

## IV. MENS REA: UNINTENTIONAL HOMICIDE\*

Part III discussed criminal liability for homicide where there is a purpose to kill. Part IV will discuss three different theories under which a defendant can be held liable for an unintentional killing.

*A. Second-Degree Murder Under an Implied Malice Theory*

A defendant can be convicted of murder if he does an act that involves a strong probability of death to another and death results.<sup>1</sup> As this Part will illustrate, murder liability can attach even where a defendant does not possess an intent to kill.<sup>2</sup> Malice can be implied in this type of killing where the defendant's conduct is so wanton and reckless as to demonstrate a depraved heart or an extreme indifference to human life.<sup>3</sup>

The following paragraphs illustrate how a defendant's reckless conduct can make him liable for murder under the "implied malice" murder theory. Other jurisdictions have coined this type of unintended homicide "depraved heart murder." The Model Penal Code classifies an unintended killing as a murder when the killing is committed recklessly under circumstances that show an extreme indifference to human life.<sup>4</sup> California discusses the same type of killing under second-degree murder within an "implied malice" theory. Therefore, "unintentional murder, whether it is called 'depraved heart,' 'implied malice,' or given some other label, centers

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1. See 1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW ELEMENTS § 195 (3d ed. 2000) [hereinafter 1 WITKIN CAL. CRIM. LAW ELEMENTS].

2. See *id.*

3. See *id.*

4. See MODEL PENAL CODE § 210.2(1)(b) (1980).

around a very risky act that causes the death of another, even though the defendant does not intend to kill.”<sup>5</sup>

### 1. The nature of implied malice

A defendant is guilty of murder, under some circumstances, if he intentionally acts in a manner that involves a high probability of death to another.<sup>6</sup> The way that this idea works in practice is complicated. Courts have held that malice is implied when the defendant’s conduct is wanton and reckless and suggests an “abandoned and malignant heart.”<sup>7</sup> The phrases “abandoned and malignant heart,” and “implied malice” lead to complexities in defining “murder.” Therefore, it is necessary to define the terms that are invoked in this area of homicide and use those terms consistently. For the purposes of this Part, the necessary level of culpability for implied malice murder is “recklessly.” Before defining the term recklessly, however, it is important to illustrate California’s terminology in its implied malice murder jurisprudence.

Courts have adopted two approaches to find implied malice. In reality, they lead to the same result, which is discussed in the following subpart. One line of cases finds implied malice where the defendant—with a base, antisocial motive, and a wanton disregard for human life—completes an act which involves a high probability that death will result.<sup>8</sup> Another line of cases finds implied malice where a killing results from a dangerous act that is deliberately performed by a defendant who knows that his conduct endangers

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5. Charles L. Hobson, *Reforming California’s Homicide Law*, 23 PEPP. L. REV. 495, 540–41 (1996) (citation omitted).

6. See 1 WITKIN CAL. CRIM. LAW ELEMENTS, *supra* note 1, § 195.

7. CAL. PENAL CODE § 188 (West 1999) (defining malice as express or implied: “It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.”); see also, Hobson, *supra* note 5, at 495 (describing the evolution of the definition of malice, and how its modern form is “completely divorced from any common sense notion of ill will.” For that reason, an alternative definition of malice is necessary.).

8. See, e.g., *People v. Gilbert*, 63 Cal. 2d 690, 703–04, 408 P.2d 365, 373–74, 47 Cal. Rptr. 909, 917–18 (1965).

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human life.<sup>9</sup> That is, the killing results from the defendant's conscious disregard for life.

*People v. Watson* adopted the following definition: Implied malice exists "when a person does an 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."<sup>10</sup> Therefore, malice may be implied when the defendant unintentionally kills as a result of his reckless conduct.<sup>11</sup> In this Part, the Model Penal Code's definition for recklessly will be employed in order to illustrate the mens rea for implied malice murder.<sup>12</sup> A person acts recklessly when he consciously disregards a substantial and unjustifiable risk to life, and thus demonstrates extreme indifference to the value of life.<sup>13</sup>

## 2. Three elements of second-degree murder under an implied malice theory

As stated above, a defendant is guilty of murder if he acts recklessly and causes a death, even if he does not have an intent to kill.<sup>14</sup> Practitioners and jurors should think of this type of murder as requiring the following three elements: (1) An act that is dangerous to life; (2) The defendant is aware of an unjustifiable risk; and (3) The defendant acts anyway, showing a conscious disregard for the unjustifiable risk.<sup>15</sup> These elements of implied malice murder must be shown in order to hold a defendant liable for an involuntary killing.<sup>16</sup>

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9. See, e.g., *People v. Phillips*, 64 Cal. 2d 574, 586, 414 P.2d 353, 359, 51 Cal. Rptr. 225, 231 (1966), *overruled on other grounds by*, *People v. Flood*, 18 Cal. 4th 470, 957 P.2d 869, 76 Cal. Rptr. 2d 180 (1998).

10. 30 Cal. 3d 290, 300, 637 P.2d 279, 285, 179 Cal. Rptr. 43, 49 (1981).

11. See *id.*

12. See MODEL PENAL CODE § 2.02(2)(c) (1999).

13. See *id.*

14. See generally 1 WITKIN CAL. CRIM. LAW ELEMENTS, *supra* note 1, § 195.

15. See *id.*

16. See *id.* § 195 (describing the many different ways that California case law has attempted to define this unintentional murder under the depraved heart murder theory).

*a. elements of implied malice murder in application**i. act dangerous to life*

*People v. Nieto Benitez* posed the question of whether the act of brandishing a firearm is sufficiently dangerous to life to support a conviction under the implied malice murder theory.<sup>17</sup> The defendant was charged with second-degree murder after he fatally shot a man who spilled food on his shirt and then refused to clean it.<sup>18</sup> The court instructed the jury to find malice based on the defendant's intentional brandishing of a firearm—an intentional act dangerous to human life. The defendant was then convicted under the implied malice murder theory.<sup>19</sup>

In *Nieto Benitez*, the court used California jury instruction 8.31 to instruct the jury on what constitutes second-degree murder under an implied malice murder theory.<sup>20</sup> The court instructed the jury that the term “intentional act” should be construed in accordance with everyday language, and that “act” refers to an act from which death results.<sup>21</sup> Such an act could be pulling a handgun in a particular manner, shooting a gun, or similar acts because it is common knowledge that guns are dangerous.<sup>22</sup> Furthermore, all of the events leading up to the death in this case—the dispute, the threats, and the retrieval of extra ammunition—“justifiably could lead a jury to reach

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17. 4 Cal. 4th 91, 840 P.2d 969, 13 Cal. Rptr. 2d 864 (1992).

18. *See id.* at 97–98, 840 P.2d at 971–72, 13 Cal. Rptr. 2d at 866.

19. *See id.* at 96–97, 840 P.2d at 970–71, 13 Cal. Rptr. 2d at 865.

20. *See id.* at 113, 840 P.2d at 892, 13 Cal. Rptr., 2d at 877 (Mosk, J., concurring). CALJIC No. 8.31 reads:

Murder of the second degree is [also] the unlawful killing of a human being when: 1. The killing resulted from an intentional act, 2. The natural consequences of the act are dangerous to human life, and 3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.

When the killing is the direct result of such an act, it is not necessary to prove that the defendant intended that the act would result in the death of a human being.

California Court Jury Instructions no. 8.31 (6th ed. 1996) [hereinafter CALJIC].

21. *See Nieto Benitez*, 4 Cal. 4th at 111, 840 P.2d at 981, 13 Cal. Rptr. 2d at 876.

22. *See id.* at 113, 840 P.2d at 882, 13 Cal. Rptr. 2d at 877 (Mosk, J., concurring).

a verdict different from one which might be reached in a case involving an accidental shooting during a friendly hunt for wild game.”<sup>23</sup> Therefore, the defendant’s brandishing of the firearm in a dangerous manner was sufficient to satisfy the dangerous-to-life requirement of second-degree murder under an implied malice theory.<sup>24</sup>

Currently, a new instruction is given in the context of implied malice with respect to surgical procedures. For example, in *People v. Brown*, the defendant surgeon was convicted of second-degree murder under an implied malice murder theory.<sup>25</sup> There, the victim suffered from apotemnophilia.<sup>26</sup> The victim learned of the defendant through a newspaper article about transsexual surgery and believed the surgeon might be willing to amputate his leg.<sup>27</sup> The defendant did indeed remove the seventy-nine-year-old victim’s leg.<sup>28</sup> Earlier, the victim had told the surgeon that he suffered from a heart condition.<sup>29</sup> The surgeon completed the surgery despite his

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23. *Id.* at 108, 840 P.2d at 978, 13 Cal. Rptr. 2d at 873.

24. *See id.* at 113–14, 840 P.2d at 982–83, 13 Cal. Rptr. 2d at 877–78 (Mosk, J., concurring). Justice Mosk’s concurring opinion illustrates the confusion in describing this category of acts, and explains the legislature’s intended definition:

In 1983 the Legislature adopted the “high probability of death/natural consequences” standard this court set forth in *Watson* for implied malice. Therefore, even if I agreed with amicus curiae the State Public Defender that the “high probability of death” language requires a graver act than the “natural consequences dangerous to life” language, and believed that the Legislature’s original “abandoned and malignant heart” formulation also set a high standard for the necessary physical act, my view would be purely academic, for the Legislature has decided that the two phrases are synonymous.

*Id.*

Therefore, the current version of the instruction and the 1983 version articulate the same standard, but the current version is in more straightforward terms. *See id.* The court urged the trial courts to adopt the clearest language describing the requirements of implied malice—i.e., the *Watson* court’s formulation that the act must have carried a “high probability that death would result.” *Id.*

<sup>25</sup>91 Cal. App. 4th 256, 259, 109 Cal. Rptr. 2d 879, 881 (2001).

26. *See id.* Apotemnophilia is the desire to have a limb amputated. Surgeons in the United States will not amputate the limbs of apotemnophiliacs. *See id.*

27. *See id.* at 260, 109 Cal. Rptr. 2d at 881.

28. *See id.* at 260, 109 Cal. Rptr. 2d at 882.

29. *See id.* at 260, 109 Cal. Rptr. 2d at 881.

awareness of the unjustifiable risk to the victim's health.<sup>30</sup> That risk was unjustified not only because the surgery was unnecessary, but also because the defendant's act was dangerous to life since he was aware of the victim's heart condition. The victim developed gangrene and died two days after the surgery.<sup>31</sup>

The defendant in *Brown* argued that the current jury instruction on implied malice was misleading when applied to an implied malice murder resulting from surgery.<sup>32</sup> He further alleged that the jury should have been provided with the 1983 version of the instruction, which stated that the act must have been "done for a base, antisocial purpose and with a wanton disregard for human life."<sup>33</sup> His reasoning was that there was evidence that all surgical procedures, even the simplest, are potentially life-threatening.<sup>34</sup> However, the court rejected the argument that the inherent dangers of surgery required the requested modification of the jury instruction.<sup>35</sup> Consequently, the court held that the trial judge did not err in giving the current version of the instruction.<sup>36</sup> *Brown* is also relevant to the next section, which deals with awareness of unjustifiable risk. Nevertheless, here, malice could be implied because the defendant realized the unjustifiable risk of his actions, and acted in total disregard of the danger to the victim's life.<sup>37</sup> This case illuminates the idea that there is a lot of conduct beyond brandishing weapons, shooting guns, and fighting that is dangerous to life. Although failed surgery normally does not trigger a murder prosecution, *Brown* indicates that a surgeon who acts recklessly—with an extreme indifference to human life—may be found guilty of murder under an implied malice murder theory.

ii. awareness of unjustifiable risk

If a person is aware of and realizes the unjustifiable risk attached to his conduct, yet acts in conscious disregard of the danger to life,

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30. *See id.* at 260–61, 109 Cal. Rptr. 2d at 882.

31. *See id.* at 261, 109 Cal. Rptr. 2d at 882.

32. *See id.* at 268–69, 109 Cal. Rptr. 2d at 887–88.

33. *Id.*

34. *See id.* at 268, 109 Cal. Rptr. 2d at 888.

35. *See id.* at 268–69, 109 Cal. Rptr. 2d at 888.

36. *See id.* at 270, 109 Cal. Rptr. 2d at 889.

37. *See id.* at 268, 109 Cal. Rptr. 2d at 887.

his crime is murder under the implied malice murder theory.<sup>38</sup> This Section focuses on what is needed to show that the defendant was aware of an unjustifiable risk. This awareness element requires defendant's subjective understanding that his behavior is reckless or dangerous to life.<sup>39</sup> Subjective awareness, however, does not require an understanding or knowledge that someone will die.

Unjustifiable risk is further defined in the Model Penal Code's definition of the term "recklessly."<sup>40</sup> That definition of recklessness is probably the best known and most widely accepted. Under the Model Penal Code, the actor's risk is unjustified where, considering the nature of the conduct and the circumstances known to the actor, the actor's conduct demonstrates a gross deviation from the standard that a law-abiding person would observe if placed in the same situation.<sup>41</sup> For example, a police officer who is driving at extremely high speeds is taking a risk, but the risk is justified if he is speeding in pursuit of someone who has committed a crime. On the other hand, a civilian who is speeding because he is racing with his friends is taking a risk that is unjustified. If that civilian were to cause death due to his reckless driving, it is possible that he could be found guilty of second-degree murder under the implied malice murder theory.

In *People v. Watson*, a drunk driver was convicted of murder.<sup>42</sup> The court found that the defendant was aware of danger to life because he drove his car to a bar, knowing that he would be driving later.<sup>43</sup> This court also presumed that the defendant was aware of the dangers of drunk driving.<sup>44</sup> Therefore, even absent an intent to kill, the defendant was held liable because he behaved recklessly under circumstances which showed an extreme indifference to human life.

The awareness element is also applicable in cases where the defendant is liable because of an omission to act. In *People v. Burden*, the defendant was convicted of second-degree murder after

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38. See CALJIC, *supra* note 20, no. 8.51.

39. See generally, *People v. Dellinger*, 49 Cal. 3d 1212, 783 P.2d 200, 264 Cal. Rptr. 841 (1989) (discussing whether implied malice requires a finding of the defendant's subjective awareness or appreciation of the life-threatening risk created by his conduct).

40. See MODEL PENAL CODE § 2.02(2)(c) (1962).

41. See *id.*

42. 30 Cal. 2d 290, 637 P.2d 279, 179 Cal. Rptr. 43 (1981).

43. See *id.*

44. See *id.*

his five-month-old son died from malnutrition and dehydration.<sup>45</sup> The defendant was aware during the last two weeks of the child's life that the child was starving to death.<sup>46</sup> On appeal, the court affirmed his second-degree murder conviction.<sup>47</sup> "[T]he common law does not distinguish between homicide by act and homicide by omission."<sup>48</sup> In *Burden*, the evidence demonstrated that the defendant failed to feed the infant despite his awareness that the baby was starving.<sup>49</sup> Applying the subjective awareness element to this case, a law-abiding person in the defendant's situation, aware that his child was starving, would not take the unjustified risk of withholding food from the child. The defendant was aware that his child could starve or become extremely malnourished. His lack of concern demonstrated recklessness and was substantial evidence of an extreme indifference to human life, making him liable for second-degree murder under an implied malice murder theory.

iii. conscious disregard of unjustifiable risk

The next two cases concern implied malice and intoxication. Defendants who kill as a result of their intoxication act recklessly. They exhibit an extreme indifference to human life, and thus can be guilty of murder even though they do not possess an intent to kill.

In *People v. Albright*, the court convicted the defendant of second-degree murder under an implied malice theory.<sup>50</sup> The court reached that conclusion because the defendant operated a motor vehicle after he had willfully consumed alcoholic beverages to the point of intoxication in conscious disregard for the safety of others.<sup>51</sup>

In *Albright*, the defendant drank at least eight beers before he drove between 90 and 110 miles per hour down a street in a small town.<sup>52</sup> He entered an intersection and crashed into the victim,

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45. 72 Cal. App. 3d 603, 606, 140 Cal. Rptr. 282, 283 (1977).

46. *See id.* at 609, 140 Cal. Rptr. at 284–85.

47. *See id.* at 621, 140 Cal. Rptr. at 293.

48. *Id.* at 618, 140 Cal. Rptr. at 290–91.

49. *See id.* at 609, 140 Cal. Rptr. at 284–85.

50. 173 Cal. App. 3d 883, 884, 219 Cal. Rptr. 334, 335 (1985).

51. *See id.* at 886–87, 219 Cal. Rptr. at 336–37.

52. *See id.* at 884, 219 Cal. Rptr. at 335.

killing him instantly.<sup>53</sup> The defendant told police that “he had tried to kill himself and had not meant to hurt anyone else.”<sup>54</sup>

Even though the defendant had no intent to kill, he could still be convicted of second-degree murder under the implied malice murder theory.<sup>55</sup> The court focused on the conscious disregard element of the crime. It stated that a defendant exhibits a conscious disregard of the safety of others when he willfully drinks alcohol to the point of intoxication, knowing that he thereafter must drive a car—thus combining impaired physical and mental abilities with a “vehicle capable of great force and speed . . . .”<sup>56</sup> The court concluded:

Intoxicated and possibly attempting suicide, defendant bolted at about 100 miles per hour through a residential area, passing three cars but smashing into the last. Defendant knew other people were on the road, and must have known of the high probability he would cause death if he continued his conduct and hit another car. His gamble that no one would enter his path killed a young man; it also rendered him guilty of second degree murder.<sup>57</sup>

*People v. Olivas* is another example of a defendant acting with a conscious disregard for life.<sup>58</sup> The court convicted the defendant of second-degree murder, without finding any intent to kill, where defendant led police on a deadly high speed chase.<sup>59</sup> The court found that a vehicular homicide committed while intoxicated involved implied malice. The court also found that such a vehicular homicide was second-degree murder if a person knew that his act endangered the life of another, yet acted with conscious disregard for life.<sup>60</sup> The defendant had consumed the drug PCP, which impaired his physical and mental faculties.<sup>61</sup> He drove at extremely high speeds, creating an unjustifiable risk.<sup>62</sup> His near misses with other

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53. *See id.* at 885, 219 Cal. Rptr. at 335.

54. *Id.*

55. *See id.* at 886–87, 219 Cal. Rptr. at 336–37.

56. *Id.* at 887, 219 Cal. Rptr. at 336–37.

57. *Id.*

58. 172 Cal. App. 3d 984, Cal. Rptr. 567 (1985).

59. *See id.* at 986, 218 Cal. Rptr. at 568.

60. *See id.* at 987, 218 Cal. Rptr. at 569 (citing *People v. Watson*, 30 Cal. 3d 290, 637 P.2d 279, 179 Cal. Rptr. 43 (1981)).

61. *See id.* at 986, 218 Cal. Rptr. at 568.

62. *See id.* at 989, 218 Cal. Rptr. at 570.

cars and his willful avoidance of pursuing police cars showed that he was aware of this risk, yet he continued his reckless driving.<sup>63</sup> It did not matter whether the defendant took the PCP knowing that he would later drive.<sup>64</sup> What mattered was that at the time of the fatal accident, the defendant acted purposefully with “conscious disregard for a known, life-threatening risk.”<sup>65</sup>

### B. Provocative Act Murder Doctrine

“In a provocative act murder, neither the defendant nor the defendant’s accomplice kill or intend to kill.”<sup>66</sup> Instead, the killer is a third party, and the victim is usually an accomplice or an innocent bystander.<sup>67</sup> Provocative act murder is a form of implied malice murder, originally derived from the felony-murder rule.<sup>68</sup> This type of homicide follows logically after implied malice murder because they share generally the same mens rea requirements. The difference is that in provocative act murder, liability attaches because of a particular causal pattern involving a defendant’s action and a third party reaction that kills the victim. Normally homicides falling under this doctrine are murder in the second-degree under the implied malice theory. However, in a few instances, the doctrine operates within a different context analogous to that of first-degree felony-murder.<sup>69</sup>

#### 1. How provocative act murder doctrine is triggered

“Under the provocative act murder doctrine, the perpetrator [or instigator] of a crime is held vicariously liable for the killing,” absent an intent to kill, when a third party kills the perpetrator’s accomplice, or target.<sup>70</sup> Provocative act murder does not require that either the defendant or his accomplices have an intent to kill.<sup>71</sup> In fact, neither

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63. *See id.*

64. *See id.* at 988, 218 Cal. Rptr. at 570.

65. *Id.* at 989, 218 Cal. Rptr. at 570.

66. 1 WITKIN CAL. CRIM. LAW ELEMENTS, *supra* note 1, §§ 192, 195.

67. *See id.*

68. *See* CAL. PENAL CODE § 187 (West 2003).

69. *See infra* note 100.

70. *People v. Briscoe*, 92 Cal. App. 4th 568, 581–83, 112 Cal. Rptr. 2d 401, 411–14 (2001); *People v. Aurelio*, 167 Cal. App. 3d 52, 57, 212 Cal. Rptr. 868, 870 (1985).

71. *See Aurelio*, 167 Cal. App. 3d at 57, 212 Cal. Rptr. at 870.

the defendant nor his accomplice needs to pull the trigger.<sup>72</sup> Rather, to invoke the provocative act doctrine, a third party actually fires the shot that results in the death of either the defendant's accomplice or an innocent bystander.<sup>73</sup>

## 2. The requirements of provocative act murder

The provocative act murder doctrine requires the prosecution to establish that the defendant committed a dangerous act (*actus reus*), and that it was highly probable a third party would react in a life-threatening manner (*mens rea*). Under the doctrine, *actus reus* requires that the defendant or an accomplice “commit[s] an act which provokes a third party into firing the fatal shot.”<sup>74</sup> Furthermore, *mens rea* is established where “the defendant or his [accomplice knows] this act has a ‘high probability’ . . . of eliciting a life threatening response from the third party.”<sup>75</sup> “[A] ‘foreseeable possibility’ of eliciting a life-threatening response from a third party” is not sufficient to satisfy the *mens rea* requirement.<sup>76</sup> In addition, the prosecution must establish that the defendant's conduct, rather than the conduct of the third party who actually fired the fatal shot, proximately caused the killing.<sup>77</sup> The relevant California jury instruction states:

[H]omicide committed during the commission of a crime by a person who is not a perpetrator of such crime, in response to an intentional provocative act by a perpetrator of the crime other than the deceased [perpetrator], is considered in law to be an unlawful killing by the surviving perpetrator[s] of the crime.<sup>78</sup> To qualify as a provocative act, the felon's conduct must be sufficiently provocative of [a] lethal response to support a finding of implied malice.<sup>79</sup>

In order to prove this crime, the California jury instructions require proof of each of the following elements:

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72. *See id.*

73. *See id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *See* CALJIC, *supra* note 20, no. 8.12.

78. *Id.*

79. *See id.*

1. The crime of \_\_\_\_\_ [or] attempted \_\_\_\_\_] was committed;
2. During the commission of the crime, a [surviving perpetrator] [the defendant] also committed an intentional provocative act;
3. [The victim of the \_\_\_\_\_] [a peace officer] [another person not a perpetrator of the crime of \_\_\_\_\_] in response to the provocative act, killed [a perpetrator of such crime] [another person] [a fetus];
4. The [defendant's] [surviving perpetrator's] commission of the intentional provocative act was a cause of death of \_\_\_\_\_ (name of the deceased).<sup>80</sup>

Provocative act murder, therefore, is similar to second-degree murder under an implied malice theory in that it requires a dangerous act, performed with a conscious disregard for human life. The difference is that the perpetrator of the intentionally provocative act is liable for a killing even though a third party, rather than the perpetrator, actually committed the killing.

### 3. Provocative act murder and the problem of causation

What makes provocative act murder so unique is that it is a doctrine through which a defendant can be convicted of murder for a killing that was actually committed by someone else. Usually in provocative act murder cases, the liability attaches to an instigator where a third party kills either the instigator's accomplice, target or rival. *Pizano v. Tulare County* illustrates such a causal pattern.<sup>81</sup>

In *Pizano*, two men forcefully entered a house shared by Vaca and Coverdell.<sup>82</sup> The neighbors' children informed their parents that two masked men had entered Vaca's house.<sup>83</sup> The neighbor went to Vaca's house, kicked the door halfway open, and saw the two men, one of whom had a pistol.<sup>84</sup> The co-defendant, Esquivel, mistook the neighbor for a policeman, grabbed Vaca, and stated that he would shoot Vaca if the police intervened. Pizano, the co-defendant, and

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80. *Id.*

81. 21 Cal. 3d 128, 131, 577 P.2d 659, 661, 145 Cal. Rptr. 524, 526 (1978).

82. *See id.*

83. *See id.*

84. *See id.*

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Vaca, then ran out of the house. Not realizing that Vaca was present, the neighbor shot at the co-defendant because the police had not arrived, and he thought that the defendants were robbing the house.<sup>85</sup> When the neighbor recognized Vaca and ceased fire, Vaca was already mortally wounded by the neighbor's shot.<sup>86</sup> Esquivel was tried separately and found guilty of first-degree murder. The prosecution successfully argued that liability should not depend on the state of mind of the person firing "the fatal shot but on the conduct of the defendant or his accomplice."<sup>87</sup>

Although the court explained that the provocative act murder doctrine is inapplicable to shield cases, *Pizano* is important because it illustrates how the victim's death was proximately caused by the defendant's provocative and reckless conduct rather than by the robbery.<sup>88</sup> Moreover, where the underlying crime, such as robbery, does not involve an intent to kill, mere participation is not sufficient to invoke murder liability.<sup>89</sup> Therefore, according to the provocative act murder doctrine, the provocative act must be greater than the act that is necessary to perform the underlying crime.<sup>90</sup>

It is difficult to determine what is "greater than necessary."<sup>91</sup> "In every robbery the possibility exists that a victim will resist and kill."<sup>92</sup> Once the robbery is in progress, the robber has little control over such a killing.<sup>93</sup> Thus, one can argue that imposing an additional penalty for the killing improperly discriminates between robbers solely on the basis of a victim's response to the robber's conduct.<sup>94</sup> For a defendant's act to be sufficiently provocative for a finding of implied malice, the defendant must have acted in furtherance of an underlying crime that was dangerous to life and in

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85. *See id.*

86. *See id.*

87. *Id.* at 137, 577 P.2d at 664, 154 Cal. Rptr. at 529.

88. *See id.* at 132, 577 P.2d at 661, 145 Cal. Rptr. at 526.

89. *See People v. Briscoe*, 92 Cal. App. 4th 568, 112 Cal. Rptr. 2d 401 (2001).

90. *See id.* at 582–83, 112 Cal. Rptr. 2d at 412.

91. *Id.*

92. *See id.* at 583, 112 Cal. Rptr. 2d at 413.

93. *Id.*

94. *See id.*

a manner beyond that which is necessary to accomplish the underlying offense.<sup>95</sup>

However, in cases in which the underlying crime does not involve an intent to kill, it is still difficult to determine what is “greater than that necessary.”<sup>96</sup> Through its decision of the proximate cause requirement for provocative act murder, the court in *People v. Cervantes* illustrates the difficulty in determining the appropriate mens rea for the provocative act murder doctrine.<sup>97</sup> In essence, the defendant must commit an extremely reckless act, and the act must actually cause others to respond in a deadly manner.

*People v. Cervantes* is distinguished from other provocative act murder cases because in *Cervantes*, “the actual murderers were not responding to the defendant’s provocative act by shooting back at him or an accomplice in the course of which someone was killed.”<sup>98</sup> The murderers in *Cervantes* were not in the shoes of the police officers in *People v. Gilbert*. There, the police officers responded reasonably to the dilemma when they returned gunfire and killed the defendant’s accomplice.<sup>99</sup> *Cervantes* can be further distinguished because (1) the defendant, Cervantes, was not the initial aggressor in the original altercation, (2) the victim was not involved in the original altercation, (3) there was no evidence that the “Alley Boys” who killed the victim were present at the original altercation, and (4) the defendant was not present when the victim was shot.<sup>100</sup> Thus,

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95. *See id.* Provocative act murder requires implied malice. “Malice may be implied if the defendant commits an act with a high probability that it will result in death and does so with a base antisocial motive . . . . [T]he defendant’s conduct [must be] sufficiently provocative of a lethal response” for the necessary implied malice to attach and therefore furnish a finding of guilt on a murder charge. *Id.* (emphasis omitted).

96. *Id.*

99. 26 Cal. 4th 860, 862, 29 P.3d 225, 227, 111 Cal. Rptr. 2d 148, 150 (2001). In this case, the defendant, a member of the Highland Street gang, shot a member of the Alley Boys, who was trying to defuse an argument between the defendant and another Alley Boys member. A short time passed and a group of Alley Boys, in retaliation, shot and killed a member of the Highland Street gang. The court found the defendant not guilty of the provocative act murder of the member of his own gang.

98. *Id.* at 872–73, 29 P.3d at 234, 111 Cal. Rptr. 2d at 158.

99. *See id.* at 873, 29 P.3d at 234, 111 Cal. Rptr. 2d at 158 (citing *People v. Gilbert*, 63 Cal. 2d 690, 705, 408 P.2d 365, 374, 47 Cal. Rptr. 909, 918 (1965) (alterations in original)).

100. *See id.* at 872, 29 P.3d at 233, 111 Cal. Rptr. 2d at 157.

the court held that because the victim's murder by other parties was not only felonious, but perpetrated with malice aforethought, and directed at a victim who had no involvement in the original altercation, the case lacked the necessary proximate causation to find the defendant guilty of the murder of his fellow gang member.<sup>101</sup> Therefore, his mere verbal altercation with a rival gang member was not sufficiently reckless, with respect to the likely responses of others, to maintain that he proximately caused the death of his fellow gang member.

#### 4. When provocative act murder doctrine brings a first-degree murder conviction

In *People v. Briscoe*, a jury used the provocative act murder doctrine to convict the defendant of first-degree murder as opposed to second-degree murder under the implied malice theory.<sup>102</sup> The defendant, Briscoe, along with accomplice Pina, went to the victim's home and knocked on the door.<sup>103</sup> The frightened victim, Rozadilla, armed herself with a gun.<sup>104</sup> When Rozadilla's boyfriend, Parovel, returned, Pina and Briscoe told Parovel that they wanted to purchase marijuana.<sup>105</sup> Parovel hid the gun in his clothing.<sup>106</sup> As Parovel was retrieving the marijuana, Pina pointed a semi-automatic pistol at Parovel and demanded his gun from him.<sup>107</sup> Meanwhile, Briscoe returned to the living room, held a .38-caliber handgun to Rozadilla's neck and asked in a very loud voice, "Where's the gun, Bitch?"<sup>108</sup> A fierce struggle ensued between the three men, which eventually led outside the house.<sup>109</sup> Briscoe gained control of the gun. Parovel grabbed for the gun and it went off.<sup>110</sup> Parovel feared for his own life and started shooting.<sup>111</sup> Parovel shot Pina twice.<sup>112</sup> Parovel fled to a neighbor's house to call the police.<sup>113</sup> Pina later died.<sup>114</sup>

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101. *See id.* at 874, 29 P.3d 234, 111 Cal. Rptr. 2d at 158.

102. *Briscoe*, 92 Cal. App. 4th at 576, 112 Cal. Rptr. 2d at 407.

103. *See id.* at 577, 112 Cal. Rptr. 2d at 408.

104. *See id.*

105. *See id.*

106. *See id.*

107. *See id.*

108. *Id.*

109. *See id.*

110. *See id.* at 578, 112 Cal. Rptr. 2d at 408–09.

111. *See id.*

Briscoe's murder charge alleged that Pina's murder was committed during a robbery and burglary, and that Briscoe personally used a firearm in the commission of all three offenses. It did not matter that Briscoe did not actually fire the shot that killed Pina because liability for Pina's death extended to Briscoe under the provocative act murder doctrine.<sup>115</sup> The court explained that more than one act may constitute the proximate cause of a killing.<sup>116</sup> If only one of the defendant's several acts provokes a deadly response, then that is the act that constitutes the provocative act by which the court finds liability.<sup>117</sup> "When the chain of causation is somewhat attenuated, the jury decides whether [the defendant is liable for murder] or not."<sup>118</sup> This fact scenario is similar to felony-murder because a death occurred while defendant was committing an enumerated felony. Instead, the defendant was convicted under the provocative act murder doctrine because of the reckless indifference he demonstrated during his participation in a felony that resulted in death.

##### 5. Second-degree murder conviction under provocative act murder doctrine—in general

In *People v. Aurelio*, the court found the defendant guilty of second-degree murder under a provocative act murder theory for the death of his fellow gang member.<sup>119</sup> The defendant appealed his conviction, based on the grounds that he did not intend to kill his fellow gang member. The court rejected the defendant's argument

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112. *See id.*

113. *See id.*

114. *See id.*

115. *See id.* at 578–80, 112 Cal. Rptr. 2d at 408–11.

116. *See id.* at 584, 112 Cal. Rptr. 2d at 414.

117. *See id.*

118. *Id.*

119. 167 Cal. App. 3d 52, 212, Cal. Rptr. 898 (1985). In this case, the defendant was a member of a juvenile gang and was upset that the previous week, another gang shot one of his fellow members. The defendant and four other members decided to drive into the rival gang's territory and shoot a rival member in revenge. As the defendant and his fellow gang members neared the targeted area, they shot at a station wagon and the station wagon returned fire. During the exchange, bullets from the defendant's car hit a residence whose occupants were also members of the rival gang. The owner of the residence shot back at the car and one of the defendant's fellow gang members was fatally wounded.

because the defendant and his fellow gang members committed a murder that involved an intent to kill.<sup>120</sup> They drove into a rival gang's territory for the specific purpose of shooting someone.<sup>121</sup> Therefore, the court did not question the defendant's liability for the death of his fellow gang member—a death that resulted when the defendant's plans misfired.<sup>122</sup> The defendant's conduct qualified as a provocative act because the act of discharging a weapon at someone both provoked others to return gunfire, and resulted in the death of a co-felon.<sup>123</sup> In other words, the defendant's conduct was sufficiently reckless to support a finding of implied malice under the provocative act murder doctrine because he performed an act dangerous to human life, and he demonstrated extreme indifference to human life. His conduct elicited a deadly response from a third party. Therefore, even though the defendant did not intend to kill his fellow gang member, he could be held liable for the victim's death by a third party because defendant's reckless conduct caused the fatal response.

An alternative application of the provocative act murder doctrine is found in *People v. Shamis*.<sup>124</sup> This case is significant because it does not involve fighting, a gun, or a police chase. In *Shamis*, the court invoked the provocative act murder doctrine because someone died as a result of the defendant entering into agreements to defraud insurance companies by staging accidents involving automobiles and big-rig trucks.<sup>125</sup> The court held that the evidence was sufficient to support a finding that the defendant entered into a conspiracy to commit insurance fraud, that the defendant committed an overt act in furtherance of the conspiracy, and that the victim's death was a probable result of the common plan.<sup>126</sup>

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120. *See id.* at 60, 212 Cal. Rptr. at 872. In other words, they did not simply enter a store and waive a gun hoping to simply rob and then leave without firing a shot.

121. *See id.* at 60, 212 Cal. Rptr. at 872.

122. *See id.* at 60–61, 212 Cal. Rptr. at 872–73.

123. *See id.*

124. 58 Cal. App. 4th 833, 68 Cal. Rptr. 2d 388 (1997).

125. *See id.* at 838–39, 68 Cal. Rptr. 2d at 390–91. Even though the defendant did not intend to kill the victim, the defendant is liable for the acts of her co-conspirators which follow “as a probable and natural consequence of the common design, even though [they are] not intended as a part of the original design or common plan.” *Id.* at 843, 68 Cal. Rptr. 2d at 393.

126. *See id.* at 843, 68 Cal. Rptr. 2d at 393–94. The prosecution's evidence showed that the collisions between cars and big-rigs were staged according to a

In *Shamis*, the defendant's actions may seem too attenuated to hold her liable for murder. However, the defendant was responsible for the drivers' actions in driving onto the freeway and leading another car to a position immediately in front of a big-rig truck.<sup>127</sup> The driver's pressing on the brakes in a life-endangering manner was the provocative conduct which substantially contributed to the victim's death.<sup>128</sup> Although it was the driver's conduct that caused the other driver to lose control of the vehicle, the defendant, in her role as a co-conspirator in an insurance fraud scheme, is criminally responsible for the actions of the drivers involved.<sup>129</sup> Having instructed someone to stage an accident, she caused a third party to react in a life-threatening manner. The defendant's conduct was dangerous to life and it involved a conscious disregard for human life. Her instigating conduct triggered a deadly accident, and therefore, she may be held accountable for the killing.

### C. *Involuntary Manslaughter*

A crime is committed when there is an act and an intent, or criminal negligence.<sup>130</sup> A distinguishing factor between murder and involuntary manslaughter is found in California jury instruction 8.51:

If a person causes another's death by doing an act or engaging in conduct in a criminally negligent manner, without realizing the risk involved, he is guilty of involuntary manslaughter. If, on the other hand, the person realized the risk and acted in total disregard of the danger to life involved, malice is implied, and the crime is murder.<sup>131</sup>

This section will discuss the requisite mens rea for involuntary manslaughter<sup>132</sup> and its development in California homicide law.

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particular plan that the defendant had orchestrated even though she was not the driver in either vehicle. *See id.* at 844, 68 Cal. Rptr. 2d at 394.

127. *See id.* at 846, 68 Cal. Rptr. 2d at 396.

128. *See id.*

129. *See id.*

130. *See* CAL. PENAL CODE § 20 (West 1999).

131. CALJIC, *supra* note 20, no. 8.51.

132. *Id.* at 8.52.

### 1. How courts define involuntary manslaughter

California's Penal Code defines manslaughter as the unlawful killing of a human being without malice.<sup>133</sup> Involuntary manslaughter, however, is a bit more complicated, and thus it is more difficult to define.<sup>134</sup> Judges instruct California jurors that involuntary manslaughter is an "unlawful killing without malice aforethought and without an intent to kill."<sup>135</sup> Specifically, involuntary manslaughter occurs by the commission of an unlawful act, not amounting to a felony; or in the "commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection."<sup>136</sup> "Without due caution and circumspection"<sup>137</sup> has the same meaning as "criminal negligence."<sup>138</sup>

### 2. Civil vs. criminal negligence

A person is liable for negligent homicide where there is "aggravated, culpable, gross or reckless negligence."<sup>139</sup> Under the Model Penal Code, "criminal homicide constitutes negligent homicide when it is committed negligently."<sup>140</sup> A person acts negligently, with respect to homicide, when he should be aware of a substantial and unjustifiable risk to human life.<sup>141</sup> The conduct of the accused must be such a departure from the ordinary, prudent, or careful man's conduct under the same circumstances that it shows "disregard of human life or an indifference to consequences."<sup>142</sup>

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133. See CAL. PENAL CODE § 192 (West 1999).

134. See Hobson, *supra* note 5, at 553. In his article, Hobson explains how negligence is primarily analyzed for the purpose of defining civil negligence. See *id.* at 529. He adds that it is more difficult to define criminal negligence because such analysis requires a compromise. See *id.* at 553–54.

135. CALJIC, *supra* note 20, no. 8.45 (2002). Charles Hobson proposes that the various forms of manslaughter in California should be retained because there exist homicides that are less culpable than murder but that still require punishment. See Hobson, *supra* note 5, at 527–28.

136. See CAL. PENAL CODE § 192 (6<sup>th</sup> ed. West 1999).

137. CALJIC *supra* note 20, no. 8.46.

138. *People v. Penny*, 44 Cal. 2d 861, 869, 285 P.2d 926, 931 (1955) (citations omitted).

139. See 26 AM. JUR. *Homicide* § 210 (1940).

140. MODEL PENAL CODE § 210.4 (1980).

141. See MODEL PENAL CODE § 2.02(2)(d) (1985).

142. *Id.*

Simple stupidity, irresponsibility, thoughtlessness, carelessness, or lack of foreseeability, no matter how serious the consequences may be, do not constitute criminal negligence<sup>143</sup>—this would simply be civil negligence. In order to be found guilty, a defendant in an involuntary manslaughter case must demonstrate gross/criminal negligence. That is, the defendant must act in a manner contrary to how a reasonable person would act in similar circumstances. There is no subjective mental state required for a defendant to be guilty of involuntary manslaughter.<sup>144</sup> The accused must be conscious of the probable consequences of his act, and he must disregard the probable consequences at the time of the act or omission.<sup>145</sup>

### 3. What the courts mean by their definitions

The definition of involuntary manslaughter is complicated and can be confusing. A practical way to distinguish involuntary manslaughter from other categories of homicide is to envision the death as a result of a careless killing or due to gross/criminal negligence. *People v. Penny* set forth the standard that is used in California to define negligent homicide.<sup>146</sup> The prosecution must establish (1) that the actor had knowledge, actual or imputed, that his conduct would endanger life, and (2) that the consequences of the negligent act were reasonably foreseeable.<sup>147</sup>

In other words, a person may be held liable for involuntary manslaughter after he acts carelessly by not perceiving a substantial and unjustifiable risk. That is, the defendant should have been aware of a substantial and unjustifiable risk that he took when he acted. A reasonable person in a similar situation would have perceived the risk and would have been more careful.<sup>148</sup>

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143. See *People v. Wells*, 66 N.Y.S.2d 161, 164 (1946).

144. See DOUGLAS DALTON, CALIFORNIA CRIMINAL LAW 5.07(E) (1995).

145. See *generally id.* (describing involuntary manslaughter).

146. *Penny v. Penny*, 44 Cal. 2d 861, 879–80, 285 P.2d 926, 937 (1955) (reversing a conviction of involuntary manslaughter because the jury was not properly instructed according to California Penal Code section 192 as to “what constitutes criminal negligence, or the lack of due caution and circumspection.” (citing 26 AM. JUR. *Homicide* § 210 (1940)).

147. See 26 AM. JUR. *Homicide* § 210 (1940).

148. See MODEL PENAL CODE § 2.02(2)(d) (1985) (see Model Penal Code’s definition of “negligently”).

In *People v. Rodriguez*, the court reversed the defendant's involuntary manslaughter conviction due to a lack of proof of criminal negligence.<sup>149</sup> The prosecution failed to offer evidence that the defendant could have reasonably foreseen that a fire would ignite in her house and burn her toddler to death.<sup>150</sup> The evidence showed, at most, that the defendant was negligent.<sup>151</sup> Mere negligence, however, is not enough to warrant an involuntary manslaughter conviction.<sup>152</sup> There must be gross negligence, which involves a gross deviation from the standard of care of a reasonable person in the same or similar circumstances.

An omission to act may also constitute gross negligence and warrant an involuntary manslaughter conviction. In *People v. Villalobos*, the court explained that the defendant's lawful act of bathing a child was performed in a grossly negligent manner.<sup>153</sup> Failure to use due care in the treatment of one's child is sufficient to constitute involuntary manslaughter resulting from an act or omission.<sup>154</sup>

A person can also be convicted of involuntary manslaughter where he unintentionally causes the death of his victim after committing an assault and battery.<sup>155</sup> In *People v. Morgan*, one such defendant was convicted of involuntary manslaughter.<sup>156</sup> The court found the defendant's intent immaterial, concluding that beyond any

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149. *People v. Rodriguez*, 186 Cal. App. 2d 433, 8 Cal. Rptr. 863 (1960).

150. *See id.* at 440, 8 Cal. Rptr. at 868.

151. *See id.* at 441, 8 Cal. Rptr. at 869.

152. *See id.*

153. 208 Cal. App. 2d 321, 325, 25 Cal. Rptr. 111, 114 (1962). In that case the defendant placed her daughter in a washbasin with only hot water, added some cold water from the kitchen, removed the child from the basin, and put her in the shower where she discovered the child's wrinkled pinkish skin. Knowing that the child's body parts were scorched by hot water, the defendant put the child to bed. The defendant's sister returned to the house, heard the child crying, discovered that the child's skin was peeling, and took the child to the hospital. At the hospital the child was diagnosed with first and second-degree burns. The child later died. *See id.* at 324, 25 Cal. Rptr. at 113.

154. *See id.* at 328, 25 Cal. Rptr. at 115-16.

155. *See People v. Morgan*, 275 Cal. 2d 603, 608, 79 Cal. Rptr. 911, 914 (1969). In this case the defendant repeatedly hit his victim with his hands and fists causing internal bleeding that eventually lead to the victim's death. *See id.* at 605, 79 Cal. Rptr. at 912.

156. *See Morgan* at 604, 79 Cal. Rptr. at 912.

reasonable doubt, the battery led to the victim's death.<sup>157</sup> The defendant could not offer a defense to the manslaughter charge because there was no evidence showing that the defendant was unconscious at the time of the beating.<sup>158</sup>

In a homicide case, a court must give an involuntary manslaughter jury instruction if an intent to kill is absent. In *People v. Welch*, the court reversed the defendant's conviction for voluntary manslaughter because the trial court failed to instruct the jury on involuntary manslaughter, and there was substantial evidence to furnish a finding that the defendant did not intend to kill the victim.<sup>159</sup>

#### 4. Evaluating criminal negligence objectively

Criminal negligence must be evaluated objectively. "[I]f a reasonable person in the defendant's position would have been aware of the risk involved, [courts and juries will presume that a defendant] had such an awareness."<sup>160</sup> Justice Holmes was a proponent of the

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157. *See id.* at 608–09, 79 Cal. Rptr. at 914.

158. *See id.* at 608, 79 Cal. Rptr. at 914.

159. *People v. Welch*, 137 Cal. App. 3d 834, 840-41, 187 Cal. Rptr. 511, 514-15 (1982). In *Welch*, the defendant and the victim got into an altercation at a bar and the victim told the defendant that he would take him outside and "kick his ass." *Id.* at 837, 187 Cal. Rptr. at 513. The defendant suffered from a life-threatening blood condition caused by an accident several years prior. *See id.* at 837, 187 Cal. Rptr. at 512. The defendant testified that he was afraid that he would die if the victim performed his threats. Therefore, the defendant maintained that he acted in self-defense and was compelled by fear of great bodily harm or death; not with an intent to kill the victim. *See id.* at 840, 187 Cal. Rptr. at 514. The court held that the defendant did not have an intent to kill when he shot the victim and the victim was the aggressor at all times prior to being shot by the defendant. The court further explained that a conviction for involuntary manslaughter is appropriate where the jury finds that the nature of the attack did not justify the resort to deadly force in self-defense or that the force used in self-defense exceeded that which was reasonably necessary to repel the attack. *See id.* at 838, 187 Cal. Rptr. at 513. The problem in this case, however, was that the appropriate jury instruction was not given. *See id.* at 841, 187 Cal. Rptr. at 515.

160. *People v. Watson*, 30 Cal. 3d 290, 296, 637 P.2d 279, 283, 179 Cal. Rptr. 43, 47 (1981) (citing *Weber v. Pinyan*, 9 Cal. 2d 226, 70 P.2d 183 (1931) (emphasis in original)). Charles Hobson analyzes current jurisprudence on the question of reasonableness:

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

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idea that negligence should be subjected to an objective standard.<sup>161</sup> He said:

[T]he object of the law is to prevent human life from being endangered or taken; and that, although it so far considers blameworthiness in punishing as not to hold a man responsible for consequences which no one, or only some exceptional specialist, could have foreseen, still the reason for this limitation is simply to make a rule which is not too hard for the average member of the community. 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.<sup>162</sup>

This explanation, along with the involuntary manslaughter category of homicide, is especially important because the law seeks to prevent harm irrespective of any actual *purpose* to cause it. This is illustrated in *People v. Albritton*.<sup>163</sup> In *Albritton*, the victim died as a result of the shaken baby syndrome after the defendant father shook the infant victim.<sup>164</sup> The court found that the defendant “did not intend to kill [the child,] but [nevertheless] caused her death by committing child abuse” in violation of California Penal Code section 273(a), (b).<sup>165</sup> The defendant was convicted of “one count of

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latter. This simply cannot be. It ignores the fact that in most cases the perpetrator will subjectively know what a reasonable person would know . . . . The reports are full of involuntary manslaughter cases in which there must have been a subjective appreciation of the risk. A better way to differentiate between unintentional murder and negligent manslaughter is the inherent risk of the conduct that caused the death.

Hobson, *supra* note 5, at 495.

161. See SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 479 (Richard A. Epstein et al. eds., 5th ed. 1989).

162. *Id.* at 480.

163. 67 Cal. App. 4th 647, 79 Cal. Rptr. 2d 169 (1998).

164. See *id.* at 656, 79 Cal. Rptr. 2d at 174-75.

<sup>165</sup> California Penal Code section 273(a), (b) states: “Any person who, having the care or custody of a child who is under eight years of age, assaults the child by means of force that to a reasonable person would be likely to produce great bodily injury, resulting in the child’s death, shall be punished . . . .” CAL. PENAL CODE § 273(b) (West 1999).

involuntary manslaughter . . . and one count of assault on a child with force likely to produce great bodily injury resulting in death.”<sup>166</sup> The prosecution’s only burden was to establish that a reasonable person, in the defendant’s situation, would know that the force used on the baby was likely to cause great bodily injury. “[The victim in this case] had retinal hemorrhages and severe brain swelling [which are signs] common in babies who have been shaken.”<sup>167</sup> The defendant maintained that he was simply trying to shake her so that she would start crying because she had been unconscious after she fell off the bed.<sup>168</sup> Because he was in a state of panic, he could not remember how hard he shook the child.<sup>169</sup> However, to convict a defendant of involuntary manslaughter, the jury has to determine only that a reasonable person would believe that the force was likely to result in great bodily injury.<sup>170</sup> In *Albritton*, the killing was in the commission of the unlawful act of child abuse, under circumstances that were dangerous to human life. Thus, the defendant could be found guilty of involuntary manslaughter and child abuse, regardless of his intent or lack thereof.<sup>171</sup> Because substantial evidence supported both the involuntary manslaughter charge, and the child abuse charge, there was no inconsistency in rendering the two verdicts.<sup>172</sup>

Likewise, a mother’s failure to act in an objectively reasonable manner in caring for her child led to an involuntary manslaughter prosecution in *Walker v. Superior Court of Sacramento County*.<sup>173</sup> There, the defendant did not physically apply force to the child, but she exposed the child to harm by neglecting to seek necessary medical treatment for her child’s flu-like symptoms. Walker moved to dismiss the prosecution because of her belief that healing through prayer was the appropriate treatment for her child.<sup>174</sup> Her motion

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166. *Albritton*, 67 Cal. App. 4th at 651, 79 Cal. Rptr. 2d at 171.

167. *Id.* at 652, 79 Cal. Rptr. 2d at 172.

168. *See id.* at 653, 79 Cal. Rptr. 2d at 173.

169. *See id.*

170. *See id.* at 655, 79 Cal. Rptr. 2d at 174.

171. *See id.* at 651, 79 Cal. Rptr. 2d at 171.

172. *See id.* at 656, 79 Cal. Rptr. 2d at 174.

173. 47 Cal. 3d 112, 763 P.2d 852, 253 Cal. Rptr. 1 (1988).

174. Samuel H. Pillsbury highlights this case in his book entitled *Judging Evil: Rethinking the Law of Murder and Manslaughter*. He states:

“To most in contemporary America, Ms. Walker’s belief that disease

was unsuccessful. The child died from meningitis because the mother, a member of the Church of Christian Science, chose to treat the child's illness with prayer instead of appropriate medical treatment.<sup>175</sup>

"The relevant inquiry . . . turned not on the defendant's subjective intent to heal her daughter but on the objective reasonableness of her course of conduct."<sup>176</sup> In Walker's defense, she summoned an accredited Christian Scientist prayer practitioner to supervise her child's condition.<sup>177</sup> In a pretrial review of Walker's charge, the California Supreme Court rejected Walker's defense of good motive and allowed for the involuntary manslaughter prosecution to continue. The court held that the defendant exercised extreme carelessness when she failed to take the child to a doctor. Thus, the defendant exposed herself to prosecution for involuntary manslaughter.<sup>178</sup>

*Walker* is distinguishable from *Rodriguez*, where the court reversed an involuntary manslaughter conviction of a woman who left her children in a home that subsequently caught fire, killing one

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[should be] treated by prayer and not medicine is crazy. . . If we were to take a utilitarian approach to punishment, the case is a fairly simple one. Parents like Walker may be strongly encouraged to seek medical treatment for children by the threat of punishment." Pillsbury then questions the deserved punishment for homicide and asks if Walker's failure to seek medical attention demonstrated a "moral indifference" to her child. Pillsbury sees this as a "case of tragically misguided concern rather than of culpable indifference." SAMUEL H. PILLSBURY, *JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER*, 186–87 (1998). Pillsbury proposed a reform to the definition of involuntary manslaughter based on an indifference approach to culpability—he suggests:

Involuntary manslaughter should be defined as follows:

A person is guilty of involuntary manslaughter who causes the death of another by the disregard of a substantial, unjustified, and reasonably apparent risk to human life, under circumstances that demonstrate a basic lack of concern for the welfare of others.

*Id.* at 184.

175. *See Walker*, 47 Cal. 3d at 119, 763 P.2d at 855, 253 Cal. Rptr. at 4.

176. *Id.* at 137, 763 P.2d at 868, 253 Cal. Rptr. at 17.

177. *See id.* at 119, 763 P.2d at 855. 253 Cal. Rptr. at 4

178. *See id.*

child.<sup>179</sup> In *Rodriguez*, the mother's conduct was not sufficiently careless to warrant a finding of criminal or gross negligence.<sup>180</sup> In contrast, the mother in *Walker* failed to seek medical attention for her daughter, who had been ill throughout a seventeen-day period.<sup>181</sup> In terms of unreasonableness, the court found that her action was "plainly more egregious than the decision of Mrs. Rodriguez to leave her children alone at home for an afternoon."<sup>182</sup>

##### 5. The "should be aware" element of involuntary manslaughter

As discussed previously, more than ordinary negligence is necessary to satisfy the requirements of involuntary manslaughter. An act constitutes criminal negligence if a prudent man would foresee that the act would cause a high risk of death or great bodily harm.<sup>183</sup> This is a hotly contested issue in nearly all negligence cases. Therefore, it is important to consider whether a person should either be aware of an unjustifiable risk, or should have knowledge of that risk.<sup>184</sup>

In *People v. Oliver*, the prosecution established that the defendant had knowledge of an unjustifiable risk of harm to the defendant, and the court consequently convicted her of involuntary manslaughter.<sup>185</sup> The sequence of events is of particular importance. The defendant, Oliver, became friendly with the victim at a bar.<sup>186</sup> They both went to the defendant's house, where the victim injected himself with heroin in the defendant's bathroom.<sup>187</sup> After the victim collapsed on the defendant's floor, the defendant instructed her daughter to drag the victim outside, where he was found dead the next day.<sup>188</sup> At trial, the evidence showed: (1) that the defendant

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179. See *People v. Rodriguez*, 186 Cal. App. 2d 433, 441, 8 Cal. Rptr. 863, 868-69 (1960).

180. See *id.*

181. See *Walker*, 47 Cal. 3d at 138, 763 P.2d 852 at 869, 253 Cal. Rptr. at 18.

182. *Id.*

183. See *Rodriguez*, 186 Cal. App. 2d at 440, 8 Cal. Rptr. at 868.

184. See *id.* at 440-41, 8 Cal. Rptr. at 868-69.

185. 210 Cal. App. 3d 138, 258 Cal. Rptr. 138 (1989).

186. See *id.* at 143, 258 Cal. Rptr. at 140.

187. See *id.*

188. See *id.* at 144, 258 Cal. Rptr. at 140.

knew that the victim requested a spoon in order to shoot-up heroine, (2) that the defendant gave the victim a spoon, (3) that the victim injected heroin into his arm, and (4) that the victim fell unconscious and collapsed.<sup>189</sup> As a result, the court determined that there was sufficient evidence to establish that the defendant intended to facilitate the victim's drug use.<sup>190</sup>

Determining whether the defendant's failure to call for medical help rose to criminal or gross negligence required the court to consider whether a reasonable person, in the defendant's circumstances, would have reasonably known that the victim was in danger of death or great bodily harm.<sup>191</sup> Furthermore, the circumstances that the court may consider include—but are not limited to—the intoxicated state of the victim due to his alcohol intake, and his apparent state of sleep. Ultimately, the defendant's knowledge of the victim's intoxicated state, combined with the defendant's failure to aid the victim, amounted to gross negligence, and subjected the defendant to liability for the victim's death.

#### 6. A nuance—"fist blow" cases and involuntary manslaughter

Mens rea and criminal intent play an interesting role in cases where a moderate fist blow causes an unforeseeable death. A common factual scenario involving fatalities from ordinary fist blows raises significant issues about this doctrine.

In *People v. Cox*, the California Court of Appeal affirmed the defendant's involuntary manslaughter conviction for a death that he caused as a result of a battery.<sup>192</sup> The defendant struck the victim's head after a confrontation regarding the defendant's ex-girlfriend, who was the victim's girlfriend at the time.<sup>193</sup> Shortly after the confrontation, the victim's girlfriend walked the victim to his motel.<sup>194</sup> The victim was unable to speak clearly.<sup>195</sup> The girlfriend asked the victim if he wanted her to call 9-1-1. He declined her

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189. *See id.* at 143, 258 Cal. Rptr. at 140.

190. *See id.* at 152–53, 258 Cal. Rptr. at 146.

191. *See id.* Footnote 4 further discusses the requirements of the knowledge element of criminal negligence.

192. 63 Cal. App. 4th 974, 976, 75 Cal. Rptr. 2d 12, 14 (1998).

193. *See id.* at 977, 75 Cal. Rptr. 2d at 14.

194. *See id.*

195. *See id.*

offer, went to sleep, and eventually died.<sup>196</sup> The defendant's conviction for involuntary manslaughter was upheld after the Court of Appeal determined that the trial court committed harmless error when it provided the jury with an improper instruction.<sup>197</sup> The court instructed the jury that for purposes of involuntary manslaughter, battery is an inherently dangerous misdemeanor.<sup>198</sup> Because the defendant committed the battery with criminal intent instead of criminal negligence, the "dangerousness of the unlawful act [e.g., battery] is irrelevant."<sup>199</sup> Furthermore, the court found that it is sufficient that the offense is dangerous under the circumstances of its commission.<sup>200</sup>

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196. *See id.*

197. "The trial court instructed the jury that the killing was unlawful if it occurred 'during the commission of a misdemeanor which is inherently dangerous to human life, namely, the offense of Battery . . .'" *Id.* at 978, 75 Cal. Rptr. 2d at 14. Appellant correctly argued that this was an incorrect statement of the law because battery is not an inherently dangerous offense. *See id.* Nevertheless, "it is almost universally held . . . that one is guilty of involuntary manslaughter who intentionally inflicts bodily harm upon another person, as by a moderate blow with his fist, thereby causing an unintended and unforeseeable death to the victim (who, unknown to his attacker, may have a weak heart of a thin skull or a blood deficiency)." *Id.* at 978-79, 75 Cal. Rptr. 2d at 15. (quoting 2 LAFAVE & SCOTT, SUBSTANTIVE CRIMINAL LAW § 7.13(d) (1986).)

198. *See id.* at 978-79, 75 Cal. Rptr. 2d at 15. In *People v. Stuart*, 47 Cal. 2d 167, 173, 302 P.2d 5, 9 (1956), the court summarized its analysis by stating, "to be an unlawful act within the meaning of section 192, therefore, the act in question must be dangerous to human life or safety and meet the conditions of section 20." This statement has sufficiently confused involuntary manslaughter law. Courts have interpreted the *Stuart* case as adding a "dangerousness" requirement to the underlying unlawful act. *See id.* at 979, 75 Cal. Rptr. 2d at 15, 1998 Cal. App. LEXIS 408.

199. *Id.* "It has been repeatedly held that where a person, in committing an assault and battery . . . unintentionally causes the death of his victim, the crime is [involuntary] manslaughter." *Id.* This determination does not depend on finding that the battery underlying involuntary manslaughter charge is dangerous. *See id.*

200. *See id.*