasonableness of the risk creating conduct is evident. Playing Russian roulette, shooting into a crowded room, or similarly dangerous conduct is never reasonable. It is meant for the extremely rare case, such as throwing a small child from a burning building in order to save the child's life.[371]

The unreasonableness requirement also brings the reform closer to the "conscious disregard for life" required for implied malice under California law.[372] In the hypothetical above, the person who is reasonably attempting to save someone from death by exposing the person to very risky conduct would not be displaying the conscious disregard for life required under California law.[373] While the unreasonableness requirement retains this element of mercy from current California law, the reform is still able to dispense with the needless and dangerous subjectivity found in current law. Unreasonableness thus allows the reform to have the best of both worlds.

iv. Second-degree felony murder

The final change is found in subdivision (d) which explicitly abrogates the second-degree felony murder rule. The problem with the second-degree felony murder rule is that unless it is limited to abstractly dangerous felonies, it is too broad to serve any useful purpose.[374] Any act that

368. *See* 2 LA FAVE & SCOTT, *supra* note 124, § 7.4; MORELAND, *supra* note 7, at 13-16, 31-41.

369. "[N]egligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm." RESTATEMENT (SECOND) OF TORTS § 282 (1965).

370. *See* MORELAND, *supra* note 7, at 32.

371. This scenario would not be covered by California's definition of justification, which only covers the use of lethal force against aggressors. *See* CAL. PENAL CODE § 197 (West 1988).

372. *See* People v. Dellinger, 783 P.2d 200, 201 (Cal. 1989).

373. *See id.*

374. *See supra* notes 123-38 and accompanying text.

passes this stringent test is already unintentional or implied malice murder.[375]

Abolishing second-degree felony murder and retaining first-degree felony murder are perfectly consistent acts. The felonies that make up the first-degree felony murder rule, such as rape, kidnapping, robbery, and burglary, are the types of violent crimes in which there is a strong incentive to kill the victim.[376] As deterring these types of killings is the heart of the felony murder rule, it makes sense to retain California's first-degree felony murder rule while abolishing the meaningless and redundant crime of second-degree felony murder.

c. Fetal murder

Subdivision (f) and the "killing of a human being or fetus" language in subdivisions (b) and (d) follows current California law that expands murder liability to the death of a fetus killed with the requisite mental state.[377] This expansion was in response to *Keeler v. Superior Court*,[378] where the California Supreme Court held that an unborn fetus could not be the subject of a homicide.[379] The legislature amended California Penal Code section 187 to nullify *Keeler*, and the proposed statute retains the same language from section 187.[380]

The facts of *Keeler* demonstrate the horror of fetal killings. Keeler and the mother of the fetus divorced after sixteen years of marriage.[381] Another man impregnated the mother, a fact she concealed from Keeler.[382] Keeler later learned of his ex-wife's pregnancy and confronted her about it when they next met.[383] During the ensuing argument he stated, "I'm going to stomp it out of you."[384] He then struck her face with several blows and kneed her in the abdomen, killing the fetus.[385]

This is the type of conduct the fetal inclusion targets.[386] It is particularly contemptible conduct and deserves severe condemnation. At the

375. *See supra* notes 123-38 and accompanying text.
376. *See supra* notes 301-05 and accompanying text.
377. *See* CAL. PENAL CODE § 187 (West 1988).
378. 470 P.2d 617 (1970).
379. *Id.* at 630.
380. *See* 1970 Cal. Stat. 2440 (codified at CAL. PENAL CODE § 187 (West 1988).
381. *Id.* at 618-19.
382. *Id.* at 618.
383. *Id.*
384. *Id.*
385. *Id.*
386. *See supra* notes 376-80 and accompanying text.

same time, subdivision (g) ensures that this statute will not interfere with a woman's constitutional right to choose to terminate her pregnancy.[387]

2. Manslaughter

§ 192. Manslaughter

a) Manslaughter consists of two distinct crimes, voluntary manslaughter and involuntary manslaughter.

b) Voluntary manslaughter is mitigated intent to kill murder. A murder committed pursuant to section 187, subdivision (b)(1), is mitigated to voluntary manslaughter if the killing is the product of adequate provocation. Adequate provocation is defined as any act or acts by the victim that would cause a reasonable person to lose normal self control. In order for the killing to be mitigated to voluntary manslaughter, the killer must actually be provoked by the victim's conduct and be acting under that provocation during the killing. If there has been sufficient time between the provocation and the killing for a reasonable person to regain self-control, then the killing may not be mitigated to voluntary manslaughter.

c) Adequate provocation, as defined in subdivision (b), is the sole means of mitigating murder to voluntary manslaughter. This subdivision is intended to overrule the doctrine of imperfect self-defense but is not limited to that purpose.

d) Involuntary manslaughter is criminally negligent homicide. Criminally negligent homicide is the killing of a human being that results from an act that a reasonable person would know to involve an unreasonable and high risk of serious injury to another human being.

a. Structure

There are two noteworthy changes from the current structure of manslaughter. The first dispenses with the notion that manslaughter is one general crime, and that its various forms—voluntary, involuntary and vehicular—are simply subspecies of the same crime.[388] These are each very distinct crimes with distinct elements and punishments. A universal definition of manslaughter, such as Penal Code section 192's "[m]anslaughter is the unlawful killing of a human being without malice,"

387. *See* Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833 (1992).
388. *See* CAL. PENAL CODE § 192 (West 1988 & Supp. 1995).

is inaccurate and confusing.[389] It is better to treat separate crimes separately.[390]

The final change to manslaughter's structure is the elimination of all forms of vehicular manslaughter from section 192. The "gross vehicular manslaughter while intoxicated" found in section 191.5 makes the other forms of vehicular manslaughter unnecessary historical artifacts.[391] Since section 192's variations on vehicular manslaughter serve no useful purpose, they should be eliminated.

b. Voluntary manslaughter

The primary effect of this statute with regard to voluntary manslaughter is to make statutory what had previously been judicial interpretation.[392] Although Penal Code section 192 only addresses "sudden quarrel or heat of passion," the key component of voluntary manslaughter has always been provocation.[393] The law should not be hidden in the reports; where possible it should be made explicit in the statutes. Thus, provocation should be a part of the definition of voluntary manslaughter. This reasoning also supports making explicit the requirement that the defendant actually be provoked. It is a part of the standard definition of voluntary manslaughter[394] and deserves to be included in the Penal Code definition. Similarly, the "sufficient time" language simply makes explicit what has been implicitly recognized.[395]

Another change from prior law is the elimination of "sudden quarrel or heat of passion."[396] This phrase, adapted from the common-law defini-

---

389. *See supra* notes 63-73 and accompanying text.

390. There is, however, no need to dispense with the manslaughter classification. Both voluntary and involuntary manslaughter are well known terms with a lineage stretching back to the common law. *See, e.g.*, 4 BLACKSTONE, *supra* note 13, at 191-94. Furthermore, unlike malice, the distinction between voluntary and involuntary manslaughter follows the common sense meaning of words. Voluntary manslaughter is truly voluntary as it is an intentional killing, while the unintentional killing for the lesser crime really is involuntary. There is thus little to be gained and much to be lost by switching to more "modern" classifications such as "second degree intentional homicide" and "second degree reckless homicide." *See* WIS. STAT. ANN. §§ 940.05, 940.06 (West Supp. 1994).

391. *See supra* notes 252-70 and accompanying text.

392. *See* CAL. PENAL CODE § 192 (West 1988 & Supp. 1995); People v. Watson, 637 P.2d 279 (Cal. 1981).

393. *See* 1 WITKIN & EPSTEIN, *supra* note 128, § 512; People v. Valentine, 169 P.2d 1, 11 (Cal. 1946).

394. *See, e.g.*, People v. Golsh, 219 P. 456, 459 (Cal. Ct. App. 1923); 2 LA FAVE & SCOTT, *supra* note 124, § 7.10(c).

395. *See, e.g.*, People v. Daniels, 802 P.2d 906, 932 (Cal. 1991), *cert. denied*, 502 U.S. 846 (1991).

396. *See* CAL. PENAL CODE § 192 (West 1988 & Supp. 1995).

tion of voluntary manslaughter,[397] tells both too little and too much. It tells too little because it neglects to include the key component of voluntary manslaughter, provocation. "Sudden quarrel" is simply one form of provocation and "heat of passion" does no more than indicate the mental state the provocation must produce.

A further problem with "heat of passion" is that it is both over- and underinclusive in defining what emotions will satisfy voluntary manslaughter. "Passion" is capable of being misconstrued as only pertaining to romantic emotions,[398] while any powerful emotion other than vengeance can satisfy this requirement.[399] Furthermore, "passion" is sufficiently vague as to leave the jury or the courts with too much room for interpretation.

> It is true that one finds such phrases as "dangerous weapon," "unlawful act," "heat of passion," "excessive force," and "act *malum in se*" running through the cases. But these are used as handles upon which to hang cases rather than as solving devices. The fact is that like "malice aforethought" they mean little or nothing, if taken literally. Worse than that, if taken generally, they mean almost anything the jury wants them to mean.[400]

Thus, "heat of passion" is replaced with the more explicit "lose normal self-control."[401] Its chief advantage is to focus the inquiry on the most important aspect of the "passion" requirement. In order to mitigate a killing to voluntary manslaughter, it is not enough that the killing be motivated by great emotion. What is necessary is that the emotion would cause a reasonable person to lose self-control.[402] It is thus appropriate to focus the statute on this key component of voluntary manslaughter.

---

397. *See* 4 BLACKSTONE, *supra* note 13, at 191.

398. *See, e.g.*, AMERICAN HERITAGE DICTIONARY 1323 (3d ed. 1992) (defining passion first as "a powerful emotion such as love, joy, hatred or anger" while the second definition defines it as a. "[a]rdent love. b. strong sexual desire, lust. c. The object of such love or desire.").

399. *See* People v. Logan, 164 P. 1121, 1122-23 (Cal. 1917)..

400. MORELAND, *supra* note 7, at 62.

401. 2 LA FAVE & SCOTT, *supra* note 124, § 7.10(a). Similar phrasing is found elsewhere. *See, e.g.*, People v. Golsh, 219 P. 456, 458 (Cal. Ct. App. 1923); MORELAND, *supra* note 7, at 309 (providing a model Criminal Homicide Act that defines voluntary manslaughter as an act "committed in sudden heat of passion immediately caused by a provocation sufficient to deprive a reasonable man of his self-control and power of cool reflection"); 3 STEPHEN, *supra* note 7, at 81 (citing DRAFT CODE OF THE CRIMINAL CODE COMMISSION § 176 (1879)).

402. *See, e.g.*, People v. Brubaker, 346 P.2d 8, 12 (Cal. 1959), *cert. denied*, 365 U.S. 824 (1961); People v. Bridgehouse, 303 P.2d 1018, 1022 (Cal. 1956).

The final change to voluntary manslaughter is the explicit limitation of voluntary manslaughter to provocation. The courts have made much mischief because no such explicit limit exists. While the legislature has overruled the chief form of mischief, diminished capacity,[403] another problem—the imperfect self-defense doctrine—remains.[404] Subdivision (c) of the proposed statute rectifies this problem and prevents further outbreaks of similar judicial innovation.

The most compelling argument against the imperfect self-defense doctrine[405] is that it injects a subjective element into an otherwise objective part of the law. Traditionally, the objective reasonable person standard has governed voluntary manslaughter.[406] At first glance, an objective standard of provocation appears contradictory. After all, no "reasonable" person kills simply because of provocation.[407] This critique fails to grasp the more subtle purpose served by voluntary manslaughter. This crime is a recognition that there are times when even reasonable people can be provoked to the point of losing self-control; once out of control it is very difficult to be reasonable.[408]

Voluntary manslaughter thus effects a delicate compromise. It recognizes that people can be provoked to killing, but also recognizes that the

---

403. *See supra* note 48.

404. *See supra* notes 77-96 and accompanying text.

405. There are two distinct imperfect self-defense doctrines. The older variant deals with a combat initiated by defendant that escalates to the point that the aggressor must use fatal force to save his own life. *See, e.g.*, PERKINS & BOYCE, *supra* note 44, at 1138; 2 LA FAVE & SCOTT, *supra* note 124, § 7.11; People v. Deason, 384 N.W.2d 72, 74 (Mich. App. 1985); State v. Partlow, 4 S.W. 14, 20 (Mo. 1886); Reed v. State, 11 Tex. Crim. 509, 517-18, (Tex. Crim. App. 1882). The other form of imperfect self-defense is the one announced in *Flannel*, an honest but unreasonable belief by the accused that his life is in danger. *See* People v. Flannel, 603 P.2d 1, 4 (Cal. 1979). As the former does not exist in California, all references to imperfect self-defense are to the *Flannel* variety. *See* CAL. PENAL CODE § 197(3) (West 1988); People v. Holt, 153 P.2d 21, 25 (Cal. 1944) (stating that self-defense does not apply to the aggressor unless he made a good faith effort to break off the combat before committing the homicide).

406. *See* 2 LA FAVE & SCOTT, *supra* note 124, § 7.10(b).

407. *See* Laurie J. Taylor, Comment, *Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense*, 33 UCLA L. REV. 1679, 1687 n.49 (1986).

408.

> The law [mitigates murder to voluntary manslaughter] because, while it is believed that all men should do as a reasonable man would do under any and all circumstances, it is also recognized that human nature is frail, often, when strongly provoked, failing to measure up to the standard of the reasonable man.

MORELAND, *supra* note 7, at 68.

killing is unreasonable. This doctrine splits the difference, making the killing mitigated rather than excused.[409]

Injecting subjective standards into the law of voluntary manslaughter upsets this balance. As the objective standard protects the reasonable person, the only effect of a subjective standard would be to protect the unreasonable person. Thus, one who is more likely to kill upon less provocation will be protected by any truly subjective standard. This is similar to the problem raised by the intoxicated offender. Intoxication makes one more disposed to commit certain crimes.[410] It makes no sense to reward someone for engaging in behavior that makes him more likely to commit his crime.[411] It is equally foolish to reward a person with a greater disposition to kill by providing him with a subjective standard of voluntary manslaughter; this is the person from whom society is in greatest need of protection.[412] The standard of provocation should be objective.

Some defenders of the imperfect self-defense doctrine argue that it neither rewards unreasonableness nor encourages the killings because it still punishes the killer for voluntary manslaughter.[413] This ignores the considerable benefit derived from a mitigation of murder to manslaughter. The penalty for murder ranges from fifteen years to life for second-degree murder, twenty-five years to life for first-degree murder, and life without possibility of parole or the death penalty for special circumstanc-

---

409. *See id.*

410. *See supra* notes 110-13 and accompanying text.

411. *See supra* notes 110-16 and accompanying text.

412. *Cf.* HOLMES, *supra* note 7, at 108.

> [W]hen men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare. If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account.

Id. While Justice Holmes made this statement during a lecture on tort liability, he believed that the general principles of civil and criminal liability were the same. *Id.* at 44. Thus, in this criminal lecture, Holmes referred to his tort lecture for a discussion on the appropriate reasonable person standard. *Id.* at 51.

413. *See, e.g.*, Dolores A. Donovan & Stephanie M. Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L.A. L. REV. 435, 449 (1981).

es first-degree murder.[414] By contrast, the punishment for voluntary manslaughter is three, six, or eleven years.[415] This considerable difference should not turn on the defendant's aggravated sense of personal safety.

More importantly, the public appreciates the gulf between murder and voluntary manslaughter. In the Dan White case, it was not an acquittal but a voluntary manslaughter verdict induced by the diminished capacity defense that brought about the subsequent riots.[416] A more recent example of public outrage is the prosecution of Lyle and Erik Menendez, in which the juries deadlocked between murder and voluntary manslaughter despite apparently strong evidence that the brothers killed their parents with considerable premeditation.[417] That some of the jury accepted this defense provoked widespread public criticism.[418]

Fortunately, these types of cases may only be rare aberrations.[419] But even if they are infrequent, these verdicts are inevitable under a subjective standard. Subjectivity invites juries to ignore the abnormality of a defendant's decision to kill and to sympathize with whatever makes a defendant different from the objective reasonable person, thus creating a "social reality" of the crime.[420] When jurors accept such an argument, they accept what is by definition unacceptable to society. Outrage will follow, as does the anecdotal evidence that "you can get away with murder," which further weakens the cohesiveness of society.[421]

---

414. CAL. PENAL CODE § 190(a) (West 1988 & Supp. 1995).

415. *Id.* § 193(a) (West 1988).

416. *See supra* notes 219-23 and accompanying text.

417. *See* Alan Abrahamson, *Lyle Menendez Case Ends in a Mistrial; D.A. to Retry Brothers*, L.A. TIMES, Jan. 29, 1994, at A1. The primary defense of both Erik and Lyle Menendez was that years of purported abuse by their parents made the brothers fear for their lives. *Id.* at A27. The prosecution sought first-degree murder convictions for both brothers, who were tried with separate juries. Both juries were hung, with some members voting for first-degree murder and the remainder holding out for manslaughter. *Id.* at A1, A26.

418. *See, e.g.*, Stephanie B. Goldberg, *Fault Lines*, 80 A.B.A. J. 40, 41 (1994).

419. *See id.* at 42.

420. *See* Donovan & Wildman, *supra* note 413, at 466-67.

421. *See supra* note 212 and accompanying text. Traditional voluntary manslaughter does not cause similar outrage. None of the recent public controversies over excessively lenient verdicts has involved traditional provocation based manslaughter. *See* GOLDBERG, *supra* note 418, at 40-44. Instead, they have revolved around portraying the killing as a result of the decedent's prior abuse or of other stressful events in the defendant's past. *Id.* The common-law forms of provocation do not appear to push the same buttons with the public. This may be due to the fact that they are ingrained in Western culture. Thus, the types of provocation that will justify voluntary manslaughter or similarly mitigated homicide are remarkably similar throughout very different western legal systems. *See* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 322-24 (1978). In any event, imperfect self-defense and traditional provocation do

The social rationale for imperfect self-defense is particularly pernicious. It asks the jury not to measure the defendant by a standard set by society for everyone, but instead to pigeonhole the defendant along racial, gender, social and economic lines,[422] and thus to render verdicts on improper grounds.[423] The last thing society needs is more fragmentation.[424] Justice Holmes was right—society must set objective standards in order to protect itself.[425] For that reason, *Flannel* must go.

c. Involuntary manslaughter

Historically, involuntary manslaughter has been surprisingly difficult to define. It is typically classified as a homicide resulting from criminal negligence.[426] Although "negligence" is perhaps the most thoroughly analyzed term in the law, the bulk of the progress has been in defining civil negligence; there has been little success in defining criminal negligence.[427]

---

appear to be different in the public eye.

422.

> The social reality is that each human being is a unique individual, with that uniqueness derived from socially differentiating factors as sex, race, national origin, religion, class background and total life experience . . . .
>
> . . . By emphasizing individual responsibility in the abstract form, the reasonable man standard leads to unjust consequences, for the standard ignores the social reality of the individual which has significantly contributed to the alienation and violence which she or he has acted out.

Donovan & Wildman, *supra* note 413, at 465.

423. *Cf.* Graham v. Collins, 113 S. Ct. 892, 911-15 (1993) (Thomas, J., concurring) (stating Supreme Court precedent requiring virtually unlimited consideration of mitigating evidence in order to get an "individualized" view of defendant in capital sentencing process increases the chance of racial discrimination in death sentences).

424. This danger is seen in the Erik Menendez case, where the jury split largely on gender lines. Abrahamson, *supra* note 417, at A26.

425. *See* HOLMES, *supra* note 7, at 49-51.

426. *See* 2 LA FAVE & SCOTT, *supra* note 124, § 7.12; 2 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 168 (14th ed. 1979); People v. Penny, 285 P.2d 926, 937 (Cal. 1955). The other form of involuntary manslaughter, "unlawful act" manslaughter, serves no useful purpose and is thus excised from the reformed definition of involuntary manslaughter. *See* 2 LA FAVE & SCOTT, *supra* note 124, § 7.13; *supra* notes 66-73 and accompanying text.

427. MORELAND, *supra* note 7, at 119-20. Although published more than 40 years ago, Moreland's work contains perhaps the most thorough and insightful analysis of involuntary manslaughter to date.

The problem is that criminal negligence must be a compromise. It must set a sufficiently high standard to distinguish itself from ordinary civil negligence,[428] but not so high a standard as to conflict with unintentional or "depraved heart" murder. This problem is further complicated by the fact that negligence encompasses an astonishing variety of patterns.[429] It is thus easy to understand why one of the most respected legal minds despaired over ever devising an adequate definition of negligent manslaughter.[430]

California's current statutory definition of negligent manslaughter as "the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection"[431] is "hardly illuminating"[432] and should be discarded. Most other jurisdictions are little better, relying on adjectives such as "reckless,"[433] "unlawful or wanton,"[434] or "grossly negligent."[435] Adjectives alone will not solve the problem.[436] Something more specific is in order.

---

428. Some jurisdictions have held that ordinary civil negligence is enough for involuntary manslaughter. *See* 2 LA FAVE & SCOTT, *supra* note 124, § 7.12(a) at 277 n.7. An overwhelming majority of jurisdictions have rejected this because ordinary civil negligence lacked the culpability necessary to justify the harsh consequences of involuntary manslaughter and juries were unwilling to convict fellow citizens for such truly accidental killings. *See* MORELAND, *supra* note 7, at 112-14.

429. MORELAND, *supra* note 7, at 118-19.

> Possible combinations of all these circumstances, objective and subjective, are literally infinite. One only has to unleash his imagination for a moment to see a host of old men with rheumatism trying to cross crowded thoroughfares, drunken drivers speeding defective automobiles through throngs of indifferent children, inexperienced youngsters recklessly burning leaves on lots located in populous communities, and so on ad infinitum.

Id.

430. *See* 3 STEPHEN, *supra* note 7, at 11.

> In order that homicide by omission may be criminal, the omission must amount to what is sometimes called gross, and sometimes culpable negligence. There must be more, but no one can say how much more, carelessness than is required in order to create a civil liability. For instance, many railway accidents are caused by a momentary forgetfulness or want of presence of mind, which are sufficient to involve the railway in civil liability, but are not sufficient to make the railway servant guilty of manslaughter if death is caused. No rule exists in such cases. It is a matter of degree determined by the view the jury happen to take in each particular case.

Id.

431. CAL. PENAL CODE § 192(b) (West 1988).

432. 1 WITKIN & EPSTEIN, *supra* note 128, § 522.

433. WIS. STAT. ANN. § 940.06 (West Supp. 1994); MODEL PENAL CODE § 210.3 (1980).

434. KAN. STAT. ANN. § 21-3404 (1988).

435. 18 PA. CONS. STAT. § 2504 (1995).

436. *See* MORELAND, *supra* note 7, at 122.

> They are not used in their dictionary sense, often far from it, but as 'vague

The Model Penal Code's definition is unacceptable because even though it gives an adequate definition of "reckless,"[437] it is too subjective to be used for involuntary manslaughter. The case for objective mental elements in the law of homicide has been made earlier[438] and need not be repeated here. If objective standards are used in the more serious crimes of second-degree murder and voluntary manslaughter, it is only logical to apply the reasonable person standard to the lesser crime of involuntary manslaughter. As in second-degree murder, this negligence-based crime brings with it an unreasonableness requirement.[439]

Current California law is little better. The courts operate under the illusion that the primary difference between implied malice and involuntary manslaughter is the subjective standard of the former and the objective standard of the latter.[440] This simply cannot be. It ignores the fact that in most cases the perpetrator will subjectively know what a reasonable person would know.[441] Except for intoxicated or slow-witted perpetrators,[442] the subjective-objective split is a distinction without a difference. The reports are full of involuntary manslaughter cases in which there must have been a subjective appreciation of the risk.[443] A better way to differentiate between unintentional murder and negligent manslaughter is the inherent risk of the conduct that caused the death.[444]

> adjectives,' straws flung to jurors drowning in a sea of uncertainty by judges floundering in like waters. Formless, without substance, they offer small relief.

Id. (footnote omitted) (quoting James W.C. Turner, *The Mental Element in Crimes at Common Law*, 6 CAMBRIDGE L.J. 31, 38 (1936)).

437. MODEL PENAL CODE § 2.02(2)(c) (1980) (defining reckless as consciously disregarding a substantial and unjustifiable risk).

438. *See supra* notes 342-65, 405-08 and accompanying text.

439. *See* People v. Brogna, 248 Cal. Rptr. 761, 765 (Cal. Ct. App. 1988).

440. *See* People v. Watson, 637 P.2d 279, 283 (Cal. 1981).

441. *See supra* note 347 and accompanying text.

442. *See supra* notes 345-49 and accompanying text.

443. *See, e.g.*, People v. Berry, 2 Cal. Rptr. 2d 416, 418 (Ct. App. 1991) (finding involuntary manslaughter when a pitbull that defendant trained for dog fighting and knew to be "vicious and dangerous" killed a small child); People v. Oliver, 258 Cal. Rptr. 138, 140-41 (Ct. App. 1989) (convicting the defendant for first providing a spoon to a heavily intoxicated man so that he could take heroin and then not summoning help when the man collapsed after injecting the heroin); People v. Tophia, 334 P.2d 133, 137 (Cal. Ct. App. 1959) (finding defendant guilty for hitting a person over the head with a loaded gun, which discharged and killed a bystander).

444. *See* 2 LA FAVE & SCOTT, *supra* note 124, § 7.4; *Watson*, 637 P.2d at 283 (recognizing some difference in the degree of risk necessary for involuntary manslaughter and implied malice murder).

The proposed definition of involuntary manslaughter provides a nice compromise between second-degree murder and civil negligence. "High risk of serious injury" is unquestionably a lower standard than "very high risk of killing," while at the same time providing a clearly higher standard than that of civil negligence.[445] The decision to include risk of serious bodily injury is consistent with the law of California and other jurisdictions.[446] Finally, it provides a clear and concise definition of criminal negligence using commonly understood terms. It is a marked improvement over current California law.

3. Gross Vehicular Manslaughter While Intoxicated

§ 191.5. Gross vehicular manslaughter while intoxicated

a) Gross vehicular manslaughter while intoxicated is the killing of a human being with gross negligence while driving a vehicle in violation of vehicle code sections 23152 or 23153 or Harbors and Navigation Code Section 655, subdivisions (b), (c), (d), (e), or (f).

b) Gross negligence is the commission of an act that a reasonable person would know to involve an unreasonable and high risk of serious injury to another person.

c) Gross vehicular manslaughter while intoxicated is punishable by imprisonment in the state prison for 4, 6, or 10 years.

d) Nothing in this section is intended to prohibit a charge of second-degree murder when the killing was committed by an intoxicated driver of a vehicle or vessel.

This crime is one of the rare exceptions to the general rule that the law should not single out for extra punishment particular ways of committing homicide. As noted earlier, driving while intoxicated causes many homicides and warrants deterrence through increased punishment.[447]

The proposed statute follows the same basic pattern of current California law defining gross negligence as the same type of negligence required by involuntary manslaughter.[448] The lawful-unlawful act distinction is

445. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 282 (1965) ("[N]egligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm.").

446. *See* People v. Penny, 285 P.2d 926, 936 (Cal. 1955); GA. CODE ANN. § 16-5-3 (1992); IOWA CODE § 707.5 (1993); State v. Beilke, 127 N.W.2d 516, 521 (Minn. 1964).

447. *See supra* note 255 and accompanying text.

448. *Compare Penny*, 285 P.2d at 937 (stating that involuntary manslaughter requires a level of negligence incompatible with a proper regard for human life) *with* People v. Watson, 637 P.2d 279, 283 (Cal. 1981) (finding that gross negligence is satisfied by showing indifference to consequences).

eliminated for the same reasons that misdemeanor and unlawful act manslaughter were eliminated from involuntary manslaughter.[449]

Subdivision (d) is meant to avoid an implicit overruling of *People v. Watson*, in which the California Supreme Court held that drunk driving can support a finding of implied malice second-degree murder.[450] An important issue in *Watson* was whether vehicular manslaughter prevented a second-degree murder finding when the killing was committed by a drunk driver.[451] Under California law, if each element of a general criminal statute corresponds to an element of a more specific statute, or if a violation of the specific statute will commonly result in the violation of the general statute, then the specific statute preempts the more general one.[452] The defense in *Watson* argued that since vehicular manslaughter proscribed killings in the course of driving, this preempted second-degree murder when driving was involved.[453]

The *Watson* court dismissed this claim, finding that vehicular manslaughter and implied malice had distinct mental elements.[454] They each predicated liability upon awareness of the risk of death.[455] Since implied malice required a slightly higher, subjective awareness of risk than did the objective standard of vehicular manslaughter, the two crimes did not overlap.[456]

Under the proposed reform, second-degree murder now has an objective mental element.[457] Since the subjectivity of second-degree murder was the main reason for distinguishing gross negligence from second-degree murder,[458] an argument could be made that section 191.5 could preclude second-degree murder prosecutions of drunk drivers who kill. This argument should not be persuasive. The difference between gross negligence and second-degree murder is greater under the proposed reforms than it is under present California law.[459] Yet it is a plausible argument and for that reason should be precluded by legislation.

---

449. *See supra* notes 136-40 and accompanying text.
450. *Watson*, 637 P.2d at 285.
451. *Id.* at 282.
452. *See* People v. Nichols, 620 P.2d 587, 592 (Cal. 1980).
453. *Watson*, 637 P.2d at 282.
454. *Id.* at 283.
455. *Id.*
456. *See id.*
457. *See supra* notes 342-65 and accompanying text.
458. *Watson*, 637 P.2d at 283.
459. *See supra* notes 435-40 and accompanying text.

The removal of implied malice from second-degree murder would not preclude *Watson*-type liability for drunk driving homicides. Under *Watson*, second-degree murder liability is based on the fact that at times drunk driving can be very dangerous to human life.[460] Because the proposal expands second-degree murder liability by adopting an objective standard, there is no reason to believe that the elimination of implied malice would mean the death of *Watson*.

Watson has focused on the fact that relatively few drunk driving incidents lead to fatalities, making *Watson* appear to be a species of murder by accident.[461] This critique fails to take into account that *Watson* liability is limited to the most egregious drunk driving homicides.[462] As the *Watson* court noted, drunk driving is not implied malice *per se*; it is no more than a way of supporting a second-degree murder conviction if the surrounding facts demonstrate the proper level of culpability.[463] Thus the relatively small number of reported drunk driving murder cases usually involve extremely aggravated cases of intoxicated driving.[464] Subdivision (d) allows the state to prosecute these most culpable drunk driving homicides as murder.

C. Other Reforms

Reforming the law of homicide is more than simply redefining the crimes. This section identifies and proposes needed reforms for other areas of the law of homicide.

---

460. *Watson*, 637 P.2d at 285-86.

461. *See id.*, at 286 (Bird, C. J., dissenting); Jeffery W. Grass, *Drunk Driving Murder and People v. Watson: Can Malice Be Implied*, 14 S.W.U. L. REV. 477, 519 (1984).

462. *See Watson*, 637 P.2d at 282 (noting that the defendant "exhibited wantonness and conscious disregard for life"); *see also* People v. Brogna, 248 Cal. Rptr. 761, 765 (Ct. App. 1988) (discussing *Watson*).

463. *See Watson*, 637 P.2d at 286.

464. *See, e.g.*, People v. Whitfield, 868 P.2d 272, 273 (Cal. 1994) (stating that the defendant had three prior drunk driving convictions, was three-quarters over the double yellow line when he hit the victim head-on, and had a blood alcohol level of .24 two hours after the accident); People v. Ricardi, 12 Cal. Rptr. 2d 364, 365-66 (Cal. Ct. App. 1992) (stating that the defendant, who, had a blood alcohol level of .17, six prior drunk driving convictions, twice participated in outpatient programs that stressed the danger of drunk driving, and the defendant's pickup crossed the median and hit the victim's car head-on, having made no attempt to avoid the victim); People v. Murray, 275 Cal. Rptr. 498, 500-01 (Cal. Ct. App. 1990) (stating that the defendant, who had been convicted twice for drunk driving and once for reckless driving, had a blood alcohol level between .18 and .23, made a U-turn on the freeway, drove eastbound in the westbound lanes at speeds of 55 to 80 miles an hour, and hit one car on its side before colliding head-on with another, killing all four passengers).

1. Defenses

a. Accident defense to felony murder

187.1. Accident defense to felony murder.

a) It is a complete defense to liability for felony murder under Penal Code section 187, subdivision (b)(2), if defendant proves by a preponderance of the evidence that the killing was accidental.

b) For the purposes of this section, a killing is accidental if none of the principals to the underlying felony intended to kill or cause great bodily injury.

c) This defense does not preclude liability under any theory of criminal homicide other than for felony murder.

d) The existence of this defense is not severable from the burden of its proof being placed on defendant. If placing this burden on defendant is found to be unconstitutional or otherwise invalid then the defense shall be abrogated.

The main academic criticism of the felony murder rule is that it allows culpability for truly accidental killings simply because they occurred during the commission of a felony.[465] Although this fear is overstated,[466] this defense will work justice in those rare cases of truly accidental killings that are prosecuted as felony murders.

Like other affirmative defenses, the burden of proving this defense is placed on the defendant.[467] This placement is crucial. A major reason behind the felony murder rule is that it is very difficult to prove intent to kill in felony murders, because the defendant has killed the only witness to the crime.[468] The felony murder rule, by eliminating the need to prove intent to kill, deals with this problem by deterring felons from killing witnesses.[469]

---

465. *See supra* notes 281-82 and accompanying text.

466. *See supra* notes 301-05 and accompanying text.

467. *See, e.g.*, People v. Drew, 583 P.2d 1318, 1326 (Cal. 1978) (involving insanity); People v. Moran, 463 P.2d 763, 765 (Cal. 1970) (involving entrapment). For some defenses where the defendant has the burden of proof, he only has to raise a reasonable doubt as to his guilt. *See, e.g.*, People v. Mayberry, 542 P.2d 1337, 1346-47 (Cal. 1975) (involving consent to rape or kidnapping).

468. *See* People v. Walker, 765 P.2d 70, 86 (Cal. 1988); State v. Robbins, 356 S.E.2d 279, 303 (N.C. 1987) ("It is a fact that one of the reasons for the enactment of the felony murder rule is that often criminals do kill potential witnesses in the course of the commission of a felony.")

469. *See supra* notes 305-06 and accompanying text.

Requiring the prosecution to prove that the killing was not accidental would thus subvert the felony murder doctrine. This also explains subdivision (d) of the proposed statute. Subdivision (d) is a poison pill, abrogating the defense if the burden of proof is ever shifted to the prosecution. While it is very unlikely that placing this burden on the defense will be declared unconstitutional,[470] nothing is certain in constitutional law. Subdivision (d) is an insurance policy against constitutional uncertainty.

b. Excuse

This is no reason to retain the doctrine of excuse. The current definition of excuse reads as follows:

> Homicide is excusable in the following cases:
>
> 1. When committed by accident and misfortune, or in doing any other lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent.
>
> 2. When committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, when no undue advantage is taken, nor any dangerous weapon used, and when the killing is not done in a cruel or unusual manner.[471]

The latter portion of part 1 is redundant. A lawful act committed with ordinary caution that kills is an accident.

Part 2 is similarly unnecessary. The first portion simply specifies another form of accidental homicide and is thus redundant. The "sudden combat" portion was probably designed to deal with the fact that a killing during an assault or battery was involuntary manslaughter under the misdemeanor manslaughter rule.[472] Part 2 provides a way to excuse truly accidental killings that arose from relatively minor fights. Since the proposed reforms eliminate misdemeanor manslaughter,[473] there is no reason to keep this defense.

"Accident," the remaining part of excuse, is also unnecessary. A truly accidental killing is at most civilly negligent and thus beyond the reach of criminal sanction under the proposed reform. A finding of accident is simply a failure of proof that the conduct was risky enough to constitute involuntary manslaughter or second degree murder. It is simply illogical to make a failure of proof a defense.

---

470. *See* Patterson v. New York, 432 U.S. 197, 205-07 (1977) (holding that placing the burden of proving affirmative defense of extreme emotional disturbance on defendant does not violate due process); Leland v. Oregon, 343 U.S. 790, 798-99 (1952) (holding that placing burden of proving insanity on the defendant does not violate due process).

471. CAL. PENAL CODE § 195 (West 1988).

472. *See* 1 WITKIN & EPSTEIN, *supra* note 128, at § 519.

473. *See supra* notes 141-45.

Excuse is derived from the ancient common law, when all homicides were illegal except for those the king deigned to excuse on a case-by-case basis.[474] Excuse is now no more than a historical artifact and deserves to be discarded as the useless clutter that it is.

2. Consistent Language

The terms "malice aforethought" and "premeditation" are not limited to the statutes defining murder and manslaughter. Since these phrases have no legal significance under the reformed homicide law, for the sake of consistency, the terms "malice aforethought" and "premeditation" should be stricken from the Penal Code. Those statutes that contain either phrase are California Penal Code sections 22, 25, 28, 29, 664 and 4500.[475] Eliminating these phrases from those statutes is a matter of editing and does not warrant further analysis.

3. Burden of Going Forward

§ 189.5. Murder—Burden of Going Forward: Mitigation, Justification, or Excuse

a) In a prosecution for murder under Section 187, the defense has the burden of going forward for any claim that the killing is mitigated or justified.

b) Once the defense submits to the trier of fact evidence of a claim of mitigation or justification, the burden is satisfied and the prosecution must prove beyond a reasonable doubt the nonexistence of the relevant claim.

c) Nothing in this section shall apply to or affect any proceeding under Section 190.3 or 190.4.

This clarifies and improves current California law on burdens as they relate to homicide defenses. The current section 189.5 refers to placing the burden of proving justification, excuse, or mitigation on the defense.[476] As interpreted by California courts, it is actually a burden of

474. *See* MORELAND, *supra* note 7, at 256.

475. *See* CAL. PENAL CODE §§ 22, 25, 28, 29, 664, 4500 (West 1988 & Supp. 1995).

476. CAL. PENAL CODE § 189.5 (West Supp. 1995).

(a) Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon the defendant, unless the proof on the part of the prosecution tends to show that the crime committed only

going forward that is met by evidence that raises a reasonable doubt of guilt.[477] The reform makes clear that this is only a burden of going forward. The only significant change is replacing the "raise a reasonable doubt of guilt" standard for discharging the burden with an "evidence to support a claim" standard. The reasonable doubt standard reflects the fact that a lack of mitigation, excuse, or justification is an element of murder under current California law.[478] Since lack of mitigation, excuse, or justification is not an element of murder under the proposed reforms, the reasonable doubt requirement should be eliminated. The evidence supporting a claim standard simply reflects current law on satisfying the burden of going forward.[479]

D. Summary

As this Article demonstrates, reforming the law of homicide is a large and complex task. Many statutes have to be amended, and others will be abandoned completely. For the sake of convenience, the following list summarizes the statutes to be changed by the proposed reform. Penal Code section 187 (definition of murder) will be deleted and replaced with the new definition of first- and second-degree murder. Section 189.5 (burden of proving mitigation, justification, or excuse) is modified. Sections 188 (express and implied malice), 191.5 (gross vehicular manslaughter while intoxicated), 192 (manslaughter), 193 (punishment for manslaughter), 199 (acquittal after justification or excuse), 22 (voluntary intoxication), 25 (diminished capacity), 28 (mental disease, defect, or disorder), 664 (attempt), and 4500 (assault by a life prisoner) will be amended but retain some of their original form. Sections 188 (express and implied malice), 189 (degrees of murder), 192.5 (vehicular manslaughter involving a vessel), 193.5 (punishment for vehicular manslaughter involving a vessel), and 195 (excuse) are abolished.

The rest of the law of homicide is unchanged. This includes numerous sentencing provisions[480] and other miscellaneous provisions.[481]

---

amounts to manslaughter, or that the defendant was justifiable or excusable.
(b) Nothing in this section shall apply to or affect any proceeding under Section 190.3 or 190.4.

Id.

477. *See* People v. Frye, 10 Cal. Rptr. 2d 217, 220-21 (Ct. App. 1992) (interpreting burden under California Penal Code section 189.5).

478. *See supra* notes 67-68 and accompanying text.

479. *See* CAL. EVID. CODE § 604 (West 1966).

480. CAL. PENAL CODE §§ 190, 190.05, 190.1, 190.2, 190.25, 190.3, 190.4, 190.5, 190.6, and 190.9 (West 1988 & Supp. 1995).

481. *Id.* §§ 191 (discussing abolition of petit treason), and 194 (laying out three year and a day rule) (West 1988).

IV. CONCLUSION

If war is too important to be left to the military,[482] then the law of homicide is too important to be left to the courts. The jumble of poorly worded and archaic statutes that make up California's homicide law cedes control of the law to the courts that interpret it. While the courts may have meant well in fashioning the law of homicide, it is not their job to do so. Defining criminal conduct is a legislative task. By creating a law of homicide that is much less in need of creative interpretation, this reform would return the law of homicide to the people and their elected representatives. The law of homicide is simply too important to be left anywhere else.

482. JOHN BARTLETT, FAMILIAR QUOTATIONS 401 (Emily Morison Beck ed., 15th ed. 1980) (quoting Charles Tallyrand).